THE SPECIAL COURT FOR SIERRA LEONE: DEVELOPING INTERNATIONAL CRIMINAL LAW ACROSS INTERNATIONAL INSTITUTIONS

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I INTRODUCTION

This paper discusses the relationships between the various international criminal tribunals, particularly the International Criminal Court ("ICC") and the Special Court for Sierra Leone. The establishment of the ICC is a significant advancement in the evolution of international justice. As one of the largest democracies in the world, India plays a significant role in the development of international justice and its participation in the ICC would contribute to the efforts to protect human rights and promote the rule of law.

Globalisation has increased the interaction of national legal systems and has led to the cross-fertilization and development of domestic law. With the advent of a number of international criminal tribunals and the establishment of the ICC, a similar process has taken place, to some extent, in the field of international criminal law. International tribunals, like the Special Court, look to the jurisprudence of their sister tribunals when confronting similar jurisprudential issues. While the decisions of one tribunal are not binding on other tribunals, the legal reasoning often contributes to the development or clarification of international criminal law. Moreover, the efforts of earlier tribunals, with respect to jurisprudence and structure, have been incorporated into the design of subsequent tribunals. This paper discusses the significant role the Special Court for Sierra Leone has played in the cross-tribunal development of international law.

II AMNESTY FOR CORE INTERNATIONAL CRIMES

One of the fundamental purposes of the International Criminal Court, as stated in the preamble of the Rome Statute, is to "put an end to impunity for the perpetrators" of core international crimes; namely genocide, war crimes and crimes against humanity.[1] Similarly, it is the mission of the Special Court for Sierra Leone to bring to justice "those who bear the greatest responsibility" for the crimes committed during the war in Sierra Leone.[2] In this pursuit of justice, the Special Court has recognized that amnesty for core international crimes is incompatible with the norms of customary international law and emphasised the need for accountability in the wake of atrocity. While the Special Court Statute explicitly addresses the issue of amnesty, such a provision is absent from the Rome Statute. The implications of this absence are of great importance, and the Special Court's jurisprudence, with regard to the amnesty provisions of the Lomé Peace Accord, provides informative guidance on this matter.

Article 9 of the Lomé Peace Accord ("Accord"), which sought to end the hostilities in Sierra Leone, grants a blanket amnesty, an unconditional and free pardon to all participants of the rebellion. With respect to core international crimes, however, the amnesty provisions of the Accord do not bind the Special Court. Article 10 of the Special Court Statute provides:

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* President of the Special Court for Sierra Leone.

1 Preamble, Rome Statute of the International Criminal Court (1999), hereinafter Rome Statute.

2 Art. 1 of Statute of the Special Court for Sierra Leone (2002).

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

This provision was challenged by two of the accused persons, Kallon and Kamara being tried by the Special Court. They argued, *inter alia*, that the Accord's blanket amnesty was binding on the government and could not be altered without the consent of all the parties to the Accord;[3] that the agreement between the United Nations and the government of Sierra Leone to establish the Special Court was in violation of the Accord;[4] and that, as the Special Court sits in Sierra Leone, it is not an international tribunal and is subject to the amnesty provisions of the Accord.[5]

On 13 March 2004, the Appeals Chamber gave full effect to Article 10 in its ruling:

> "[T]he grant of amnesty in respect of such crimes . . . is not only Incompatible with, but is in breach of an obligation of a State towards the international community as a whole . . . Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction."[6]

As the decision of the Special Court demonstrates, the effect of blanket amnesties may, under international humanitarian law, be more illusory rather than real. Moreover, the decision, along with jurisprudence from the International Criminal Tribunal for Yugoslavia (ICTY),[7] confirms that there is a crystallizing international norm denying the effect of amnesties granted to those most responsible for core international crimes.

While the preamble to the Rome Statute provides that there is a "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," the Rome Statute does not contain a provision similar to Article 10 of the Special Court Statute. Although there is no explicit provision in the Rome Statute prohibiting amnesties, the prosecutor, as an organ of an international criminal tribunal, is nevertheless bound by customary international law.

However, article 53(2) (c) of the Rome Statute provides the prosecutor of the ICC with the discretion to cease an investigation where it is "not in the interests of justice." In determining whether the investigation is in the interest of justice, the prosecutor may consider the gravity of the crime, the interests of the victims, and the age and infirmity of the accused.[8] As the ICC only has jurisdiction over core international crimes it would appear that Article 53 implicitly contemplates circumstances where the Prosecutor will not pursue core international crimes. Nevertheless, in accordance with Special Court jurisprudence, which has clarified the international norm, the prosecutor is unlikely to rely on amnesties for core international crimes as a reason for declining to pursue a case.

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3 *Prosecutor against Kallon and Kamara*, (SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E)), 13 Mar. 2004, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, para. 25.

4 *Ibid*

5 *Id.* at para 55.

6 *Id.* at paras 73, 88.

7 *See*, e.g., *Prosecutor* v. *Furundzija*, ICTY Appeals Decision, (IT-95-17/1) 21 July 2000.

