

**THE SPECIAL COURT FOR SIERRA LEONE: A POTENTIAL
MODEL FOR ESTABLISHING THE RULE OF LAW AFTER
LARGE SCALE COMBAT OPERATIONS**

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I. Introduction

In October 2017, the Army revised Field Manual (FM) 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 . . ."⁶

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¹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (6 Oct. 2017) [hereinafter FM 3-0].

² *Id.* at 1-1.

³ *Id.*

⁴ *Id.* at 1-16.

⁵ *Id.* at 8-12.

⁶ *Id.* (emphasis added).

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, FM 3-0 does not provide a framework for establishing the rule of law when civil infrastructure has been destroyed and critical civic institutions, like the judicial system, are no longer functioning. Neither is there any framework found in joint doctrine, the Uniform Code of Military Justice, or the Military Commissions Act.⁷ If the U.S. Army were tasked to conduct conflict resolution after large-scale combat operations, it would not have an existing framework for constructing a legal system to reestablish the rule of law. In other words, there is a capability gap in the Army's ability to conduct Phase IV stability operations.

The Special Court for Sierra Leone, an ad hoc international tribunal, provides an instructive example for addressing this gap:

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.⁸ The same court later sentenced Taylor to fifty years in prison.⁹ The SCSL's conviction made Taylor the

⁷ 10 U.S.C. §§ 948–949.

⁸ 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.

⁹ Marlise Simons & David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES (May 30, 2012),

first former head of state to be convicted by an international court since the Nuremberg trials that followed World War II.¹⁰

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 (ICC) cannot.

II. 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.¹¹ In response, the Security Council passed Resolution 1315 that authorized the United Nations' Secretary-General to develop a special ad hoc tribunal in cooperation with Sierra Leone's government.¹² Both the United Nations (U.N.) and the Sierra Leonean government agreed to the resulting draft legislation and the Special Court for Sierra Leone (SCSL) was born.¹³

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.¹⁴ The court's conception sought to avoid the difficulties and setbacks of previous ad hoc international criminal tribunals and the shortcomings of the ICC.¹⁵

<http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all>.

¹⁰ *Id.* Admiral Karl Dönitz, a German naval officer who succeeded Adolph Hitler, was convicted of war crimes at Nuremberg. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 33 (1983).

¹¹ Permanent Rep. of Sierra Leone to the U.N., Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000) [hereinafter Kabbah's Letter].

¹² S.C. Res. 1315, at 2, (Aug. 14, 2000) [hereinafter UNSCR 1315].

¹³ HUMAN RIGHTS WATCH, *WORLD REPORT 2003: EVENTS OF 2002* at 67, 69 (2003).

¹⁴ Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 *MICH. J. INT'L L.* 395 (2011).

¹⁵ 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).

This article will begin by briefly discussing Sierra Leone's civil war and the genesis of the SCSL. It will then explore the framework and jurisdiction of the Court, the 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 Charles Taylor. The article will argue that there is an accountability gap between the ICC and national courts. 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 if the U.S. military seeks to impose the rule of law in the stability phase of large-scale combat operations.

II. The Genesis of the Special Court for Sierra Leone

A. Sierra Leone's Civil War

1. *A Savage Conflict*

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,¹⁶ invaded Sierra Leone with support and direction from Charles Taylor.¹⁷ The RUF's pretext was liberating Sierra Leone from its corrupt dictatorship,¹⁸ but after looting the country's eastern diamond mines and massacring the civilian population, the RUF proved to be nothing more than a bloodthirsty criminal enterprise.¹⁹

The decade-long conflict that followed was waged almost entirely against civilians²⁰ and characterized by systematic atrocities such as the mass executions of noncombatants, rape, mutilations, and the forced conscription of child soldiers.²¹ The death toll is estimated to be

¹⁶ GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES 71 (2004).

¹⁷ COLIN WAUGH, CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA'S LONE STAR STATE 208-209 (2011).

¹⁸ *Footpaths to Democracy: Toward a New Sierra Leone* (1995), at <http://www.fas.org/irp/world/para/docs/footpaths.htm> (last visited February 10, 2019) (the RUF's manifesto).

¹⁹ LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE 96 (2005).

²⁰ Simons, *supra* note 8.

