

# Sierra Leone's shoestring Special Court

by

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The lengthening arm of international criminal justice is about to reach even further with the creation of a Special Court for Sierra Leone. Plans to establish the Court have been on the drawing board since mid-2000; its creation has been delayed by negotiations on some contentious aspects of the Court's Statute and the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (the Agreement). Final agreement on both was reached in early 2001. Delays since then have mainly been due to difficulty in finding enough money to establish the Court.

Despite these difficulties, the United Nations and the Government of Sierra Leone signed eventually, in January 2002, an agreement setting up the Special Court to prosecute persons bearing the "greatest responsibility" for crimes committed in that country.<sup>1</sup>

This note first examines the process leading to the finalization of the Statute for the Special Court, before turning to a brief discussion of the provisions of the Agreement and the Statute. To round off, a few conclusions are offered. The aim is to highlight the most significant, contentious and troubling aspects of the Court's

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Statute and the Agreement and to compare key provisions with those of the Statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Statute of the International Criminal Court (ICC Statute).

Although not discussed here, it should be noted that Sierra Leone is currently also in the process of establishing a Truth and Reconciliation Commission (TRC).<sup>2</sup> It is the first time that an international court, even a quasi one such as the Special Court, will function simultaneously with such an institution, and offers an interesting experiment in how criminal prosecutions can complement other processes aimed at providing justice and promoting reconciliation and peace-building. It is not yet clear what the relationship will be between the Special Court and the Truth Commission,<sup>3</sup> but it is to be hoped that they will work in cooperation and harmony in order to maximize the potential of these two complementary mechanisms.

### Security Council Resolution 1315

On 14 August 2000, the United Nations Security Council unanimously passed Resolution 1315 (2000), initiating a process intended to lead to the creation of a Special Court for Sierra Leone. The resolution expressed the Council's concern at the "very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity", stated that those who commit such crimes are individually responsible and asserted "that the international community would exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law". Further, it recognized that "in the particular circumstances of Sierra Leone, a credible system of justice

<sup>1</sup> See "Sierra Leone: UN, Government sign historic accord to set up special war crimes court", UN News Center, 16 January 2002.

<sup>2</sup> Pursuant to The Truth and Reconciliation Commission Act 2000 of 22 February 2000.

<sup>3</sup> While SC Res. 1315 (2000), initiating the creation of the Court, noted the steps taken

by Sierra Leone to establish a national truth and reconciliation process, it did not specifically request that the possible relationship between the Special Court and the Truth and Reconciliation Commission be considered, and the Secretary-General subsequently failed to take any initiative in this regard.

and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace”.

Resolution 1315 was a complete about-turn with regard to a resolution on Sierra Leone passed by the Council a year earlier. Resolution 1260 of 20 August 1999 welcomed the signing of the Lomé Peace Agreement, which was meant to put an end to almost nine years of fighting in Sierra Leone, and commended the Government for its “courageous efforts to achieve peace, including through legislative and other measures already taken towards implementation of the Peace Agreement (...)” — a reference to the blanket amnesty, seats in the government and other concessions to the rebels provided for in the Lomé Agreement. At the time of the signing of the Lomé Agreement on 8 July 1999 it was widely accepted, including by the UN, the government of Sierra Leone and the governments of other involved States, particularly the United States and United Kingdom, that the price of peace was complete impunity for all those who had committed serious violations of international humanitarian law, although the UN Secretary-General’s special representative to Sierra Leone added a disclaimer to the Peace Agreement that the United Nations did not recognize the validity of the amnesty in respect of war crimes, crimes against humanity or genocide.<sup>4</sup>

A year later, it had become clear that the gamble had not paid off. The Revolutionary United Front (RUF) had failed to honour its commitments and was flagrantly violating the Peace Agreement and obstructing the peace process, which had, in fact, collapsed. Attacks on civilians and on the UN peacekeepers sent to enforce the agreement continued, culminating in the kidnapping of over 500 UN peacekeepers in May 2000. With the credibility of UN peacekeeping and the Organization itself on the line, the spirit of reconciliation fading in Sierra Leone and the government calling for the Security Council’s

<sup>4</sup> See UN Doc. S/1999/836, p. 2, para. 7. For national and international responses to the 1999 Peace Agreement, see A.J.M. McDonald, “The amnesties in the Lomé Peace

Agreement and the UN’s dilemma”, *Humanitäres Völkerrecht*, No. 1, 2000, pp. 11 at 12-14.

help in prosecuting the numerous accused persons it already had in its custody,<sup>5</sup> and some prominent States, including the US and UK, expressing their support for prosecutions, it was clear that the momentum had changed in favour of holding perpetrators of serious crimes accountable.

