

“Lessons from the Special Court for Sierra Leone in the Fight against Impunity”

A Paper Presented by Mr. Ibrahim Tommy-Executive Director Centre for Accountability and Rule of Law Sierra Leone at a Regional Forum on International and Transitional Justice organized by Avocats Sans Frontières-Uganda Mission and the Uganda Coalition of the International Criminal Court on 31st July, 2012 at Imperial Botanical Beach Hotel, Entebbe

Introduction

The Special Court for Sierra Leone (SCSL) is expected to conclude its work by the end of this year, ten years after it was set up as a new model – designed as a constructive response to the pitfalls of the of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICTY and ICTR had a number challenges, including their costly nature and their isolation from the countries where the crimes took place. The Special Court was thus conceived to be lean and inexpensive, that would sit in Sierra Leone, and in addition would prosecute and try only those “who bear the greatest responsibility” for crimes perpetrated. It was billed as an inexpensive and credible model that would deliver justice to the victims of Sierra Leone’s 11-year civil conflict in a fair and expeditious manner. As the court winds up, it’s worth reflecting on the overall lessons court in its efforts at fostering accountability for the crimes that took place in Sierra Leone.

This paper discusses the lessons from the Special Court for Sierra Leone and their ramifications for ongoing efforts at combating impunity for heinous crimes across the world. In a broad sense, it also discusses how the international and national political context at the time of establishing the Court, its constitutive statute, and other operational arrangements impacted on its work as a “genuine” model of combating impunity for the crimes that took place in Sierra Leone. It briefly discusses the impact of the Court’s verdicts on victims.

Background

After 11-years of brutal conflict in which at least 50,000 people were estimated to have been killed and limbs of thousands of civilians hacked off, the Sierra Leone government wrote a letter to the United Nations Secretary-General requesting assistance from the UN and the rest of the international community in establishing a Special Court for Sierra Leone. In 2002, an agreement was signed between the Sierra Leone Government and the United Nations to establish a Special Court with a mandate to bring to justice “those who bear the greatest responsibility” for the atrocities that took place in the territory of Sierra Leone since 30th November, 1996. It was certainly a novelty - the first criminal tribunal based on an agreement between the UN and a government of a member state. The Special Court was seen as an improvement in terms of implementing a narrow focus on “those bearing the greatest responsibility”, which in turn would allow for a more limited and efficient approach.

The Court had a number of limitations, though: First, it could not try crimes that occurred before November 30, 1996¹, and only those who “bear the greatest responsibility” for the atrocities could be tried. I propose that those limitations, even if justified in light of a genuine need to respond to the pitfalls of the ICTY and ICTR, somewhat undermined Court’s competence to combat impunity for the crimes that took place in Sierra Leone.

The Proceedings

In March 2003, the Prosecutor of the Special Court for Sierra Leone handed down the first set of indictments, and included the leaders of all three major factions in the war - the Revolutionary United Front (Foday Sankoh and Issa Sesay), the Armed Forces Revolutionary Council (Johnny Paul Koroma), and the Civil Defence Forces (Sam Hinga Norman). This batch of indictments also included the indictment of Charles Taylor, although it was kept under seal until June 4, 2004. Sam Bockarie

¹ As a result of the Amnesty provision in the Lome Peace Accord of 1999 between the Sierra Leone Government and the RUF rebels, the Court could not have preferred any charges under Article 5 (which constituted crimes under Sierra Leone law) after 1999, but could prefer charges under Article 5 before 1999. It could, and did, prefer charges under Articles 2-4 before and after 1999.

and Foday Sankoh died before their trials began, while Chief Sam Hinga Norman died in the course of his trial. Charles Taylor was finally transferred into the custody of the Court in 2006. Eight accused – including two former leaders of the CDF, three former leaders of the RUF, and three former leaders of the AFRC were ultimately tried and convicted by the court in Freetown. They were sentenced to prison terms ranging from 15 to 52 years. They are currently serving their prison terms in Rwanda.

For security concerns, the international community and the Sierra Leone government, in spite of serious objections by the civil society, moved the trial to The Hague. In light of the increased significance that was attached to the Taylor trial after the deaths and disappearance of three key leaders – Foday Sankoh, Johnny Paul Koroma, and Sam Bockarie - it was disappointing that the trial was moved to The Hague.