²¹ *Id.*

50,000.²² 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.²³

2. *The Lomé Agreement*

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.²⁴ 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.²⁵

²² *Id.*

²³ Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, 8 (July 19, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.07.19_Prosecutor_v_Brima_Kamara_Kanu1.pdf.

²⁴ GBERIE, *supra* note 199, 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 16, 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. *Id.*

²⁵ Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone (July 7, 1999), <http://www.sierra-leone.org/lomeaccord.html> [hereinafter the Lomé Agreement].

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 (SLA), the Armed Forces Revolutionary Council (AFRC), and the Civilian Defense Force (CDF).²⁶ 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 U.N. would not endorse amnesty for "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."²⁷

3. *The Conflict's End*

As part of the Lomé Agreement, the U.N. also agreed to deploy 6,000 additional soldiers to Sierra Leone, whom the RUF immediately attacked.²⁸ Furthermore, the RUF leadership, now government ministers, resumed plundering the diamond mines.²⁹ With violence spinning out of control yet again, the British government forcefully intervened and largely pacified Sierra Leone by the end of 2001.³⁰ After Charles Taylor pulled his support for the RUF under international pressure, its leadership disarmed, and Sierra Leone's civil war finally ended.³¹

B. Establishing the Special Court for Sierra Leone

1. *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.³² On 12 June 2000, Sierra Leone's president,

²⁶ *Id.* at Article IX.

²⁷ 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).

²⁸ CAMPBELL, *supra* note 16, at 93.

²⁹ *Id.*

³⁰ WAUGH, *supra* note 17, at 224.

³¹ *Id.* at 225. Sierra Leone's government officially declared the war's end on 18 January 2002. DANNY HOFFMAN, *THE WAR MACHINES: YOUNG MEN AND VIOLENCE IN SIERRA LEONE AND LIBERIA* xii (2011).

³² Pham, *supra* note 15, at 76.

Ahmed Tejan Kabbah,³³ wrote to the 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 U.N. peacekeepers.³⁴ Kabbah argued that the RUF had “reneged” on the Lomé Agreement and would continue its violence with impunity if its members were not prosecuted.³⁵ Citing the U.N.’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.³⁶

Kabbah suggested a tribunal with a framework and mandate to apply both a blend of international and domestic Sierra Leonean law.³⁷ 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.³⁸ However, Kabbah was concerned that serious crimes like kidnapping and arson were unlikely to be prosecuted through international law.³⁹

2. Security Council Resolution 1315

In response to Kabbah’s letter, the United Nations Security Council passed Resolution (UNSCR) 1315, which authorized the Secretary-General to begin working with the Sierra Leonean government to establish a special court.⁴⁰ United Nations Security Council Resolution 1315 noted an earlier reservation by the UN Special Representative to the Lomé Agreement’s amnesty provision,⁴¹ but curiously made no mention of the RUF. Instead, UNSCR 1315 recommended that the

³³ 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 19, at 95.

³⁴ Kabbah’s Letter, *supra* note 11, at 2.

³⁵ *Id.*

³⁶ *Id.* Furthermore, the ICC, which began its operations in July 2002, did not have retroactive jurisdiction over the conflict, though Sierra Leone was a party to the Rome Statute. Jalloh, *supra* note 14, 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].

³⁷ Kabbah’s Letter, *supra* note 11, at 3.

³⁸ *Id.*

³⁹ Pham, *supra* note 15, at 82, 83.

⁴⁰ UNSCR 1315, *supra* note 12.

⁴¹ *Id.*

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”⁴² The language, “greatest responsibility,” would become especially significant later.

3. *The Court’s Structure: A New Model*

Despite UNSCR 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.⁴³ To address these concerns, the SCSL’s framework was designed to operate more efficiently than its predecessors.⁴⁴ The tribunals on which the SCSL was based, the International Criminal Tribunals for Rwanda and Yugoslavia (ICTR and ICTY, respectively), were subsidiary organs of the United Nations and subject to unavoidable delays and bureaucracy.⁴⁵ The SCSL was its own independent entity and could function faster and more economically. The SCSL was also independent of Sierra Leone’s judiciary, which was an effort to make the court more credible.⁴⁶

a. *Structure*

The court was divided into three principal branches: chambers, registry, and prosecution.⁴⁷ The chambers branch consisted of two trial

⁴² *Id.*

⁴³ Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121, 124 (2002).

⁴⁴ 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.