The nine-paragraph Resolution 1315 entrusted the Secretary-General with the task of negotiating with the government of Sierra Leone an agreement to create an independent special court. This showed a marked divergence from the approach taken in establishing the ICTY and ICTR, where the governments of the territorial States were not involved in the tribunals' creation, and where the Statutes were drafted by the UN Secretariat and adopted by the Security Council. The manner of the Special Court's creation is directly related to its funding. There was no political support for setting up another, very expensive, international criminal tribunal,<sup>6</sup> and the Court could be established only with the full support and cooperation of Sierra Leone, which, in any event, wanted a mixed tribunal with national and international components. It is thus a *sui generis* Special Court, not so much because this was necessarily the best or most effective approach to take in the particular circumstances of Sierra Leone, but because it was the only politically acceptable option.

Resolution 1315 recommended that the subject matter jurisdiction of the Court should cover crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law.

<sup>5</sup> UN Doc. S/2000/786.

<sup>6</sup> Ralph Zacklin, UN Assistant Under-Secretary-General for Legal Affairs, said that there was no longer support on the Council for establishing subsidiary legal bodies, and that the UN Security Council, while it was

supportive of other ad hoc Tribunals, would not fund them as it did the ICTY and ICTR. Robert McMahon, "UN: International justice – ad hoc Tribunals fill void (Part 4)", *Radio Free Europe/Radio Liberty*, 7 September 2001.

### The Report of the Secretary-General and negotiations towards final agreement on the Statute and the Agreement

On 4 October 2000, the Secretary-General submitted his Report on the establishment of a Special Court for Sierra Leone.<sup>7</sup> Annexed to it were a draft statute of the Court and a draft agreement between the United Nations and Sierra Leone. Most of the provisions suggested by the Secretary-General were retained in the final drafts. The main bones of contention were the Court's jurisdiction *ratione personae*, and in particular the question whether it should exercise jurisdiction over child soldiers; the size of the Court; and funding for the Court. Differences of opinion between the Secretary-General and the Security Council were resolved over the following months through a series of letters;<sup>8</sup> more precisely, they were not so much resolved as cleared in that the Secretary-General made a final determination of the matter. By early February 2001, final agreement was reached.<sup>9</sup>

### The Agreement and the Statute

Unlike the ICTY and ICTR, which were established by a Security Council resolution, the Special Court is established by an Agreement between the UN and the government of Sierra Leone. The main disadvantage of this approach is that the Court lacks Chapter VII powers, powers that have proven indispensable for the operation of the *ad hoc* Tribunals. In his report, the Secretary-General noted that the Court's primacy extends only to the courts of Sierra

<sup>7</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000.

<sup>8</sup> Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234; Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40; Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

<sup>9</sup> By a letter of 9 February 2001 to the Legal Counsel, the Government of Sierra Leone expressed its willingness to accept the Statute and Agreement. Letter from the Secretary-General to the President of the Security Council, UN Doc. S/2001/693, 13 July 2001. However, the Court would only be established once the Secretary-General had ascertained that sufficient contributions were in hand.

Leone and not to those of third States. It thus lacks the power to, for example, order that another State arrest an accused person or compel evidence to be handed over. The Secretary-General requested the Security Council to consider endowing the Court with Chapter VII powers for the specific purpose of requesting the surrender of an accused person, but as of October 2001, the Council had not done so.<sup>10</sup>

There is considerable overlap between the Agreement and the Statute. They should be read together, as a single instrument, rather than as two separate instruments. — Article 1 of both the Agreement and the Statute provides for the competence of the Court, dealing with its personal and temporal jurisdiction: the Court shall have jurisdiction over those persons who bear the greatest responsibility<sup>11</sup> for serious violations of international humanitarian law committed in Sierra Leone since 30 November 1996. However, Article 1 of the Agreement goes further insofar as it actually establishes the Court. Like the Statute, the Agreement also deals with such matters as the composition of the Special Court and the appointment of Judges (Arts 12 and 2, respectively), the Prosecutor (Arts 3 and 15) and the Registry (Arts 4 and 16). In addition, the Agreement provides for operational aspects of the Court, such as premises (Art. 5) — which are the responsibility of the government — and their inviolability (Art. 7); expenses (Art. 6); the seat of the Court (Art. 9); juridical capacity (Art. 10); privileges and immunities of the Judges, the Prosecutor and the Registrar (Art. 11) and of international and Sierra Leonean personnel (Art. 12); immunity of defence counsel (Art. 13); and of witnesses and experts (Art. 14). Article 15 provides that the UN Mission in Sierra Leone (UNAMSIL) shall provide security, pending the restructuring and rebuilding of the Sierra Leonean Armed Forces.

Article 16 deals with cooperation between the Special Court and the Sierra Leonean government. It provides for a legal obligation on the government to comply without undue delay with any request for assistance by the Court and any order issued by the Trials Chamber or the Appeals Chamber. Article 17 provides that the

<sup>10</sup> *Ibid.*, para. 10.

