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LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE: CREATING SPACE FOR NON-JUDICIAL ALTERNATIVES

*Linda Carter**

Professor Jalloh's excellent book on the legal legacy of the Special Court for Sierra Leone (SCSL) gives us a comprehensive view of the pioneering efforts of the SCSL and its legacy in international criminal justice today. It has been an honor to participate in this microsposium, especially because Professor Jalloh facilitated my first trip to Sierra Leone and introduced me to the dual operation of the SCSL and the Truth and Reconciliation Commission (TRC).¹ As a beneficiary of Professor Jalloh's background, experience, and insights on the developments in Sierra Leone, I have become particularly interested in the role of non-judicial alternatives in addition to criminal prosecutions for atrocity crimes.

Non-judicial mechanisms, as usually discussed, include not only truth commissions, but also amnesties and traditional mediation practices. As Professor Jalloh develops in two of his chapters, the SCSL wrestled with issues related to both amnesties and a truth and reconciliation commission.² In addition to contributing to the continuing evolution of legal issues, a lasting legacy of the seminal efforts and experience of the SCSL will hopefully be a move towards a more comprehensive, coordinated use of both judicial and non-judicial mechanisms in post-conflict situations. It is this issue, the neglected element of non-judicial alternatives, that I would like to comment on, building on Professor Jalloh's discussion in his book.

The international community has created significant and important judicial accountability venues—international criminal tribunals such as the SCSL and the International Criminal Court (ICC), domestic prosecutions in countries around the world, and universal jurisdiction to expand the domestic forums in which cases can be tried.

Largely left out of the initial discourse on international justice were non-judicial procedures. One reason is that non-judicial processes often operate

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¹ The research from my first trip to Sierra Leone was part of a rewarding collaboration with Professor Jalloh, which led to a chapter in a prior book of Professor Jalloh's on the SCSL. Linda E. Carter, *International Judicial Trials, Truth Commissions, and Gacaca: Developing a Framework for Transitional Justice from the Experiences in Sierra Leone and Rwanda*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 724–45 (Charles C. Jalloh ed., 2014).

² See CHARLES C. JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* 181, 193 (2020) [hereinafter JALLOH, *LEGAL LEGACY*].

in a parallel track, not necessitating a direct integration with judicial trials. A second reason, though, is insufficient agreement on whether and, if so, how to integrate non-judicial mechanisms into a legal framework for international justice for atrocity crimes. For example, when the Rome Statute for the ICC was developing, South Africa wanted consideration of its form of a truth and reconciliation commission. Agreement could not be reached on how to treat TRCs under the Statute, and, consequently, there is no mention of them in the statutory provisions.³

The SCSL had to tackle issues with amnesty and the TRC that arose during the criminal trials. As Professor Jalloh points out, the legacy of the Court's decision rejecting the applicability of the Lomé Agreement on amnesty is apparent in today's discourse in multiple forums that questions the validity of any amnesties for international crimes.⁴ The Court's jurisprudence also leaves a legacy on issues related to TRCs and lays the groundwork for protocols to define the relationship between a Court and a TRC. Professor Jalloh points out that the lack of coordination between the SCSL and the TRC resulted in problems related to funding, disclosure of confidential information, primacy, and public testimony by SCSL detainees.⁵ As he notes, a legacy of Sierra Leone's experience is the need at the outset for a formal clarification of the relationship between the Court and the TRC.⁶

The SCSL's decisions on legal issues related to non-judicial alternatives also have the possibility, and I hope probability, of leading to an even broader legacy based on the need to develop a more comprehensive, coordinated, and inclusive approach to post-conflict situations. There is a tendency to compartmentalize post-conflict mechanisms: the box for judicial criminal trials is different from the box for TRCs (or amnesties or traditional mediation practices). The overlap of the SCSL and the TRC in Sierra Leone

³ See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 (2003) (describing the negotiations and the purposeful ambiguity left in the statute on amnesties and truth commissions); Sharon A. Williams & William A. Schabas, *Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 617–19 (Otto Triffterer ed., 2008) (describing the difference of views on amnesties); John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 693, 700 (Antonio Cassese et al. eds., 2002) (noting the issue of amnesties was raised but not resolved).