⁴⁵ *Id.* The U.N. briefly considered expanding the jurisdiction of the ICTR to include Sierra Leone, but decided against it. 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).

⁴⁶ Kabbah’s Letter, *supra* note 11, 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) (Aug. 14, 2000), <http://www.rscsl.org/Documents/scsl-statute.pdf> [hereinafter the SCSL Statute].

⁴⁷ Vincent O. Nmehielle & Charles Cherner Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 108 (2006).

courts and one appellate court, with the latter's presiding judge serving as the President of the Court.⁴⁸ The head prosecutor, appointed by the U.N. Secretary-General, was responsible for investigating and prosecuting cases before the court.⁴⁹ The registry, the administrative branch of the court, was responsible for the court's operation, and housed the Office of the Principal Defender.⁵⁰

b. Financing

Significant criticism of the previous ad hoc international tribunals has much to do with their expense.⁵¹ Rwanda's government criticized the ICTR for spending \$1.5 billion over eleven years to secure fewer than forty verdicts.⁵² The country's government complained that the ICTR's slow pace damaged the perception among Rwandans that the tribunal would achieve justice.⁵³ Similarly, the ICTY has spent well over a billion dollars, at a cost of approximately \$10 million per defendant.⁵⁴

This frustration and dissatisfaction with the cost of the ICTY and ICTR drove the Security Council to institute a novel method of funding the SCSL—voluntary donations.⁵⁵

Those countries that donated to the SCSL comprised a Management Committee to handle the general administration of the court.⁵⁶ The advantage to having the court funded through donations was that the

⁴⁸ *Id.*

⁴⁹ *Id.* The government of Sierra Leone appointed the SCSL's deputy prosecutor. *Id.*

⁵⁰ *Id.*

⁵¹ See generally, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541 (2004).

⁵² Jalloh, *supra* note 14, at 429.

⁵³ Permanent Rep. of Rwanda to the U.N., Letter Dated 26 July 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).

⁵⁴ Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, HUM. RTS. BRIEF, Spring 2008, at 6.

⁵⁵ UNSCR 1315, *supra* note 12, 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).

⁵⁶ Pham, *supra* note 15, at 89.

SCSL would be accountable to its donors.⁵⁷

c. Temporal Jurisdiction

One of the most controversial decisions made by the tribunal was the SCSL's expansive temporal jurisdiction,⁵⁸ implemented because the amnesty provision of the 1999 Lomé Agreement⁵⁹ posed a significant hurdle to prosecuting members of the RUF, many of whom may not have ceased fighting without it.⁶⁰ If the amnesty provision was valid, the SCSL would only have jurisdiction for offenses that took place after 7 July 1999.⁶¹ Conversely, if the SCSL disregarded the provision, offenses could be prosecuted dating back to 30 November 1996, when the Abidjan Peace Agreement failed.⁶²

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.⁶³ 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.⁶⁴ Yet UNSCR 1315's preamble noted that the Secretary-General's Special Representative had appended to the Lomé Agreement the U.N.'s understanding that the amnesty provision would not apply to international crimes.⁶⁵

⁵⁷ Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 453 (2002).

⁵⁸ Temporal jurisdiction is defined as "jurisdiction based on the court's having authority to adjudicate a matter when the underlying event occurred." *Temporal Jurisdiction*, BLACK'S LAW DICTIONARY 931 (9th ed. 2009).

⁵⁹ 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." Lomé Agreement, *supra* note 25, at article IX.

⁶⁰ HOFFMAN, *supra* note 3131, at 49.

⁶¹ U.N. Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, (2000).

⁶² *Id.* The Abidjan Peace Agreement also had an amnesty provision that dated back to 1991, when the conflict began. Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone (Nov. 30, 1996) <http://www.sierra-leone.org/abidjanaccord.html> [hereinafter the Abidjan Agreement].

⁶³ GBERIE, *supra* note 19, at 207.

⁶⁴ Schabas, *supra* note 2727, at 150.

⁶⁵ UNSCR 1315, *supra* note 12.

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.⁶⁶

The Government of Sierra Leone, which never supported the 1996 amnesty provision,⁶⁷ 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.⁶⁸ Though negotiations over the draft statute continued for more than a year, there is no evidence of either party revisiting the issue.⁶⁹ The draft language remained and was incorporated into the Special Court's statute in Article 10.⁷⁰

d. 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 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”⁷¹ Out of concern that the language would be interpreted to allow for the prosecution of peacekeepers and child soldiers, the Security

⁶⁶ *Id.* at 2.