<sup>11</sup> UN Doc. S/2000/1234.

Court's working language shall be English. Article 18, governing practical arrangements, stipulates that, in order to maximize efficiency and cost-effectiveness, the Court shall be established in a graduated or phased manner. The first phase will consist of the appointment of the Judges, Prosecutor and Registrar, along with the investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

As noted by the Secretary-General in his report to the Security Council, in order to determine the Special Court's temporal jurisdiction it was first necessary to pronounce on the legality of the amnesties granted in the Lomé Peace Agreement. If they were legal, the Court's jurisdiction would be restricted to crimes committed after 7 July 1999; if they were not legal, the Court could have jurisdiction over crimes committed before as well as after that date.<sup>12</sup> The Secretary-General stated that "the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law".<sup>13</sup> Article 10 of the Statute thus provides that an amnesty granted to anyone falling within the Court's jurisdiction is no bar to prosecution of international crimes.<sup>14</sup> However, it pointedly excludes mention of crimes under Sierra Leone's national law. It has thus been argued that the Court's temporal jurisdiction may differ as regards international and national crimes, and that regarding the latter, the Court's temporal jurisdiction may begin on 7 July 1999.<sup>15</sup>

While recognizing that the conflict in Sierra Leone began on 23 March 1991, when RUF forces invaded Sierra Leone from

<sup>12</sup> *Ibid.*, para. 21.

<sup>13</sup> *Ibid.*, para. 22.

<sup>14</sup> It provides: "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." Crimes under Sierra Leonean law are referred to in Article 5.

<sup>15</sup> Micaela Frulli, "The Special Court for Sierra Leone: Some preliminary comments", *EJIL*, vol. 11, 2000, p. 859.

Liberia and launched a rebellion to overthrow the one-party rule of the All People's Congress, the Secretary-General observed that, in deciding on the Special Court's temporal jurisdiction, he was guided by several considerations, *inter alia* that the Prosecutor and Court should not be overloaded. It was necessary to avoid a date with political connotations, but it should be such as to encompass the most serious crimes which have been committed by all sides. For these reasons, the date of 30 November 1996 was chosen. It was the date of the signing of the Abidjan Peace Agreement, the first comprehensive agreement between the government of Sierra Leone and the Revolutionary United Front (RUF), the country's main rebel group.

As the conflict is still ongoing, the Court's temporal jurisdiction is open-ended. Its life span is limited, however, and will be determined by a subsequent agreement between the parties upon completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. Any agreement terminating the Court should also provide for matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Court.<sup>16</sup>

Articles 2 to 5 of the Statute deal with jurisdiction *ratione materiae*, and cover three sets of crimes: crimes against humanity; violations of the law applicable in internal armed conflicts; and certain crimes under Sierra Leonean law. Article 2, concerning crimes against humanity, provides a different, simpler, definition of this crime than the equivalent provisions of the ICTY, ICTR or ICC Statutes.<sup>17</sup> While there is overlap between the acts constituting crimes against humanity in all cases (with the exception that Article 7 of the ICC Statute criminalizes a much broader range of acts as crimes against humanity than do Articles 5 and 3, respectively, of the Statutes of the *ad hoc* Tribunals

<sup>16</sup> UN Doc. S/2000/1234, paras. 25-28.

<sup>17</sup> It also departs from the definition of crimes against humanity in the United Nations Transitional Administration in East Timor (UNTAET)'s Regulation No. 2000/15 on the Establishment of Panels with Exclusive

Jurisdiction over Serious Criminal Offences, which follows the ICC definition. Regulation 2000/15 also adopts a definition of war crimes almost identical to that in Art. 8 of the ICC Statute.

or Article 2 of the Special Court), the elements of the opening paragraphs differ. According to Article 2 of the Special Court's Statute: "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecutions on political, racial, ethnic or religious grounds; (i) Other inhumane acts."<sup>18</sup> As noted by one commentator, unlike the Statute of the ICTR, which Article 2 most closely resembles, "and in conformity with customary international law, the Special Court definition does not require a discriminatory *animus* for crimes against humanity (except those charged as persecution)".<sup>19</sup> The prohibited acts almost precisely mirror the equivalent provisions of the ICTY and ICTR Statutes. The only difference is in Article 2(g) dealing with sexual crimes, which is far more detailed than sub-paragraphs (g) of Articles 5 and 3 of the *ad hoc* Tribunals' Statutes, and has more in common with, though is less comprehensive than, Article 7(1)(g) of the ICC Statute.

