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## The Legacy of the Special Court for Sierra Leone: Balancing Different Transitional Justice Elements to Ensure Accountability for Atrocity Crimes

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## **THE LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE: BALANCING DIFFERENT TRANSITIONAL JUSTICE ELEMENTS TO ENSURE ACCOUNTABILITY FOR ATROCITY CRIMES**

*Alpha Sesay*

Charles Jalloh's elegantly written and original book on *The Legacy of the Special Court for Sierra Leone* offers a much-needed scholarship on the "legal legacy" of the Sierra Leone war crimes tribunal that was a product of an agreement between the Sierra Leone government and the United Nations. While a lot has been written and discussed and questions asked about the legacy of the Special Court for Sierra Leone (SCSL), much of the discourse has focused on the Court's contribution to peace and justice in Sierra Leone, and the contribution that a hybrid mechanism that pursues accountability for atrocity crimes makes to the field of international criminal justice. A renowned African scholar of international law generally and the SCSL in particular, Charles Jalloh's excellent monograph not only contributes to the existing scholarship on this important subject but also offers significant insight into the jurisprudential contribution that the SCSL has made to the growing field of international criminal law. Written by an insider-outsider, and reflecting the refreshing vantage points of a scholar-practitioner, Jalloh's rigorous book deserves a special place at the top of the reading list on the legacy of modern international criminal courts and tribunals.

The SCSL, based on the way it was established and its jurisdiction, meant it was bound to deal with many legal issues that were still evolving in the field of international criminal justice. How the Court dealt with these issues would determine its legal legacy. These are the important issues that Charles Jalloh, who now cements his place as the most prominent Sierra Leonean authority on the work of the SCSL, discusses in his book. He begins by dissecting the Court's personal jurisdiction to prosecute persons bearing the "greatest responsibility," an underappreciated issue which is so central to the debates about the current status and direction of international criminal law as manifested in the work of the Cambodia Tribunal, and goes on to deal with some of the more complex issues including the SCSL's jurisprudence on forced marriage as a crime against humanity, child recruitment as a war crime, head of state immunity, and amnesties for atrocity crimes.

Forced marriage, as a crime against humanity, is an example of the prosecutorial and judicial creativity to address the gendered dimensions of

the Sierra Leone conflict—a concern that has received increasingly well-deserved attention in the field of international criminal law. Here, as he shows, the SCSL forged new ground with jurisprudence that attended, as best as possible under the circumstances, to the traumas and the horrors that women and girls experienced during the conflict. By situating the internal debates amongst judges and prosecutors on everything from whether the crime was necessary or not to issues of fairness and notice to suspects and accused, Jalloh demonstrates the complexities that arise in a system such as international criminal law without a single criminal code of crimes.

With respect to child recruitment, which codification in the Sierra Leone Court was inspired by the agreement of the international community to prohibit the recruitment and use of children in hostilities in the 1998 Rome Statute of the International Criminal Court, Jalloh explains the significance of the SCSL jurisprudence as stemming from the fact of being the first international tribunal to actually indict and prosecute persons for that crime under international law but also the generally well-received finding by the Appeals Chamber of the SCSL that child recruitment was also a crime under customary international law by November 1996.

With regard to the topic of head of state immunity, which has been a challenging issue for international and national courts alike, the SCSL indictment of the sitting Liberian president Charles Taylor for war crimes and crimes against humanity in Sierra Leone enabled the Court to extend the application of the judgment of the International Court of Justice in the Arrest Warrant Case. The SCSL found the logic of immunity, which applies as between sovereigns on the horizontal level, incompatible with the international community's goal of prohibiting the commission of international crimes. Jalloh, in what proved to be the lengthiest chapter of the book, tells the Taylor story and shows the tremendous influence of the *Taylor* caselaw in the judicial findings of various chambers of the International Criminal Court, which culminated in a most prominent place in the first substantive appeals chamber ruling on the matter in the Jordan Al Bashir Case. In its judgment, which ruled against Jordan, the ICC Appeals Chamber expressly concurred with the finding in the *Taylor* Case that there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. This is a significant legal ruling, which now clarifies the law and the obligations of the ICC's 123 States Parties in relation to the duty to arrest and surrender indicted government officials accused of committing Rome Statute crimes.