⁶⁷ Sierra Leone's government felt pressured by the international community into the Lomé Agreement and the amnesty provision caused national outrage. GBERIE, *supra* note 19, at 157-158.

⁶⁸ 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*, RELIEFWEB (Feb. 13, 2001), <https://reliefweb.int/report/sierra-leone/sierra-leone-un-security-council-must-make-special-court-effective-and-viable>.

⁶⁹ Schabas, *supra* note 27, at 156.

⁷⁰ SCSL Statute, *supra* note 46, art. 10.

⁷¹ *Id.* art. 1.

Council restricted jurisdiction over peacekeepers⁷² to the sending state and barred prosecution of anyone under the age of 15.⁷³

4. *The World's First International Hybrid Tribunal*

On 16 January 2002, the U.N. and Sierra Leone reached an agreement establishing the SCSL.⁷⁴ Appended to the agreement was a statute passed by Sierra Leone's government that established the court under Sierra Leonean law⁷⁵ making the SCSL the world's first international hybrid tribunal. In July 2002, the court began operating.⁷⁶

IV. The Special Court's Prosecutions Begin

A. Indictments

In March 2003, the SCSL Chief Prosecutor announced seven initial indictments against the RUF leader, Foday Sankoh, his chief of staff, Sam Bockarie, RUF commanders, Issa Hassan Sessay and Morris Kallon, AFRC leaders, Johnny Paul Koroma and Alex Brima, and Sierra Leone's interior minister, Sam Hinga Norman, who founded the CDF and served as President Kabbah's deputy defense minister during the fighting.⁷⁷ The indictments against the RUF leader, the RUF chief of staff, and Sierra Leone's interior minister were later dismissed due to their deaths.⁷⁸ Johnny Koroma fled to Liberia and died under mysterious

⁷² *Id.* art. 2.

⁷³ *Id.* 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 eighteen at the time of the alleged commission of the offense. The Rome Statute, *supra* note 36, art. 26.

⁷⁴ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), <http://www.rscsl.org/Documents/scsl-agreement.pdf> [hereinafter SCSL Agreement].

⁷⁵ SCSL Statute, *supra* note 46.

⁷⁶ Schabas, *supra* note 27, at 157.

⁷⁷ Pham, *supra* note 15, at 95. At trial, Norman called President Kabbah as a defense witness, but he refused to testify. The SCSL sided with Kabbah. Penfold, *supra* note 45, at 64.

⁷⁸ Sankoh died of a stroke while in custody. *Foday Sankoh*, ECONOMIST.COM, (AUG. 7, 2003), <http://www.economist.com/node/1974062>. Charles Taylor murdered Bockarie presumably to prevent him from testifying. Crane, *supra* note 44, at 211. 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. *Id.* Norman

circumstances.⁷⁹

Within the next few months, the Chief Prosecutor also indicted Augustine Gbao of the RUF, Ibrahim Kamara and Santigie Kanu of the AFRC, and Moinina Fofana and Allieu Kondewa of the CDF.⁸⁰ All of the defendants were charged with war crimes, crimes against humanity, and serious violations of international humanitarian law.⁸¹

B. 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-AFRC, ex-SLA or CDF 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.⁸²

Morris Kallon, Ibrahim Kamara, Moinina Fofana, and Augustine Gbao all filed preliminary motions with the Special Court arguing that the amnesty provision of the Lomé Agreement barred their prosecutions.⁸³ 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.⁸⁴ Furthermore, they argued, it was arbitrary and capricious for the government of Sierra Leone to honor its commitments to the Abidjan Agreement and the U.N.,

died of natural causes during the proceedings and his case was dismissed. Prosecutor v. Norman, Fofana, & Kondewa, Case No. SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues (May 21, 2007), <http://www.rscsl.org/Documents/Decisions/CDF/776/SCSL-04-14-T-776.pdf>.

⁷⁹ Penfold, *supra* note 45, at 67.

⁸⁰ Pham, *supra* note 15, at 96.

⁸¹ *Id.*

⁸² The Lomé Agreement, *supra* note 2525, at Article IX.

⁸³ 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).

⁸⁴ *Id.*

but disregard its commitments under the Lomé Agreement.⁸⁵

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.⁸⁶

“States cannot use domestic legislation to bar international criminal liability.”⁸⁷ The prosecution could now present its case.

