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A LEGAL LEGACY THAT OPENS THE WAY TO JUSTICE IN CHALLENGING PLACES AND TIMES

Stephen J. Rapp

Charles Jalloh's *The Legal Legacy of the Special Court for Sierra Leone* reminds us of the great usefulness of the hybrid model of international criminal justice. It is very timely when so many of the mass atrocities committed in today's world—in Syria, Iraq, South Sudan, and Myanmar (except for forced deportation)—are outside the reach of the International Criminal Court (ICC), either because of non-membership of the territorial states or the blockage of the UN Security Council.

Indeed, even where the atrocities are committed on the territory of ICC member states, the hybrid approach can be viewed as a form of "complementarity" that avoids taking the situation to The Hague but does not rely exclusively on national trials. It can be a better alternative than a single global court in The Hague that is expensive, distant, and easy for local leaders to demonize, and national courts where it can be very hard to properly try powerful actors, particularly if these courts were dysfunctional before the violence and were further disabled by it.

The usual arguments for hybrid justice focus on the advantages of locating a court near the victims and affected communities but with a structure that ensures the necessary *capacity* and *will* to deliver independent justice for core international crimes. From my own experience at the SCSL, I have seen how the mixing of national and international personnel was a "win-win" in building capacity because we were able to learn from each other's knowledge and experience in ways not easily achieved by any other means.

I also saw how the hybrid model allowed us to overcome the "political will" challenge and prosecute and build public understanding of our case against the leadership of the Civil Defense Forces (CDF) for serious violations committed while they fought on the "pro-democracy" side of the internal conflict. My friends in Sierra Leone tell me that this delivered an enduring message that no one should attack innocent civilians, no matter what the cause, and as a result the country has survived two power-changing elections without lethal violence.

Charles Jalloh's book makes the case that beyond these advantages, the greatest may be on the legal front. In particular, he shows how the SCSL's decisions on head-of-state immunity and amnesties have profoundly changed the international legal landscape. He draws a direct line from the SCSL's

denial of immunity to President Charles Taylor of Liberia, which was not a state party of the SCSL, to the ICC's decisions on the immunity of President Omar al-Bashir of Sudan, which was not a state party to the ICC. While both courts were treaty-based, the state parties of which recognize head-of-state immunity in their national systems, it was the international character of the SCSL and ICC that extended their legal reach to enable the arrests and trials of even the highest officeholders.

As Jalloh acknowledges, the ICC head-of-state immunity decisions have been criticized by several states and many legal commentators. It is possible that they could be overturned if the opposing states were successful in building sufficient support for a UN General Assembly (UNGA) resolution asking for an advisory opinion of the International Court of Justice (ICJ) and then if the ICJ opined that the ICC immunity decisions were incorrect. But would the ICJ wish to be seen as closing the door to accountability for high-level officials when it previously took care to leave it partially open in the *Arrest of Warrant Case* of 2002 by holding that immunities of such officials do not apply "before certain international criminal courts where they have jurisdiction?"

But even if the ICJ were to opine that immunities of certain serving officials still apply in treaty-based courts, the legal legacy of the SCSL is rock solid as to whether such courts can apply customary international law, even where that law is not reflected in the statutes or constitutions of the ratifying states. This has important implications on immunity of former heads-of-state, amnesties, and retroactivity of statutes in a number of atrocity crime situations where the hybrid model has been under active consideration as a practical solution.

In the Gambia, the Truth, Reconciliation, and Reparations Commission (TRRC) has been busy with the first phase of transitional justice after the electoral defeat and exile of President Yahya Jammeh, who ruled the country from 1994 to 2017. The TRRC is mandated to complete its work by 2021 and then identify and recommend "prosecution of persons who bear the greatest responsibility for human rights violations and abuses" committed when Jammeh was in power.[1] The hybrid model has strong support in the Gambia, in part because of the legal limitations of the Gambian domestic justice system.

The present Gambian constitution immunizes Jammeh and those involved in his 1994 *coup d'etat* and in the transition that followed. This immunity could be overcome if the proposed new constitution were ratified.[2]

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1 Truth, Reparations And Reconciliation Act, Act No. 9, GMB-2017-L-110052, Dec. 13, 2017 (the Gambia).

