

# THE SPECIAL COURT FOR SIERRA LEONE: ESTABLISHING A NEW APPROACH TO INTERNATIONAL CRIMINAL JUSTICE

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## I. INTRODUCTION

The proposed Special Court for Sierra Leone is sometimes referred to as a national/international hybrid entity. There are several factors that may lead to this conclusion. Unlike the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which were established by

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the United Nations Security Council as United Nations subsidiary bodies, the legal basis for the Special Court for Sierra Leone is a treaty between the United Nations and Sierra Leone. The substantive criminal law to be applied by the Court, while codified in the treaty, was derived from both international law and domestic law. Finally, the personnel of the Court will also be mixed, employing both international and national staff.

## II. THE CONTEXT: THE CONFLICT IN SIERRA LEONE

Over the course of the past decade a very brutal civil war raged in Sierra Leone. The conflict was marked by the use of child soldiers and the severance of limbs of civilians as part of a strategy of terror. An estimated two-thirds of the population was displaced. Six hundred thousand Sierra Leoneans fled to neighboring countries.<sup>1</sup>

In the Summer of 1999, the Government of Sierra Leone and the rebels, represented by the Revolutionary United Front (RUF), concluded the Lomé Agreement, one of a series of failed peace agreements. Under that agreement, the RUF was brought into the government, receiving cabinet and ambassadorial posts as well as the leadership of certain public sector agencies. The agreement also provided for the establishment of a Truth and Reconciliation Commission (TRC) to be established under the laws of Sierra Leone. Finally, the Government agreed to a blanket amnesty for crimes committed during the war. In adding his signature to the agreement, the United Nations envoy indicated that the amnesty would not bar prosecution for crimes under international law.<sup>2</sup> The Lomé Agreement rapidly collapsed and fighting resumed.

## III. THE GENESIS OF THE SPECIAL COURT

Deeply concerned “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,” the Security Council took up the issue of an international criminal justice mechanism for Sierra Leone in August 2000. In its Resolution 1315, the Council called upon the United Nations Secretary General to negotiate an agreement with the Government of Sierra Leone to create “an independent special court” consistent with that resolution.

Resolution 1315 contained several significant features. First, the resolution stated that the Council deemed the situation in Sierra Leone to

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1. INT’L CRISIS GROUP, AFR. REPORT NO. 28, *SIERRA LEONE: TIME FOR A NEW MILITARY AND POLITICAL STRATEGY* (2001).

2. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 23, S/2000/915, Oct. 4, 2000.

constitute a threat to international peace and security in the region. Thus, while it did not proceed to invoke its Chapter VII power, the Council indicated that the situation would warrant the use of Chapter VII power if necessary. Second, the Council recalled that the amnesty provision of the Lomé Agreement was inapplicable to crimes under international law.<sup>3</sup> Third, the Council recommended that the “subject matter jurisdiction of the special court should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.” Fourth, it recommended that the special court should have “personal jurisdiction over persons who bear the greatest responsibility for the commission of” these crimes. Finally, the Council indicated that the court would be funded through voluntary (as opposed to assessed) contributions from states.

#### IV. DIFFERENCES BETWEEN THE SPECIAL COURT AND THE ICTY / ICTR

##### A. *Legal Basis*

The ICTY and ICTR were established by the Security Council acting under Chapter VII of the United Nations Charter.<sup>4</sup> Having a Chapter VII resolution as their legal basis, all United Nations member states are obliged to cooperate with those tribunals. As with all obligations arising under the Charter, the obligation to cooperate with the tribunals is superior to other international obligations.<sup>5</sup>

The legal basis for the Special Court will be a treaty between the United Nations and Sierra Leone. Thus, obligations arising under that treaty will bind only the United Nations, as a legal entity, and Sierra Leone.<sup>6</sup> This issue may become significant should alleged perpetrators of crimes within the jurisdiction of the Special Court flee from the territory of Sierra Leone.

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3. This is reflected in the Draft Statute of the Court. Article 10 of the Draft Statute provides that “[a]n 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.”

4. See U.N. SCOR, 3217th mtg., U.N.. Doc. S/RES/827 (1993). U.N. SCOR, 3453rd mtg., U.N.. Doc. S/RES/955 (1994).

5. U.N. CHARTER, art. 103.

6. Vienna Convention on the Law of Treaties, May 3, 1969, art. 34, 8 I.L.M. 679 (1969). See also Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 34 & 74(3), March 21, 1986, 25 I.L.M. 543.