C. Convictions

In 2007, Alex Brima, Ibrahim Kamara, and Santigie Kanu were all convicted of war crimes, crimes against humanity, and serious violations of international humanitarian law.⁸⁸ Brima and Kanu each received fifty years in prison, while Kamara received forty-five years.⁸⁹

The next year, Issa Hassan Sessay, Morris Kallon, Augustine Gbao,⁹⁰

⁸⁵ *Id.*

⁸⁶ Prosecutor v. Kallon & Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para. 42 (Mar. 13, 2004), <https://www.legal-tools.org/doc/b67cdd/pdf/>.

⁸⁷ Novogrodsky, *supra* note 8383, at 200.

⁸⁸ Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Sentencing Judgement 13 (July 19, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.07.19_Prosecutor_v_Brima_Kamara_Kanu1.pdf.

⁸⁹ *Id.* at 36.

⁹⁰ Prosecutor v. Sessay, Kallon, & Gbao, Case No. SCSL-04-15-A, Judgment 477-80 (Oct. 26, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/Appeal/1321/RUF%20Appeal%20Judgment.pdf>.

Allieu Kondewa, and Moinina Fofana⁹¹ were all convicted and sentenced to fifty-two, forty, twenty-five, twenty, and fifteen years respectively.⁹²

D. Prosecutor vs. Taylor

The SCSL was under serious threat of losing credibility in Sierra Leone if Charles Taylor was not brought to justice.⁹³ Taylor was widely believed to have directed the RUF to invade Sierra Leone to support his own civil war in Liberia.⁹⁴ 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.⁹⁵ Taylor would then sell these diamonds for an enormous profit.⁹⁶ 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.⁹⁷ If Taylor were indicted, there would be no incentive for him to make peace.

1. *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.⁹⁸ The indictment was sealed because Crane feared that publicizing it would destabilize Sierra Leone and increase violence in Liberia.⁹⁹ Hoping to seize an opportunity to apprehend Taylor outside Liberia, Crane unsealed the indictment while Taylor was in Ghana for peace talks.¹⁰⁰ Yet, Ghanaian authorities balked at apprehending Taylor and he fled back to

⁹¹ Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment (May 28, 2008), <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>.

⁹² For a complete list of the SCSL's indictments and sentences, see Appendix C, *infra*.

⁹³ Jalloh, *supra* note 14, at 419.

⁹⁴ The SCSL found that the Prosecutor failed to prove Taylor had directly commanded the RUF. Simons, *supra* note 8.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ WAUGH, *supra* note 17, at 273.

⁹⁸ Crane, *supra* note 44, at 209.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 211.

Liberia.¹⁰¹ 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.¹⁰² After Taylor violated the terms of his asylum by attempting to flee to Cameroon, Nigeria extradited him to Sierra Leone.¹⁰³ Taylor was then transferred from Sierra Leone to The Hague, where a branch of the SCSL had opened amid security concerns in Freetown.¹⁰⁴

2. *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.¹⁰⁵ Taylor argued that customary international law did not give the national courts of another sovereign an exception to head of state immunity.¹⁰⁶

The SCSL rejected Taylor's argument and ruled that heads of state are not immune from international tribunals.¹⁰⁷ The Court further held that, even though the SCSL originated with a treaty between the U.N. and Sierra Leone, as opposed to Chapter VII of the U.N. Charter, the fact that the Security Council passed a resolution creating the SCSL gave it distinct international characteristics trumping head of state immunity.¹⁰⁸

3. *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

¹⁰¹ *Id.*

¹⁰² WAUGH, *supra* note 17, at 281.

¹⁰³ *Id.* at 285-286.

¹⁰⁴ Jalloh, *supra* note 14, 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 U.N. Charter, adopted Resolution 1688, authorizing the change in venue. *Id.* This was incredibly controversial at the time because of a feared loss of the SCSL's legitimacy. *Id.*

¹⁰⁵ Novogrodsky, *supra* note 83, at 203.