8 Art. (53)(2)(c) of the Rome Statute.

The situation in Uganda concerns many of the issues that confronted the Special Court in addressing the conflict in Sierra Leone. In an effort to end the hostilities with the Lord's Resistance Army (LRA), the Ugandan government adopted an Amnesty Act in 2000.[9] However, LRA commanders did not turn over their weapons and the war continued. On 16 December 2003 Uganda referred the situation to the Prosecutor of the ICC.[10] This was the first time a state party referred a case to the ICC.

When a case is referred to the Prosecutor of the ICC, the state party cannot limit the scope of the Prosecutor's investigation.[11] Ugandan President Yoweri Museveni agreed to cooperate with the ICC prosecutor, including any investigation into the alleged war crimes of the Ugandan army.[12] The President promised:

> "I am ready to be investigated for war crimes . . . and if any of our people were involved in any crimes, we will give him up to be tried by the ICC . . . And in any case, if such cases are brought to our attention, we will try them ourselves."[13]

It was hoped that the involvement of the ICC would engage the international community and help to ensure that those "bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda [would be] brought to justice."[14] However, in recent peace negotiations, President Museveni offered Joseph Kony and the LRA leadership a complete amnesty and immunity to ICC prosecution in exchange for peace.[15]

Such proclamations by President Museveni are not only incongruent with his previous referral of the case to the ICC, but would, in my submission, be deemed ineffectual under international law. Although Uganda may be unwilling or unable to address the atrocities that have been inflicted upon its people, this does not deprive the ICC of jurisdiction to prosecute such atrocities. Like the Special Court, the ICC is an international criminal tribunal whose authority to prosecute is not affected by domestic amnesties. As the Special Court jurisprudence makes clear, amnesties are "ineffective in removing the universal jurisdiction to prosecute persons accused of [core international crimes]."[16] The prosecutor of the ICC will be able to draw upon the authority and experience of the Special Court to support his efforts in addressing the situation in Uganda.

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9 Akhavan Payam, Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court, 99 A.J.I.L. 403 (2005).

10 President of Uganda refers the situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC press release, 29 January 2004, *available at* http://www.icc-cpi.int/press/pressreleases/16.html.

11 Statement by the Chief Prosecutor on the Uganda Arrest Warrants, ICC press release, 14 October 2005, *available at* http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf; See also, Art. 14, Rome Statute.

12 Payam, *supra* note 9 at 411.

13 *Id.* (citing Remarks by the ICC Prosecutor Luis Moreno-Ocampo, Strasburg, 18th March 2004, Committee of Legal Advisors on Public International Law, Council of Europe, *available at* http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Public_international_law/).

14 "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC," ICC press release, 29 January 2004, *available at* http://www.icc-cpi.int/press/pressreleases/16.html.

15 "Uganda and LRA Rebels Sign Truce," BBC News, 26 August 2006, *available at* http://news.bbc.co.uk/2/hi/africa/5288776.stm.

16 *Prosecutor against Kallon and Kamara*, (SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E)), 13 Mar. 2004, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, para. 88.

III The Case of a Sitting Head of State

Head of State Immunity

On 7 March 2003 an indictment was issued for Mr. Charles Taylor, then the sitting Head of State of Liberia, for alleged involvement in supporting the conflict in Sierra Leone. Mr. Taylor found asylum in Nigeria and was only transferred to the custody of the Special Court on 29 March 2006. The only state which is bound to co-operate with the Special Court is Sierra Leone. With regard to other states, the Special Court can only invite them to cooperate.

Mr. Taylor is accused of playing an integral part in the conflict by allegedly supporting the hostilities of the Revolutionary United Front ("RUF"). Due to security concerns it has been decided that the Taylor trial will be conducted in The Hague by Special Court personnel under the authority of the Special Court Statute. The trial will be conducted by Trial Chamber II, which is currently in the closing stages of the Armed Forces Revolutionary Council ("AFRC") trial. Trial Chamber II has set the 2 April 2007 as the provisional start date for the Taylor trial.

Indicting and trying a Head of State at an international tribunal was, until recently, a rather novel concept. The principle of sovereign equality limits the ability of other states to try Heads of State for acts conducted in their official capacity. The extent of this immunity has been challenged where the head of state has committed serious violations of international criminal law. The trials of Slobodan Milosevic, Augusto Pinochet and Saddam Hussein are examples that leaders are subject to individual criminal liability for internationally recognized crimes during their time in office. However, whether other countries can try Heads of State is a different issue than that posed by the Special Court's indictment of Mr. Taylor. The Special Court has held in effect that sovereign equality of states does not prevent a head of state from being prosecuted before an international criminal tribunal or court.

