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The Continued Relevance of the Contributions of the Sierra Leone Tribunal to International Criminal Law

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INTRODUCTION
THE CONTINUED RELEVANCE OF THE CONTRIBUTIONS OF THE SIERRA LEONE TRIBUNAL TO INTERNATIONAL CRIMINAL LAW

Charles C. Jalloh[*]

First, I am grateful to the editors of the *FIU Law Review* for hosting this "micro-symposium" on my new book *The Legal Legacy of the Special Court for Sierra Leone*.[1] In addition to publishing this "micro-issue" of the law review, with prominent international law experts that they have invited commenting on the book, Sofia Perla, Christina Ramsey and their colleagues invited me to give a talk for FIU Law students in September 2020.[2] Due to the COVID-19 global health pandemic, which led to a shutdown of the university campus, we were not able to hold the event in person. Nonetheless, taking advantage of videoconferencing technology, we were able to meet virtually. It was still a delight to present the book and to engage with these bright students. Their probing questions on the book gave me much fodder for thought. I thank them all.

Second, it is said that it is an honor to write and an even bigger honor to be read. I feel privileged to both be able to write and even more privileged to be read, especially by such prominent colleagues. I am therefore indebted to the stellar lineup of scholars and practitioner colleagues who so kindly accepted the law review's invitation to read and engage with the ideas in my book. Without their generosity of time and critical engagement, both this special issue on the legacy of the Special Court for Sierra Leone (SCSL) and the online Opinio Juris book symposium, hosted by Jessica Dorsey and Kevin

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[1] CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE (2020) [hereinafter THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE].

[2] Symposium, *The Legal Legacy of the Special Court for Sierra Leone*, 15 FIU L. REV. 1 (2021), https://law.fiu.edu/2020/09/21/fiu-law-review-micro-symposium-the-legal-legacy-of-the-special-court-for-sierra-leone/.

Jon Heller, in March 2021[3] would not have been possible. I am indebted to both the commentators and my other academic colleagues.

In the remainder of this introduction, and for the benefit of the readers who might not get a chance to secure a copy or to read the book, I wish to briefly introduce the main chapters and arguments in the book. Thereafter, the reviewer comments on the book will follow, based on the sequence of the chapters as they have appeared in the monograph. In a final essay, at the end of the present issue, I will respond to the main comments and few criticisms of the book.

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It must be common knowledge by now, at least among international lawyers, that it was the fateful decision of the UN Security Council to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993[4] and the International Criminal Tribunal for Rwanda (ICTR) in 1994[5] to prosecute atrocity crimes in the Balkans and East Africa that rescued the idea of international criminal law (ICL). The SCSL, whose work began in 2002 and concluded in 2013, followed in the footsteps of the ICTY and the ICTR. The SCSL benefited from its predecessors but also introduced a new "hybrid" model of the international criminal tribunal. An ad hoc model that, for various reasons including its mixed subject matter jurisdiction and local ownership, has proved to be of relevance for States as a means of providing credible justice for international crimes, despite the initial impression that the creation of a permanent International Criminal Court (ICC)[6] would render them superfluous.[7]

The significant contribution of the ICTY,[8] and to a lesser extent the ICTR,[9] to the development of ICL is well known. The same is not as true of the SCSL.[10] My goal in writing this book was to shine a spotlight on this innovative institution, as the first such court created by the UN and one of its member states, by evaluating its main contributions to the evolution of ICL.

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3 *See* Jessica Dorsey, *Book Symposium: The Legal Legacy of the Special Court for Sierra Leone, by Charles Jalloh*, OPINIOJURIS (Mar. 15, 2021), http://opiniojuris.org/2021/03/15/book-symposium-the-legal-legacy-of-the-special-court-for-sierra-leone-by-charles-jalloh/.

4 S.C. Res. 827 (May 25, 1993).

5 S.C. Res. 955 (Nov. 8, 1994).

6 Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

7 *Id.*

8 *See ICTY Symposium: Final Reflection on the ICTY*, IRMCT (Dec. 18, 2017), https://www.icty.org/en/features/icty-legacy-dialogues/icty-symposium-final-reflections-on-the-icty.