¹⁰⁶ *Id.* at 204.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

attorneys and boycotted the proceedings.¹⁰⁹ The trial resumed in January 2008¹¹⁰ and concluded on 11 March 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.¹¹¹ On 26 April 2012, after thirteen 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 AFRC during the war.¹¹² One month later, the same three judges sentenced Taylor to fifty years in prison.¹¹³

E. 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.

1. *Lack of Resources*

a. *Funding*

Many of the SCSL's problems revolved around funding. The UNSC established the SCSL to be funded with voluntary contributions from U.N. member states.¹¹⁴ This meant that those most interested in the SCSL's success, the U.N. and the people of Sierra Leone, were now entirely dependent on donations.¹¹⁵ At one point, the Court became so cash-strapped that it needed a bailout from the U.N. just to meet its mandate.¹¹⁶

The SCSL's limited budget significantly restricted its capabilities

¹⁰⁹ Jason McClurg, *Witnesses Begin Testifying as Charles Taylor's War Crimes Trial Resumes*, 24 INT'L ENFORCEMENT L. REP. 114 (2008).

¹¹⁰ *Id.*

¹¹¹ Marlise Simons, *The Netherlands: Taylor Trial Ends*, N.Y. TIMES (Mar. 11, 2011), http://www.nytimes.com/2011/03/12/world/europe/12briefs-Netherlands.html?_r=0.

¹¹² Simons, *supra* note 8. *See also*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement (May 18, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>.

¹¹³ Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment 40 (May 30, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf>.

¹¹⁴ UNSCR 1315, *supra* note 12, art. 8.

¹¹⁵ Jalloh, *supra* note 14, at 430.

¹¹⁶ Nmehielle & Jalloh, *supra* note 47, at 121.

and forced the court's chief prosecutor to limit the number of indictments and prosecutions.¹¹⁷

b. 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.¹¹⁸ As a result of Taylor's penury, the SCSL funded Taylor's defense, which cost \$100,000 a month.¹¹⁹ 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.¹²⁰

2. Narrow Interpretation

The SCSL's mandate was to "prosecute persons who bear the greatest responsibility" for the conflict's violence.¹²¹ Obviously, there were differing opinions on 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 U.N. Secretary General urged the Security Council to widen the personal jurisdiction of the Court's mandate.¹²² His proposal was rejected.¹²³

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.¹²⁴

¹¹⁷ McDonald, *supra* note 43, at 124.

¹¹⁸ Simons, *supra* note 8.

¹¹⁹ *Id.*

¹²⁰ Jalloh, *supra* note 14, at 443.

¹²¹ SCSL Agreement, *supra* note 74, art. 1.

¹²² Jalloh, *supra* note 14, at 414.

¹²³ *Id.*

¹²⁴ *Id.* at 421-422.

3. *Selective Prosecutions*

At the SCSL's formation, juveniles and peacekeepers were specifically excluded from prosecution.¹²⁵ These exclusions were controversial in Sierra Leone. Though there was a segment of the population that wanted to see juveniles prosecuted,¹²⁶ the United Nations Children's Fund and other human rights organizations were adamantly against it.¹²⁷ In contrast, the failure to hold peacekeepers accountable, especially those assigned to the Economic Community of West African States Monitoring Group (ECOMOG), caused outrage and instantly damaged the SCSL's credibility.¹²⁸ The ECOMOG was responsible for crimes against Sierra Leone's population, including summary executions, rape, and looting.¹²⁹

Finally, Sierra Leone's civil war began, almost inevitably, because of terrible governance, rampant corruption, and regional instability.¹³⁰ Yet the conflict was fueled and perpetuated by the factions' exploitation of the country's diamond mines, both for greed and revenue.¹³¹ These "conflict diamonds" were sold on the international market with the complicity of the diamond industry.¹³² The SCSL's failure to hold foreign businesses accountable for knowingly profiting from conflict diamonds diminished the court's legitimacy.¹³³

¹²⁵ SCSL Statute, *supra* note 46, art., 1, 7.

¹²⁶ 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).

¹²⁷ Schocken, *supra* note 57, 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.

¹²⁸ GBERIE, *supra* note 19, at 212.

¹²⁹ *Id.* at 131.

¹³⁰ Ozzonia Ojielo, "Beyond the TRC" in *RESCUING A FRAGILE STATE: SIERRA LEONE 2002-2008* at 43 (Lansana Gberie ed., 2009).

¹³¹ *Id.*

¹³² Ian Smillie, Lansana Gberie, & Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamond & Human Security* (2000), <https://www.africaportal.org/publications/the-heart-of-the-matter-sierra-leone-diamonds-and-human-security/>.