Article 3 of the Statute of the Special Court, giving it jurisdiction over violations of Article 3 common to the 1949 Geneva Conventions and of their Additional Protocol II of 1977, mirrors Article 4 of the ICTR Statute except in the wording of the opening paragraph: Article 3 states that the violations coming under this provision "shall include: ...", whereas the said Article 4 goes on to specify that "the violations shall include, but shall not be limited to: ...". The acts prohibited are those enumerated in Article 4(2) of Protocol II and

<sup>18</sup> Art. 3 of the ICTR Statute stipulates in addition that, to be subject to prosecution by the ICTR, the acts should be committed "as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*" (emphasis added). Art. 5 of the ICTY Statute adds a different requirement: that the crimes should be committed "in armed conflict, whether international or internal in character, and

directed against any civilian population". Finally, Art. 7 of the ICC Statute provides that crimes against humanity are the enumerated acts, "when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack".

<sup>19</sup> Robert Cryer, "A "Special Court" for Sierra Leone?", *JCLQ*, vol. 50, 2001, p. 443.

probably have the status of customary international law, according to the ICTY Appeals Chamber in the *Tadic* jurisdiction decision.<sup>20</sup> Most of the prohibited acts are also outlawed under common Article 3, which unquestionably has the status of customary international law.<sup>21</sup>

Article 4 of the Statute of the Special Court gives it jurisdiction over “[o]ther serious violations of international humanitarian law”. Rather than being a residual clause, akin to Article 3 of the ICTR Statute, Article 4 enumerates the three types of offences included in this provision.<sup>22</sup> Its wording is taken almost directly, but with some variation in the section dealing with children, from Article 8(2)(e)(i), (iii) and (vii) of the ICC Statute.<sup>23</sup> Article 4(b) could prove especially interesting if it provokes a debate on whether UN and ECOMOG peacekeepers were entitled to the protection of the 1994 UN Convention on the Safety of United Nations and Associated Personnel or could be considered as combatants bound by international humanitarian law.

Article 5 gives the Court jurisdiction over certain crimes under Sierra Leonean law,<sup>24</sup> distinguishing its Statute from those of the ICTY, ICTR and ICC, which cover only international crimes. Similarly, UNTAET Regulation 15 establishing Special Panels in East Timor gives them jurisdiction over national as well as international

<sup>20</sup> *Prosecutor v. Duško Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 117.

<sup>21</sup> *Nicaragua v. USA*, I.C.J. Reports 1986, Judgment, para. 218; confirmed in *Tadic* jurisdiction decision, *ibid.*, para. 98; *Prosecutor v. Duško Tadic*, Opinion and Judgment, 7 May 1997, para. 609.

<sup>22</sup> “(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian or peacekeeping mission in

accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.”

<sup>23</sup> See *op. cit.* (note 18), p. 444, and *op. cit.* (note 14), pp. 864-865.

<sup>24</sup> That is, offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and to the 1861 Wanton Destruction of Property under the Malicious Damages Act.

crimes, although the national crimes included differ in each case.<sup>25</sup> The inclusion of this article necessitates having judges with local knowledge or a common law background. Thus, the Secretary-General, in seeking nominations for judges from States, will be encouraging in particular nominations of persons from ECOWAS or Commonwealth countries.<sup>26</sup>

Article 6, concerning individual criminal responsibility, mirrors the equivalent provisions of the Statutes of the ICTY and ICTR, but also contains an additional clause, paragraph 5, which states: "Individual criminal responsibility for the crimes referred to in Article 5 shall be determined in accordance with the respective laws of Sierra Leone." It might have been preferable in drafting this provision to be guided instead by the equivalent provision of the ICC Statute (Art. 25), which is much more detailed, although there are arguments over the extent to which some parts of Article 25 reflect customary law, particularly as it stood in 1996.

Article 9, concerning *Non bis in idem*, resembles the equivalent provisions in the Statutes of the ICTY (Art. 10) and ICTR (Art. 9), except in one respect. The latter state that no persons shall be tried before a national court (without specifying any restriction of this provision to the courts of the former Yugoslavia or Rwanda) for crimes for which he or she has already been tried by one of the International Tribunals. Conversely, Article 9 of the Statute of the Special Court provides that: "No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court." It is odd that the Secretary-General decided to phrase the provision in this way. This can hardly mean that persons who had already been tried before the Special Court could be tried for the same acts before the courts of third States.

### Personal jurisdiction

The question as to the personal jurisdiction that the Court should exercise had two interconnected facets: it was necessary to clarify

<sup>25</sup> Regulation 15 gives the Special Panels jurisdiction over murder and sexual offences under the applicable Penal Code in East Timor (sections 8 and 9).