9 *See A Compendium on the Legacy of the ICTR and the Development of International Law*, IRMCT (Nov. 8, 2014), https://unictr.irmct.org/en/compendium-legacy-ictr-and-development-international-law.

10 THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE, *supra* note 1.

The monograph, which began life as a doctoral thesis but was subsequently expanded with new chapters, examined what I dub the SCSL's legal legacy. The idea of "legacy" has been part of ICL discourse since at least the seminal Nuremberg Trials. But, somewhat surprisingly, there is no universally accepted meaning of the term. Even though experts in the field often colloquially talk about the "Nuremberg Legacy." In simple terms, as I used the term in this book, legacy was a shorthand for the body of legal decisions and rules that the SCSL may have left behind for current and future courts tasked with prosecuting the same or similar international crimes.

Of course, under Article 38(1) of the Statute of the International Court of Justice,[11] judicial decisions along with the works of scholars are only *subsidiary means* for determining rules of international law. But this starting point for the sources of international law understates the significant role judicial decisions have historically played in international law's development generally and international criminal law in particular. A keen observer might also note that SCSL rulings are not binding on other courts. So, the question for them will be, what value could one claim to come from its decisions and rulings for other courts, especially given the decentralized nature of international law. That, of course, would be a valid question.

Nonetheless, in the book, my point of departure is not a claim that judicial decisions of an ad hoc court like the SCSL is equivalent to the primary sources of international law found in *treaties* or *customary international law* which correspond to Article 38(1)(a) and (b) of the ICJ Statute. The claim is that formally bindingness of judicial decisions is not the only way to assess the influence of jurisprudence especially in a decentralized legal system like international law. Thus, one must assess the extent that the SCSL developed persuasive legal reasoning on critical questions of broader relevance in ICL. Where persuasive legal rulings are offered, those decisions help to facilitate the work of other criminal tribunals and in that way contribute to solidifying the still emerging corpus of ICL norms. If this contention is correct, it seems natural that much of the initial influence we can expect to find from the SCSL caselaw will be in international criminal courts and tribunals, whether those are ad hoc or permanent, but the jurisprudential legacy will also be felt in national, sub-regional and regional courts addressing human rights issues or similar concerns as those that confronted the SCSL during its existence.

In the book, though I noted essentially in passing that the SCSL was innovative in its institutional design as well such as through the establishment

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11 Charter of the United Nations and Statute of the International Court of Justice, Oct. 24, 1945, https://www.icj-cij.org/en/statute.

of a Defense Office, I focused the book on the main SCSL judicial rulings on several fascinating legal questions for the ICL field as a whole. These concerned the challenge of framing the personal jurisdiction of such courts to demarcate the types of cases suitable for prosecution at the *international* instead of the *national* level which is an ongoing challenge for the field; the issue of the novel forced marriage as a crime against humanity in the effort to redress the gender imbalanced impact of atrocity crimes; how to flesh out the elements of the newly minted crime of child recruitment as a war crime under international law; the question of whether a sitting head of a third state could be prosecuted by a tribunal partly created by a neighboring state in collaboration with the UN; the status of blanket amnesties for international crimes under international law; and finally, the relationship between truth commissions and criminal tribunals.

I noted other interesting caselaw such as the prosecution of UN peacekeepers for the first time, as a war crime, as well as the SCSL caselaw on defense rights and the role of the Security Council in creating such courts. I could not address those in the book for reasons of space. Overall, my principal argument in the book on the main topics that are widely associated with the SCSL is that by virtue of its jurisprudence on the above topics which is increasingly being used by both international and regional and national courts, from Kampala to The Hague and beyond, the SCSL has bequeathed a vital juridical legacy to the field of ICL.

Structurally, the book is divided into eleven chapters. Chapter One discussed the background and purpose of the book, the aims of the research and why it is significant as well as the methodology and contribution to the legal literature. This chapter situated the SCSL against the post-Cold War international criminal law landscape. As I explained in greater detail in the book, in contrast to the Chapter VII tribunals created by the UN to prosecute crimes in the former Yugoslavia in 1993 and Rwanda in 1994, that landscape was not a barren one by the time the SCSL was established in 2002. This meant that there was already an appreciable body of caselaw and legal norms that the SCSL could build upon to make its own unique contributions. Yet, in doing so, the SCSL also considered several thorny legal issues that were in some respects specific to Sierra Leone, but, perhaps even more importantly, foreshadowed similar concerns for other conflict affected States in Africa and elsewhere. The rulings in response to the Sierra Leone fact pattern, which raised questions of broader systemic significance, could thus be an informative basis for other situations where those same or similar issues arose.

