

Bridging the Accountability Gap: The Special Court for Sierra Leone

by Dale McFeatters

In October 2017, the Army revised Field Manual 3-0, *Operations*, the capstone doctrine on unified land operations, to focus on conducting and sustaining large-scale combat operations.¹ Large-scale combat operations are the employment of the range of military operations occurring at the extremes of the conflict continuum.² The purpose of FM 3-0 is to reorient the Army's training and education curricula on decisive action, which is the heart of the Army's operating concept.³ Decisive action is "the continuous, simultaneous combinations of offensive, defensive, and stability or defense support of civil authorities tasks"⁴ in the broader context of the ways of unified action to achieve national strategic ends.

A crucial element of the stability component of decisive action is establishing civil control, which fosters the rule of law.⁵ The rule of law is the fundamental principle of human rights that "all persons, institutions, and entities – public and private, *including the state itself* – are accountable to laws... equally enforced [and] independently adjudicated...." (Emphasis added.)⁶

However, according to FM 3-0, paragraph 1-4:

Large-scale combat operations are intense, lethal, and brutal. Their conditions include complexity, chaos, fear, violence, fatigue, and uncertainty. Future battlefields will include noncombatants, and they will be crowded in and around large cities. Enemies will employ conventional tactics, terror, criminal activity, and information warfare to further complicate operations. To an ever-increasing degree, activities in the information environment are inseparable from ground operations. Large-scale combat operations present the greatest challenge for Army forces.

Given the unavoidable destructive nature of large-scale combat operations, how can the Army promote the rule of law when civil infrastructure has been destroyed and critical civic institutions, like

Major Dale McFeatters is the deputy chief of operations for the Criminal Law Division of the U.S. Army's Office of the Judge Advocate General. He received an LL.M. in Military Law from the U.S. Army Judge Advocate General's Legal Center and School, and graduated from the U.S. Army Command and General Staff College and the Duquesne University School of Law.

the judicial system, are no longer functioning? The Special Court for Sierra Leone, an ad hoc international tribunal, provides an instructive example.

In April 2012, the Special Court for Sierra Leone (SCSL) convicted Charles Taylor, the former president of Liberia, of war crimes, human rights violations, and crimes against humanity for his involvement in Sierra Leone's ten-year civil war.⁷ The same court later sentenced Taylor to fifty years in prison.⁸ The Special Court's conviction made Taylor the first former head of state to be convicted by an international court since the Nuremberg trials that followed World War II.⁹

The SCSL, though flawed and imperfect, can provide a workable model for restoring the rule of law and establishing civil control, in the final phases of decisive action, where national courts or the International Criminal Court cannot.

Background

Eighteen years ago, as Sierra Leone's civil war began to wind down, the country's president, Ahmed Tejan Kabbah, asked the United Nations Security Council to develop an international tribunal to assist in prosecuting members of the rebelling Revolutionary United Front for crimes against the country's citizens and United Nations peacekeepers.¹⁰ In response, the Security Council passed Resolution 1315 which authorized the United Nations' Secretary-General to develop a special ad hoc tribunal in cooperation with Sierra Leone's government.¹¹ Both the United Nations (UN) and the Sierra Leonean government agreed to the resulting draft legislation and the SCSL was born.¹²

Many in the international community met the creation of the SCSL with high expectations, believing its success would be a watershed event for the future use of ad hoc international criminal courts.¹³ The court's conception sought to avoid the difficulties and setbacks of previous ad hoc international criminal tribunals and the

shortcomings of the International Criminal Court.¹⁴

This article will begin by briefly discussing Sierra Leone's civil war and the genesis of the SCSL, which was created to bridge the gap in accountability between the country's dysfunctional national court system and existing international tribunals. It will then explore the framework and jurisdiction of the Court, the

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precedents upon which it was based, and its unique composition as an international hybrid tribunal. From there, the article will discuss the court's prosecutions, particularly that of Taylor. Finally, the article will conclude that the SCSL, though far from perfect, has made important contributions to the field of international criminal law and is a practical and necessary model for the future of international ad hoc tribunals. These contributions may be instructive should the U.S. military seek to impose the rule of law in the stability phase of large-scale combat operations.

The Genesis of the Special Court for Sierra Leone

Sierra Leone's Civil War

In March of 1991, the Revolutionary United Front (RUF), a group of Sierra Leonean dissidents based in Liberia and linked to Libyan president Mohamar Qaddafi,¹⁵ invaded Sierra Leone with support and direction from Charles Taylor.¹⁶ The RUF's pretext was liberating Sierra Leone from its corrupt dictatorship,¹⁷ but after looting the country's eastern diamond mines and indiscriminately massacring civilians, the RUF

proved to be nothing more than a bloodthirsty criminal enterprise.¹⁸

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The decade-long conflict that followed was waged almost entirely against civilians¹⁹ and characterized by systematic atrocities such as mass executions of noncombatants, slave labor, rape, mutilation, and the forced conscription of child soldiers.²⁰ The death toll is estimated to be 50,000.²¹ In explaining that the combatants' behavior amounted to "some of the most heinous, brutal and atrocious crimes ever recorded in human history," the SCSL noted:

Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs split open and the [fetus] removed merely to settle a bet amongst the troops as to the gender of the [fetus].... Hacking off the limbs of innocent civilians was commonplace.... Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population.²²

After a particularly heinous and shocking RUF attack on the capital city of Freetown, which killed 6,000 civilians in just two weeks, the international community finally forced the combatants to the negotiating table.²³ The subsequent peace agreement, signed in Lomé, Togo and known as the Lomé Agreement, folded

the RUF into the government and established a truth and reconciliation commission.²⁴