Turning to the sensitive issue of amnesties, Jalloh set the context of the Sierra Leone conflict and the government's decision to confer a blanket

amnesty to the combatants in exchange for peace. He discussed the subsequent shift from what he calls the “forgive and forget policy” to “the investigate and prosecute policy” after the rebels failed to abide by the terms of the July 1999 Lomé Peace Agreement. This later set up the scenario where, in the end, the Appeals Chamber was asked to rule on whether the amnesty conferred by Sierra Leone was consistent with the trials at the SCSL. The ruling was affirmative, with the SCSL ultimately determining that there was a crystallizing international law norm that limits a government’s ability to grant amnesty for serious crimes under international law. In critically analyzing the SCSL ruling, Jalloh examined both the positive and negative scholarly criticisms of the amnesty decision and sought to find the middle ground, supporting, on the one hand, the ultimate conclusion, while on the other hand showing how the reasoning could have been strengthened. In the concluding section of his chapter, Jalloh alludes to the influence not just of the SCSL caselaw in other jurisdictions but also in the work of the International Law Commission relating to international criminal law topics.

In sum, as Jalloh ably demonstrates, in all the above areas, the SCSL broke new ground in its jurisprudence on these important issues of wider significance for international law, which represent meaningful contributions to the field of international criminal law.

In the book, Jalloh provides significant insight into the relationship between different transitional mechanisms, in the case of Sierra Leone, the SCSL, and the country’s Truth and Reconciliation Commission (TRC). As noted in the book, the SCSL and TRC both served as crucial post-conflict accountability mechanisms, and there were strong arguments for Sierra Leone pursuing either or both mechanisms. Both mechanisms operated simultaneously, not by design but as a result of several factors. When Sierra Leone signed a peace agreement with rebel forces in 1999, the country settled for a truth and reconciliation process that will develop a historical account of the conflict, create a forum for perpetrators and victims alike to tell their stories, make recommendations to prevent a repeat of the conflict, and help reconcile a country that had been depleted by conflict. However, a breakdown in the peace process after rebel forces abducted United Nations peacekeepers led the Sierra Leone President to request assistance from the UN for the setting up of a tribunal that will prosecute persons bearing the greatest responsibility for atrocity crimes during the conflict. The SCSL is a product of this request to the UN. With both the SCSL and TRC operating simultaneously, there were several unresolved legal issues.

In his book, Jalloh discusses some of these key legal issues that confronted Sierra Leone—from earlier debates on whether the two institutions needed a formal relationship, to information sharing and the

question of primacy of one institution over the other. The book goes further to discuss key jurisprudential issues that were a result of disagreements between the SCSL and TRC. In discussing the conflicts over an obligation for the TRC to disclose confidential information to the SCSL, or for the TRC to gain access to detainees in the custody of the SCSL and get them to testify publicly, Jalloh not only provides analysis of the legal submissions and their subsequent decisions, but he provides valuable lessons for how similar mechanisms in other countries can manage these dynamics. As several countries in Africa, such as South Sudan and Central African Republic, have drafted statutes and are in the process of developing mechanisms that mirror Sierra Leone's experience, Jalloh's book and his discussion of the complex legal issues in the SCSL-TRC relationship are valuable lessons to learn from. They are must-reads for all those involved in those situations to avoid reinventing the wheel. The lessons certainly demonstrate the continued relevance of the SCSL's legal legacy for other situations in Africa and the world.

To take perhaps the most prominent example, in February 2019, the African Union adopted the African Union Transitional Justice Framework (AUTJP), which consolidates the experiences of various African countries and their approach to transitional justice. The policy is meant to be a guide to African states in developing their own context-specific transitional justice mechanisms in their quests for peace, justice, and reconciliation. The policy recommends the need for transitional justice mechanisms to mutually reinforce each other and ensure a balance between peace and reconciliation on the one hand, and individual criminal responsibility and accountability on the other. In relying on the guidance that the AUTJP provides, especially on the necessity of sequencing and balancing different transitional justice interests, Jalloh's excellent analysis of the legal issues that these mechanisms will confront and the legacy of Sierra Leone's approach provide valuable lessons for the AU and for African states.