In Chapter Two of the book, which gave a brief overview of Sierra Leone's horrific blood diamonds driven civil war which lasted between 1991

and 2002, I provided the context for understanding the later SCSL mandate. Based on the findings of the SCSL and the Sierra Leone Truth and Reconciliation Commission (TRC), and the leading works of Sierra Leonean historians, I trace the origins of the conflict that nearly tore what was thought to be the most peace-loving country in West Africa to internal and external factors which led to a border incursion by the Revolutionary United Front (RUF) rebels from neighboring Liberia in March 1991. I show how widespread killings by Sierra Leoneans and Liberians and other West Africans against innocent Sierra Leoneans; rape and acts of sexual violence, particularly against women and young girls; mass amputations; use of child soldiers; acts of terrorism against civilians, including the burning of entire towns and villages; and the attacks on UN peacekeepers became some of the tragic signatures associated with the Sierra Leone conflict.

In Chapter Three, I discussed the circumstances leading up to the establishment of the SCSL. Basically, I show how the elected Sierra Leonean government's push to prosecute was a result of the breakdown of a regionally sanctioned peace agreement between the authorities and the RUF rebels concluded at Togo in July 1999 under the auspices of the sub-regional body known as the Economic Community of West African States (ECOWAS).[12] In the lead up to the ECOWAS peace negotiations, what I call a "forgive and forget policy" had been adopted by President Ahmad Tejan Kabbah's government. He deliberately sought to trade non-prosecution and conferral of a blanket amnesty to the rebels in exchange for peace. But the generous Lomé accord emboldened the RUF, partly because of the "bitter pill" [13] that it contained in Article IX (Pardon and Amnesty) and the lack of good faith on the part of the rebels, eventually led the government to reverse course and instead request UN assistance[14] to establish a credible special court to prosecute its former enemies and their collaborators. This represented a shift to a new policy of "prosecute and punish."

This part of the book highlights the dilemmas that the Sierra Leonean leaders faced, and, noting that this same concern had arisen in other contexts of transitional justice, I wondered whether policy discretion including the amnesty carrot may sometimes be needed to end atrocities in otherwise

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12 U.N. Security Council, Letter Dated 12 July 1999 from the Chargé D'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/777 (July 12, 1999).

13 President Alhaji Dr. Ahmad Tejan Kabbah, Statement by His Excellency made before the Truth and Reconciliation Commission (Aug. 5, 2003), http://www.sierra-leone.org/Speeches/kabbah-080503.html.

14 U.N. Security Council, Letter Dated 9 August 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), http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf.

unwinnable civil wars. This, of course, is the famous peace *versus* justice or peace *and* justice question. Its broader relevance, beyond Sierra Leone, is self-evident and in fact also a sensitive topic for many other conflicts around the world. The same issue has already negatively affected the narrative about the ICC's work in Africa with some especially in the African political elite claiming that the global penal court has become an obstacle to peace in places like Sudan, Kenya and Uganda because of the ICC's dogged insistence on prosecutions.[15] The argument, being a caricature of a more complex set of circumstances involving considerable governmental elite self-interest, ought to be taken seriously where merited but also with a grain of salt where it is often a fig leaf for inaction or considerable self-dealing.

Having set the war and the creation of the tribunal in context, Chapter Four of the book turned to the SCSL's more technical aspects in terms of its jurisdiction, organization, and trials. I critically evaluated the competence or jurisdiction of the SCSL over persons, the mix of international and Sierra Leonean crimes that it could prosecute, the geographic territory over which it could exercise its authority, as well as its limited temporal jurisdiction that started at roughly the half-way point of the war rather than its beginning. I show that, despite the perhaps understandable high expectations amongst Sierra Leoneans and their government that the UN's involvement in establishing the SCSL would lead to the prosecutions of hundreds of perpetrators, the SCSL was only actually designed to carry out only a small set of trials over a short three-year period. This decision was driven by cost concerns, especially in the halls of the UN. The funding fatigue affected the design of all aspects of the institution, including its extremely limited personal jurisdiction to persons bearing greatest responsibility and unstable donations-based funding system which the UN Secretary-General protested to no avail.