<sup>26</sup> Agreement, Art. 2(2)(a).

what level of defendant the Court should pursue and whether it should prosecute child soldiers. Regarding the former, the Secretary-General's original draft Statute provided that the Special Court should have jurisdiction over "persons most responsible for serious violations of international humanitarian law and Sierra Leone law (...)"<sup>27</sup> The Security Council changed the wording to "persons who bear the greatest responsibility (...)"<sup>28</sup> The Secretary-General responded that while he agreed that the Court should prosecute those most responsible for serious violations of international humanitarian law, this "does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term 'persons who bear the greatest responsibility' in any given case falls initially to the Prosecutor and ultimately to the Special Court itself".<sup>29</sup> Given its financial constraints, however, which are mentioned below, the Special Court is unlikely to be able to prosecute all those who bear the greatest responsibility but only a handful of top suspects. The Security Council also added to the Secretary-General's draft the wording "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".<sup>30</sup> This wording is now included in the final Statute, but as the Secretary-General noted, "the words (...) do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy".<sup>31</sup>

These amendments by the Security Council reduce the likelihood of persons other than rebels being tried by the Court. To reinforce the idea that the Special Court is not established to try UN peacekeepers or members of the regional peacekeeping force ECOMOG, the Security Council added two paragraphs to the original draft Article 1. They make it clear that the primary responsibility

<sup>27</sup> Art. 1.

<sup>28</sup> UN Doc. S/2000/1234.

<sup>29</sup> Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40;

Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

<sup>30</sup> *Ibid.*

<sup>31</sup> UN Doc. S/2001/40, para. 3.

for prosecuting peacekeepers falls to the sending State.<sup>32</sup> Only “[i]n the event the sending State is either unwilling or unable genuinely to carry out an investigation or prosecution” may the Court, “if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons”.<sup>33</sup> The Secretary-General pointed out that the “amended article, however, falls short of inducing the unwilling State to surrender an accused person situated in its territory, with the result that a State which is unwilling to prosecute a person in its own courts would in all likelihood be unwilling to surrender that person to the jurisdiction of the Special Court”.<sup>34</sup> He suggested that Article 1(c) be reformulated to permit the President of the Special Court, where he is convinced that the sending State is either unable or unwilling to cooperate, to report this to the Security Council “and seek its intervention with the State in question to induce it to investigate and prosecute or to surrender the accused to the jurisdiction of the Court”.<sup>35</sup> However, the Security Council responded negatively to this suggestion.<sup>36</sup>

The question of whether the Court should exercise jurisdiction over *child soldiers* was perhaps the most controversial. The Secretary-General’s report noted the moral dilemma posed by the question of how to deal with child soldiers who committed some of the worst atrocities but who themselves had been abducted, drugged and were acting under duress. His solution was to leave open the possibility of trying them but to build in a number of safeguards in the event that they should be tried, including separate trials from adults, protective measures and provisional release pending trial. At all stages of the proceedings, minors should be treated with “dignity and a sense of worth, taking into account his or her young age and the desirability

<sup>32</sup> Art. 1(2) of the Statute provides: “Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that

the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending state.”

<sup>33</sup> Statute, Art. 1(3).

<sup>34</sup> UN Doc. S/2001/40, para. 4.

<sup>35</sup> *Ibid.*, para. 5.

<sup>36</sup> UN Doc. S/2001/95.

of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society”.<sup>37</sup> The Secretary-General’s initial draft Statute gave the Court jurisdiction “over persons who were 15 years of age at the time of the alleged commission of the crime”.<sup>38</sup> This would allow the Court the possibility to prosecute child soldiers if they could be considered as being amongst those persons with the greatest responsibility.

Responding to the Secretary-General’s draft, the Security Council took the view that “the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end”.<sup>39</sup> It thus amended (and significantly abridged) Article 7.<sup>40</sup>

The Secretary-General in turn noted that Article 7 of the draft Statute, as amended, retains the principle of juvenile justice but omits any reference to a minimum age or to the guarantees of juvenile justice. On the understanding the members of the Security Council did not intend to allow prosecution below the age of 15, (...) Article 7 should be amended to read: “The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. (...)”. “It is also my understanding that persons in this age group [i.e., between 15 and 18], if brought before the Court, will be entitled to all the guarantees stipulated in the draft Statute annexed to my report.”<sup>41</sup> The Security Council subsequently concurred with all of the Secretary-General’s suggestions, while reiterating that it is extremely unlikely that juvenile members will in fact come before the Special Court.<sup>42</sup>

<sup>37</sup> Art. 7(2) of the draft Statute of October 2000, in Annex to Special Report of the UN Secretary-General.

<sup>38</sup> *Ibid.*, Art. 7.

<sup>39</sup> UN Doc. S/2000/1234.

<sup>40</sup> To read in full: “Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with

dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.”

<sup>41</sup> UN Doc. S/2001/40, para. 7.

<sup>42</sup> UN Doc. S/2001/95.