Controversially, the Lomé Agreement contained an amnesty provision, which conferred immunity from any legal or official adverse action by the government of Sierra Leone on any member of the conflict's principal combatants: the RUF, the Sierra Leone Army, the Armed Forces Revolutionary Council, and the Civilian Defense Force.²⁵ In a belated act of protest to the amnesty clause, the United Nations Special Representative to the Lomé negotiations appended a handwritten statement to the agreement stating that the UN would not endorse amnesty for "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."²⁶

As part of the Lomé Agreement, the UN also agreed to deploy 6,000 additional soldiers to Sierra Leone, whom the RUF immediately attacked.²⁷ Furthermore, the RUF leadership, now government ministers, resumed plundering the diamond mines.²⁸ With violence spinning out of control yet again, the British government forcefully intervened and largely pacified Sierra Leone by the end of 2001.²⁹ After Charles Taylor pulled his support for the RUF under international pressure, its leadership disarmed, and Sierra Leone's civil war finally ended.³⁰

Establishing the Special Court for Sierra Leone

The Need for a Hybrid Tribunal

The Lomé Agreement's failure forced Sierra Leone's government to rethink the controversial amnesty provision and consider a different approach to a stable peace.³¹ On June 12, 2000, Sierra Leone's president, Ahmed Tejan Kabbah,³² wrote to United Nations Security Council requesting international support for a "special court" to "bring credible justice" to the RUF for its crimes against Sierra Leone's people

and UN peacekeepers.³³ Kabbah argued that the RUF had “renege[d]” on the Lomé Agreement and would continue its violence with impunity if its members were not prosecuted.³⁴ Citing the UN’s response to crimes against humanity in Rwanda and the former Yugoslavia, Kabbah argued that a similar legal framework was needed given the magnitude of the RUF’s atrocities.³⁵

Kabbah suggested a tribunal with a framework and mandate to apply both a blend of international and domestic Sierra Leonean law.³⁶ This was necessary because the gaps in the country’s existing criminal legal code and the extensive nature of the RUF’s crimes were well beyond the capacity of the country’s existing judicial infrastructure.³⁷ However, Kabbah was concerned that serious crimes like kidnapping and arson were unlikely to be prosecuted through international law.³⁸

Security Council Resolution 1315

In response to Kabbah’s letter, the United Nations Security Council passed Resolution 1315, which authorized the Secretary-General to begin working with the Sierra Leonean government to establish a special court.³⁹ UN Security Council Resolution 1315 noted an earlier reservation by the UN Special Representative to the Lomé Agreement’s amnesty provision⁴⁰ but curiously made no mention of the RUF. Instead, UN Security Council Resolution 1315 recommended that the proposed special court “have personal jurisdiction over persons who bear the greatest responsibility” for “crimes against humanity, war crimes and other serious violations of international humanitarian law....”⁴¹ The language “greatest responsibility” would become especially significant later.

The Court’s Structure: A New Model

Despite UN Security Council Resolution 1315, there was no political will in the international community for setting up another international criminal tribunal because of the

expense and longevity of the existing tribunals.⁴² To address these concerns, the SCSL’s framework was designed to operate more efficiently than its predecessors.⁴³ The tribunals on which the SCSL was based, the International Criminal Tribunals for Rwanda and Yugoslavia, were subsidiary organs of the United Nations and subject to unavoidable delays and bureaucracy.⁴⁴ The SCSL was its own independent entity and could function faster and more economically. The SCSL was also independent of Sierra Leone’s

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judiciary, which was an effort to make the court more credible.⁴⁵

Structure

The court was divided into three principal branches: chambers, registry, and prosecution.⁴⁶ The chambers branch consisted of two trial courts and one appellate court, with the latter’s presiding judge serving as the President of the Court.⁴⁷ The head prosecutor, appointed by the UN Secretary-General, was responsible for investigating and prosecuting cases before the court.⁴⁸ The registry, the administrative branch of the court, was responsible for the court’s operation and also housed the Office of the Principal Defender.⁴⁹

Financing

Significant criticism of the previous ad hoc international tribunals has much to do with their expense.⁵⁰ Rwanda’s government criticized the International Criminal Tribunal for Rwanda for spending \$1.5 billion over 11 years to secure fewer than 40 verdicts.⁵¹ The country’s government complained that the International Criminal Tribunal for Rwanda’s

slow pace damaged the perception among Rwandans that the tribunal would achieve justice.⁵² Similarly, the International Criminal Tribunal for Yugoslavia has spent well over a billion dollars, at a cost of approximately \$10 million per defendant.⁵³

This frustration and dissatisfaction with the cost of the International Criminal Tribunals

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for Yugoslavia and Rwanda drove the Security Council to institute a novel method of funding the SCSL: voluntary donations.⁵⁴

Those countries that donated to the SCSL comprised a Management Committee handling the general administration of the court.⁵⁵ The advantage to having the court funded through donations was that the SCSL would be accountable to its donors.⁵⁶

An international tribunal established by the United States or a North Atlantic Treaty Organization (NATO) coalition would be much better resourced than the SCSL. Iraq and Afghanistan are indications that U.S. taxpayers have been willing to shoulder the burden of post-war reconstruction for countries that, unlike a near-peer adversary in large-scale combat operations, did not necessarily pose an existential threat.

