

WHO BEARS THE GREATEST RESPONSIBILITY FOR INTERNATIONAL CRIMES?

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Among the many fascinating aspects of the Special Court for Sierra Leone (SCSL)'s legal legacy analyzed in Professor Jalloh's excellent book, one of the most intriguing is the question of who bears the greatest responsibility for international crimes. The SCSL's statute describes the Court's "competence" as extending to "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in that country's decade-long civil war.¹ As Professor Jalloh explains, the primary impetus for including this limitation was the desire of the Court's creators to control costs.² This aspect of the SCSL's legacy may be particularly important because virtually all international courts and tribunals face similar resource constraints. As such, most such institutions have declared the intent to focus their efforts on persons most responsible for the worst crimes within their jurisdictions, regardless of whether such a limit appears in their statutes.³ The question of who bears the greatest responsibility for international crimes goes to the heart of the global justice project. In selecting defendants to prosecute, international courts co-constitute, along with the various actors who create and sustain international courts, the identity of the international criminal justice regime. For that reason, this essay argues that future courts should take great care in determining who bears the greatest responsibility for international crimes.

Professor Jalloh's book provides an excellent starting place for exploring the impact of the SCSL's legacy on future determinations of who bears the greatest responsibility for international crimes. First, it analyzes the SCSL's holdings regarding that Court's "greatest responsibility" statutory provision, with trial chambers diverging as to whether it was intended as a limit on jurisdiction or a guide to prosecutorial discretion, and the Appeals

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¹ Agreement Between the United Nations and Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 138.

² CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 62 (2020).

³ *Id.* at 135.

Chamber ultimately holding the latter. Professor Jalloh argues convincingly that the Appeals Chamber misinterpreted its statute in an effort—conscious or not—to reach the result it considered most practicable.⁴ Among other things, the judges seem to have feared that resources would be wasted if, after a long and expensive trial resulting in conviction, the accused was found not to be one of those most responsible.⁵ Professor Jalloh counters first by questioning the assumptions inherent in this reasoning, including that a determination could not be made earlier.⁶ More importantly, he deploys the canons of statutory interpretation, including those in the Vienna Convention on the Law of Treaties, to demonstrate that the statute’s requirement of greatest responsibility was a limit on the Court’s personal jurisdiction, not simply a guide to the prosecutor’s discretion.⁷ For instance, the limitation’s placement in a provision entitled “competence” signaled an intent to create a binding requirement.

Perhaps more important for the Court’s legacy than this question of statutory interpretation is the matter of how the SCSL interpreted the term “greatest responsibility.” After a thorough discussion of the Court’s jurisprudence in this regard, Professor Jalloh concludes that the Court adopted the correct interpretation. That is, the Court extended the reach of “persons bearing greatest responsibility” not only to persons in positions of leadership or authority in organizations that committed international crimes, but also to perpetrators of the more “wicked” crimes.⁸

Professor Jalloh’s excellent analysis of the work of the SCSL with regards to the “greatest responsibility” provision, raises at least two important issues for the work of future courts and tribunals: first, whether such provisions should be included in international court statutes, and second, assuming such limits are adopted, either by statute or through prosecutorial policy, how should “greatest responsibility” be interpreted? In the remainder of this essay, I offer some thoughts about each of these questions, answering the first in the negative, and suggesting that the latter should take account of institutional goals and values.

First, assuming Professor Jalloh is right that the SCSL’s greatest responsibility provision was a jurisdictional limit on the Court’s reach, those establishing future courts should avoid such limits. International crimes are often committed by persons acting within organizations, such as military groups, and it is generally appropriate for international courts to focus on the

⁴ *Id.* at 137–46.

⁵ *Id.* at 135.

⁶ *Id.* at 136.

⁷ *Id.* at 140–42.

⁸ *Id.* at 112.

leaders of such groups in allocating responsibility and imposing punishment. For instance, the International Military Tribunal at Nuremberg was right to focus on the Nazi leadership, and the Extraordinary Chambers in the Courts of Cambodia appropriately adjudicated the crimes of those most responsible within the Khmer Rouge leadership. Beyond the top leaders of criminal organizations, however, it is very difficult to determine who bears greatest responsibility for crimes. What does it mean for crimes to be particularly “wicked,” “heinous,” or otherwise “grave”? As I have written elsewhere, these are complex concepts that do not lend themselves easily to consistent interpretation and application.⁹ Yet inconsistent application can undermine a Court’s legitimacy.

