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Introduction

1.1 INTRODUCTION

On January 16, 2002, the United Nations (UN) and the Government of Sierra Leone (Sierra Leone/the GoSL) signed a historic agreement establishing the Special Court for Sierra Leone (SCSL, the Court, the Tribunal). The SCSL, authorized by UN Security Council (“UNSC”) Resolution 1315 (2000), was mandated under Article 1 of its Statute to try those persons bearing “greatest responsibility” for crimes against humanity, war crimes, and other serious violations of international humanitarian law committed in the West African nation during the latter half of a decade-long conflict involving at least four armed factions. The SCSL, whose legal legacy and contributions to the development of the emerging field of international criminal law is the subject of this book, was also empowered to bring to justice those who masterminded violations of Sierra Leonean law relating to the abuse of underage girls, the wanton destruction of property and arson during what has been described as one of “the worst in the history of civil conflicts.”

Tribunal prosecutors were directed to prioritize the investigation and prosecution of those leaders who had, in

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1 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter UN-Sierra Leone Agreement]. Annexed to the UN-Sierra Leone Agreement was the Statute of the Special Court for Sierra Leone, id. at 145 [hereinafter SCSL Statute]. Both can be found in Consolidated Legal Texts for the Special Court for Sierra Leone at 7, 19 (Charles C. Jalloh ed., 2007). For convenience, all three instruments have also been annexed to this book.


3 SCSL Statute, supra note 1, at art. 1(1).

4 Because the Sierra Leone conflict had not ended when the parties were negotiating the establishment of the SCSL, the expiry date for the temporal jurisdiction was left open-ended. Sierra Leone officially declared the war over on January 18, 2002. Thus, that date informally represents the cut-off point of the Court’s jurisdiction. For a detailed discussion of the Court’s various jurisdictions, see infra, at Chapter 4.

the course of carrying out the heinous crimes, threatened the establishment and implementation of the peace process in Sierra Leone.

Regrettably, though grave international crimes were documented by human rights groups from the start of the conflict on March 23, 1991, the temporal jurisdiction\(^6\) of the SCSL was limited – apparently because of concerns about funding and overburdening the time-limited Court with cases – to the offenses committed in Sierra Leone after November 30, 1996.\(^7\) The hostilities were ongoing at the time the Tribunal was created. Therefore, it made sense for the UN and the GoSL to leave open the formal end date of the temporal jurisdiction. The hope was that this would help bolster the fragile peace accord, stem the perpetration of atrocity crimes, and deter further violence. In the end, although there were a few dramatic Revolutionary United Front (RUF) rebel violations of the ceasefire which had been signed at Lomé, Togo in July 1999 with the view to ending the conflict, the government could declare the war over on January 18, 2002. The latter date thereby effectively serves as the end point for the Tribunal's temporal jurisdiction. This implied, to the concern of many Sierra Leoneans, that the SCSL would prosecute only the crimes committed in the last six years of a brutal eleven-year war.

The creation of the SCSL, which successfully prosecuted and convicted nine individuals\(^8\) notably including former Liberian President Charles Taylor (who is currently serving a fifty-year sentence in Great Britain), was one of the most important institutional developments in international criminal law since the adoption on July 1, 1998 of the Rome Statute of the International Criminal Court (Rome Statute) and its entry into force on July 1, 2002.\(^9\) This importance arguably derived from the SCSL's status as the first independent and consensual treaty-based international criminal tribunal with a mixed *ratione materiae* jurisdiction and composition. Indeed, while so-called “hybrid”\(^10\) courts were set up by the UN in East Timor, Kosovo, Bosnia and Cambodia at the request of those countries, those tribunals were grafted on to the institutions and structures of those countries' legal systems. They therefore formed an integral part of their domestic legal orders. Conversely, although it exhibits some

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\(^7\) See id. at ¶ 27.