Temporal Jurisdiction

One of the most controversial decision made by the tribunal was the SCSL's expansive temporal jurisdiction,⁵⁷ implemented because the amnesty provision of the 1999 Lomé Agreement⁵⁸ posed a significant hurdle to prosecuting members of the RUF, many of whom may not have ceased fighting without it.⁵⁹ If the amnesty provision were valid, the SCSL

would only have jurisdiction for offenses that took place after July 7, 1999.⁶⁰ Conversely, if the SCSL disregarded the provision, offenses could be prosecuted dating back to November 30, 1996, when the Abidjan Peace Agreement failed.⁶¹

Furthermore, given the sheer number and atrocious nature of the crimes committed during the conflict, the parties to the Lomé Agreement believed that a truth and reconciliation commission was necessary for the country to properly heal.⁶² In order to do so, amnesty would encourage those responsible for the conflict's crimes to testify before the commission without risk of penal consequences.⁶³ Yet UN Security Council Resolution 1315's preamble noted that the Secretary-General's Special Representative had appended to the Lomé Agreement the UN's understanding that the amnesty provision would not apply to international crimes.⁶⁴ Disregarding the amnesty provision, the Security Council proposed:

[T]hat the special court should have personal jurisdiction over persons *who bear the greatest responsibility* for the commission of [crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law], including those leaders, who in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.⁶⁵ (Emphasis added.)

The government of Sierra Leone, which never supported the 1996 amnesty provision,⁶⁶ agreed with the draft jurisdictional language and expressed its belief that the Lomé Agreement did not bar prosecution for international crimes or crimes under Sierra Leonean law.⁶⁷ Though negotiations over the draft statute continued for more than a year, there is no evidence of either party revisiting the issue.⁶⁸ The draft language

remained and was incorporated into the Special Court's statute in Article 10.⁶⁹

Personal Jurisdiction

As noted above, the personal jurisdiction of the SCSL extended to those “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”⁷⁰ Out of concern that the language would be interpreted to allow for the prosecution of peacekeepers and child soldiers, the Security Council restricted jurisdiction over peacekeepers⁷¹ to the sending state and barred prosecution of anyone under the age of 15.⁷²

The World's First International Hybrid Tribunal

On January 16, 2002, the UN and Sierra Leone reached an agreement establishing the SCSL.⁷³ Appended to the agreement was a statute passed by Sierra Leone's government that established the court under Sierra Leonean law⁷⁴ making the SCSL the world's first international hybrid tribunal. In July of 2002, the court began operating.⁷⁵

The Special Court's Prosecutions Begin

Indictments

In March 2003, the SCSL Chief Prosecutor announced seven initial indictments against RUF leader Foday Sankoh, his chief of staff Sam Bockarie, RUF commanders Issa Hassan Sessay, and Morris Kallon, Armed Forces Revolutionary Council leaders Johnny Paul Koroma and Alex Brima, and Sierra Leone's interior minister, Sam Hinga Norman, who founded the Civilian Defense Force and served as President Kabbah's deputy defense minister during the fighting.⁷⁶

The indictments against Sankoh, Bockarie, and Norman were later dismissed due to their deaths.⁷⁷ Koroma fled to Liberia and died under mysterious circumstances.⁷⁸

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Within the next few months, the Chief Prosecutor also indicted Augustine Gbao of the RUF, Ibrahim Kamara and Santigie Kanu of the Armed Forces Revolutionary Council, and Moinina Fofana and Allieu Kondewa of the Civilian Defense Force.⁷⁹ All of the defendants were charged with war crimes, crimes against humanity, and serious violations of international humanitarian law.⁸⁰

Jurisdictional Challenges

As expected, the Lomé Agreement's amnesty clause was the first major hurdle to prosecution. Article IX of the Agreement stated:

To consolidate peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, [ex-Armed Forces Revolutionary Council], [ex-Sierra Leone Army] or [Civilian Defense Force] in respect of anything done by them in pursuit of their objectives as members of those [organizations] since March 1991, up to the signing of the present Agreement.⁸¹

Kallon, Kamara, Fofana, and Gbao all filed preliminary motions with the Special Court arguing that the amnesty provision of the Lomé Agreement barred their prosecutions.⁸²

The argument was not without merit. The defendants claimed that the entire purpose of the Lomé Agreement was irreconcilable with the establishment of the SCSL.⁸³ Furthermore, they argued, it was arbitrary and capricious for the government of Sierra Leone to honor its commitments to the Abidjan Agreement and the UN, but disregard its commitments under the Lomé Agreement.⁸⁴

The Appeals Chamber for the Special Court disagreed. Ruling that domestic amnesty laws cannot prohibit prosecutions under international law for crimes of universal jurisdiction by simple decree, the court noted:

The Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may take note of. That, however, will not convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal law.⁸⁵

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As Noah Novogrodsky put it, “[s]tates cannot use domestic legislation to bar international criminal liability.”⁸⁶ The prosecution could present its case.

Convictions

In 2007, Brima, Kamara, and Kanu were all convicted of war crimes, crimes against humanity, and serious violations of international humanitarian law.⁸⁷ Brima and Kanu each received 50 years in prison, while Kamara received 45 years.⁸⁸

The next year, Sessay, Kallon, Gbao,⁸⁹ Kondewa, and Fofana⁹⁰ were all convicted and sentenced to 52, 40, and 25, 20, and 15 years respectively.⁹¹

Prosecutor vs. Taylor

The SCSL was under serious threat of losing credibility in Sierra Leone if Charles Taylor was not brought to justice.⁹² Taylor was widely believed to have directed the RUF to invade Sierra Leone to support his own civil war in Liberia.⁹³ His warlord economy prolonged both conflicts, especially Sierra Leone’s, because he traded logistical and operational support to the RUF for access to Sierra Leone’s eastern diamond mines.⁹⁴ Taylor would then sell these diamonds for an enormous profit on the black market to circumvent the Kimberly Process.⁹⁵ Yet indicting Taylor would be immensely problematic because he was still Liberia’s sitting president at a time when the country was fighting its own civil war.⁹⁶ If Taylor were indicted, there would be no incentive for him to make peace.

