

**ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES
THE UNITED NATIONS' SPECIAL COURT FOR SIERRA LEONE**

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I. BACKGROUND

Widespread and horrendous violations of human rights¹ and humanitarian law have characterised the brutal ten-year civil war in Sierra Leone. Even though the Revolutionary United Front (RUF) in Sierra Leone was mainly responsible for the systematic and widespread abuses throughout this period, other parties were not blameless.² The Armed Forces Revolutionary Council (AFRC),³ former soldiers of the Sierra Leone Army (ex-SLA),⁴ members of the Civil Defences Forces

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¹ For more information see generally Human Rights Watch, "Sierra Leone – Sowing terror", July 1998, 10:3(A) *Atrocities against civilians in Sierra Leone* at <www.hrw.org/reports98/sierra/> especially "Sierra Leone: Human rights abuses in a war against civilians", 13 September 1995, *AI Index: AFR 5/05/95*; "Sierra Leone: A disastrous set back for human rights", 20 October 1997 (*AI Index: AFR 51/2/98*); "Sierra Leone: Recommendations to the International Contact Group on Sierra Leone", New York, 19 April 1999, *AI Index: AFR 51/05/99*; Amnesty International Report 2000, *AI Index: POL 10/01/00*. For the key United Nations documents, refer UN Security Council, "Sierra Leone and Liberia" at <www.global.policyorg/security/issues/slindyex.htm> (visited December 2001).

² On 23 March 1991, Foday Saybana Sankoh (ex-army corporal who had served time for treason) led RUF forces into Sierra Leone from neighbouring Liberia and tried to overthrow the one-party rule there by the All Peoples Congress Party (APC). Rt Major-General Joseph Saidu Momoh had led the APC then. However, RUF's motives were questionable and it acted under the pretext of ridding corruption, misrule and one-party statism in Sierra Leone. Later, 26-year old Captain Valentine Esegrobo Melvin Strasser and others overthrew President Momoh's government in April 1992: *Federation of American Scientists*, 27 May 2000, "Sierra Leone" at <www.fas.org/man/dod-101/ops/war/sierra_leone.htm>.

³ This was the military junta formed in May 1991 after President Ahmad Tejan Kabbah's democratically elected government was removed from power: UN Security Council, "Sierra Leone and Liberia" at <www.global.policyorg/security/issues/slindx.htm> (visited December 2001).

⁴ When President Kabbah returned to power in March 1998, he disbanded the army. Some former soldiers retreated into the jungle and began a brutality campaign against innocent and unarmed civilians. In January 1999, this group (together with AFRC and

(CDF)⁵ and soldiers from the Economic Community of West African States Monitoring Group (ECOMOG)⁶ were also alleged to have committed gross human rights abuses, mainly against innocent and unarmed civilians.

In March 1996, Sierra Leone returned to civilian rule after its first democratic elections in almost three decades. President Ahmad Tejan-Kabbah's government negotiated a peace agreement with RUF on 30 November 1996 in Ivory Coast, commonly known as the Abidjan Peace Agreement.⁷ The aim was an immediate ceasefire, demobilisation and acceptance of RUF as a political party. However, the Agreement failed soon afterwards. RUF continued its attacks and the brutality escalated. In May 1997 a military coup ousted the Kabbah government and AFRC invited RUF to join it in governing the country but this step did not bring about the intended peace.⁸ Several months of chaos, barbarity, murder and civil disobedience ensued.⁹ In February 1998, ECOMOG (assisted by British-based Sandline mercenaries and

RUF elements) invaded the capital, Freetown, and committed unspeakable atrocities: Khobe, "The evolution and conduct of ECOMOG operations in West Africa" in Malan M (editor), *Monograph 44 – Boundaries of Peace Support Operations: The African Dimension* (February 2000, Institute for Security Studies, Pretoria). See also generally Human Rights Watch, "Sierra Leone – Sowing terror", July 1998, 10:3(A) *Atrocities against civilians in Sierra Leone* at <www.hrw.org/reports98/sierra/>.

⁵ The government formed and supported civil militia groups to fight RUF. They were from different tribes such as the Kamajors from the Mende tribe, the Tamaboros from the Koranko tribe and the Kapras from the Temne tribe: Kemokai, "The security issue", *Sulima Internet* at <www.sulima.com/pubs/kamajors.html> (visited December 2001).

⁶ This was the peacekeeping force of the Economic Community of West African States (ECOWAS) consisting of Nigerian soldiers mainly. Originally deployed to Liberia to monitor a ceasefire agreement, it was later sent to Sierra Leone after RUF invaded Sierra Leone in March 1991. It fought RUF and AFRC alongside the army: see generally Dowyaro, "ECOMOG operations in West Africa: Principles and praxis" in *Monograph No 44, Institute for Security Studies, Pretoria* at <www.iss.co.za/Pubs/Monographs/No44/ECOMOGPraxis.html> (visited December 2001).