⁴ Amnesties have raised, and continue to raise, complex and controversial legal issues. As Professor Jalloh discusses in his in-depth chapter on amnesties, blanket amnesties are almost always rejected for international atrocity crimes. Even with conditional amnesties, there is a growing body of commentary that rejects them for atrocity crimes. See JALLOH, LEGAL LEGACY, *supra* note 2, at 181; see also Linda E. Carter, *The Relationship of International Criminal Courts with National Non-Judicial Proceedings*, in THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL JUSTICE SYSTEM, 137–208 (2016) (discussing the status of amnesties and other non-judicial processes under the Rome Statute) [hereinafter Carter et al., *Non-Judicial Proceedings*].

⁵ JALLOH, LEGAL LEGACY, *supra* note 2, at 313–14, 321–36.

⁶ *Id.* at 310.

is illustrative of political and societal interests in multiple solutions based on different purposes. A legacy from Sierra Leone should be that it is not sufficient to simply punt either a legal or a policy question to the next situation or case. Instead of separating the post-conflict mechanisms, we need to find a bigger box and combine the thinking about judicial and non-judicial post-conflict processes in the planning stages, policy discussions, and legal analyses.

In addition to recognizing the importance of multiple proceedings, a legacy of Sierra Leone's experience should also lead to a better framework in which they can operate. Truth commissions, in particular, are a common tool in post-conflict societies. Professor Jalloh notes that "nearly half of the fifty-five African countries have established a truth commission in one form or another."⁷ TRCs are also in use throughout the rest of the world.⁸ Furthermore, there continue to be combinations of criminal proceedings and TRCs. As Professor Jalloh notes, this is occurring now in the Central African Republic and in South Sudan.⁹

Moreover, there are good reasons for the co-existence of criminal trials and TRCs. They serve different purposes in a post-conflict society. As Professor Jalloh points out, TRCs are primarily aimed at reconciliation while criminal courts are focused on retribution, deterrence, and incapacitation.¹⁰

Although not at issue with the SCSL, traditional mediation practices are also prevalent in many parts of the world and, like TRCs, serve broader purposes than a criminal trial. Many societies around the world have community-based procedures or rituals to resolve conflict and restore harmony within the community. This serves as a means for a community to reintegrate an offender and to move forward. Usually, there is a form of restitution as a penalty; this might, for example, be an apology, compensation, or both.¹¹ Not only do traditional practices raise issues of substituting for, or operating parallel to, criminal trials, they also could potentially serve as an alternative to a sentence of incarceration. For example, in the case of Dominic Ongwen at the ICC, the defense is requesting his return to the Acholi Cultural Institution in northern Uganda for a traditional

⁷ *Id.* at 309.

⁸ Carter et al., *Non-Judicial Proceedings*, *supra* note 4, at 139–40 (identifying TRCs around the world).

⁹ JALLOH, *LEGAL LEGACY*, *supra* note 2, at 309.

¹⁰ *Id.* at 310–11.

¹¹ Carter et al., *Non-Judicial Proceedings*, *supra* note 4, at 154–57 (discussing *mato oput* in Uganda and *nahe biti bot* in Timor-Leste).

ritual designed to reintegrate a serious offender into the community in lieu of a sentence to prison.¹²

Continuing developments, such as those briefly discussed here, with both TRCs and traditional practices, demonstrate that the field of post-conflict justice is not static. Lessons can be learned from the ground-breaking efforts of the SCSL, as Professor Jalloh documents well in his book. As the first country in which an international court and a truth commission existed side-by-side, the issues that arose and the decisions about that relationship are fundamental to the ongoing process of improving coordination and thoughtful co-existence of judicial and non-judicial procedures.

¹² *Public Redacted Version of 'Corrected Version of "Defence Closing Brief"' ¶ 733*, Prosecutor v. Ongwen, (2020) (No. ICC-02/04-01/15), https://www.icc-cpi.int/CourtRecords/CR2020_00998.PDF.