The Indictment

In March 2003, the SCSL’s chief prosecutor, David Crane, indicted Charles Taylor under seal for crimes against humanity, war crimes, and other serious violations of international humanitarian law.⁹⁷ The indictment was sealed because Crane feared that publicizing it would destabilize Sierra Leone and increase violence in Liberia.⁹⁸ Hoping to seize an opportunity to apprehend Taylor outside Liberia, Crane unsealed the indictment while Taylor was in Ghana for peace talks.⁹⁹ Yet Ghanaian authorities balked at apprehending Taylor and he fled back to Liberia.¹⁰⁰ Later, as part of a compromise to bring peace to Liberia, Nigeria offered Taylor asylum if he stepped down as president, which he accepted under intense international pressure.¹⁰¹ After Taylor violated the terms of his asylum by attempting to flee to Cameroon,

Nigeria extradited him to Sierra Leone.¹⁰² Taylor was then transferred from Sierra Leone to The Hague, where a branch of the SCSL had opened amid security concerns in Freetown.¹⁰³

Head of State Immunity

Shortly after Taylor was indicted, his attorneys filed a motion to quash the SCSL's indictment citing head of state immunity.¹⁰⁴ Taylor argued that customary international law did not give the national courts of another sovereign an exception to head of state immunity.¹⁰⁵

The SCSL rejected Taylor's argument and ruled that heads of state are not immune from international tribunals.¹⁰⁶ The Court further held that, even though the SCSL originated with a treaty between the UN and Sierra Leone, as opposed to Chapter VII of the UN Charter, the fact that the Security Council passed a resolution creating the SCSL gave it distinct international characteristics trumping head of state immunity.¹⁰⁷

Verdict

Charles Taylor's trial began in June of 2007 but was postponed when Taylor, in behavior typical of a despot facing trial, fired his defense attorneys and boycotted the proceedings.¹⁰⁸ The trial resumed in January of 2008¹⁰⁹ and concluded on March 11, 2011 after the presentation of tens of thousands of pages of evidence, more than 1,000 exhibits, and testimony from 120 witnesses, including Taylor himself.¹¹⁰ On April 26, 2012, after 13 months of deliberation, the panel of three judges, from Uganda, Samoa, and Ireland, convicted Taylor of aiding, abetting, and planning the atrocities committed by the RUF and Armed Forces Revolutionary Council during the war.¹¹¹ One month later, the same three judges sentenced Taylor to 50 years in prison.¹¹²

Criticisms of the Special Court for Sierra Leone

Though successful in its limited prosecutions, the SCSL is far from perfect and the Court is not without its critics.

Lack of Resources

Funding

Many of the SCSL's problems revolved around funding. The UN Security Council established the SCSL to be funded with voluntary contributions from UN member states.¹¹³ This meant that those most vested in the SCSL's success, the UN and the people of Sierra Leone, were now entirely dependent on donations.¹¹⁴ At one point, the Court became so cash-strapped that it needed a bailout from the UN just to meet its mandate.¹¹⁵

The SCSL's limited budget significantly restricted its capabilities and forced the court's chief prosecutor to limit the number of indictments and prosecutions.¹¹⁶

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Support to the Defense Office

The Court's shoestring budget also limited the resources that could be provided to the defense attorneys. Though Taylor sat atop a vast and lucrative criminal enterprise, investigators were never able to track down the millions of dollars he allegedly sent offshore.¹¹⁷ As a result of Taylor's claimed indigence, the SCSL funded Taylor's defense at a cost of \$100,000 per month.¹¹⁸ Even so, Taylor's defense attorneys complained that they were significantly underfunded and that the Registrar often asked the Defense Office to make decisions that undermined the representation of its clients.¹¹⁹

Narrow Interpretation

The SCSL's mandate was to "prosecute persons who bear the greatest responsibility" for the conflict's violence.¹²⁰ Obviously, there were differing opinions about whom and how many were most responsible for the atrocities in Sierra Leone. This was, after all, a decade-long conflict waged primarily against a civilian population. Concerned that the phrasing of the mandate would overly restrict the number of prosecutions, the UN Secretary General urged the Security Council to widen the personal jurisdiction of the Court's mandate.¹²¹ His proposal was rejected.¹²²

The limited funding available and the SCSL's narrow jurisdiction lead the Prosecutor to charge only a tiny fraction of the conflict's worst perpetrators, allowing some of the most notorious to escape justice.¹²³

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Selective Prosecutions

At the SCSL's formation, juveniles and peacekeepers were specifically excluded from prosecution.¹²⁴ These exclusions were controversial in Sierra Leone. Though there was a segment of the population that wanted to see juveniles prosecuted,¹²⁵ the United Nations Children's Fund and other human rights organizations were adamantly against it.¹²⁶ In contrast though, the failure to hold peacekeepers accountable, especially those assigned to Economic Community of West African States Monitoring Group, caused outrage and instantly damaged the SCSL's credibility.¹²⁷ The group was itself responsible for crimes against Sierra Leone's population, including summary executions, rape, and looting.¹²⁸