\(^8\) Besides the Taylor case, as further discussed infra at Chapter 3, there were three joint trials comprised of three indictees each. The nine accused are former members of the main warring parties: The Revolutionary United Front (Issa Sesay, Morris Kallon, Augustine Gbao), the Armed Forces Revolutionary Council (Alex Brima, Santigie Kanu, Ibrahim Kamara) and the Civil Defence Forces (Samuel Norman, Moinina Fofana, Allieu Kondewa). The indictment of Johnny Paul Koroma still stands though he is not, as of writing, in the custody of the SCSL. The Court closed down in December 2013. Provision was made, should he be surface, for the case to be tried in the Residual Special Court for Sierra Leone. The indictments of Foday Sankoh and Sam Bockarie were withdrawn following their confirmed deaths. For further discussion of the trials and indictments, see infra Chapter 4.


Sierra Leonean features in relation to its mixed material jurisdiction and staff composition, the SCSL operated independently of its mother and father (that is the GoSL and the UN). This is because it possessed the distinct legal personality of an international organization, which permitted it to operate in the sphere of international law.11

Significantly, only six decades after the establishment of the International Military Tribunals at Nuremberg12 (IMT) and for the Far East (IMTFE),13 the SCSL was widely heralded, in retrospect prematurely, as “a more cost effective”14 and “more efficient model”15 of the ad hoc international criminal court. Some even expected that its type and focused mandate would play a central role in future attempts to prosecute perpetrators of mass atrocities in situations where, for whatever reason, the sole use of pure domestic or pure international judicial mechanisms is deemed inadequate, ineffective or both.16 Indeed, the establishment of what the UNSG described as a “sui generis”17 court with a mixed jurisdiction ratione materiae and

11 An international organization, of course, is an entity “established by a treaty or other instrument governed by international law and possessing its own international legal personality.” The SCSL, like the Special Tribunal for Lebanon, fits into this definition since it was an entity created, on the one part, by a State (i.e. Sierra Leone), and on the other, an international organization (the UN). It is therefore a subject of international law. Of course, the classical example of an international organization with legal personality under international law is the United Nations itself. See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11). The Appeals Chamber of the SCSL has confirmed, in several decisions, that the Tribunal exists in and functions solely in the sphere of international law rather than the municipal law of Sierra Leone. See Prosecutor v. Kallon, Case No. SCSL-2004-14-PT, SCSL-2004-15-PT, SCSL-2004-16-PT, Decision on Consti tutionality and Lack of Jurisdiction, ¶ 80 (Mar. 13, 2004); Prosecutor v. Kondewa, SCSL-2004-14-ARY2(E), Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution of Sierra Leone, ¶ 2 (May 25, 2004) (holding that “the Special Court acts only in an international sphere.”). We need not, for our limited purposes here, dwell on the debate about how an international organization acquires international legal personality. It suffices to note that the ICJ’s obiter dicta to date have not established any stringent requirements, preferring instead an open and liberal approach to the question. See, in this regard, Interpretation of the Agreement of Mar. 25, 1951 between the WHO and Egypt, Advisory Opinion, 1950 I.C.J. Rep. 89–90, ¶ 57 (May 28); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1966 I.C.J. Rep. 78 ¶ 25 (July 8). See Draft Articles on the Responsibility of International Organizations with Commentaries, U.N. Doc. A/66/10 reprinted in [2011] 2 Y.B. Int’l L. Comm’n 88, U.N. Doc. A/CN.4/SER.A/2011/Add.1.

12 After World War II, the allies set up a tribunal to try former senior Nazi officials. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1386, 82 U.N.T.C. 279.


14 See Antonio Cassese, Report on the Special Court for Sierra Leone (Dec. 12, 2006).

15 Id.

16 For example, as Cassese suggested, the mixed SCSL model could be particularly useful wherever the national judicial system is weak or has collapsed or is unable to dispense justice because of civil strife or ethnic and religious hatred. See Antonio Cassese, The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA AT 10 (Cesare Romano et al. eds., 2004).

composition by the UN and Sierra Leone appeared to be a significant development in the trend towards ascribing criminal liability to perpetrators of crimes that scar the conscience of people throughout the world. Alongside the increased reliance on universal jurisdiction to investigate international crimes, which initially gained momentum in the early 1990s in countries such as Belgium, France and Spain but declined as of the 2000s, the SCSL was perceived as yet another step in the inevitable forward march against impunity for atrocity crimes. That movement had begun in the immediate aftermath of World War I when the victorious allies established a Commission on the Responsibility of the Authors of the War at the Paris Peace Conference and included in the subsequent Treaty of Versailles of June 1919 several provisions mandating the establishment of an Allied High Tribunal that would, among other things, try Kaiser Wilhelm II. It became significantly reinforced by the successful completion of the unprecedented Nuremberg and Tokyo trials in the immediate aftermath of World War II.

