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DID THE SPECIAL COURT FOR SIERRA LEONE WORK?

Simon M. Meisenberg[*]

In his 2007 Alec Roche Annual Lecture in Public International Law at the University of Oxford, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Theodor Meron, asked: "Does international criminal justice work?" For such an assessment, Judge Meron suggested four criteria: i) finding and trying alleged perpetrators; ii) providing a fair trial; iii) deterring international crimes; and iv) promoting peace and healing.[1]

How would such an assessment for the Special Court for Sierra Leone (SCSL) look like? Did the Special Court for Sierra Leone work? Moreover, does Professor Jalloh's comprehensive assessment in his book *The Legal Legacy of the Special Court for Sierra Leone* provide an honest and straightforward answer to this question? Obviously, Professor Jalloh worked in the trenches of the SCSL in Freetown and The Hague. Therefore, and as equally noted by Judge Meron at the outset of his assessment of the ad hoc tribunals, Professor Jalloh's assessment may naturally tend to answer the question with a resounding "Yes" or "Yes, but . . . ," as any negative response would inevitably tarnish his own professional heritage. The detail and rigor of Professor Jalloh's assessment, his critical but polite and witty observations prove that his appraisal is genuine and made in the best academic fashion. He puts the finger on the sore spots of the jurisprudential legacy of the SCSL, in particular where the reasoning of the decisions and judgments are weak or at times questionable. The book is without any doubt an objective and critical assessment of the Court's work.

Having said this, how did the SCSL perform according to Judge Meron's four-pronged criteria and to the assessment of Professor Jalloh? It is of note that Professor Jalloh's study of the SCSL focuses on the jurisprudential legacy, but it nevertheless provides sufficient detail to assess the Court's work according to Judge Meron's test.

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[1] THEODOR MERON, *Does International Criminal Justice Work?*, *in* THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH: SELECTED SPEECHES 139 (2011).

Finding and trying alleged perpetrators and providing fair trials: Only six months after the conclusion of the agreement between the UN and the Government of Sierra Leone on January 16, 2002, the Court began establishing its offices and operating with an advance team by July 2002. Judges were sworn in on July 25, 2002, and a first Plenary was held in early March 2003. Thereafter, the Prosecutor quickly filed charges against thirteen individuals whom it believed to bear the greatest responsibility for the atrocities committed during the armed conflict in Sierra Leone between 1996 and 2001. Almost all individuals were arrested within months. The arrest and trial of Taylor, the only non-Sierra Leone national who had to be arrested outside Sierra Leonean territory, was a more complex affair and stalled the overall impressive record of apprehending the perpetrators. Three joined trials were conducted within an average of three years, and the individual trial of Taylor took four years. All accused were guaranteed the minimum fair trial rights in accordance with international human rights law and made use of their right to challenge questions of fact and law before an appeals bench. The appeals process on average took about seven months for the AFRC, RUF and CDF Trials.[2] The *Taylor* appeal took considerably longer. Overall, nine persons were convicted and sentenced, one person died during trial, one died shortly after his arrest, and one before his arrest. Only one person is formally still at large but believed to be deceased. Approximately a decade after its establishment, the SCSL concluded its mandate in 2013.

This is undeniably an impressive record, despite the constant criticism at the time about the languor of the trials.[3] The critical question under Judge Meron's first two criteria is, however, whether all perpetrators were found and tried fairly. The SCSL mandate focused on those "who bear the greatest responsibility . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[4] Professor Jalloh concludes that this formulation was chosen to limit the jurisdiction of the Court and to ensure an efficient and

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2 Prosecutor v. Brima, Case No. SCSL-2004-16-A, Appeals Judgment (Feb. 22, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Trial Judgment (March 2, 2009); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Appeals Judgment (May 28, 2008).

3 *See* ANTONIO CASSESE, REPORT ON THE SPECIAL COURT FOR SIERRA LEONE 1 ¶ 3 (Dec. 12, 2006), http://www.rscsl.org/Documents/Cassese%20Report.pdf ("This institutional experiment was indisputably innovative and broke new ground in international criminal justice. However, although meritorious in many respects, the new judicial body has not fully lived up to its initial expectations from the viewpoint of expeditiousness.").