Finally, Sierra Leone's civil war began,

almost inevitably, because of terrible governance, rampant corruption, and regional instability. Yet the conflict was fueled and perpetuated by the factions' exploitation of the country's diamond mines, both for greed and revenue. These "conflict diamonds" were sold on the international market with the complicity of the diamond industry.¹²⁹ The SCSL's failure to hold foreign businesses accountable for knowingly profiting from conflict diamonds diminished the court's legitimacy.¹³⁰

The Special Court for Sierra Leone's Legacy and the Future of International Hybrid Tribunals

Contributions

A "Nationalized" International Tribunal

The SCSL was the world's first international hybrid tribunal empowered to adjudicate its cases under both international and national law.¹³¹ The use of national law can be important to a country as devastated as Sierra Leone and trying to regain a sense of nationhood and seeking a return to normalcy. In other words, the hybrid nature of the court can give a country a feeling of "ownership" over the process, even where international law is necessary because national courts and law are not capable.¹³²

The rule of law had effectively vanished in Sierra Leone. Though the government was functioning at the time of the SCSL's creation, its civil and judicial infrastructure had been destroyed and the RUF was on the verge of another coup.¹³³ Exposure to highly publicized and fair trials held in *locus criminis* would significantly improve Sierra Leone's rule of law.

Bilateral Creation

The SCSL, in contrast to the International Criminal Tribunal for Rwanda and ICTY, was the first criminal tribunal created by treaty between the UN and a member state.¹³⁴ The International

Criminal Tribunals for Rwanda and Yugoslavia were created by the Security Council under its Chapter VII authority and imposed on Rwanda and the former Yugoslavia.¹³⁵ As Charles Jalloh, a law professor and SCSL scholar noted:

While Chapter VII resolutions are coercive in the sense of being binding on all UN Member States, the SCSL consensual bilateral treaty approach offers a practical alternative to the use of such exceptional powers where the affected State is willing to prosecute serious international law violations but is unable to do so for some reason....¹³⁶

The SCSL's model may also assist a UN member state in sparking interest among the international community for assistance in resolving a conflict.¹³⁷ For instance, the international community had no real interest or motivation to resolve Sierra Leone's conflict until the jaw-dropping horror of the RUF's attack on Freetown.¹³⁸ When the international community finally intervened, it obviously did not understand the war.¹³⁹ The resulting and doomed Lomé Agreement and its amnesty clause, which President Kabbah was pressured into signing, were a give-away to the RUF.¹⁴⁰ It was only through the creation of the SCSL that the conflict could end with any color or sense of justice.

An Existing Template

The SCSL was designed to avoid the deficiencies of the International Criminal Tribunals for Rwanda and Yugoslavia.¹⁴¹ Yet it also borrowed from what the two previous tribunals used effectively, such as rules of evidence, procedure, and the jurisprudence of their appellate chambers.¹⁴² Future hybrid tribunals can benefit by inheriting and employing the robust contributions and precedents these tribunals have made to international criminal law.

Did the Special Court "Work"?

Sierra Leone is unquestionably better off than it was in 2002. Since the SCSL began operating, the country has had four transparent, fair elections with relatively peaceful transfers of power.¹⁴³ Though still plagued by government corruption, tribalism, and regionalism, the country has endured economic turmoil and devastating natural disasters, including an Ebola outbreak that killed 4,000, without mass violence or breakdown of civil-society.¹⁴⁴

It is impossible to gauge how much of progress was due to the SCSL. Post-conflict tribunals are relatively new initiatives in international law and their contributions to conflict resolution may take decades to accurately assess. Yet in the short term, the prosecution and incarceration of Charles Taylor was vital to stabilizing West Africa.

The SCSL was designed to avoid the deficiencies of the International Criminal Tribunals for Rwanda and Yugoslavia.

Bridging the Accountability Gap

A Supplement to the International Criminal Court

The United States is not a party to the International Criminal Court.¹⁴⁵ Neither are China, India, Pakistan, Indonesia, Turkey, and a number of other states.¹⁴⁶ Therefore, resort to the International Criminal Court may not be feasible after a large-scale conflict. Furthermore, while the International Criminal Court was intended to be a court of last resort,¹⁴⁷ there are many instances where the national courts of countries victimized by war are not capable of handling the conflict's fallout. In protracted internal armed conflicts like Sierra Leone and Liberia's, a devastated judicial infrastructure, corruption,

or ethnic bias may render domestic prosecutions impossible. Furthermore, given the dissatisfaction with the cost and inefficiencies of the International Criminal Tribunal for Rwanda and ITCY, it is unlikely that the UN will return to Chapter VII tribunals that are centrally funded by its member states. International hybrid tribunals, like the SCSL, can be used to effectively bridge the existing gap between the International Criminal Court and incapacitated, incapable, or overwhelmed national courts.

Recommendations

Funding

Funding will continue to be a problem for future hybrid tribunals. For the International Criminal Tribunals for Rwanda and Yugoslavia, the costs were too high. For the SCSL, there was never enough money in the first place, which diminished its credibility.¹⁴⁸ Ideally, the UN would consider setting up a standing global fund that its member states can augment through voluntary donations when the next hybrid tribunal is established.

The next hybrid tribunal should also have a clear mandate and jurisdiction before its creation. This will allow for a better prediction of its costs.

Finally, the UN should create a workable template for the logistics of physically setting up and running a tribunal. This includes office management, translation equipment, case file management systems, and witness accommodations. This type of institutional knowledge can lower initial startup costs.