But the SCSL may also have been part of a new cosmopolitanism premised on liberal notions of “international community.” That globalist attitude emphasized a common humanity and fidelity to principles of individual criminal responsibility for international crimes that was resuscitated with the UNSC’s fateful decision to establish the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in 1993 to punish “ethnic cleansing” in the Balkans and the shocking genocide in Rwanda in 1994. From this perspective, the SCSL represented a new breed or a “second generation” of the ad hoc international court, and importantly, preceded the formal establishment of the permanent International Criminal Court (ICC). Today, as of this writing, the world criminal court sits in The Hague and enjoys the support of 123 States Parties. However, taking a historic view, the establishment of the SCSL might best exemplify the slow evolution of an international rule of law. That notion would insist on directly


19 For an excellent discussion on the wide use of the phrase in international instruments and discourse and its various meanings, see Edward Kwakwa, THE INTERNATIONAL COMMUNITY, INTERNATIONAL LAW and the United States: Three in One, Two against One, or One and the Same, in UNITED STATES Hegemony and the Foundations of International Law 25 (Michael Byers & Georg Nolte eds., 2008).

20 Daphna Shraga, THE SECOND GENERATION UN-Based Tribunals: A Diversity of Mixed Jurisdictions, in INTERNATIONALIZED CRIMINAL COURTS, supra note 16.

imposing responsibility on individual perpetrators of atrocities. It first reached its watershed at Nuremberg in 1946, but at the same time, now seeks to account for the wider context of what Harmen van der Wilt and André Nollkaemper have described as the “system criminality”$^{22}$ which makes the commission of such crimes possible.

That said, the SCSL can also be understood as the product of a political compromise. On the one hand, it was an ambitious project of a war-weary African country that sought international assistance to break with a past full of governance, accountability and nation-building demons, all ills which seemed to have been exacerbated by a brutal fratricidal war. On the other hand, a UN reeling from David Scheffer’s infamously described “tribunal fatigue”$^{23}$ and the disillusionment that quickly beset the UN when it became increasingly clear that the post–Cold War honeymoon in the Security Council could no longer be taken for granted to bankroll another full-fledged international criminal tribunal that would become a subsidiary organ and financial responsibility for the UN’s wealthier Member States. Thus, with a carefully calibrated mandate to deliver a limited quantity of donations-supported justice for the widespread atrocities Sierra Leoneans experienced during the war, the Court was expected to address – and perhaps even help to remedy – some of the perceived inadequacies of the ICTY and ICTR model. It is a model that was supposed to reflect the lessons learned from the experiences of the first modern ad hoc international criminal tribunals. For these and related reasons, the SCSL contained many novel features that reflected the general malaise with Chapter VII courts with respect to the pace, cost and efficiency of their investigations and trials. It also sought to account for some of the particularly problematic features of the dirty war that nearly destroyed Sierra Leone.

The Court’s founding instruments contained several innovations. Among other things, the SCSL was: (1) the first independent international penal tribunal to be endowed with a limited personal jurisdiction over a narrow class of persons “bearing greatest responsibility” for serious international/national crimes; (2) the first modern ad hoc court to sit in the locus commissi delecti – the place where the crimes were committed; (3) the first to be funded entirely through donations from UN Member States; (4) the first to be overseen by an independent management committee comprised of non-party states that would provide policy oversight and assist the Tribunal on non-judicial aspects of its operations; (5) the first to provide scope for the government of the affected state (that is Sierra Leone) to appoint a minority of its principal officials including judges and the deputy prosecutor; and (6) significantly for transitional justice debates on whether truth commissions and criminal courts

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22 See André Nollkaemper et al., Preface, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW vii (Harmen van der Wilt & André Nollkaemper, eds., 2009) (defining “system criminality” as “situations where collective entities such as states or organised armed groups order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes”).

can complement or detract from each other, the first international court to provide for prosecutions in a situation where an amnesty was already part of the negotiated end to the conflict. This meant that it would later become the first to operate alongside a national truth and reconciliation commission in a post-conflict situation anywhere in the world.