Should a juvenile be prosecuted by the Court, its Statute stipulates that he or she shall not be subject to imprisonment.<sup>43</sup> The Secretary-General insisted that Article 7(3)(f) of his original draft Statute, providing for sentencing options, should be retained as Article 7(2) of the final draft. It provides that in the disposition of the case of a *juvenile* offender, the Court may order any of the following: “care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.” Judges, prosecutors, investigators and registry staff should be experienced in juvenile justice.<sup>44</sup> Moreover, Article 15 of the Statute provides that in the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to the Truth and Reconciliation Commission where possible.

It could be argued that the Statute strikes an acceptable balance between the desire to ensure that child soldiers do not escape justice and guaranteeing their rights and interests. While neither the Statutes of the ICTY, ICTR or the ICC extend jurisdiction to persons below 18 years of age, this Court has to confront the reality of the circumstances of Sierra Leone, where there was considerable popular support for prosecuting juveniles. There is nothing in international law to prevent such prosecution — it is foreseen even by the Convention on the Rights of the Child,<sup>45</sup> and children as young as ten are subject to prosecution before national jurisdictions.<sup>46</sup>

On the other hand, leaving the decision of whether to prosecute juveniles to the Prosecutor, while emphasizing that their

<sup>43</sup> Art. 7(2).

<sup>44</sup> Arts 13(2), 15(4) and 15(5).

<sup>45</sup> Arts 37 and 40.

<sup>46</sup> In its report to the Committee on the Rights of the Child, the government of Sierra Leone stated that its age of criminal responsibility was ten. Initial Report of Sierra Leone,

03/06/96 CRC/C/3/Add. 43 para. 33. Persons over 17 years are considered as adults and can be subject to the death penalty: Chapter 44 of The Children and Young Persons Act, 31 December 1948, Part I, Article 2.

prosecution should be exceptional, is something of a cop-out. It is also inconsistent with and runs counter to the current international legal trend towards standard-setting in the field of children's rights and interests. Under international law, anyone under the age of 18 is a child, and the recently adopted Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict prohibits the recruitment or use of children under 18 years as soldiers.<sup>47</sup> Article 39 of the Convention on the Rights of the Child provides: "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

The child soldiers of Sierra Leone who have committed the most heinous crimes are themselves victims of the armed conflict who have been subjected to all the forms of abuse mentioned in the above provision. Their recovery and reintegration into normal, civil society should be the top priority. Arguably, this cannot be achieved by subjecting children under 18 years to the criminal justice process, but through a non-judicial, mediative process, perhaps in the context of the Truth Commission, or in a special children's commission or commissions which should ideally be community-based.

### Structure and size of the Special Court

The Special Court will be an entirely self-contained, independent Court. Like the ICTY and ICTR, it is to consist of three organs: the Registry, Chambers, and the Office of the Prosecutor. However, unlike the ICTY and ICTR, both of which have three Trial Chambers,<sup>48</sup> it is to consist of a single Trial Chamber and an Appeals Chamber. The Security Council rejected the Secretary-General's call

<sup>47</sup> Of 25 May 2000.

<sup>48</sup> Pursuant to requests of both Tribunals and by virtue of SC Res. 1165 (1998), 30 April 1998, and 1166 (1998), 13 May 1998, respectively.

for two Trial Chambers, saying that “the Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation”.<sup>49</sup> It also rejected his suggestion of having alternate judges.

Given the Special Court’s instant docket, the need for at least two Chambers seems evident. In the case of the *ad hoc* Tribunals, even two have not proven sufficient.<sup>50</sup> Undaunted by the experiences of the *ad hoc* Tribunals, the Statute provides for a total of eight judges, of which three will sit in the Trial Chamber and five in the Appeals Chamber.<sup>51</sup> The government of Sierra Leone will appoint one of the Trial Chamber judges and two of the Appeals Chamber judges.<sup>52</sup> The Secretary-General will appoint the remainder. One, necessarily tireless, law clerk, is envisaged for all of the judges.<sup>53</sup>

The Security Council had asked the Secretary-General to look into the possibility of the Special Court sharing an appeals chamber with the *ad hoc* Tribunals, but he rejected this option. While recognizing the theoretical benefits of such an approach, including the desirability of having an overarching appeals chamber which, as the ultimate judicial authority in matters of interpretation and application of humanitarian law, would offer the guarantee of a coherent development of the law, the Secretary-General found that this goal could also be achieved “by linking the jurisprudence of the Special Court to that of the International Tribunals. (...) The main consideration in rejecting the option of a single appeals chamber for all three courts was the fact that the already overburdened Appeals Chamber would not be able to cope with the additional workload without risking collapse and delays which are not consistent with the fair and prompt administration of justice, including the right to have one’s case heard within a reasonable time. However, Article 20(3) of the Statute of the Special Court pro-

<sup>49</sup> UN Doc. S/2000/1234, para. 3.