Landmark Rulings and Impact on combating Impunity:

Through a number of landmark rulings, the Special Court's proceedings contributed to the development of the jurisprudence of international criminal justice. On May 31, 2004, for instance, the Appeals Chamber held that the recruitment or use of children under the age of 15 was a crime under international law since 1996, and that defendants are subject to individual criminal responsibility for this offence during the entire period covered by the court's jurisdiction. This ruling certainly helped promote justice for the thousands of children who were recruited by the various fighting forces.

Furthermore, on May 31 2004, the Appeals Chamber held that heads of state immunity does not apply to the prosecution of international crimes, and unanimously rejected Charles Taylor's preliminary motion challenging the legality of his indictment on the grounds that he was the President of Liberia at the time it was issued. The significance of this ruling is huge. It means that no one – including national leaders who perpetrate or order the commission of crimes - will be legitimately shielded from facing justice on the basis of their political power.

The Appeals Chamber also held that the amnesty granted under the Lomé Peace Agreement could not bar the Court from prosecuting crimes of international nature before July 1999. It ruled that the amnesty granted in the Lomé Peace Accord applied only to national criminal jurisdiction and not international crimes. This essentially paved the way for the Special Court's trials. In essence, while countries emerging from conflict can grant amnesty, such amnesty provisions cannot preclude international criminal justice system from holding perpetrators accountable.

During Taylor's trial, for instance, the Court ruled that raping of women and girls in public was part of a campaign aimed at terrorizing the civilian population. Although there had been many previous judgments in international war crimes tribunals in which the accused were convicted of rape, sexual slavery, and other forms of sexual violence, all were when the accused physically perpetrated the rape or was present, ordering, or ignoring the crimes. According to Kelly Askin, "The conviction of Taylor recognizes that civilian or military leaders who are far from the battlefield but who support and encourage sexual violence, or make no attempt to prevent or punish it, can be held responsible for sex crimes".

Important Lessons of the Special Court Proceedings:

Location of the Court – (In situ trials):

In spite of the serious challenges that faced the Court, the fact that the trials were held in the country where the crimes took place (in situ) meant that the victims could see justice at work. It also gave all the principals of the Court unhindered access to the people. This contributed immensely to the success of Outreach and Public Affairs Unit in terms of disseminating timely and useful information to local and international audiences, thus enhancing the legitimacy of the process. In a sense, the proceedings helped create both a sense of ownership among the victims and respect for the potency of international criminal justice.

Truth value:

Views on the peace process and Taylor's role differ in Sierra Leone and Liberia, but without the justice mechanism – the SCSL – the entire picture of Taylor's involvement may not have emerged. The trial helped to give a full account of history, which is necessary for maintaining long-term peace and promoting justice because it brought out some stark realities about the conflict that will not be easy to repeat in the future. As the Trial Chamber judgment illustrates when it borrowed the Prosecution's term "two-headed Janus" to describe Taylor, a key player in the peace process could simultaneously undermine the peace process.

Addressing Impunity gap for mid-level commanders?

Get 'the big man', but not the 'bad boy'

The restrictive nature of the Court's jurisdiction meant that only the most senior commanders or leaders of the various fighting forces were indicted. There are still many mid-level commanders who actively participated in, and ordered the commission of crimes but were not tried by the Court. Victims of rebel brutality in Kono, for example, would tell you that an ex-combatant 'Colonel Savage' was responsible for the deaths of hundreds of civilians, who were all buried in a mass grave – otherwise known as Savage Pit in Tombodu Village. Today, Colonel Savage freely moves across the country. To most victims, Savage represents the hundreds of mid level commanders who wielded tremendous power at the battlefield, but have never been made to account for the crimes they committed. This impunity gap needs to be addressed. It's certainly an important lesson that future war crimes tribunals will need to address. The "greatest responsibility" standard allowed too many key actors to remain at large and, of particular concern, in the army. My organization has repeatedly called for amnesty provision in the Lome Peace Accord to be revoked in order to bring more perpetrators accountable.