Upon its establishment, mostly due to its limited funding and its location in the “former theatre of conflict,” the SCSL had to innovate in various areas of broader interest for the global anti-impunity project. Its practice in a range of areas therefore had some modeling potential. In this regard, the Tribunal became the first ad hoc court to create a Defense Office charged exclusively with ensuring that the rights and interests of suspects and accused persons are protected. This would later serve as an innovation for other similar tribunals. In this way, it provided for better equality of arms between the prosecution and defense and impacted the approach to defense rights in the courts that followed it. The SCSL was also the first to create an Outreach Office unprecedented within international criminal courts for its location, depth, scope, and impact, as it sought to create a two-way communication system that enabled it to establish good rapport with the local population.

Finally, relatively early in its operations, the Court also established a Legacy Phase Working Group, which was comprised of staff from the various sections, and entrusted with devising long-term projects that were intended to assist the Tribunal to leave a lasting legacy for the host country. Though there remain open questions concerning the extent of the legacy that the process actually bequeathed to Sierra Leone, the attempt to do deliberate and advance planning of a court’s legacy was unique. It was also intended to go well beyond the prosecution of a few bad guys towards helping bolster the country’s fledgling local justice system. Whether it could, with the limited resources it had, realistically achieve much in this area was always open to some doubt. In any case, these other legacies of the SCSL in those areas are not discussed in this work.

Once the SCSL became operational in August 2003, the Prosecutor issued thirteen indictments which generally reflected the main government, army and militia parties to the armed conflict. But the indictment list did not include the peacekeepers from the West African region, under the banner of the Economic Community Of West African States Monitoring Group (ECOMOG), who were effectively excluded from the Tribunal’s jurisdiction. Yet, during their time in Sierra Leone, the ECOMOG forces – mostly from Nigeria and Guinea – had actively

57 The trials are discussed infra at Chapter 4.
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fought against the rebels to restore the democratically elected Kabbah Government. They were later accused of engaging in wanton acts of violence against civilians that allegedly amounted to war crimes. The jurisdiction also excluded mercenaries from two private companies retained by the government, first from Nepal (the Gurkhas) and then South Africa (Executive Outcomes), who had been involved at different stages of the Sierra Leonean conflict. In the end, save for the deaths of three suspects and the prosecutor’s withdrawal of their indictments, the Court went on to successfully indict, arrest and try all but one of its thirteen fugitives (Major Johnny Paul Koroma). Koroma, who overthrew an elected government and served as president between May 1997 and February 1998, is presumed dead. A total of nine persons were ultimately convicted for crimes against humanity, war crimes and other serious violations of international humanitarian law that occurred in Sierra Leone. Unlike the Chapter VII courts, the SCSL did not enter any acquittals in its international crimes trials.

1.2 AIM AND SIGNIFICANCE OF THIS BOOK

Sierra Leone’s request for UN assistance to create an independent special tribunal to try those most responsible for atrocity crimes during its brutal armed conflict seems remarkable considering the near paralysis of states in prosecuting individuals for international crimes between the end of World War II in 1945 and the creation of the ICTY and ICTR in the early 1990s. While partly motivated by the desire of the government of President Ahmed Tejan Kabbah to credibly punish its adversaries, with the SCSL in place alongside the other international criminal courts, it appeared that international criminal justice is beginning to come of age, and with it, the extension of the horizontal as well as vertical reach of international criminal and humanitarian law.

