

2021

The Legal Legacy of the Special Court for Sierra Leone: The Relationship Between the Court and the Sierra Leone Truth and Reconciliation Commission

Joseph Rikhof

University of Ottawa, Faculty of Common Law, ruthandjoseph@rogers.com

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [International Law Commons](#), and the [Jurisprudence Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Joseph Rikhof, *The Legal Legacy of the Special Court for Sierra Leone: The Relationship Between the Court and the Sierra Leone Truth and Reconciliation Commission*, 15 FIU L. Rev. 69 (2021).

DOI: <https://dx.doi.org/10.25148/lawrev.15.1.15>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE: THE RELATIONSHIP BETWEEN THE COURT AND THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION

*Dr. Joseph Rikhof**

The book *The Legal Legacy of the Special Court for Sierra Leone* by Professor Charles Jalloh is a tour de force. While it is not the first book written that discusses this institution,¹ it is certainly the most comprehensive, detailed, and, most importantly, the most skillful monograph by providing an excellent in-depth analysis of the most pressing legal issues faced by the Special Court for Sierra Leone (SCSL) and the impact of these legal issues on the development of international criminal law (ICL).

The connection between the jurisprudence of the SCSL and the use of this caselaw by other international criminal institutions, especially the Extraordinary Chambers in the Court of Cambodia (ECCC) and the International Criminal Court (ICC), shows the courage of the SCSL judges in tackling novel and unique legal issues in a manner, which had resonance in different situations than the ones faced in the Sierra Leone context. The erudite analysis by Professor Jalloh of these legal questions and the subsequent references to this jurisprudence, which he adroitly weaves into this narrative, make his book stand out compared to other works in ICL, which often limit themselves to a description of legal issues without taking into account their impact on the larger ICL canvas. His approach can be found in all the chapters of the book dealing with substantive legal matters, such as

* Adjunct professor, University of Ottawa, Faculty of Common Law.

¹ There were a number of publications between 2006 and 2008. *See, e.g.*, WILLIAM SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* (2006); ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE SPECIAL COURT FOR SIERRA LEONE 2003–2004 9 (André Klip & Göran Sluiter eds., 2006); INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (Cesare P.R. Romano et al. eds., 2006); CYRIL LAUCCI, *DIGEST OF JURISPRUDENCE OF THE SPECIAL COURT FOR SIERRA LEONE* (2007); CHARLES C. JALLOH, *CONSOLIDATED LEGAL TEXTS FOR THE SPECIAL COURT FOR SIERRA LEONE* (2007); *THE SIERRA LEONE SPECIAL COURT COLLECTION* (C. Tofan ed., 2008). This was followed by TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE* (2013); CHARLES C. JALLOH, *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* (2014).

the issues of greatest responsibility,² forced marriage,³ child recruitment,⁴ head of state immunity,⁵ and amnesties.⁶

Especially the issue of forced marriage, which was originally seen by the SCSL Trial Chamber as sexual slavery but which its Appeal Chamber determined to be a crime against humanity of other inhumane acts had an important impact in the recent ICC judgment in the case of Ongwen,⁷ both in the general analysis of this crime⁸ but also in distinguishing this crime of forced marriage from sexual enslavement.⁹ The ICC Trial Judgment in Ongwen was delivered on 4 February 2021, but already in Professor Jalloh's book published in July 2020, he had foreshadowed that development from the pre-trial chamber ruling noting that it would potentially give the ICC trial chamber the opportunity to clarify this issue.¹⁰

The Trial Chamber in setting out the essence of the crime of forced marriage reflected the language of the AFRC Appeal judgment when it said: "The central element, and underlying act of forced marriage is the imposition of this status on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being. Accordingly, the harm suffered from forced marriage can consist of being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse."¹¹

Regarding the distinction between forced marriage and sexual slavery, the Ongwen judgment said (resonating the language of the SCSL) that "while

² CHARLES C. JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* 107–49 (2020) [hereinafter JALLOH, *LEGAL LEGACY*]. For a discussion of further developments, see Joseph Rikhof, *Who Are Most Responsible in International Criminal Law?*, *GLOBAL JUST. J.* (Nov. 21, 2019), <https://globaljustice.queenslaw.ca/news/who-are-most-responsible-in-international-criminal-law>.

³ JALLOH, *LEGAL LEGACY*, *supra* note 2, at 150–86. For further developments, see ECCC, *Prosecutor v. An*, 004/02/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals against Closing Orders, December 19, 2019, ¶¶ 606–12 nn.1233, 1246.

⁴ JALLOH, *LEGAL LEGACY*, *supra* note 2, at 187–213; for further developments, see ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, July 8, 2019, ¶¶ 1102–08 n.3075.