In the end, although the work of the tribunal lasted for eleven years and it successfully concluded only nine cases (i.e., the AFRC joinder of three cases, CDF [2 cases] and RUF [three] plus that of former Liberian president Charles Taylor), its task from the beginning was to deliver symbolic justice to a handful of persons deemed most responsible for the war crimes, crimes against humanity and other serious violations of international humanitarian law carried out during the second half of the "dirty war in West Africa."[16]

In Chapter Five, since this form of *ratione personae* jurisdiction was novel, I evaluated the SCSL's key contributions in relation to its personal

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15 Charles C. Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445 (2009); THE INTERNATIONAL CRIMINAL COURT AND AFRICA (Charles Chernor Jalloh & Ilias Bantekas eds., 2017).

16 LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA (2005).

jurisdiction over persons "bearing greatest responsibility." This way of framing personal jurisdiction was first introduced to international law by Article 1 of the SCSL Statute.[17] Before that, all the tribunals since the Nuremberg Trials had been conferred jurisdiction in a much broader way over "persons responsible." Since the SCSL Statute was adopted, the "greatest responsibility" lexicon appears to have become a sort of darling phrase for the expression of personal jurisdiction in relation to international penal courts. The popularity of the notion seems partly explained by the simply catchy nature of the idea that it expresses, which is that the reach of modern international criminal tribunals must be carefully limited since the bulk of prosecutions for atrocity crimes ought to take place at the national instead of the international level. This phrase has thus been warmly embraced by prosecutors and judges of the ICC, whose use of it in contrast to their SCSL counterparts, reflects policy positions rather than a formal legal requirement of the ICC Statute.[18]

A key argument of this chapter is that the attraction of greatest responsibility jurisdiction represented a subtle shift towards lowered expectations of the number of atrocity prosecutions that can be expected from international courts. A more positive way of viewing this jurisdictional framing is that it represents a more realistic framing of the limited reach of international penal tribunals which are ultimately supplements, not replacements, for the exercise of jurisdiction by national courts. The problem, of course, is that while there is considerable political rhetoric including by the ICC's 123 States Parties calling for *an end to impunity*, the number of national prosecutions of atrocity crimes are not matched by the rhetoric. The reality is more complex and reveals a relatively small number of prosecutions, and despite the apparent fatigue with international prosecutions and their expense, they often are the only means to achieve any type of justice for victims.

In any case, despite the initial almost vehement disagreement amongst the SCSL judges regarding the best way to construe the novel "greatest responsibility personal jurisdiction," that is to say whether as a form of *guideline* for the prosecution or as a *jurisdictional threshold* that they must establish beyond a reasonable doubt, the rulings of the SCSL in the AFRC and the CDF cases on this issue advanced a useful understanding of this form of narrow personal jurisdiction in ICL. The SCSL judges, despite repeated defense challenges, concluded that "greatest responsibility" was merely a

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17 S.C. Res. 1315, art. 1, Statute of the Special Court for Sierra Leone (Aug. 14, 2000) [hereinafter SCSL Statute].

18 Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

form of prosecutorial guidance instead of a jurisdictional requirement forming part of the element of the crime. In addition, as regards the secondary questions it raised as to who fell within its ambit, the phrase was found to be sufficiently broad to encompass both what I call "killer-perpetrators" as well as those in the "political-military leaders" category. The chapter demonstrates the influence of the SCSL rulings on the work of other courts, with similar limited mandates, especially the Cambodia Tribunal[19] for instance in the *Duch* Case.[20]