2 The proposed new constitution failed to receive the necessary votes in the Gambian parliament in October 2020, leaving the 1997 Constitution in place with its provisions granting immunity to ex-

However, there is also the problem that Gambian law during the Jammeh regime did not include crimes against humanity, torture, or enforced disappearance. While Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) allows retroactive application of statutes that reflect the "law recognized by the community of nations," there is an additional legal obstacle in the West African region that arose during the preparations for the trial of former Chadian President Hissene Habré in Senegal.[3]

In June 2006, the African Union Summit asked Senegal to try Habré, then in exile in Senegal, "on behalf of Africa." There was not a problem with his immunity as a former head of state because Chad had waived the immunity, and there was no amnesty applicable to his alleged conduct. The problem arose over the retroactive application of Senegal's 2007 statute by which it intended to try Habré for crimes committed in Chad during 1982–1990.

In November 2010, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled that it was a violation of the African Charter on Human and Peoples' Rights for Senegal to try Habré under a retroactive domestic statute and that this could only be accomplished by following the international practice of establishing an ad hoc or special court. This was subsequently achieved by an international agreement between the African Union and Senegal to create a hybrid court—the Extraordinary African Chambers (EAC), staffed entirely by Senegalese personnel except for two international judges, one to preside at trial and the other on appeal.

The hybrid model is also under active consideration in Liberia, where its TRC in 2009 recommended a Special Court like the SCSL, but where the presence and power in the Liberian Legislature of former warlords and their followers have blocked progress. Now thanks to a public mobilization of support for accountability for war crimes and economic crimes, more than 2/3 of the members of the Liberian House of Representatives are sponsoring a resolution calling for a Special Court. At a conference of civil society organizations in Monrovia in November 2018, the hybrid model was seen as offering many advantages, particularly in overcoming domestic legal limitations. These include the amnesty that was adopted by the Liberian legislature before President Taylor's departure in August 2003, the absence of international crimes in domestic statutes, and the constitutional guarantee

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President Jammeh and the members of the junta that ruled with him during 1994–1997. However, the immunity provision was invalidated by the Gambia Supreme Court in the case of Yankuba Touray, a junta member charged with the murder of a political opponent. The decision was announced on January 27, 2021, with full reasoning issued on March 19, 2021, and was based on the incompatibility of the immunity provision with the protection of the human right to life. State v. Yankuba, Case No. SC CR/001/2020, Judgment (Mar. 19, 2021).

3 International Covenant on Civil and Political Rights art. 15(2), Dec. 16, 1966, 999 U.N.T.S. 171.

of trial by jury—so important for ordinary crimes but difficult to apply in war crimes cases given the challenges to juror impartiality and security in a society where alleged perpetrators present themselves as protectors of their communities.

A hybrid court to provide accountability for the mass atrocities committed in South Sudan since a brutal civil conflict began in December 2013 was promised by the government and the armed opposition in the peace agreement of August 2015 and the revitalized peace agreement of September 2018. Article V of both agreements provides for an African Union Hybrid Court for South Sudan (AUHCSS), with the statute to be negotiated between the government and the AU, and with the AU empowered to enact the statute if the government does not agree. Article V specifically mandates that the statute incorporate international crimes and allow prosecution without regard to amnesties or immunities based on official position.[4] The AUHCSS appears to be a vehicle that would make the maximum effective use of the legal legacy of the SCSL. However, to date, there has been an absence of the domestic political will, regional (and AU) support, and the active international engagement that made it possible for the SCSL to be established.

But the hybrid model does not require political will by all local actors or active engagement by all international partners. Where there is sufficient will and engagement of key parties, a critical mass can be reached to build a judicial institution based on the legal legacy of the SCSL. This could happen even in the situation of Syria, the site of ongoing atrocities that are the worst of this twenty-first century.

In 2019, the Swedish government called for the creation of an international court to try European citizens accused of committing crimes while in the service of *Da'esh* (aka ISIS) in Syria, many of whom are in the custody of Syrian Kurdish forces after the defeat of *Da'esh* in eastern Syria. From subsequent discussions, and from a published legal opinion of Prof. Dr. P.A. Nollkamper that was requested by the Dutch government, it became clear that the legal basis for such a court was to be the "pooling" of the active personality jurisdiction of member states to try their own nationals for these extra-territorial crimes. As noted in the Dutch opinion, the implementation of the concept would face many practical difficulties, but it was legally

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4 *Compare* Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, art. V, Jan. 9, 2005 *with* Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), art. V, Sept. 12, 2018.

sound: "With such a treaty, the parties would transfer the jurisdiction they each have over members of ISIS to the tribunal."[5]

The concept ran into opposition because it seemed designed to avoid the states' responsibility to take back their own citizens because their governments were afraid of political repercussions if the individuals were soon freed by domestic courts because weak evidence of serious criminal conduct could result in short sentences or acquittals. It was also opposed because of the violation of the principle that an international court should pursue equally those alleged to have committed serious crimes on whatever side they fought.