Chapter VII Authority

Tribunals created by bilateral treaty do not have extraterritorial jurisdiction or extradition authority. This could have been problematic for the SCSL given the cross-border nature of the conflict and that three of the principle defendants – Taylor, Bockarie, and Koroma – were in Liberia while under indictment. The UN Security Council should consider augmenting a hybrid tribunal with Chapter VII authority to allow for extradition.

Conclusion

There will never be a one-sized approach for hybrid tribunals and conflict resolution. What worked in Sierra Leone may not work in Syria or the Democratic Republic of the Congo. Yet despite valid criticism, the SCSL made important contributions to the field of international criminal law and Sierra Leone has been at peace nearly two decades.

The worst evils of war too often fall on those who have no stake in it. The culture of impunity and the willingness of combatants to terrorize civilians are too common in the world. The SCSL is a necessary and practical model for providing justice and establishing the rule of law where the International Criminal Court and national courts cannot. If the United States finds itself prosecuting large-scale combat operations, something akin to the Special Court for Sierra Leone may become necessary. **IAJ**

NOTES

- 1 U.S. Department of the Army, Field Manual 3-0, Operations, (6 Oct. 2017) [hereinafter FM 3-0].
- 2 Ibid. at 1-1.
- 3 Ibid.
- 4 Ibid. at 1-16.
- 5 Ibid. at 8-12
- 6 Ibid.
- 7 Marlise Simons, *Ex-President of Liberia Aided War Crimes, Court Rules*, N.Y. Times, April 26, 2012, http://www.nytimes.com/2012/04/27/world/africa/charles-taylor-liberia-sierra-leone-war-crimes-court-verdict.html?pagewanted=all&_r=0.
- 8 Marlise Simons and David Goodman, *Ex- Liberian Leader Gets 50 Years for War Crimes*, N.Y. Times, May 30, 2012, <http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all>.
- 9 Ibid. Admiral Karl Dönitz, a German naval officer who succeeded Adolph Hitler, was convicted of war crimes at Nuremberg. Robert E. Conot, Justice at Nuremberg at 33 (1983).
- 10 Letter from the Permanent Representative of Sierra Leone to the United Nations to the President of the Sec. Council, U.N. Doc. S/2000/786 [hereinafter Kabbah’s Letter].
- 11 S.C. Res. 1315, U.N. SCOR. 418th mtg. at 2, U.N. Doc. S/RES/1315 (2000).
- 12 Human Rights Watch, World Report 2003: Events of 2002 67, 69 (2003).
- 13 Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 Mich. J. Int’l L. 395 (2011).
- 14 J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. Int’l L. Rev. 37, 42 (2006).
- 15 Greg Campbell, Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stones at 71 (2004).
- 16 Colin Waugh, Charles Taylor: Ambition and Atrocity in Africa’s Lone Star State at 208-209 (2011).
- 17 *Footpaths to Democracy* (1995), at <http://www.fas.org/irp/world/para/docs/footpaths.htm> (last visited February 10, 2019). *Footpaths to Democracy* was the RUF’s manifesto.
- 18 Lansana Gberie, A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone at 96 (2005).
- 19 Simons, *supra* note 7.
- 20 Ibid.
- 21 Ibid.
- 22 Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, 13 (July 19,

2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=v3P%2fxMoNm6U%3d&tabid=173>.

23 Gberie, *supra* note 18, at 161. In “Operation No Living Thing,” the RUF attacked Freetown’s civilian population with orders to murder, rape, or mutilate by amputation every person they encountered, including infants and children. Campbell, *supra* note 15, at 86. The Nigerian peacekeeping soldiers deployed in the city, who panicked and lost control, counterattacked by summarily executing, raping, or torturing anyone remotely suspected of assisting the RUF.

24 Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, July 7, 1999, at <http://www.sierra-leone.org/lomeaccord.html> [hereinafter the Lomé Agreement].

25 *Ibid.* at Article IX.

26 William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. Davis J. Int’l L. & Pol’y 145, 148-149 (2004).

27 Campbell, *supra* note 150, at 93.

28 *Ibid.*

29 Waugh, *supra* note 16, at 224.

30 *Ibid.* at 225. Sierra Leone’s government officially declared the war’s end on January 18, 2002. Danny Hoffman, *The War Machines: Young Men and Violence in Sierra Leone and Liberia* at xii (2011).

31 Pham, *supra* note 14, at 76.

32 President Kabbah took office through surprisingly fair elections that were the result of the failed Abidjan Peace Accord, signed in Abidjan, Côte d’Ivoire in 1996. Gberie, *supra* note 18, at 95.

33 Kabbah’s Letter, *supra* note 10, at 2.

34 *Ibid.*

35 *Ibid.* Furthermore, the International Criminal Court, which began its operations in July of 2002, did not have retroactive jurisdiction over the conflict, though Sierra Leone was a party to the Rome Statute. Jalloh, *supra* note 13, at 458. *See also*, Rome Statute of the International Criminal Court, art. 11(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter the Rome Statute].

36 Kabbah’s Letter, *supra* note 10, at 3.

37 *Ibid.*

38 Pham, *supra* note 14, at 82, 83.

39 S.C. Res. 1315, *supra* note 11.

40 *Ibid.*

41 *Ibid.*

42 Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121, 124 (2002).