⁷ See "Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL)" at <www.sierra-leone.org/abidjanaccord.html> (visited December 2001).

⁸ US Committee for Refugees, "Coup in Sierra Leone culminates month of insecurity", *News and Resources*, 27 May 1997 at <www.refugees.org/news/press_releases/1997/052797.htm>

⁹ *Ibid.*

CDF) forced AFRC from power.¹⁰ The following month, President Kabbah returned to Sierra Leone from Guinea (where he had sought refuge) for a ceremonial reinstatement.¹¹

In January 1999, elements of AFRC, ex-SLA and RUF attacked the capital, Freetown, and occupied the central and eastern parts for almost three weeks until ECOMOG troops removed them. The egregious abuses of human rights during this period¹² shocked the international community's conscience and the United Nations finally focused its attention on this State.¹³ Persuaded by military weakness and the blandishments of Western governments, the government of Sierra Leone (GOSL) concluded the Lomé Peace Agreement with RUF.¹⁴ *Inter alia*, Article IX of the Agreement granted amnesty to all collaborators and combatants for activities undertaken in pursuit of their objectives throughout the conflict. Further, the Agreement granted Foday Sankoh the protocol rank of Vice-President and leadership of a government commission that controlled the State's mineral wealth (including diamonds). A United Nations peacekeeping force, part of the United Nations Mission in Sierra Leone (UNAMSIL), was formed and mandated with peacekeeping duties from ECOMOG.

The Lomé Peace Agreement's amnesty and pardon provisions in Article IX were widely condemned by human rights and other

¹⁰ Amnesty, "Killing for gain – The Sierra Leone affair", Amnesty News at <www.amnesty.org.uk/news/mag/jul98/killinghtm> (visited December 2001);

¹¹ CNN Interactive, "Jubilant crowds greet returning Sierra Leone leader", World News, 10 March 1998 at <www.cnn.com/WORLD/9803/10/sierra.leone/>.

¹² During the fighting, there were innumerable killings, amputations, rapes of women and girls, child abductions and the burning of houses and vehicles. For more information see generally Human Rights Watch, "Getting away with murder, mutilation and rape – New testimony from Sierra Leone", July 1999, 11:3(A) Human Rights Watch Report.

¹³ For example, the United Nations High Commissioner for Human Rights, Mrs Mary Robinson, described the human rights situation as worse than in Kosovo: BBC News, "Sierra Leone abuses worse than Kosovo", BBC News Online, 25 June 1999 at <http://news.bbc.co.uk/hi/english/world/africa/newsid_377000/377541.stm>; BBC News, "Sierra Leone and Britain: Key dates", BBC News Online, 9 February 1999 at <http://news6.thdo.bbc.co.uk/hi/english/special_report/19_99/sierra_leone/newsid_>.

¹⁴ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed in Lomé, Togo on 7 July 1999 at <www.sierra-leone.org/lome.accord>.

groups.¹⁵ Ambassador Francis G Okelo, Special Representative of the Secretary-General of the United Nations, signed the Agreement on behalf of the United Nations but attached a disclaimer regarding these provisions. The disclaimer provided that international crimes (such as genocide, crimes against humanity and war crimes) and other serious violations of international humanitarian law were to be excluded from the interpretation of Article IX. This was in keeping with international law that did not allow amnesty for crimes of this nature.¹⁶

Although the amnesty and pardon provisions amounted to impunity and injustice and were perceived to have a negative effect on the future prospects of peace in Sierra Leone, the Agreement was subsequently ratified by the Sierra Leone parliament and enacted into law as the 2000 Lomé Peace Act. This was despite the amnesty and pardon provisions being inconsistent with Section 28(1) of the 1991 Sierra Leone Constitution,¹⁷ deemed the supreme law of the land.

Notwithstanding the Lomé Peace Agreement, in May 2000 RUF attacked UNAMSIL peacekeeping forces and took more than 500 hostages.¹⁸ A subsequent public demonstration outside Foday Sankoh's house led to his bodyguards killing 17 civilians, the resumption of war and his own arrest. Following this, British troops intervened that demonstrated international resolve to keep RUF from assuming

¹⁵ In a letter to the United Nations Secretary-General, Human Rights Watch condemned the amnesty and pardon provisions and called for the punishment of the perpetrators of human rights violations: Amnesty International Press Release, "A peace agreement but no justice", 9 July 1999 at <<http://www.hrw.org/campaigns/sierra/anna2ltr.htm>>. The Sierra Leone Bar Association condemned the provisions and called for an independent inquiry into the gross human rights abuses committed in Sierra Leone since 1991. Further, it urged the government to ratify the 1998 Rome Statute of the International Criminal Court, referring to the urgent need to bring the perpetrators to justice: News Archives, 31 May 2000 at <www.sierra-leone.org/slnews0500.html>.