¹³³ *Id.* at 11-12.

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

A. Contributions

1. 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.¹³⁴ 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.¹³⁵

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.¹³⁶ Exposure to highly publicized and fair trials held in *locus criminis* would significantly improve Sierra Leone's rule of law.

2. Bilateral Creation

The SCSL, in contrast to the ICTR and ICTY, was the first criminal tribunal created by treaty between the U.N. and a member state.¹³⁷ The ICTR and ICTY were created by the Security Council under its Chapter VII authority and imposed on Rwanda and the former Yugoslavia.¹³⁸ 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

¹³⁴ SCSL Agreement, *supra* note 74.

¹³⁵ 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).

¹³⁶ GBERIE, *supra* note 19, at 166.

¹³⁷ SCSL Agreement, *supra* note 74.

¹³⁸ Jalloh, *supra* note 135, at 172.

the affected State is willing to prosecute serious international law violations but is unable to do so for some reason¹³⁹

The SCSL's model may also assist a U.N. member state in sparking interest among the international community for assistance in resolving a conflict.¹⁴⁰ 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.¹⁴¹ When the international community finally intervened, it obviously did not understand the war.¹⁴² The resulting and doomed Lomé Agreement and its amnesty clause, which President Kabbah was pressured into signing, were a give-away to the RUF.¹⁴³ It was only through the creation of the SCSL that the conflict could end with any sense of justice.

3. *An Existing Template*

The SCSL was designed to avoid the deficiencies of the ICTR and ICTY.¹⁴⁴ 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.¹⁴⁵ Future hybrid tribunals can benefit by inheriting and employing the robust contributions and precedents these tribunals have made to international criminal law.

B. 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

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ GBERIE, *supra* note 19, at 161.

¹⁴² *Id.* 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 31, 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 (Jan. 9, 2000), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/28/AR2006112800682.html>.

¹⁴³ *Id.* at 157.

¹⁴⁴ Crane, *supra* note 44, at 204. *See also*, McDonald, *supra* note 4343, at 124.

¹⁴⁵ Pham, *supra* note 15, at 85.

elections with relatively peaceful transfers of power.¹⁴⁶ 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.¹⁴⁷

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. In the short term, the prosecution and incarceration of Charles Taylor was vital to stabilizing West Africa.

C. Bridging the Accountability Gap

1. *A Supplement to the International Criminal Court*

The United States is not a party to the ICC.¹⁴⁸ Neither are China, India, Pakistan, Indonesia, Turkey, and a number of other states.¹⁴⁹ Therefore, resorting to the ICC may not be feasible after a large-scale conflict. Furthermore, while the ICC was intended to be a court of last resort,¹⁵⁰ 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 in Sierra Leone and Liberia, a devastated judicial infrastructure, corruption, or bias may render domestic prosecutions impossible. Furthermore, given the dissatisfaction with the cost and inefficiencies of the ICTR and ITCY, it is unlikely that the U.N. 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 ICC and incapacitated, incapable, or overwhelmed national courts.

¹⁴⁶ *A Little Hope in Sierra Leone: Sierra Leone's New President has Made Big Promises*, ECONOMIST.COM (Apr. 12, 2018), <https://www.economist.com/middle-east-and-africa/2018/04/12/sierra-leones-new-president-has-made-big-promises>.

¹⁴⁷ *Id.*

¹⁴⁸ *What Does the International Criminal Court Do?*, BBC NEWS.COM (June 25, 2015), <https://www.bbc.com/news/world-11809908>.

¹⁴⁹ *Id.*

¹⁵⁰ *See* Rome Statute, *supra* note 36.

2. *Recommendations*

a. *Funding*

Funding will continue to be a problem for future hybrid tribunals. For the ICTR and ICTY, the costs were too high. For the SCSL, there was never enough money in the first place, which damaged its credibility.¹⁵¹ Ideally, the U.N. 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 U.N. 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.

b. *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 U.N. Security Council should consider augmenting a hybrid tribunal with Chapter VII authority to allow for extradition.

VIII. 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. Despite valid criticism, the SCSL made important contributions to the field of international criminal law and Sierra Leone has been at peace for nearly two decades.

The worst evils of war too often fall on those who have no stake in it.

¹⁵¹ Jalloh, *supra* note 14, at 421-422. *See also*, GBERIE, *supra* note 19, at 212.

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 ICC 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.