The treatment of gendered crimes continues to be a challenge for international criminal courts, which have been sometimes criticized for their general indifference to the plight of women and girls who so often bear the devastating brunt of sexual violence in armed conflicts. The latter was true in the Sierra Leone civil war as well. In Chapter Six, I discussed the SCSL's landmark contribution to the law of crimes against humanity, focusing in particular, on the novel crime against humanity of forced marriage as part of the residual category of "other inhumane acts." The efforts to investigate, charge and prosecute such bad conduct associated with the Sierra Leone conflict were undoubtedly laudable. The prosecutors also charged the crimes of rape and sexual slavery. They went even further, deliberately seeking to repair a blind spot in the law by capturing conduct that was so egregious that it warranted the introduction of a new crime against humanity into the ICL lexicon. The new crime, proposed by prosecutors through amended indictments eventually endorsed by the SCSL judges in the AFRC[21] and RUF[22] but not CDF[23] Cases symbolically acknowledged the disproportionate gendered burden of the Sierra Leone war on women and girls. But this expressive goal took place against the backdrop of the countervailing concern to ensure that the fair trial rights of the suspects are respected and the debate amongst the judges whether recognition of a new crime was actually warranted. The significant impact of the SCSL rulings on forced marriage and the law of crimes against humanity is illustrated by the ICC Trial Chamber's recognition of forced marriage as a crime under Article 7(1)(k) of the Rome Statute in its February 2021 *Ongwen* Trial Judgment.[24] This point perhaps demonstrates, more than any other, that it is not so much the

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19 *Extraordinary Chambers in the Courts of Cambodia*, ECCC, https://www.eccc.gov.kh/en/node/39457 (last visited May 30, 2021).

20 Prosecutor v. Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, paras. 62–74 (Feb. 3, 2012).

21 Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Appeals Judgment (Feb. 22, 2008).

22 Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009).

23 Prosecutor v. Fofana et al., Case No. SCSL-04-14-A, Judgment (May 28, 2008).

24 Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment (Feb. 4, 2021).

bindingness of a court's ruling in a decentralized hierarchy of courts where stare decisis is unknown but rather the possibility of prosecutorial and judicial creativity and innovation that can provide significant influence in developing the existing law.

In Chapter Seven, I turned to the war crime prohibiting the recruitment and use of children under the age of fifteen for the purposes of using them to participate actively in hostilities in Article 4(c) of the SCSL Statute.[25] The prosecution of this crime in Freetown, similar to one that was first included in Article 8(2)(e)(vii) and b(xxvi) of the ICC Statute,[26] gained in global importance for two reasons. First, upon invocation by the SCSL prosecutors against several accused persons in the trials, it became the first of such prosecutions in international law. The inclusion of the crime in the SCSL Statute reflected the evident reality that the Sierra Leone war was fought with a significant participation by underaged youth. Second, and as a consequence, it meant the SCSL judges became the first to flesh out the elements of this crime to a concrete set of cases. This enabled them to influence the subsequent development of the ICC case law. This seemed fortuitous because the maiden ICC case, *The Prosecutor v. Thomas Lubanga*,[27] relied solely on war crime of child recruitment charges as the basis for the indictment.[28] I argue that, though not perfect, the SCSL's celebrated ruling that child recruitment constituted a crime under customary international law by November 1996, which ruling has been widely embraced by courts and commentators, constitutes a useful contribution to international law. It has helped clear the path for the use of this post-1998 crime in the ICC and opened the way for further development of a customary law crime that can be used to justify prosecutions for such heinous and unconscionable behaviors on other contexts around the world.

Today, moving on from the SCSL's jurisprudential impact on the development or application of new crimes, in the field of international law, the issue of immunities from prosecution for sitting heads of state remains sensitive. At the international tribunal level, since at least World War II, we have seen an erosion of the absolute rule of immunity which basically rendered leaders untouchable in relation to criminal proceedings. By the late 1940s, the International Law Commission could craft Nuremberg Principle III to the effect that [t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or

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25 SCSL Statute, *supra* note 17, at art. 4.

26 Rome Statute of the International Criminal Court art. 8, July 1, 2002, 2187 U.N.T.S. 3.

27 Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment (Dec. 1, 2014).

28 *See generally* Diane Marie Amann, *International Decisions: Prosecutor v. Lubanga*, 106 AM. J. INT'L L. 809 (2012).

responsible government official does not relieve him from responsibility under international law. The General Assembly had endorsed that same principle, which many now consider to be part of customary international law. Now, while virtually all international courts established by the UN has applied this principle since 1993, some sovereigns accused of international crimes by international or internationalized courts have occasionally sought to contest it drawing upon classical international law principles that predated the historic Nuremberg trials and judgment.