¹⁶ Amnesty International Report, "Sierra Leone: Ending impunity – An opportunity not to be missed", AFR 51/60/00, 26 July 2000 at 3.

¹⁷ If individuals allege that their constitutional rights are infringed, Section 28(1) of the Constitution gives them the right to apply by motion to the Sierra Leone Supreme Court for redress. However, the amnesty and pardon provisions of the Lomé Peace Agreement, an inferior law to the Constitution, bar them from enjoying this right: see Article IX.

¹⁸ Human Rights Watch, "Sierra Leone: Getting away with murder, mutilation, and rape" at <www.hrw.org/reports/world/sierraleone-pubs.php> (visited August 2001).

power.¹⁹ In November 2000, a ceasefire paved the way for peace talks to consolidate and observe the Agreement during the first half of 2001, thereby ending the hostilities.²⁰

These events forced GOSL to reconsider the Lomé Peace Agreement and request assistance from the United Nations Security Council to establish an appropriate judicial forum to try and punish those responsible for the gravest atrocities. As a result, the Security Council passed resolution 1315 (2000) requesting the Secretary-General to pursue negotiations with GOSL to create an independent 'Special Court'. Following successful negotiations, the Secretary-General submitted to the Security Council a Report dated 4 October 2000 that incorporated an agreement between the United Nations and GOSL, including a proposed Statute for the Special Court.²¹ Discussions and negotiation on this draft Statute is still ongoing and GOSL has yet to sign the agreement.

II. THE PROPOSED SPECIAL COURT – NATURE AND STRUCTURE

Unlike the International Criminal Tribunal for Yugoslavia (ICTY)²² and the International Criminal Tribunal for Rwanda (ICTR),²³ both established by resolutions of the Security Council acting under Chapter VII of the United Nations Charter, the proposed Special Court is treaty-based.²⁴ There are a number of reasons for this.

¹⁹ CNN News, "Sankoh capture complicates position of UN hostages in Sierra Leone – British call to expand UN force", 17 May 2000, CNN.com at <www.cnn.com/2000/WORLD/africa/05/17/sleone.sankoh>.

²⁰ "UNAMIL chairs peace talks between Sierra Leone government and the RUF" at <www.un.org/av/radio/news/2001/may/01051500.htm> (visited December 2001).

²¹ See United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.

²² Security Council Resolution 827, 3217th Meeting, 25 May 1993, UN Doc S/RES/827 (1993).

²³ Security Council Resolution 955, 3453rd Meeting, 8 November 1994, UN Doc S/RES/955 (1994).

²⁴ See Article 9 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, which is annexed to United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.

First, the legitimacy and legality of ICTY and ICTR have been controversial and these topics continue to be passionately debated and questioned.²⁵ Commentators have argued that the Security Council had arbitrarily extended its powers when it created these tribunals.²⁶ To avoid a similar controversy, the Special Court was proposed.²⁷

Secondly, it is hardly questionable that under contemporary international law and in the light of the pro sovereignty-based attitude of States, a treaty-based body enjoying the consent of the government concerned would raise far less, if any, legal concerns. Further, such consent would facilitate the Court and its processes and contribute to its effective functioning well into the future. Thus, the usual problems resulting from the lack of co-operation from the government concerned – as experienced by ICTY, for example²⁸ – would be avoided.²⁹ It was the International Military Tribunal at Nuremberg established after World War II, the very root of modern international criminal jurisdiction, which paved the way for treaty-based bodies. In fact, negotiations are presently under way to establish a somewhat similar court for Cambodia to try and punish persons responsible for atrocities committed under the Pol Pot regime.³⁰

The structure of the proposed Special Court incorporates such unique features that it heralds a new epoch in the history of international

²⁵ See Murray, "The objections to the transfer of criminal jurisdiction to the UN Tribunal", (1995) 46 *International and Comparative Law Quarterly* 434, 435-436; Wembou, "The International Criminal Tribunal for Rwanda – Its role in the African context" (31 December 1997) 321 *International Review of the Red Cross* 685 at <www.icrc.org>.

²⁶ *Ibid.*

²⁷ See United Nations Secretary-General, "Report on the Establishment of a Special Court for Sierra Leone", 4 October 2000, UN Doc S/2000/915; Scharf, "The Special Court for Sierra Leone", *ASIL Insights*, October 2000 at <www.asil.org/insights/insigh53.htm>.

²⁸ See Peter, "The International Criminal Tribunal for Rwanda: Bringing the killers to book", 31 December 1997, 321 *International Review of the Red Cross* 694-704; Dubois, "Rwanda's national criminal courts and the international tribunal", 31 December 1997, 321 *International Review of the Red Cross* 717-731.