43 David Crane, *The Take Down: Case Studies Regarding “Lawfare” in International Criminal Justice: The West African Experience*, 43 Case W. Res. J. Int’l L. 201, 204 (2010). Mr. Crane, who recently retired

- from teaching at Syracuse University's College of Law, was the founding Chief Prosecutor for the Special Court for Sierra Leone, serving from 2002-2005.
- 44 Ibid. The UN briefly considered expanding the jurisdiction of the International Criminal Tribunal for Rwanda to include Sierra Leone but decided against it. *Rescuing a Fragile State: Sierra Leone 2002-2008* at 55 (Lansana Gberie ed., 2009).
- 45 Kabbah's Letter, *supra* note 10, at 2. Although the SCSL is independent of the Sierra Leonean judiciary, Sierra Leone's courts have concurrent jurisdiction. *See*, Statute of the Special Court for Sierra Leone, art. 8(2) at <http://www.sc-sl.org/LinkClick.aspx?fileticket=uCInd1MJeEw%3d&tabid=176> [hereinafter the SCSL Statute].
- 46 Vincent O. Nmeielle and Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30-SUM Fletcher F. World Aff. 107, 108 (2006).
- 47 Ibid.
- 48 Ibid. The SCSL's deputy prosecutor was appointed by the government of Sierra Leone.
- 49 Ibid.
- 50 *See generally*, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. Int'l Crim. Just. 541 (2004).
- 51 Jollah, *supra* note 13, at 429.
- 52 Letter dated July 26, 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, 6 U.N. Doc. S/2002/842 (July 26, 2002).
- 53 Rupert Skilbeck, *The Price of War Crimes Trials*, 15 No. 3 Hum. Rts. Brief 6 (2008).
- 54 S.C. Res. 1315, *supra* note 11, art. 8. The Security Council chose this method of financing against the advice of the Secretary-General, Kofi Annan, who believed assessed contributions were the only way to "produce a viable and sustainable financial mechanism affording secure and continuous funding." *See*, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915, para. 71 (2000).
- 55 Pham, *supra* note 14, at 89.
- 56 Celina Schocken, Notes and Comments, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 Berkeley J. Int'l L. 436, 453 (2002).
- 57 Temporal jurisdiction is defined as "jurisdiction based on the court's having authority to adjudicate a matter when the underlying event occurred." Black's Law Dictionary 931 (9th ed. 2009).
- 58 The Amnesty clause in the Lomé Agreement reads "[a]fter the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the Agreement." *Supra* note 19, at article IX.
- 59 Hoffman, *supra* note 30, at 49.
- 60 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S.C. Res. 915, U.N. SCOR, 55th Sess., 915th mtg., U.N. Doc., S/2000/915, (2000).
- 61 Ibid. The Abidjan Peace Agreement also had an amnesty provision which dated back to 1991, when

the conflict began. Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, November 30, 1996, at <http://www.sierra-leone.org/abidjanaccord.html> [hereinafter the Abidjan Agreement].

62 Gberie, *supra* note 18, at 207.

63 Schabas, *supra* note 26, at 150.

64 S.C. Res. 1315, *supra* note 11.

65 Ibid. at 2.

66 Sierra Leone's government felt pressured by the international community into the Lomé Agreement and the amnesty provision caused national outrage. Gberie, *supra* note 18, at 157-158.

67 Amnesty International objected to granting amnesty to any combatant, including the amnesty granted under the Abidjan Agreement in 1996. Amnesty International, Sierra Leone: The U.N. Security Council Must Make the Special Court Effective and Viable (Feb. 13, 2001), <http://www.amnesty.org/fr/library/asset/AFR51/001/2001/fr/23646266-dc3d-11dd-a4f4-6f07ed3e68c6/afr510012001en.html>.

68 Schabas, *supra* note 26, at 156.

69 SCSL Statute, *supra* note 45, art. 10.

70 Ibid. art. 1.

71 Ibid. at art. 2.

72 Ibid. at art 7. This was a break with the prevailing view of international criminal justice. The Rome Statute for International Criminal Court bars prosecution of any offender who was under the age of 18 at the time of the alleged commission of the offense. The Rome Statute, *supra* note 35, at art. 26.

73 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, available at <http://www.sc-sl.org/scsl-agreement.html> [hereinafter SCSL Agreement].

74 SCSL Statute, *supra* note 45.

75 Schabas, *supra* note 26, at 157.

76 Pham, *supra* note 14, at 95. At trial, Norman called President Kabbah as a defense witness but he refused to testify. The SCSL sided with Kabbah. Penfold, *infra* note 78, at 64.

77 Sankoh died of a stroke while in custody. *Foday Sankoh*, Economist.com, <http://www.economist.com/node/1974062> (last visited February 10, 2019). Charles Taylor likely murdered Bockarie, who was living in Liberia, presumably to prevent him from testifying. Taylor maintains that Bockarie died while resisting arrest, but in a defiant and gruesome gesture, shipped Bockarie's corpse directly to the SCSL's chief prosecutor in a box. Crane, *supra* note 43, at 211. Norman died of natural causes during the proceedings and his case was dismissed. Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, <http://www.sc-sl.org/LinkClick.aspx?fileticket=FquDwR8Mupo%3d&tabid=153>.

78 Peter Penfold, *The Special Court for Sierra Leone: A Critical Analysis in Rescuing a Fragile State: Sierra Leone 2002-2008* at 55 (Lansana Gberie ed., 2009).