The problem is that because of their nature, immunities raise critical questions for international law and the ideal of equality of all persons before ICL. The problem is compounded since removals of immunities are often read or painted as pushback to age old notions of sovereignty, which ordinarily limit the possibility of assertion of criminal jurisdiction by the courts of one state over the officials of another state, largely for the sake of maintaining serene international relations. The stability of international relations is not something to be taken for granted. History shows many wars in history where the strong States do what they wish in terms of use of force, with devastating consequences, and the weaker ones suffer what they must. At the same time, after World War II offered an opportunity to move the needle from State centric security to human security, taking as a point of departure that the preservation of human beings are also legitimate preoccupations even of sovereign States. Thus, as I have often pointed out during plenary debates on immunity and crimes against humanity in the International Law Commission, the challenge today is how international law can better balance the imperatives of sovereignty and the fight against impunity.

I analyze the SCSL's treatment of head of state immunity in Chapter Eight of the book. The SCSL's trial of former Liberian president Charles Taylor, who was indicted by the SCSL while an incumbent, grounds the discussion of the appeals chamber's conclusion[29] that he was not entitled to any immunity from prosecution before the SCSL in light of the ICJ's ruling on customary international law immunities in the *Arrest Warrant Case*.[30]

Essentially, the SCSL Appeals Chamber held that Taylor's personal immunity was irrelevant to proceedings carried out by an international penal court established with the support of the international community.[31] I argue

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

30 Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14, 2002).

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

that, though sometimes criticized by some commentators, the core added value of the Taylor immunity decision seems to have been largely overlooked. I emphasize the SCSL's judicial finding concerning the rationale for immunity, which is relevant for the maintenance of serene relations between co-equal sovereigns at the *horizontal* level but was adjudged of little assistance in *vertical* relationships between international criminal courts and States.

The fact that Taylor's immunity was deemed unavailable, in the context of an international criminal court established partly by the UN and partly by Sierra Leone at the *vertical* level, differs from the horizontal level of co-equal sovereigns in that international community involvement offers the vital safeguards to constrain problematic unilateral actions by the courts of one state (Sierra Leone) against the leader of another state (Liberia). That is not to say that a handful of States can come together to establish a tribunal via treaty simply as a way to get around the immunity of the leader of a third state which may be applicable at the horizontal level. To allow that could prove problematic, and depending on the context, could even give rise to a return to the law of the jungle where might makes right.

But that is not what happened at the SCSL. If I am right, in the Taylor scenario, an additional point of distinction is that while the treaty that established the SCSL is between the UN and Sierra Leone only, the consent of Liberia is not necessarily required for the removal of the immunity of its head of state. This is because, as a UN member state, it arguably already indirectly consented to the UN Security Council decisions taken under Chapter VI and Chapter VII to address the conflict in both countries as a way of maintaining or restoring international peace and security in West Africa. In any case, Liberia later on expressly consented to the request for Taylor's arrest and transfer to the SCSL for trial, implicitly waiving his immunity as the holder of the immunity. This cured any presumed defects in relation to Taylor's immunity. The ICC pre-trial and trial chambers, which has faced some challenges concerning its rulings on requests for States Parties to arrest high level suspects including heads of state holding immunity, seems to have benefited from the SCSL *Taylor* precedent in several cases involving Malawi,[32] Chad,[33] and in May 2019, by the ICC Appeals Chamber *Al Bashir*

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32 Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011).

33 Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011).

decision.[34] The same can be said of the impact of the Taylor precedent in other settings, for example, in the debates of the International Law Commission where it has been invoked frequently in the reports of special rapporteurs and debates on questions of international criminal law.