<sup>50</sup> In fact, even three have not proven sufficient for the ICTY. In response to its request the UN Security Council, by res. 1329 (2000), voted to create a pool of 27 so-called “*ad litem*” judges to serve in ICTY Trial Chambers on a single case. There will thus be three Trial

Chambers each consisting of three sections, that is, up to nine sections of Chambers hearing cases at trial.

<sup>51</sup> Agreement, Art. 2.

<sup>52</sup> Agreement, Art. 2(2).

<sup>53</sup> UN Doc. S/2000/915, para. 57.

vides that it shall be guided by the decisions of the Appeals Chamber of the *ad hoc* International Criminal Tribunals, while Article 14(1) provides that the Rules of Procedure and Evidence of the ICTR shall be applicable *mutatis mutandis* to the proceedings before the Special Court.<sup>54</sup>

The Prosecutor of the Special Court will be chosen by the Secretary-General and shall be assisted by a Sierra Leonean deputy (Art. 15 of the Statute). The Prosecutor shall be entirely independent and free from interference by any government. The Registrar shall be appointed by the Secretary-General and shall serve as a UN staff member (Art. 16).

UNAMSIL is to provide technical and support assistance to the Special Court during its initial operational phase. It was recognized that, given the security situation in the country, UNAMSIL is the only credible force capable of providing adequate security to the personnel and premises of the Special Court. Its role and relationship with the Special Court will have to be worked out by the United Nations, the government of Sierra Leone and UNAMSIL. The entrusting of any such additional tasks to UNAMSIL would necessitate a change in its mandate, which would have to be approved by the Security Council, as well as additional financial, personnel and other resources.<sup>55</sup>

### Financing of the Court

The Secretary-General's original budget estimates for the Court had to be drastically scaled back when it became clear that even his modest targets<sup>56</sup> could not be met. Concerned about the viability of a Special Court budgeted at a reduced level, he convened a meeting of Security Council members on 1 June 2001. The message of that meeting was that the Special Court would have to be a bargain base-

<sup>54</sup> *Ibid.*, paras 40-46.

<sup>55</sup> *Ibid.*, para. 66.

<sup>56</sup> His original estimated requirements for the establishment and first year of operation of the Court and for the following 24 months

were \$30.2 million and \$84.4 million, respectively, a total of \$114.6 million. Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/693, 13 July 2001.

ment court, while at the same time complying with the requisite standards of due process and other human rights. At a meeting on 14 June, “the Secretariat presented to the group of interested States revised budget estimates amounting approximately to \$57 million for the first three years of operation of the Court, with \$6.5 million for the first year”.<sup>57</sup> The Secretary-General stated that the revised budget estimates reflect “a scaled down operation of the Special Court, while maintaining its nature and *sui generis* character, international standards of justice and the applicable law”.<sup>58</sup> However, even these reduced estimates could not be met: as of 6 July 2001, the Secretary-General had received pledges of only \$15 million. He noted: “Very limited contributions of personnel have been offered,”<sup>59</sup> although one State had offered some furniture. Despite deciding to press ahead with the creation of the Court, his misgivings about the difficulties of running a court on the basis of voluntary contributions had not been entirely assuaged, and he reserved “the right to revert to the Council at any time in the course of the operation of the Special Court and ask it to reconsider alternative means of financing the Court”.<sup>60</sup>

As the Secretary-General’s determined efforts to secure a more stable financial basis for the Court’s existence than the voluntary contributions that the Security Council insisted on have failed, the Special Court will be in a far more precarious financial position than the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which are funded directly out of the UN budget, and which demonstrate that international criminal justice, to be credible and effective, carries a very hefty price tag.<sup>61</sup> It is not clear why the Security Council considers that it will be significantly cheaper doing international judicial business in Freetown than in The Hague or Arusha.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> The ICTY’s budget, for example, has risen steadily from \$276,000 in 1993 to \$96,443,900 in 2001. Source: ICTY Key Figures, 9 August 2001. <<http://www.un.org/icty/glance/keyfig-e.htm>>.

### Conclusions

The Special Court for Sierra Leone has its work cut out for it. It is to deliver justice and assist reconciliation in a country that has been traumatized beyond comprehension and remains highly volatile. Its situation in the territorial State and its mixed national/international nature has some benefits in terms of its greater relevance for the population, whereas the siting of the ICTY and ICTR outside the former Yugoslavia and Rwanda has contributed to their apparent remoteness from the affected populations. However, security reasons largely determined the decision to situate the ICTY in The Hague and the ICTR in Arusha, and the security situation remains equally grave in Sierra Leone.