### B. Personnel

Prosecutors and judges at the ICTY and ICTR are all international staff. The personnel of the Special Court will be mixed. The Special Court will be composed of one Appeals Chamber and one or more Trial Chambers. Of the five judges in the Appeals Chamber, three will be appointed by the United Nations Secretary General and two will be appointed by the Government of Sierra Leone. Of the three judges in each Trial Chamber, two will be appointed by the United Nations Secretary General and one will be appointed by the Government of Sierra Leone.<sup>7</sup> Note that there is no requirement that the judges appointed by Sierra Leone be citizens of that country.<sup>8</sup>

The Prosecutor of the Special Court will be appointed by the Secretary General. He or she will have a "Sierra Leonean" Deputy Prosecutor.<sup>9</sup>

### C. Relationship with National Courts

Similar to the ICTY and ICTR, the Special Court will have concurrent jurisdiction with national courts, but will also have primacy. Thus the Special Court will be able to take cases away from the domestic courts of Sierra Leone.<sup>10</sup>

### D. Temporal Jurisdiction

As with the ICTY and ICTR,<sup>11</sup> the starting date of the Special Court's jurisdiction will be specified in the Statute of the Court. In addition, as with the ICTY but unlike the ICTR,<sup>12</sup> no termination date is specified. The starting date of the Special Court's temporal jurisdiction will likely be November 30, 1996.<sup>13</sup> The Agreement establishing the Court will

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7. Draft Statute, art. 12.

8. Report of the Secretary-General, *supra* note 2.

9. Draft Statute, art. 15.

10. Note, however, that the authority to assert primacy extends only vis-à-vis domestic courts of Sierra Leone, and cannot apply with respect to the courts of other countries, which are not parties to the treaty establishing the Court. Vienna Convention, *supra* note 6; see also *supra* text accompanying note 6.

11. The temporal jurisdiction of the ICTY extends to Jan. 1, 1991. The temporal jurisdiction of the ICTR is limited to the calendar year 1994.

12. *See id.*

13. The Government of Sierra Leone has recently requested that this date be changed to correspond with the date upon which the armed conflict is deemed to have been initiated. *See infra* note 17; see also text accompanying note 17.

terminate by agreement of the parties once its judicial activities have been completed.

### *E. Territorial Jurisdiction*

Unlike the statutes for the ICTR and ICTY, the Draft Statute of the Special Court does not contain a separate article stipulating the Court's territorial jurisdiction. The Court will have the power, as expressed in Article 1 of the Draft Statute, "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone . . . ." Thus, while it is clear that the territorial jurisdiction of the Court will include Sierra Leone, it is conceivable that those who bear the greatest responsibility for crimes committed in Sierra Leone never set foot in the country. It may therefore be possible that acts of instigation, the ordering of atrocities, or other serious forms of complicity could be prosecuted even if they occurred outside of the territory of Sierra Leone.

The ICTY Statute limits its jurisdiction to the territory of the former Yugoslavia. The territorial jurisdiction of the ICTR covers the territory of Rwanda, as well as the territories of neighboring countries to the extent that crimes otherwise falling within the jurisdiction of the Court were committed there by Rwandan nationals.<sup>14</sup>

Note also that while the seats of the ICTY and ICTR are located outside of the territories over which those courts have jurisdiction, the seat of the Special Court will be in Sierra Leone.

### *F. Personal Jurisdiction*

As with the ICTY and ICTR, the Special Court will have jurisdiction over natural persons only. Thus it will not have the power to prosecute organizations, as did the Nuremberg Tribunal. Further, as noted above, and as mandated by the Security Council in Resolution 1315, the personal jurisdiction of the Special Court will be limited to those "who bear the greatest responsibility for" the crimes committed.

The Draft Statute also contains a provision on jurisdiction over peacekeepers. While not excluded from the Special Court's jurisdiction, the Draft Statute provides that peacekeepers are within the primary jurisdiction of the sending state. If a state is unwilling or unable to

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14. Contrast the International Criminal Court (hereinafter ICC), which is envisioned as a court of general criminal jurisdiction. The ICC Statute contains no express limitation on the Court's territorial competence. If a criminal act did not occur on the territory of a state party, the act will still fall within the competence on the court if the perpetrator is the national of a state party.

prosecute its peacekeepers, the Special Court may do so, if it receives authorization from the United Nations Security Council. Thus, there are two hurdles to the Special Court's exercise of jurisdiction over a peacekeeper. The sending state must be unwilling or unable to prosecute and the Security Council must authorize the Special Court's exercise of jurisdiction in the particular case.

The Special Court will not have jurisdiction to prosecute those under fifteen years of age at the time of the offense. While it will have jurisdictions over those between fifteen and eighteen years of age at the time of the offense, such persons will be treated as juvenile offenders. The Draft Statute provides that in

The disposition of a case against a juvenile offender, the Special Court shall 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 . . .

In this regard, it is also important to recall the mandate of the Court to prosecute "persons who bear the greatest responsibility." As a juvenile offender's youth would presumably mitigate his or her degree of responsibility, those under eighteen are not likely to be prosecuted.