⁵ JALLOH, *LEGAL LEGACY*, *supra* note 2, at 214–76.

⁶ *Id.* at 277–305.

⁷ *Prosecutor v. Ongwen*, ICC-02/04-01/15, Judgment, Feb. 4, 2021.

⁸ *Id.* ¶¶ 2748–49 n.7212 (referring to the AFRC Appeals Judgment).

⁹ *Id.* ¶¶ 2750–51 n.7215–16 (referring to SCSL jurisprudence).

¹⁰ JALLOH, *LEGAL LEGACY*, *supra* note 2, at 185.

¹¹ *Prosecutor v. Ongwen*, ¶ 2749.

the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the other inhumane act of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement."¹²

Chapter Ten, the discussion of the relationship between the SCSL and the Sierra Leone Truth and Reconciliation Commission (TRC) is different than the other chapters for two reasons. First, while there have been a large number of TRCs,¹³ it has been rare for such a transitional mechanism to be working in parallel with a criminal justice institution while, secondly, because of this unusual configuration, the lessons set out in this chapter have not been utilized in subsequent similar situations.

Professor Jalloh discusses the main points of friction arising out of the confluence of the operations of the SCSL and TRC, namely the issue of information sharing between the two institutions, specifically the disclosure of confidentially obtained information by the TRC and whether such information could or should be shared with the SCSL and the concomitant question whether the SCSL had priority over the TRC;¹⁴ and the issue of whether SCSL detainees could testify and if so, under which circumstances, specifically whether this should be in public or in private.¹⁵ Professor Jalloh discusses in detail the various arguments brought to bear by academic observers, judges of the SCSL and members of the TRC but does not shy away from providing his own perspective by indicating that TRC information should be shared with the SCSL and that the SCSL should allow detained persons to testify before the TRC but only in a private capacity. His overall astute conclusion is that in a situation where there are two institutions working in parallel in achieving justice in a broad sense, a detailed agreement between the two would be imperative.¹⁶

This recommendation should be adhered to in two contemporary situations, namely in the Central African Republic (CAR) and Kosovo.

¹² *Id.* ¶ 2750. For a general commentary on the case, see Dr. Joseph Rikhof, *Dominic Ongwen Convicted by the International Criminal Court*, GLOBAL JUSTICE JOURNAL (Mar. 3, 2021), <https://globaljustice.queenslaw.ca/news/dominic-ongwen-convicted-by-the-international-criminal-court>.

¹³ *Id.* at 306, 311; *see also* THE GLOBAL IMPACT AND LEGACY OF TRUTH COMMISSIONS (Jeremy Sarkin ed., 2019).

¹⁴ JALLOH, LEGAL LEGACY, *supra* note 2, at 321–30.

¹⁵ *Id.* at 330–35.

¹⁶ *Id.* at 336–37; *see also* Lydia A. Nkansah, *The Dance of Truth and Justice in Postconflict Peacebuilding in Sierra Leone*, 23 AFR. J. INT'L COMP. L. 199, 223–24 (2015).

Unfortunately, it appears that this might not be happening in the CAR,¹⁷ while in Kosovo a TRC has been proposed by the President¹⁸ while that same person is also indicted by the Kosovo Specialist Prosecutor's office,¹⁹ raising other unique legal questions. Lastly, this issue could also come into play as part of a determination in the ICC context whether a national TRC fulfills the requirement in the Rome Statute of being able and willing to conduct its own investigations, thereby usurping the jurisdiction of the International Criminal Court.²⁰ In the end, even though the decentralized nature of ICL and the wide range of States and actors involved in its institutional development might mean that lessons from courts such as the SCSL may not always be reflected in the design of the successor institutions, the mere fact that this experimentation already occurred and that there are lessons to be applied elsewhere gives some hope about the continued maturity of the field.

¹⁷ See Gregory Leberger, *Central African Republic: Ambitious Truth Commission Plans*, JUSTICEINFO (Feb. 5, 2020), <https://www.justiceinfo.net/en/truth-commissions/43733-central-african-republic-ambitious-truth-commission-plans.html>.

¹⁸ See *Preparatory Team for the Establishment of the Truth and Reconciliation Commission*, ACTING PRESIDENT OF THE REPUBLIC OF KOSOVO, <https://www.president-ksgov.net/en/preparatory-team-for-the-establishment-of-the-truth-and-reconciliation-commission> (last visited May 24, 2021).

¹⁹ See *Press Statement*, KOSOVO SPECIALIST CHAMBERS SPECIALIST PROSECUTOR'S OFFICE (June 24, 2020), <https://www.scp-ks.org/en/press-statement>.

²⁰ Rome Statute of the International Criminal Court, art. 17(1), July 17, 1998, 2187 U.N.T.S. 90.