²⁹ However, as seen below, this feature could become a major shortcoming of the Special Court.

³⁰ See UN Press Release, 6 July 2000; United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915 para 9.

judicial bodies. One such feature is its mixed composition³¹ of both international and Sierra Leonean judges and prosecutors,³² resulting in a dual dependence – on both the United Nations and GOSL. Indeed, this seems to be a novel way to dispense justice and it gives the Court a specific Sierra Leonean character, something that the international community failed to achieve with ICTR.

The Special Court is a self-contained organ³³ with two Trial Chambers, an Appeals Chamber, an independent Prosecutor and a Registry. These features add to the Sierra Leonean, and interdependent, nature of the Court, composed of eleven judges appointed for four-year terms.³⁴ The Trial Chambers are composed of three judges each, with GOSL appointing one of them.³⁵ GOSL need not appoint a national to this position and if it so desired may appoint a foreign national. The United Nations Secretary-General appoints the other judges with the support of the international community, particularly the Commonwealth and ECOWAS.³⁶ As an important safeguard, the Prosecutor will be an international functionary³⁷ whereas the Deputy Prosecutor will be a Sierra Leonean national.³⁸ The Secretary-General appoints the Registrar who will remain a United Nations staff member.³⁹ In the light of these unusual features, it is no wonder that the Secretary-General's Report classified the Special Court as a "*sui generis* court".⁴⁰

ICTR's rules of procedure and evidence will apply *mutatis mutandis* to the Special Court's proceedings.⁴¹ However, the judges will have the power to amend or adopt additional rules if a specific situation is not provided for.⁴² It is envisaged that the Court's seat will be in Sierra Leone with provisions made for a third State if Sierra Leone's security

³¹ See Agreement on the Special Court Articles 2-3.

³² Ibid Article 2(1)(b).

³³ Ibid Articles 11-12 and 15.

³⁴ Ibid Article 2(2).

³⁵ Ibid Article 2(2)(A).

³⁶ Ibid Article 2(2)(C).

³⁷ Ibid Article 3(1).

³⁸ Ibid Article 3(2).

³⁹ Ibid Article 4(1)-(2).

⁴⁰ United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915 para 9.

⁴¹ Statute of the Special Court Article 14.

⁴² Ibid.

situation deteriorates. However, trials held in Sierra Leone seem the best way to ensure that justice is manifestly seen by the Sierra Leonean populace to be done. Further, this would be more convenient for the witnesses who have to testify in the proceedings, visits *locus in quo* by the Court and evidence gathering by the Prosecutor.

III. JURISDICTION

(a) Subject Matter

The Special Court's jurisdiction covers the most egregious practices in Sierra Leone, such as mass killings, extra judicial executions and the widespread mutilation and amputation of body parts.⁴³ It also includes sexual violence against girls and women, abductions and forced recruitment of children, looting of property and the burning of dwellings and villages.⁴⁴ These are all existing crimes against humanity and violations of the Geneva Conventions and Additional Protocol II,⁴⁵ serious violations against international humanitarian law⁴⁶ and crimes under Sierra Leonean law.⁴⁷

The inclusion of domestic crimes in the Statute of the Special Court represents another new and unique feature. The rationale for this seems to be threefold:

1. From the viewpoint of Sierra Leone and its criminal jurisdiction its sovereignty becomes less restricted this way.
2. From the viewpoint of the international community these crimes, owing to their large-scale and grave features, are worthy of inclusion in the Statute and therefore of prosecution by an international (or semi-international) court.
3. It is the common goal of Sierra Leone and the United Nations that the Special Court be more specific, both State-wise and crisis-wise.

⁴³ Scharf, "The Special Court for Sierra Leone", ASIL Insights, October 2000 at <www.asil.org/insights/insigh53.htm>; Human Rights Watch, "Sierra Leone: Getting away with murder, mutilation, and rape" at <www.hrw.org/reports/world/sierraleone-pubs.php> (visited January 2002).

⁴⁴ Ibid.

⁴⁵ See common Article 3.

⁴⁶ Statute of the Special Court Articles 3-4.

⁴⁷ Ibid Article 5.

The Special Court has concurrent jurisdiction with, and enjoys primacy over, national courts in matters that fall under it. Since it does not have a general jurisdiction, its effectiveness is limited to this extent. The Sierra Leone conflict is also essentially internal and not international in nature, a situation similar to the Rwandan crisis. The reasons for the limitation could be the historically negative experience of international criminal tribunals, generally speaking, and the treaty-based nature of the Special Court. The Court lacks *erga omnes* character, including the power to request the surrender of an accused from a third State, thus resulting in a serious defect.⁴⁸ For example, since certain individuals who were accused of committing serious violations against human rights and humanitarian law had fled Sierra Leone and sought refuge in neighbouring States, it would be a fair summation that some of them would never be brought to justice.