The ICTY, ICTR and SCSL characterized the international legal landscape for many years. Today, all their trials and appeals have been completed. Of the three,

28 Human Rights Watch, Sierra Leone – Getting Away with Murder, Matilation, Rape, Vol. 11, No. 3(A) (1999); Human Rights Watch, Sowing Terror: Atrocities Against Civilians in Sierra Leone, Vol. 10, No. 3(A) (July 1998). The contemporaneous reports of a small percentage of peacekeeper crimes documented by human rights groups were later corroborated through the evidence heard by the Sierra Leone Truth and Reconciliation Commission as well as in the judgments of the SCSL.


30 For a thoughtful assessment of this development in international law, see THEODOR MERON, WAR CRIMES LAW COME OF AGE (1998).

31 The ICTY and ICTR were supposed to complete their work by 2010 but took until 2015 to do so. See S. C. Res. 1534 (Mar. 26, 2004). The SCSL also had a Completion Strategy, and following its winding up in Dec. 2013, became the first of the U.N.-supported ad hoc courts to complete its work. All the courts have finished their first instance trials. The remaining cases of the Chapter VII tribunals have were transferred to the Mechanism for International Criminal Tribunals. See U.N. Secretary-General, Identical Letters dated May 26, 2005 from the Secretary-General addressed to the President of the
The SCSL was the last of the three ad hoc courts to be established but the first of them to finish its caseload. Irrespective of their individual number of trials, it is undisputable that all three international tribunals have left an indelible imprint on international criminal law. Perhaps not surprisingly given that the ICTY and ICTR were the first truly international criminal tribunals to be ever created, there has been much scholarly commentary on their pioneering work. Much of that literature has elucidated their jurisprudential contributions to the advancement of the concept of individual criminal responsibility at the international level and on the elaboration of the substantive content of the various crimes within their jurisdiction, especially genocide, crimes against humanity and war crimes.

In stark contrast, between the creation of the SCSL in January 2002 and its closure in December 2013, relatively fewer scholarly works have systematically studied that ad hoc court to discern whether it has offered any meaningful additions to the corpus of international criminal law and practice. True, there was towards the end of the SCSL’s lifespan an exponential growth in the literature on the Court. Nonetheless, for a long time, the bulk of the commentary focused on the SCSL’s so-called hybridity compared to the ICTY and ICTR and its potential to serve as a more cost effective nationalized-internationalized tribunal model for bringing justice to diverse post-conflict situations. Even fewer academic works have studied the case law and judicial practice of the Court after it began operations in 2002 to determine whether it made substantive contributions to the development of the relatively young field of international criminal law.

Yet, beyond its seeming status as a forgotten African tribunal based in what some might perceive as an unimportant African State, an in-depth study of the SCSL and core aspects of its jurisprudence that would likely remain justified for at least four additional reasons. First, despite the tremendous achievements of the ICTY and ICTR and their significant contributions to international law since they were established in the early 1990s, institutional design issues are still part of the fundamental challenges facing the nascent international criminal law regime. This is evidenced by the international community’s continued experimentation with different accountability models to hold responsible high-level persons who oversee the commission of serious international crimes in specific situations. These range from full-fledged international criminal courts, whether ad hoc or permanent, to hybrid models that combine elements of national and international justice systems.

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to various types of mixed courts. Notable examples include the Serious Crimes Panels in the District Court of Dili (East Timor) through to the permanent ICC as well as other models such as the Special Tribunal for Lebanon, the special chambers within the courts of Bosnia, Cambodia, Kosovo, the International Crimes Division of the Ugandan High Court and the Extraordinary Chambers within the Courts of Senegal. The proliferation of the various types of tribunals in the past two decades, as states searched for appropriate prosecution mechanisms suitable to their individual circumstances, suggests that we are in the early days of a cottage industry of internationally supported courts. Thus, bringing to bear analysis of what worked, and what did not, in Sierra Leone's own transitional justice experiment may hold wider interest for other transitional situations especially those in Africa and perhaps even others much further afield.