79 Ibid. at 96.

- 80 Ibid.
- 81 The Lomé Agreement, *supra* note 24, at Article IX.
- 82 Noah Novogrodsky, *Speaking to Africa: The Early Success of the Special Court for Sierra Leone*, 5 Santa Clara J. Int'l L. 194, 199 (2006).
- 83 Ibid.
- 84 Ibid.
- 85 Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para. 42 (Mar. 13, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=u0qVGu09CTE%3d&tabid=195>.
- 86 Novogrodsky, *supra* note 82 at 200.
- 87 Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, 13 (July 19, 2007), <http://www.sc-sl.org/LinkClick.aspx?fileticket=v3P%2fxMoNm6U%3d&tabid=173>.
- 88 Ibid. at 36.
- 89 Prosecutor v. Sesay Appeals Judgment, Case No. SCSL-04-15-A, Judgment, 477-80 (Oct. 26, 2009), <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/AppealJudgment/tabid/218/Default.aspx>.
- 90 Prosecutor v. Fofana & Kondewa, Appeals Judgment, Case No. SCSL-04-14-A, Judgment (May 28, 2008), <http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMIY%3d&tabid=194>.
- 91 For a complete list of the SCSL's indictments and sentences, see Appendix C, *infra*.
- 92 Jalloh, *supra* note 13, at 419.
- 93 The SCSL found that the Prosecutor failed to prove Taylor had directly commanded the RUF. Simons, *supra* note 7.
- 94 Ibid.
- 95 Ibid.
- 96 Waugh, *supra* note 16, at 273.
- 97 Crane, *supra* note 43, at 209.
- 98 Ibid.
- 99 Ibid. at 211.
- 100 Ibid.
- 101 Waugh, *supra* note 16, at 281.
- 102 Ibid. at 285-286.
- 103 Jalloh, *supra* note 13, at 411. The SCSL's president feared that trying Taylor in Sierra Leone could spark a return to violence in the fragile region. *Id.* After the Dutch government agreed to host the trial, the

Security Council, relying on its authority under Chapter VII of the UN Charter, adopted Resolution 1688, authorizing the change in venue. This was incredibly controversial at the time because of a feared loss of the SCSL's legitimacy. Ibid.

104 Novogrodsky, *supra* note 82, at 203.

105 Ibid. at 204.

106 Ibid.

107 Ibid.

108 Jason McClurg, *Witnesses Begin Testifying as Charles Taylor's War Crimes Trial Resumes*, 24 No. 3 *Int'l Enforcement L. Rep.* 114 (2008).

109 Ibid.

110 Marlise Simons, *The Netherlands: Taylor Trial Ends*, *N.Y. Times*, March 11, 2011, http://www.nytimes.com/2011/03/12/world/europe/12briefs-Netherlands.html?_r=0.

111 Simons, *supra* note 7. See also, *Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment (May 18, 2012)*, <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREEPCQ%3d&tabid=107>.

112 *Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment, at 40 (30 May, 2012)*, <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107>.

113 S.C. Res. 1315, *supra* note 11, art. 8.

114 Jalloh, *supra* note 13, at 430.

115 Nmehielle and Jalloh, *supra* note 46, at 121.

116 McDonald, *supra* note 42, at 124.

117 Simons, *supra* note 7.

118 Ibid.

119 Jalloh, *supra* note 13, at 443.

120 SCSL Agreement, *supra* note 73, at art. 1.

121 Jalloh, *supra* note 13, at 414.

122 Ibid.

123 Ibid. at 421-422.

124 SCSL Statute, *supra* note 45, art., 1, 7.

125 Under Sierra Leonean law, the age of majority is 17. Nicole Fritz and Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 *Fordham Int'l L.J.* 391, 415 (2001).

126 Schocken, *supra* note 56, at 449, citing Chris McGreal, *Unique Court to try killers of Sierra Leone; Those who were enslaved, raped and mutilated demand justice*, *The Guardian* (London), Jan. 17, 2002, at 15.

- 127 Gberie, *supra* note 18, at 212.
- 128 Ibid. at 131.
- 129 Ian Smillie, Lansana Gberie & Ralph Hazelton, *The Heart of the Matter: Sierra Leone, Diamond & Human Security* (2000), available at http://www.pacweb.org/Documents/diamonds_KP/heart_of_the_matter-full-2000-01-eng.pdf.
- 130 Ibid. at 11-12.
- 131 SCSL Agreement, *supra* note 73.
- 132 Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 Afr. J. Int'l & Comp. L. 165, 173 (2007).
- 133 Gberie, *supra* note 18, at 166.
- 134 SCSL Agreement, *supra* note 73.
- 135 Jalloh, *supra* note 13, at 172.
- 136 Ibid.
- 137 Ibid.
- 138 Gberie, *supra* note 18, at 161.
- 139 Ibid. at 157. The United States' envoy and mediator to the Lomé talks, Jesse Jackson, called the RUF's Sankoh, a "true revolutionary" and compared him to Nelson Mandela. Hoffman, *supra* note 30, at 49. Jackson, for his part, said that an isolationist U.S. Congress gave him no leverage over the RUF and he had no alternative to negotiation. Steve Coll, *The Other War*, Wash. Post, January 9, 2000, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/28/AR2006112800682.html>.
- 140 Ibid. at 157.
- 141 Crane, *supra* note 43, at 204. *See also*, McDonald, *supra* note 42, at 124.
- 142 Pham, *supra* note 14, at 85.
- 143 *A Little Hope in Sierra Leone*, Economist.com, <https://www.economist.com/middle-east-and-africa/2018/04/12/sierra-leones-new-president-has-made-big-promises> (last visited February 10, 2019).
- 144 Ibid.
- 145 *What does the International Criminal Court do?*, BBC News.com, <https://www.bbc.com/news/world-11809908> (last visited February 10, 2019).
- 146 Ibid.
- 147 *See* the Rome Statute, *supra* note 35.
- 148 Jalloh, *supra* note 13, at 421-422. *See also*, Gberie, *supra* note 18, at 212.