The issue of sentencing raises another serious problem because the Special Court can sentence perpetrators to imprisonment only.⁴⁹ On the other hand, if Sierra Leone's domestic courts are to try and punish such perpetrators they may be sentenced to death.⁵⁰ This will produce an anomalous result because persons responsible for the most heinous of crimes when tried by the Special Court will walk away with maximum life terms whereas persons tried by domestic courts may be sentenced to death for lesser crimes possibly. If so, this will impact negatively on justice where two different forms of sentencing are possible in a State for similar offences. One solution is for Sierra Leone's parliament to outlaw the death penalty as cruel and inhuman punishment.⁵¹

⁴⁸ It would be possible to remedy the defects because the Security Council, upon request, could provide the Special Court with *erga omnes* powers. Additionally, the Court would have the power to "enter into agreements with States as may be necessary for the exercise of its functions and its operation": Agreement on the Special Court Article 10(d). It could therefore, in principle, conclude extradition agreements with relevant States in accordance with the powers found in Article 10(d).

⁴⁹ Statute of the Special Court Article 22.

⁵⁰ For example, RUF leader Foday Sankoh was sentenced to death under Sierra Leone law: Judicial Diplomacy, "Sierra Leone: Creation of a Special Court for Sierra Leone", 7 December 2000 at <www.diplomatiejudiciaire.com/UK/sierraleone.htm>.

⁵¹ The above discussion brings to mind the similar effects of the proposed International Criminal Court.

Sentences handed down by the Special Court may be served in Sierra Leone⁵² or in other States⁵³ where the circumstances so require and where a prior framework agreement exists. Since it is expected that prison sentences will be mainly served in Sierra Leone, this will compound the existing problems in that State's prison system. At present, the prison conditions are in dire need of improvement and it has been reported that prisoners die *en masse* from malnutrition, illness or inadequate or non-existent medical care at present.⁵⁴ Further, it appears that only one prison is functioning more or less properly today, the central penal institution in Freetown. Even then, this prison has become dated, built by the British in the colonial days to house about 220 inmates only.⁵⁵

(b) Personal Jurisdiction

The Special Court for Sierra Leone is special in nature owing to its *ratione personae*. It has power to prosecute persons "most responsible" for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 30 November 1996.⁵⁶ This includes the political and military leadership and those in command authority. Also, by implication, the Court allows the prosecution of children aged 15-18 years⁵⁷ when the crime is alleged to

⁵² Statute of the Special Court Article 22.

⁵³ Agreement on the Special Court Article 10 endows the Special Court with a treaty-making power "to enter into agreement with States as may be necessary for the exercise of its functions and the operation of the Court".

⁵⁴ United States Department of State, Bureau of Democracy, Human Rights and Labor Sierra Leone Country Report on Human Rights Practices for 1996, 30 January 1997 at <www.usis.usemb.se/human/human96/sierrale.html>.

⁵⁵ Although the government's human rights record has improved, serious problems remain. The security forces were responsible for extrajudicial killings, beatings, arbitrary arrest and detention, and illegal searches. There were reports that police abused suspects during arrest and interrogation. Prison conditions remain life threatening, and lengthy delays in trials, prolonged pre-trial detentions, and violations of due process remain problems. Over half of the 640 persons detained at the Pademba Road prison are awaiting trial. Most abuses, including extrajudicial killings by RSLMF units, were committed chiefly in the area of armed conflict. The government has harassed, arrested, and detained journalists. Discrimination and violence against women remain widespread, as does violence against children: *ibid*.

⁵⁶ Statute of the Special Court Article 1. Note that on this date the Abidjan Peace Agreement collapsed.

⁵⁷ Statute of the Special Court Article 43.

have occurred. In contrast, the Rome Statute of the International Criminal Court (ICC) excludes children under 18 years from its jurisdiction, discussed below. Consequently, moral and legal dilemmas have been raised by the Special Court adopting this position.