4 Statute of the Special Court for Sierra Leone, art. 1, ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 145.

cost-effective tribunal that would only prosecute a handful of perpetrators.[5] Despite the legal challenges identified by Professor Jalloh with the concept of only prosecuting those who bear the greatest responsibility, it has to be stated that this model of narrowing the mandate of an international court ensures that international criminal justice works in an effective manner. International criminal justice can never entirely substitute a domestic judicial system and prosecute all perpetrators of atrocity crimes. It can only complement domestic prosecutions and other transitional justice mechanisms, such as a truth and reconciliation commission. In addition, focusing on the leading warmongers effectively and eventually silences their willing executioners. Uprooting and prosecuting all the leaders of the warring factions of the Sierra Leone conflict was undoubtedly one of the key elements that ensured a successful peace process in the war-torn country. All previous attempts and measures, for example providing blanket amnesties to perpetrators, were in vain and not successful. To be sure, this is not to say that the SCSL is alone responsible for ensuring a successful transition to peace, but it was an effective ingredient. The unease identified by Professor Jalloh with respect to the concept of "those who bear the greatest responsibility," as it lacks legal specificity, should therefore not overshadow a key tool that increases the potential of international criminal tribunals and which keeps the expectations towards such courts within realistic boundaries.

Deterring international crimes and promoting peace and healing: The consequence of limiting the prosecution of individuals before an international criminal tribunal brings us to the third and fourth criteria. The gap created by the absence of any credible domestic prosecution may alter a deterrent effect created by international tribunals and may hinder peace and reconciliation. The unfortunate absence of domestic prosecutions in Sierra Leone is the consequence of the Lomé amnesty agreement. The SCSL Appeals Chamber held that such a blanket amnesty did not shield the prosecution from international crimes, which may be prosecuted in accordance with the principle of universality before an international tribunal. It did not pronounce the effect of the amnesty for domestic crimes and prosecutions. In the specific circumstances of Sierra Leone, and, given the violation of the amnesty deal by the rebel factions, there are strong arguments to simply declare such a Faustian bargain null and void, thereby providing domestic prosecutors with a door opener to prosecute mid-level and low-level perpetrators.[6] The SCSL

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5 CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 146 (2020).

6 *See* Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J. INT'L CRIM. JUST. 1130–40 (2004).

Appeals Chamber did not choose this path. This was an unusual restrictive decision for an Appeals Chamber that otherwise did not shy away from judicial ingenuity.[7] On the other hand, this provided the TRC with the necessary room to promote reconciliation within the war-torn Sierra Leonean society. The fact that the Prosecutor even-handedly charged individuals of all the warring factions equally contributed to the peace process and the healing of the society. The SCSL was not established during an armed conflict but only when it had ended. It was, therefore, not able to deter any crimes in that specific context. But as Professor Jalloh points out in his discussion on the relationship between the TRC and the SCSL, the creation of the Court was a repudiation of the Lomé amnesty and a shift from the emphasis of reconciliation towards punishment and deterrence.[8] Too long was there the belief among the rebel leadership of getting away with impunity despite the commission of the most heinous crimes. Moreover, through the establishment and the ground-breaking jurisprudence on the non-applicability of amnesties and immunities of Head of States for international crimes before international criminal tribunals, a clear deterrent message has been sent that such heinous crimes will not go unpunished and that the rule of law prevails over the rule of force. This general observation was also shared by the Head of the Sierra Leonean delegation at the Kampala Review Conference to the Rome Statute stating:

> [I]n Sierra Leone, the Special Court has not only made tremendous contributions to accountability through its legal and judicial achievements; it has also developed our national capacity, particularly for our law enforcement and legal professionals, to investigate and, where appropriate, prosecute those alleged to have committed crimes under international law; and it has contributed to restoring confidence in the institutions of State and the rule of law. Capacity building is of critical importance for the principle of complementarity: at the time the Special Court was established, Sierra Leone was willing but unable to address those crimes. We were fortunate to have the support of the international community in establishing the Court to assist us to ensure that impunity would not stand.[9]

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7 *See* JALLOH, *supra* note 5, at 150–276.

8 *Id.* at 311.

9 Vandi Chidi Minah, Deputy Minister of Foreign Affairs and International Cooperation of the Republic of Sierra Leone, Statement by the Head of Delegation, to the Review Conference of the Rome Statute of the International Criminal Court (June 2010).

Professor Jalloh points to critical aspects of the SCSL jurisprudence. Indeed, not everything was faultless, and his detailed assessment provides proof of some unpersuasive aspects of some of the decisions. Such critical analysis is important in the discussion of the jurisprudential legacy of the SCSL. Nevertheless, from a holistic point of view and with some of the weaknesses identified by Professor Jalloh, an overall assessment of Judge Meron's criteria would result in an overall positive reflection of the SCSL legacy and that this model of international criminal justice did indeed work.