The situation in Sierra Leone illustrates this point. Unlike the Nazis and Khmer Rouge, there was no single organization that bore greatest responsibility for the crimes committed in the conflict in Sierra Leone. Instead, there were several organizations that committed crimes of various kinds and to various degrees. The SCSL’s first prosecutor adopted a strategy of prosecuting a small number of leaders from each of the three principal organizations. In his view, this approach best illustrated the kinds of crimes committed and expressed condemnation of those crimes to the broadest audiences, particularly to victims.¹⁰ This approach was controversial. In particular, it raised the question whether, by spreading prosecutions among the three organizations, the prosecutor inappropriately telegraphed a moral equivalency among them. In fact, two of the groups had committed many more serious crimes than had the third. Another approach consistent with the goal of prosecuting “persons bearing greatest responsibility” would have been to select the organization responsible for the most widespread crimes and prosecute a greater number of leaders from that organization.

A similar controversy arose at the Extraordinary Chambers in the Courts of Cambodia (ECCC), which has similar language in its constitutive document.¹¹ The ECCC’s co-prosecutors agreed on the top ten defendants, but when the international co-prosecutor sought to expand the number of defendants, the Cambodian prosecutor demurred, asserting that additional

⁹ See MARGARET M. DEGUZMAN, *SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW* (2020).

¹⁰ David M. Crane, *Prosecuting Children in Times of Conflict: The West African Experience*, 15 HUM. RTS. BRIEF 1, 3 (2008) (describing the indictments of RUF, CDF, and AFRC leaders).

¹¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006, art. 1 [hereinafter “Law on ECCC”].

defendants were beyond the Court's mandate.¹² This decision was broadly attacked as political given that the Cambodian government opposed including the new defendants for fear it would be implicated in their cases.¹³ The difficulty of identifying the scope of "those who were most responsible"¹⁴ inhibited effective argument on both sides of this debate.

In light of such difficulties of interpretation and application, therefore, those creating courts and tribunals should avoid including jurisdictional requirements limiting personal jurisdiction based on degree of responsibility. As a policy matter, on the other hand, it is entirely appropriate, indeed important in many cases, for international courts and tribunals to focus their efforts on those they believe bear particular responsibility for the most serious crimes in the situation. In fact, this is standard practice in many national prosecutor's offices. If a prosecutor is unable to prosecute all those responsible due to resources or other constraints, she will typically seek to adjudicate the cases of those highest up the ladder, often by obtaining the cooperation of those below them.

Given that most international courts and tribunals will seek to prosecute those they deem most responsible for the international crimes in their jurisdictions, it is important for such institutions to develop procedures for identifying such individuals. Such procedures will largely be a matter of prosecutorial policy, although in some courts, including the ICC, prosecutorial selection decisions are subject to review in some circumstances. Additionally, the bodies that govern international courts, like the ICC's Assembly of States Parties, should play a part in developing the procedures for identifying the most responsible defendants.

In determining who bears greatest responsibility, such actors should endeavor to align their decision-making with articulated institutional goals and priorities. This is the best way to ensure the effectiveness of international criminal law's institutions. Effectiveness requires the identification and application of goals and priorities, against which the institution's actions can be measured.¹⁵ In some situations, the answer to the question who bears greatest responsibility may be intuitively obvious. A president who directed the apparatus of the state to commit genocide surely is one of those most

¹² *Cambodia: Extraordinary Chambers in the Courts of Cambodia - New International Co-Prosecutor Should Commit to Fulfilling the Tribunal's Mandate*, AMNESTY INT'L (Dec. 4, 2009), <https://www.amnesty.org/download/Documents/44000/asa230222009en.pdf>.

¹³ *See, e.g., Cambodia: Khmer Rouge Convictions 'Too Little, Too Late'*, HUM. RTS. WATCH (Aug. 8, 2014), <https://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late>.

¹⁴ Law on ECCC, *supra* note 11.

¹⁵ Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 230 (2012).

responsible for the ensuing crimes. Often, however, a more nuanced understanding of what an institution seeks to achieve is necessary to make the greatest responsibility determination. The ICC, for instance, could set as an institutional goal to address the needs for justice of a certain victim population. This goal would likely counsel adjudicating a rather broader set of perpetrators in the situation than the Court would if its goal were to express global condemnation of a select set of crimes.

The process of formulating goals and priorities and using them in determining who bears greatest responsibility should be a dynamic one. Prosecutors should be careful not to adopt inflexible policies in this regard since institutional goals and priorities change over time. Moreover, international courts and tribunals should seek to engage a wide spectrum of their constituencies in this process. Whether explicitly in policy statements, or implicitly in their selection decisions, international courts and tribunals express their goals and priorities to such audiences, who then react. The institutions should take account of such reactions as they continue the process. In this way, the institutions and their supporters co-create norms about who bears the greatest responsibility, and thus contribute to the gradual development of international criminal law.