In Chapter Nine, I turned to another celebrated SCSL ruling. This concerned Sierra Leone's initial conferral of a blanket amnesty on all the combatants that perpetrated international crimes during the war, and the ensuing legal debate whether the subsequent unilateral withdrawal of that amnesty, barred the prosecutions by the SCSL. In the main, I argued that the SCSL judges reached the right result on the amnesty issue but that their legal reasoning was perhaps too convoluted in answering the question presented. Even though the SCSL conceded that the use of *conditional* amnesties as a way of settling bitter conflicts is not *per se* prohibited, the amnesty ruling also suggested that *blanket* amnesties may be different and that a norm against amnesties for serious crimes under international law may be crystallizing. In any case, the Sierra Leonean government's conferral of amnesty for all crimes is not necessarily binding on other sovereigns. Other States would continue to retain jurisdiction to investigate and prosecute the offenders, for international crimes, should they wish to do so. Similarly, such amnesties could not bar subsequent criminal prosecutions for international crimes before a separate international tribunal such as the SCSL. Though I was perhaps rather critical of aspects of the decisions, in the end, I did conclude that the SCSL rulings on amnesty now constitute a significant part of its widely cited caselaw on the question of amnesties by national, regional, and international courts, including in recent ICC decisions concerning Libya.

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[34] Prosecutor v. Al Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019). The present author was involved as one of two external counsel for the AU Commission as intervener in the *Al Bashir* case, the judgment on which has been met with both scholarly support, s*ee e.g.*, CLAUS KREß, PRELIMINARY OBSERVATIONS ON THE ICC APPEALS CHAMBER'S JUDGMENT OF 6 MAY 2019 IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL (2019), https://www.toaep.org/ops-pdf/8-kress; Leila Sadat, *Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising*, JUST SECURITY (July 12, 2019), https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/; Adil Ahmad Haque, *Head of State Immunity Is Too Important for the International Court of Justice*, JUST SECURITY (Feb. 24, 2020), https://www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/, and criticism, *see e.g.*, Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL:TALK! BLOG EUR. J. INT'L L. (May 6, 2019), https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/; Kevin Jon Heller, *A Thought Experiment About Complementarity and the Jordan Appeal Decision*, OPINIOJURIS (May 9, 2019), http://opiniojuris.org/2019/05/09/a-thought-experiment-about-complementarity-and-the-jordan-appeal-decision/; Asad Kiyani, *Elisions and Omissions: Questioning the ICC's Latest Bashir Immunity Ruling*, JUST SECURITY (May 8, 2019), https://www.justsecurity.org/63973/elisions-and-omissions-questioning-the-iccs-latest-bashir-immunity-ruling/.

It therefore represents a valuable contribution of the tribunal to the development of international law.

Turning to the potentially tenuous interaction between, on the one hand, truth and reconciliation commissions, and on the other hand special criminal courts, those being traditionally seen as *alternatives* to each other, I argue in Chapter Ten of the book that the SCSL caselaw adds considerably to our understanding of the challenges that arise in transitional situations where both of these types of mechanisms are deployed simultaneously. Indeed, I discussed the SCSL trials against the backdrop of its concurrent operation, for a period of eighteen months, with the Sierra Leone TRC. That case study suggests a range of practical issues that will arise. I note that, to avoid future problems in other contexts, it would be better to clarify up front how such institutions with inherently tense mandates must relate to each other whenever used simultaneously. This clarity should ideally come from the founders, during their establishment of the two separate mechanisms, but failing that, through the early conclusion of an agreed framework between the two institutions. The lesson of Sierra Leone has been relevant for accountability discussions in the Gambia, and South Sudan, and will be useful for Kosovo and the Central African Republic.

Finally, in Chapter Eleven, I summarized the main conclusions derived from the analysis in the book. On the whole, while conceding that its jurisprudence was sometimes not as well reasoned as it could have been given the tendency to sometimes simplify complex questions, on balance, the SCSL's judicial rulings on often complicated issues of international law made some important judicial contributions to the development of the nascent field of ICL. Already, the impact of the tribunal's jurisprudence has resonated well beyond the confines of Sierra Leone and Africa. Indeed, the SCSL caselaw is already proving helpful for the work of other national and international courts. In a way, by its valiant efforts to resolve some thorny issues it had before it, the SCSL also gave back to the international community through its key contributions on greatest responsibility personal jurisdiction, forced marriage as a crime against humanity, the war crime of child recruitment, head of state immunity, amnesties and the relationship between special courts and truth commissions. Based on the evidence, so far, the SCSL legacy on these topics will continue to be of great relevance to the international legal community. That, in my view, can legitimately be called the Freetown Legacy.