The Special Court faces a peculiar problem in that, unlike the ICTY and ICTR, there are many potential defendants awaiting it in custody. Fair and speedy trials are a requisite of international justice, yet with but a single trial chamber and very few resources, it is hard to see how it will be able to deliver either. Criticisms of the Special Court extend not only to its underfunding and undersizing but also to the serious deficiencies and gaps in its Statute. For example, unlike the Rome Statute, which criminalizes all recruitment of children under 15, the Special Court will have jurisdiction only over those who recruited children under 15 by means of force or abduction. This is a particularly unfortunate omission, given the reality of the war in Sierra Leone, and is at odds with the new international standard established in the Optional Protocol to the Convention on the Rights of the Child, which bans the compulsory recruitment of children under the age of 18 years.<sup>62</sup> The Statute does not include the crime of slavery as a war crime. Nor is genocide included. While the Secretary-General said that there was no evidence that genocide had been committed,<sup>63</sup> Amnesty International noted that “this is a decision for an independent Prosecutor to make on the basis of the evidence presented to him

<sup>62</sup> Art. 2.

<sup>63</sup> UN Doc. S/2000/915, para. 13.

or her, and is not a decision that should be made when drafting the Statute”.<sup>64</sup>

Furthermore, the provisions on crimes against humanity and war crimes are far less detailed than in the ICC Statute, which should now be considered as the international gold standard, rather than the ICTY and ICTR Statutes which were drafted before it. The Special Court notably has jurisdiction only over crimes committed in non-international armed conflicts. This means that it will not be able to examine the extent to which the RUF had outside assistance, particularly from Liberia, and whether this was sufficient to internationalize the conflict. As a result, the conflict in Sierra Leone will be treated in isolation, rather than as part of a regional conflict, and its root causes will not be properly or fully addressed.

A major failing of the draft Statute is the absence of provisions relating to reparations for victims and their participation in the criminal proceedings. This represents a major backtracking from the relatively progressive provisions of the ICC Statute. Another significant limitation is the absence of Chapter VII powers obliging all States to cooperate with it. The Special Court's inadequate funding will affect every part of its operations, but most seriously its capacity to investigate and prosecute and mount fair trials. The lesson of the *ad hoc* Tribunals is that it costs several million dollars to prosecute and defend an individual case.

It may be too early to write off the Special Court, before it has even commenced its work, yet it seems reckless to hail the dawn of a new chapter in international criminal justice and wonder about what interesting new legal developments this exercise may bring without sounding a note of caution. Recent years have shown that international criminal justice is indeed possible, if enormously challenging. Even in the best of circumstances it disappoints expectations, but its validity and efficacy have been proven. The *ad hoc* Tribunals repre-

<sup>64</sup> *Sierra Leone: Recommendations on the Draft Statute of the Special Court*, Amnesty International, AFR 51/083/2000, 14 November 2000.

sent high-end justice; East Timor's Special Panels and now the Special Court for Sierra Leone are the low-end of the scale. It may be too early to properly critique these different manifestations of *ad hoc* justice, given that they are still evolving, and unfair to compare them, given the specificity of their respective jurisdictions, yet one thing already seems clear: cut-price and shoddy attempts at international criminal justice run a huge risk not only of discrediting the idea of justice itself but of further alienating the affected populations. The experiences of the *ad hoc* Tribunals have shown that even copious resources are no guarantee of success, and do not necessarily ensure the ultimate legitimacy of the institution and its proceedings, in particular in the affected territories. But adequate resources are surely the least of what is required.

As the Special Court gets running, it will no doubt quickly become clear that it cannot function on its current budget and at its envisaged size. More funds will have to be found, if the Court is not to be remembered primarily for its contribution to the regression of human rights. For too long, Sierra Leone has been short-changed. An opportunity has now emerged for the international community to finally redeem itself, but it will require putting the hand deeper into the pocket and facing up to the tangibility of international criminal justice.



## Résumé

### **Le Tribunal spécial pour la Sierra Leone: une instance aux moyens très limités**

par AVRIL McDONALD

*Par la résolution 1315 du 14 août 2000, le Conseil de sécurité des Nations Unies a demandé au Secrétaire général de négocier avec le gouvernement de la Sierra Leone un accord portant création d'un tribunal spécial chargé de juger les atrocités commises sur le territoire de cet État meurtri par plusieurs années de guerre civile. L'accord a été conclu en février 2001. Le Tribunal spécial sera notamment compétent pour poursuivre les crimes contre l'humanité, les crimes de guerre et les autres violations graves du droit international humanitaire commis au cours de cette époque. L'auteur examine en détail le statut du Tribunal spécial, qui s'inspire d'ailleurs des statuts élaborés pour la Cour pénale internationale et les deux tribunaux ad hoc. En conclusion, l'auteur constate avec amertume que les moyens matériels mis à la disposition du Tribunal spécial pour la Sierra Leone ne suffiront jamais pour instaurer une justice adéquate et performante, condition sine qua non d'un retour à la paix en Sierra Leone.*