Address the needs of Victims

While it is absolutely critical to bring perpetrators to justice, addressing the social and economic needs of victims is just as important. Since the verdict in the Taylor

trial was handed down, for example, we have received mixed messages from the victims in Sierra Leone. While some have expressed relief at Taylor's conviction, others say the verdict means little to them as long as they continue to suffer. We have often made the point that the Sierra Leone government has the primary responsibility of ensuring that the recommendations of the Truth and Reconciliation Commission (TRC), including the reparations programme, are fully implemented. The Sierra Leone experience has shown that efforts at combating impunity must be complimented by a meaningful and sustainable reparations programme in order to respond to the needs of those most affected by the conflict. Really, victims who were disabled physically and emotionally by the conflict cannot move on, regardless of who is tried and convicted, as long as they continue to live in squalor.

Intersection of peace and justice: Lesson for the ICC

The proceedings of the Special Court for Sierra Leone (SCSL) have taught us valuable lessons about the intersection of peace and justice. During the trial of former Liberian President, Charles Taylor, the Prosecution argued that Taylor's involvement in the various peace negotiations between the Government of Sierra Leone and the RUF was a deliberate attempt to appear to the outside world as a peacemaker, thus providing a front for his continued clandestine activities of arming and financing the RUF and AFRC. The SCSL Trial Chamber looked beyond the surface in order to issue a nuanced ruling that extensively details and considers Taylor's involvement in the peace process. The Chamber did find that Taylor was undermining the peace process by continuing to privately provide arms and ammunition to the RUF in contravention of a UN and ECOWAS arms embargo while he was publicly engaged in the peace negotiations in Lomé. In essence, the international criminal

There are lessons here for African conflict situations being investigated by the permanent International Criminal Court (ICC), which celebrated its 10th anniversary on July 1st 2012. The Taylor trial and verdict does not mean that every leader involved in a peace process has an ulterior motive and is secretly continuing to fuel the conflict that he claims to be helping to bring to an end, but it sends an important message that even the supposed peacemakers will be held

accountable for any crimes they commit. In short, no one should hide under the cloak of a “peace maker” in order to seek exemption from prosecution for serious international crimes.

Relationship between politics and justice

The SCSL Statute, unlike those of ICTY and ICTR, does not impose obligations on other states to cooperate with it. The Court lacks the UNSC Chapter VII powers which can oblige states to cooperate with the tribunal in the investigation and prosecution of crimes. Some commentators have suggested this limitation might have contributed to the prosecutor’s decision not to indict late Muammad Ghaddaffi of Libya, Blaise Campaore of Burkina Faso, and other influential business men who clearly provided immense financial support to the rebels in exchange for diamonds. In fact, this limitation presented a practical challenge after Charles Taylor, who as an indictee of the Court, sought refuge in Nigeria as part of a political arrangement. Since the Court did not have the powers to force Nigeria to transfer Taylor into its custody, the Court had to rely on the goodwill of Presidents Ellen Johnson-Sirleaf of Liberia and Obansajo of Nigeria to transfer Taylor into the custody of the Court. The Taylor trial, in particular, showed the important relationship that exists between international criminal justice and the decisions that are made in political headquarters. It is such level of political support that the ICC, for instance, needs from state parties and non-state parties alike to get the job done. Alleged perpetrators will continue to escape justice unless there is political will to promote the interests of justice.

Conclusion

The establishment of the Special Court for Sierra Leone certainly represents an important step forward in the fight against impunity at local and international levels, but additional efforts should be made to close the impunity gap for mid-level commanders who were not tried by the Court. In a 2006 report by a Special Court-appointed independent expert, late Antonio Cassese wrote: “Contrary to what has been claimed by various commentators, in my opinion Sierra Leonean courts are not barred by Article IX (3) of the Lomé Agreement of 1999 from trying lesser

defendants who allegedly committed war crimes and other offences against international humanitarian law. As there is no legislation in Sierra Leone concerning international crimes, courts could try persons accused of offences committed during the war such as treason (a statutory offence), murder (a common law offence), wounding and causing grievous bodily harm (a statutory offence), rape (both a common law and statutory offence), larceny (a statutory crime), kidnapping (a common law crime), malicious damage to property (a statutory offence), or arson."² The report recommended, among other things, that copies of evidence collected by the Special Court's Prosecution should be handed over to Sierra Leone's Director of Public Prosecution to facilitate trials of alleged mid-level perpetrators and the so-called notorious criminals.

I entirely agree with his view, and it is critical that the international community and the Sierra Leone Government continue to work together to fully combat impunity in Sierra Leone.

² REPORT ON THE SPECIAL COURT FOR SIERRA LEONE: Submitted by the Independent Expert Antonio Cassese, paragraph 284