Second, despite the landmark contributions of the ICTY and ICTR through their revival of what Larissa van den Herik has described as an essentially "dormant branch of public international law," the elaboration of the substantive elements of international crimes within their jurisdiction, which will likely be their primary legal legacy, will necessarily continue into the future. The reason is that the limited post July 1, 2002 ICC temporal jurisdiction, and the relative immaturity and abundance of the present accountability models, will likely necessitate the continued deployment of this evolving body of law to address new situations from around the world. To fill the impunity gap would require the creation of not only new enforcement regimes, but also development of novel crimes such as the international-transnational blend recently incorporated by the African Union into a June 2014 regional treaty that would establish a criminal chamber within the African Court of Justice and Human and Peoples' Rights. Over time, such institutions should help to fill the lacuna arising from the lack of a unified and comprehensive code of international/transnational crimes while speaking to the particular needs of a given region.

54 See van den Herik, supra note 35, at 30.

55 The "legacy" of these tribunals has been the subject of recent examination. The leading works include Diane F. Orentlicher, Shrinking the Space for Denial: The Impact of the ICTY in Serbia (2008); Legacy of the International Criminal Tribunal for the Former Yugoslavia (Bert Swart et al. eds., 2011); Assessing the Legacy of the ICTY (Richard Steinberg ed., 2011). Of course, this legacy has been largely endorsed by others as well. See Rep. of The Assembly of States Parties to the Rome Statute of the ICC, pt. II B. Elements of Crimes, ICC-ASP/4/5 (Sept. 2002); Knut Dorman, Contributions by the ad hoc tribunals for the former Yugoslavia and Rwanda to the ongoing work on elements of crime for the ICC, 94 PROG. ANN. MEETING AM. SOCIE INT'L L. 284 (2000).

The third reason why the main aspects of the SCSL judicial legacy deserves critical scrutiny is also important. The Court benefited from, and at the same time, presumably also added to solidifying the legal foundation laid by the two Chapter VII ad hoc tribunals that preceded it. This was so not only with respect to the definition of the core international crimes within its jurisdiction, but also its rules. Thus, though in the early discussions the UN and Sierra Leone contemplated the prospect of having the SCSL share a joint appellate chamber with the ICTY and ICTR to promote a coherent development of international criminal law, this did not come to pass. The proposal for a common appeals court did not garner the support of the Chapter VII courts because of concern about possible negative effects on their Security Council-mandated Completion Strategies. For that reason, and due partly to concerns about maintaining a measure of unity of the body of international criminal law being applied by these ad hoc tribunals, the Statute of the SCSL ultimately provided that the Appeals Chamber shall be guided by the decisions of the Appeals Chamber of the ICTY and ICTR. The SCSL, as only the second Africa-based tribunal, was similarly instructed to apply to the conduct of its proceedings, mutatis mutandis, the Rules of Procedure and Evidence of the ICTR obtaining at the time.

The question therefore arises whether, when viewed in the wider context of the UN’s apparent interest in the normative development of a coherent international criminal law architecture, the Court’s practice reflected awareness of that edict. If so, it might have assisted towards that unifying goal either by reaffirming or strengthening the existing body of legal norms.

On the other hand, the SCSL as only the third ad hoc international penal tribunal might have had to address novel legal issues presented for the first time before such courts. If so, did the manner in which the judges resolved the relevant questions offer useful precedents which could then be developed and expanded upon by future sister courts? In that case, we could find that it might have contributed to enhancing international criminal law’s certainty and predictability by exploring some of the rougher terrain of international criminal justice. Conversely, if the judges of the SCSL failed to give adequate reasoning to justify their more important rulings, we might find that it may have added to legal uncertainty and perhaps even contributed to the oft-discussed fragmentation of international (criminal) law.

Fourth, an evaluation of some of the SCSL’s main contributions through this work could add value to the present literature on such courts because tribunals like the ICTY/ICTR are, as the now late Italian jurist Antonio Cassese has submitted, “no longer an option, as they are too expensive, trials are too lengthy, and they will be superfluous because of the setting up of the [ICC].” While, as Cassese rightly observed, the prosecution of modern atrocities will require different types of responses for different situations and the jury is still out on the outcome of some

57 Cassese, in Romano et al., supra note 16.