Even though the conflict and the ensuing abuses started in March 1991, the Special Court's jurisdiction extends to those persons "most responsible" for the abuses from November 1996 onwards only. A reason advanced for this time limitation is to prevent the Prosecutor from being overburdened and the Special Court from being overloaded.⁵⁸ However, notwithstanding these reasons, the time limitation is a serious weakness of the Court. Before November 1996, the conflict concentrated mainly in Sierra Leone's rural areas, extending to Freetown in May 1997. As a result, such a time limitation creates the impression that the Court was established to deal with the abuses committed in Sierra Leone's capital exclusively and not in the State as a whole. Furthermore, for justice to be seen to be done, those responsible for serious crimes since the conflict started in March 1991 should be held responsible and subject to prosecution. Thus, the establishment of the Special Court should not create a situation where the persons most responsible for abuses during the conflict are able to escape prosecution based on technicalities.⁵⁹

(c) Territorial Jurisdiction

The Special Court's territorial jurisdiction embraces, but does not extend beyond, the territory of Sierra Leone.⁶⁰ Although this reflects a sound legal position, it has become another weakness of the Special Court. This is because persons who commit gross violations against Sierra Leoneans outside Sierra Leone would escape the jurisdiction of the Special Court. More specifically, it would exclude those persons who had committed relevant offences against Sierra Leoneans but in Guinea refugee camps during cross border raids.

⁵⁸ United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.

⁵⁹ Amnesty International Report, AI Index: AFR 51/007/2001, 24 September 2001 at 10.

⁶⁰ Statute of the Special Court Article 1.

(d) Temporal Jurisdiction

The Special Court's temporal jurisdiction has been left open-ended due in part to ongoing hostilities in some parts of Sierra Leone. This open-ended *ratione temporis* of the Court raises questions on its closing date.⁶¹ For example, who will determine it? When will it be determined? Will such a measure require an amendment to the Agreement on the Special Court? Bearing in mind that the Agreement is subject to the international law of treaties, the answer seems to be 'yes' to the last question.

The effects of the amnesty and pardon provisions of the 1999 Lomé Peace Agreement, now part of Sierra Leonean law, on the functioning of the Special Court may be outlined as follows. From among the crimes listed in the Court's Statute, the Court may try all those with an international character if they fall within its *ratione temporis*.⁶² However, its competence regarding domestic crimes is limited to the period that follows the Lomé amnesty.⁶³ Therefore, for domestic crimes perpetrated between 30 November 1996 and the signing of the Lomé Peace Agreement on 7 July 1999, the Special Court has no power to hear them.

IV. THE NATIONAL TRUTH AND RECONCILIATION COMMISSION

The Lomé Peace Agreement provides for the National Truth and Reconciliation Commission (TRC) to be established. Its aim is:⁶⁴

to address impunity, break the cycle of violence, provide a forum for both the victims and the perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.

⁶¹ When a similar problem surfaced recently regarding ICTY, the Security Council urged for a determination of the closing date of ICTY's temporal jurisdiction: see Security Council Resolution 1329, 4240th Meeting, 30 November 2000, UN Doc S/RES/1329 (2000) para 6.

⁶² See Article 1.

⁶³ Ibid.

⁶⁴ Lomé Peace Agreement Article XXVI(1).

The TRC deals with human rights violations from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement in 1999.⁶⁵ In 2000, GOSL enacted the Truth and Reconciliation Act thereby giving effect to the provisions of the Agreement. It is important to note that the Special Court was proposed after the Agreement provided for the establishment of the TRC. So far, great uncertainty surrounds the would-be relationship between the Special Court and TRC. Many issues need clarification, such as the timing and sequencing of both institutions and whether they should operate concurrently or consecutively. Other examples are as follows:⁶⁶

- sharing of information by the Special Court and TRC;
- witnesses' rights (including the right to silence if the answer to a question could be incriminating in nature);
- TRC's handling of information that is potentially incriminatory;
- implication for the Special Court's work if the TRC named individual perpetrators of human rights abuses who had been indicted by the Special Court; and
- implications of the different temporal jurisdictions of the Special Court (from 30 November 1996 onwards but open-ended at present) and TRC (23 March 1991-7 July 1999).

A clear relationship between the TRC and the Special Court is seen in Article 15(5) of the Statute of the Special Court. The provision states that when prosecuting juvenile offenders appropriate resort may be had to alternative truth and reconciliation mechanisms "to the extent of their availability". Thus, there is scope for juvenile offenders to be transferred from the Special Court to the TRC. This also clarifies the relationship between them for their proper functioning especially if those expected to appear before the TRC are to cooperate fully.

V. FINANCING

For the Special Court to function properly it will require adequate and appropriate financing, a very sensitive issue. If financed by the United Nations, the Court will be transformed into a *de facto* United Nations body. If financing is to come from voluntary contributions, this is an unreliable source that, in turn, will adversely hamper the Court's

⁶⁵ Ibid Article XXVI(2).