The counsel for Taylor, in a preliminary motion to the Appeals Chamber, challenged the Special Court's jurisdiction to prosecute Taylor, claiming Head of State immunity. Article 6(2) of the Special Court Statute states:

> "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

Confirming the authority of Article (6)(2) and creating a precedent for other international courts of justice, the Appeals Chamber made clear in its 31 May 2004 decision:

> "[T]he principle of head of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community."[17]

In reaching this conclusion the Appeals Chamber of the Special Court considered the jurisprudence of the International Court of Justice (ICJ). In the Case concerning *Arrest Warrant of 11 April 2000*,[18] the ICJ

[17] *Prosecutor against Taylor*, (SCSL-2003-01-I), 31 May 2004, Decision on Immunity from Jurisdiction, para. 51.

[18] *Democratic Republic of Congo* v. *Belgium* (2002) ICJ Reports, February 14, 2002.

examined the approaches that the ICC and ICTY adopted towards the issue of head of state immunity.[19] The approach that the Special Court adopted in considering the issue of head of state immunity exemplifies the cross-tribunal exchange that is informing the development of international criminal law.

The Special Court to Sit in The Hague

A very important and significant aspect of the Special Court is the fact that it is sited in Freetown, Sierra Leone, in the very country where the crimes it has jurisdiction to prosecute are alleged to have been committed. The people of Sierra Leone have the opportunity to go and see the Special Court first-hand and see and listen to the cases being tried in public. They can also listen to their local radio network as the public hearings are broadcast. Unlike the International Criminal Tribunal for Rwanda ("ICTR") or the ICTY, the people of Sierra Leone can stay in the capital city of their country and witness the enforcement of international humanitarian law on a day to day basis.

Due to the security concerns in Sierra Leone, the Taylor trial is being conducted in The Hague. However, the benefits of locating the Special Court in Sierra Leone will be maintained. Taylor is being tried under the authority and law of the Special Court by Special Court personnel. Although it will be necessary to have a significant number of personnel in The Hague, the trial will be supported directly from Freetown. There will be an increased focus on the outreach and publicity programs so that the people of Sierra Leone will be able to stay informed of the developments in the trial.

While the use of ICC facilities by the Special Court is an obvious example of cooperation across the boundaries of international tribunals, this interaction, in addition, may provide a model for future operations of the ICC. Article 3 of the Rome Statute allows the ICC to conduct trials elsewhere than The Hague. The success of locating the Special Court in Sierra Leone and conducting the Taylor trial at a different location, may impress upon the ICC the benefit of establishing its presence in the country of conflict. This presence may range from outreach offices to the establishment of a "satellite" court to try some figures of the conflict. Just as the Special Court learned and improved upon the structures of previous tribunals, the ICC will undoubtedly look to the Special Court for guidance.

IV Development of Substantive Crimes

By incorporating developments from other international criminal tribunals, the Special Court serves as a locus for norm development and has clarified international norms regarding the treatment of child soldiers and gender-based crimes.

Child Soldiers

Article 4(c) of the Special Court Statute provides that the Special Court shall have the power to prosecute persons who committed serious violations of international humanitarian law by conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. A similar provision appears in the Rome Statute of the ICC. In a landmark decision, the Appeals Chamber of the Special Court not only recognised the customary basis for the prohibition of the recruitment of child soldiers in Additional Protocol II and the Convention on the Rights of the Child, but also emphasized that those who

[19] *Prosecutor against Taylor, supra* note 17 at para 28.

recruit them shall be held criminally responsible. In its Decision of 31st May 2004 in Prosecutor against Sam Hinga Norman, the Appeals Chamber held:

> "The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the [Convention on the Rights of the Child] provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the [Convention on the Rights of the Child] underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance." [20]

Extensive use of child soldiers has been alleged in the conflict in northern Uganda involving the LRA. Hopefully, the principles articulated by the Special Court with respect to child soldiers will contribute to the ICC's efforts to address the crimes that have occurred in Uganda.

Gender-Based Crimes

In contrast to the statutes of the ICTY and ICTR, the Special Court has adopted a more expansive definition of sexual crimes. In response to the sexual crimes committed in Sierra Leone during the conflict, and recognizing the developments of international law in this area, the Special Court Statute recognizes a number of gender-based crimes in addition to rape. Similar to the Rome Statute of the ICC, the Special Court Statute explicitly includes:

- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault
- Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.

A unique aspect of the conflict in Sierra Leone is the issue of "bush wives," where women were allegedly forced to enter into "marriages" under the threat of harm and death. Some of these women were allegedly forced to perform sexual acts and bear children.

The Special Court and the ICC have looked to the experiences of other international tribunals and incorporated normative developments into their respective statutes. The recognition of these crimes as violations of international law, and the litigation of these crimes at the Special Court, represent a significant advancement towards a more just and effective regime of international law.

V Conclusion

Although the ICC is at an early stage in its development, it has already made significant strides in furthering international justice. As long as core international crimes continue to be perpetrated, it is imperative that the international community address those crimes in the most effective manner. The Special Court for Sierra Leone has played a significant role in furthering international justice by addressing the conflict in Sierra Leone and contributing to the future development of international criminal law.

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[20] *Prosecutor against Hinga Norman*, (SCSL-2004-14-AR72(E)), 31 May 2004, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 20.