At the same time European states were considering pooling their active personality jurisdiction to bring to trial European members of *Da'esh* in a multi-state court, European prosecutors were achieving historic but limited success in using universal jurisdiction to bring to trial Syrian regime perpetrators in European courts. These two developments have opened the door to the consideration of a multi-state court that would pool all of the state parties' jurisdictions of whatever form—active, protective, and universal--to achieve complete justice for the victims of the crimes in Syria. This idea was proposed in a widely-circulated but unpublished paper by Dr. Ingrid Elliot, MBE, issued in May 2018 and titled "A Briefing Note—Pooled Extra-Territorial Court Option for Syria."

Charles Jalloh's book teaches us that the best way to create a pooled jurisdiction court for Syria would be by engaging the broader "international community" in its establishment, as it was in the birth of the of SCSL—the statute of which was negotiated between Sierra Leone and the UN Secretary-General (UNSG), the latter acting under direction from the UNSC in Resolution 1315. Of course, unlike Sierra Leone, Syria as the territorial state would certainly not now wish to be a state party. But Senegal, the state party of the treaty-based EAC, was not the territorial state of Habré's crimes. And yes, Russia would veto any UNSC resolution like UNSCR 1315. But when the Cambodia tribunal was created, China was not supportive, and the direction for the UNSG to negotiate came from the UN General Assembly.

Consider that the UN General Assembly has already approved and funded a mechanism to provide a foundation for criminal accountability as to the mass atrocities in Syria. In December 2016, the UNGA adopted Resolution 71/248 (by a vote of 105–15), creating an International Impartial Independent Mechanism (IIIM)—a proto-Office of the Prosecutor for the

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[5] Prof. Dr. P.A. Nollkaemper, *Advies International Tribunaal ISIS* 7 (July 22, 2019), https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis ("Bij een dergelijk verdrag zouden de partijen de rechtsmacht die zij elk hebben over leden van ISIS overdragen aan het tribunaal.").

international crimes committed in Syria since March 2011.[6] The IIIM has since been hard at work building case files that could be ready for trial. This IIIM could thus provide a UNGA-approved core for the investigative and prosecutorial capacity of a Special Court for Syria—a treaty-based court with a statute negotiated pursuant to the UNGA's direction to the UNSG to seek agreement with those states wishing to pool their jurisdiction over crimes committed in Syria.

There is also another route by which the "international community" could be engaged in the creation of a hybrid court that would benefit from the jurisprudence of the SCSL. The Executive Council of the Organization for the Prohibition of Chemical Weapons (OPCW), representing 193 state parties, adopted a Decision on July 7, 2020, based on the findings of its Identification and Investigation Team (IIT) about the use of sarin and chlorine in a number of specific attacks in Syria, that "emphasize[d] the importance of bringing to justice those individuals responsible for the uses of chemical weapons found by the IIT to have been perpetrated by the Syrian Arab Republic, including those who ordered such attacks."[7] The Decision noted that the OPCW had concluded a Memorandum of Understanding (MOU) with the Syria IIIM which had its "full support" and to which it would provide relevant information. Finally, it promised "the greatest measure of assistance in connection with criminal investigations or criminal proceedings in accordance with international law."[8]

The OPCW Executive Council provided Syria with 90 days to respond, and if Syria failed to redress the situation, it recommended that the Conference of State Parties (CSP) take "appropriate action" when it convenes in November–December 2020. Given the language of the OPCW Executive Council Decision, it would be the logical next step for the CSP to call on state parties "to exercise their criminal jurisdiction in accordance with international law, including by forming an international court (or Special Court for Syria) that would pool their jurisdiction and resources to 'bring to justice the individuals responsible.'"

The experience of the SCSL would provide useful lessons for such a Special Court for Syria (SCS) as to the processes of appointment, management, and cooperation, to ensure an impartial and effective judicial institution. Of course, an SCS should also leave open the door for a post-transition Syria to join the court, bringing in its jurisdiction and judicial personnel and fully benefiting from the hybrid model.

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6 G.A. Res. 71/248 (Dec. 21, 2016).

7 *OPCW Executive Council Adopts Decision Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic*, OPCW (July 9, 2020), https://www.opcw.org/media-centre/news/2020/07/opcw-executive-council-adopts-decision-addressing-possession-and-use.

8 OPCW Decision EC-94/DEC.2 (July 9, 2020).

Some fear that we are at the end of the age of accountability that saw the successes of ad hoc and hybrid courts and the operationalization of the ICC. Charles Jalloh shows how the jurisprudence of one of those courts, the SCSL, has provided a valuable and useful legal legacy—one that can open the way to justice in even more challenging places and times.