⁶⁶ Amnesty International, 24 September 2001, AI Index: AFR 51/007/2001 at 15.

effective functioning. Thus, the Security Council has recommended that the United Nations membership should provide voluntary contributions (funds, equipment and services).⁶⁷ Secretary-General Kofi Annan had estimated the Court needed about US\$57 million in funding for the first three years including about US\$16.8 million for the first year. An earlier estimate had been US\$30.3 million for the first year and US\$84.4 for the next two years.⁶⁸

From the above estimates, it appears that the establishment and proper functioning of the Special Court will depend on the willingness of the United Nations membership to contribute to its financing. If successful, it means that the United Nations and GOSL together have finally found a way to avoid transforming the Court into a *de facto* United Nations body. But at what cost? The Secretary-General's observation that "a Special Court based on voluntary contributions would be neither viable nor sustainable"⁶⁹ describes the situation aptly. It is possible that the uncertain nature of voluntary contributions could undermine the Court's effectiveness and independence and limit its ability to bring those responsible to justice. Notwithstanding, some States have begun to pledge funding which is a start and a move in the right direction.⁷⁰

VI. OTHER PROBLEMS AND FUTURE CHALLENGES

In spite of the efforts and intentions of GOSL and the international community, the Special Court continues to be fraught with problems and challenges. The treaty-based nature of the Court and its attendant advantages (discussed above) inherently carry with it great risks since it will require GOSL's full cooperation and support to function effectively. Since the Special Court does not have *erga omnes* character, the risk is even higher and any undesirable change of government⁷¹ may potentially result in the Court's failure.

⁶⁷ United Nations Security Council Resolution 1315 (2000).

⁶⁸ UN News, "Annan scales back requests to fund Sierra Leone special court", 16 July 2001 at <www.un.org/esa/africa/UNNewsOnAfrica/annan_scales_back_requests_to_fund_u.htm>; see also Scharf, "The Special Court for Sierra Leone", ASIL Insights, October 2000 at <www.asil.org/insights/insigh53.htm>.

⁶⁹ See United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915 para 70.

⁷⁰ Scharf, "The Special Court for Sierra Leone", ASIL Insights, October 2000 at <www.asil.org/insights/insigh53.htm>.

⁷¹ Sierra Leoneans will be voting in presidential and parliamentary elections in May

Further, the Special Court's position on the prosecution of children aged 15-18 years when the offence was committed is of concern. The position is unlike that adopted under the Rome Statute establishing the ICC, which excludes children under 18 years.⁷² This jurisdiction of the Special Court raises a moral dilemma and children's rights groups have opposed it.⁷³ It has become a particularly significant issue in the Sierra Leone conflict because thousands of children were abducted and forcefully recruited⁷⁴ by the RUF, AFRC and other groups to join their ranks.⁷⁵

It has been observed that the Special Court should not try children but instead concentrate on the prosecution of those who recruited them as soldiers.⁷⁶ This is the policy adopted under the Rome Statute that concentrates on the prosecution of the most heinous of alleged criminals, which seems to be a more appropriate position. Nevertheless, if children are to be brought before the Special Court either as accused or witness, they should be given special protection and treatment in accordance with the principles of juvenile and

2002. However, if a political party sympathetic to the perpetrators of the abuses gained power, the whole process to establish the Special Court may come to an end.

⁷² The Secretary-General has argued that there is no international standard that establishes the minimum age of criminal responsibility. The Rome Statute of the ICC excluded from the Court's jurisdiction persons under 18 years. The Statute's travaux preparatoire shows the drafters did not intend to establish, in general, a minimum age of criminal responsibility: see generally United Nations Security Council, "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone", 4 October 2000, UN Doc S/2000/915. Premised on the complementarity notion between national courts and the ICC, it is arguable that the intention is that persons under 18 years accused of crimes for which the ICC has jurisdiction will be brought before their national courts.

⁷³ Scharf, "The Special Court for Sierra Leone", ASIL Insights, October 2000 at <www.asil.org/insights/insigh53.htm>.

⁷⁴ Most of the children were transformed from victims initially to perpetrators of crimes. Though feared for their brutality now, they experienced psychological, physical and sexual abuse, duress, abduction from their families, forcible recruitment, all types of slavery and training under the influence of drugs: Human Rights Watch, "Sierra Leone: Human Rights Development", 1999 at <www.hrw.org/worldreport99/africa/sierraleone.html>.

⁷⁵ The Sierra Leone army and CDF had also actively recruited large numbers of children during the conflict: *ibid.*

⁷⁶ *Ibid.*

restorative justice.⁷⁷ Be that as it may, the Members of the United Nations Security Council have adopted a position, contrary to the Secretary-General's, advocating that children be brought before the proposed Truth and Reconciliation Commission instead of the Special Court.⁷⁸

Another challenge for the Court is its inability to request the surrender of an accused from a third State.⁷⁹ Although it is well known that certain perpetrators of serious abuses had fled to neighbouring States,⁸⁰ this lack of extradition powers is of concern. Thus, it is likely that some who were "most responsible" for serious abuses and who had fled Sierra Leone may never be brought to justice under the current framework. The litmus test for the Special Court is whether it is able to prosecute alleged perpetrators in high government positions. However, once again, it is highly unlikely that such persons will be tried. In addition, it is also unlikely that ECOMOG soldiers who had committed serious abuses in Sierra Leone⁸¹ will be prosecuted.

⁷⁷ The issue of trials of juvenile offenders before the Special Court had been advocated: United Nations, "Council agrees on a war crimes tribunal for Sierra Leone", UN Press Release, 14 August 2000, SC/6910; Agence France Presse (AFP), "UN says Sierra Leone war crimes court should be able to try children", 5 October 2000 at <www.globalpolicy.org/security/issues/sierra/court/001005.af.htm>.

⁷⁸ The Members of the Security Council's position is that "it is extremely unlikely that juvenile offenders will in fact come before the special court and that other institutions, such as the Truth and Reconciliation Commission, are better suited to address cases involving juveniles": Mahbubani, "Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General", 31 January 2001, United Nations Security Council, S/2001/95. See also Smith, "A response to 'a Special Court' for Sierra Leone's war crimes", Global Policy Forum, 15 August 2001 at <www.globalpolicy.org/security/issues/sierra/court/2001/critique.htm>.

⁷⁹ United Nations Secretary-General, Report on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915.

⁸⁰ For example, General Sam Bockarie alias 'Mosquito', (notorious former RUF Field Commander) is presently residing in Liberia. Further, most (if not all) of the Nigerian soldiers who committed human rights abuses in Sierra Leone have returned home: Sierra Leone News, "Tremors in the RUF", Focus on Sierra Leone, 19 December 1999 at <www.focus-on-sierra-leone.co.uk/>.

⁸¹ Responding to the Secretary-General's Report on the Establishment of the Special Court, the Security Council proposed amendments to the draft Statute of the Special Court. This would extend jurisdiction to crimes that peacekeeping or related personnel committed where the sending State was unwilling or unable to investigate or prosecute. This amendment has yet to be effected.

Thus, the Special Court's independence may be doubtful for two main reasons. First, it is foreseeable that if Sierra Leonean authorities were permitted to play a dominant role in the Special Court this could lead to the process' political manipulation and result in biased prosecutions and inadequate protection for persons standing trial before this tribunal. Whether this would occur depends on the independence and integrity of the judges appointed by the United Nations. Secondly, in a similar fashion, the *mutatis mutandis* application of the rules of procedure and evidence of ICTR and the Special Court's dual dependence on the United Nations and GOSL could likely affect its independence as well.

VII. CONCLUDING REMARKS

The importance of establishing the Special Court is unquestionable and Sierra Leoneans and the international community are anxious to see a viable and effective court functioning as soon as possible. Its specific nature and independence, including GOSL's acceptance and support, are the key factors required for the effectiveness of this Court. Most of the Court's features manifest the effort to make the requirements of specificity, independence and recognition consistent with one another. As a result, the Court has become an original, *sui generis* court with a mixed composition and mixed jurisdiction.

To make the Special Court more crisis-specific, the drafters of the enabling legislation included Sierra Leonean crimes within its scope and confronted the moral dilemma by deciding to prosecute children aged 15-18 years. To ensure its independence, the Court's financing would be based upon voluntary contributions. Finally, in an attempt to establish a court that was unquestionably recognised by GOSL, a treaty-based, self-contained and mixed composition was envisaged and acted upon. If all the expectations were fulfilled, the Court would be a real success.

Nonetheless, there are reasons why the Statute of the Special Court should be reconsidered or reviewed. They are:

1. The Court should be vested with extradition powers in order to have the capacity to bring perpetrators to justice.
2. The international community and the Sierra Leonean government should consider excluding children from the Court's

- jurisdiction especially in the face of the Security Council's position.
3. A closing date for the temporal jurisdiction of the Court should be established.
 4. Most importantly, the Special Court should be (re-)designed to prevent the Sierra Leone government from manipulating the process politically. For example, an individual or a party to the conflict should not be singled out for prosecution to the exclusion of others.

Additionally, Sierra Leone should consider abolishing the death penalty, a punishment that is generally accepted as contrary to international human rights law. This would bring its law in keeping with international standards and avoid excessive and cruel punishment for serious violations of human rights and of humanitarian law.

Finally, it is hoped that the efforts of the international community and the Sierra Leone government in establishing this Special Court would succeed, particularly if the growing culture of impunity were to cease. The efforts are crucial because:

1. the arrest, detention and trial of "persons most responsible" would alleviate the desire to exact revenge on suspects;
2. the process of voluntary repatriation of Sierra Leonean refugees (many of whom are victims of violations) would be accelerated if they can be assured of justice; and
3. the punishment of individuals responsible for such opprobrious acts would help to deter potential similar violations by others and accelerate the process of peace and reconciliation.