### *G. Penalties*

As with the ICTY and ICTR, the Special Court will not be empowered to sentence convicted persons to death. Only imprisonment will be allowed, with the exception of juvenile offenders who will be subject to the alternative measures outlined above.

### *H. Subject Matter Jurisdiction*

The subject matter jurisdiction of the Special Court can be divided into three categories: Crimes Against Humanity, War Crimes, and Crimes under Sierra Leonean Law. Unlike the ICTY and ICTR, the crime of genocide is not within the jurisdiction of the Special Court.

As with the ICTY and ICTR, all of the crimes contained within the Draft Statute have either acquired the status of customary law or been drawn from treaties to which Sierra Leone is a party. Thus, the principle *nullem crimen sine lege* is respected.

## 1. Crimes Against Humanity

Article 2 of the Draft Statute contains the definition of Crimes Against Humanity. As with all definitions of crimes against humanity, Article 2 sets forth contextual elements as well as a list of enumerated acts that will constitute Crimes Against Humanity if the contextual elements are established.

The definitions in the statutes of the two ad hoc tribunals are almost identical. However, there are two critical distinctions in the contextual elements of each. That is, the definition in each of the two statutes requires a contextual element that the other does not. Under the ICTY Statute, the existence of a state of armed conflict is a required element. Under the ICTR Statute, the attack within which the crimes occur must be launched on discriminatory grounds. As defined in the Draft Statute, Crimes Against Humanity requires neither of these contextual elements. It requires only that there be a widespread or systematic attack directed against any civilian population. This definition is therefore broadly in accord with the definition established in the Statute of the International Criminal Court (ICC), and with what is generally considered to be the definition under customary law.

The lists of enumerated acts contained in the ICTY and ICTR Statutes are identical. While the acts listed in Article 2 of the Draft Statute are similar, there are some important differences. First, in addition to politics, race, and religion, ethnicity is included as a grounds for persecution. Second, borrowing language from the ICC Statute, Article 2 includes "sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence" as additional acts constituting Crimes Against Humanity if the contextual elements are met, *i.e.*, if committed as part of a widespread or systematic attack against any civilian population.

## 2. War Crimes

War Crimes are divided between two articles in the Draft Statute. Article 3 concerns Violations of Common Article 3 and Additional Protocol II. Article 4 is entitled Other Serious Violations of International Humanitarian Law.

Article 3 of the Draft Statute essentially contains the law of non-international armed conflict. It is virtually identical to Article 4 of the ICTR Statute. While not expressly set forth in the ICTY Statute, the law of non-international armed conflict has been read into Article 3 of the ICTY Statute, which covers "[v]iolations of the laws or customs of war."<sup>15</sup>

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15. The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, IT-94-1-AR72 (RP D6413-D6491).

Article 4 lists certain serious war crimes that have occurred during the conflict in Sierra Leone, and is thus specific to the Draft Statute. These acts include attacks against civilians, attacks against peacekeepers and those providing humanitarian assistance, and the use of child combatants. Thus, Article 4 permits prosecution for:

- 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 assistance 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; and
- c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

### 3. Crimes Under Sierra Leonean Law

Certain crimes under Sierra Leonean law are set forth in Article 5 of the Draft Statute. Again, the acts listed correspond to acts that have occurred in the course of the conflict in Sierra Leone. This article is also unique for obvious reasons.

The crimes are drawn from the Prevention of Cruelty to Children Act of 1926 and the Malicious Damage Act of 1861. The first crime listed is abusing a girl or abducting a girl for immoral purposes. The second relates to the wanton destruction of property, and is specifically concerned with arson.

## V. THE CURRENT STATE OF PLAY: OCTOBER 2001

At present, the United Nations Secretariat is preparing to dispatch a planning mission to Freetown. The purpose of the mission will be two-fold. First, the mission will be responsible for making the practical arrangements for the establishment of the Court. Second, the mission is also charged with drafting guidelines, in consultation with the United Nations Mission in Sierra Leone (UNAMSIL) and the Office of the High Commissioner for Human Rights (OHCHR), regarding the relationship between the Special Court and the TRC.<sup>16</sup>

Finances for the Special Court remain a concern. Recall that the Special Court is to be funded through voluntary contributions of states. Even though the budget has been drastically reduced from initial

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16. OHCHR has taken a lead role in facilitating the establishment of the TRC.

projections, sufficient funds have yet to be deposited for the first year of operations.

Finally, the issue of the temporal jurisdiction of the Court has recently been re-opened. While the Government of Sierra Leone continues to express full support for the Court, it has requested a modification to its proposed temporal jurisdiction. On August 20, 2001, the Government sent a letter to the United Nations Office of Legal Affairs requesting that the temporal jurisdiction of the Special Court extend back to March 1991, coinciding with the inception of the armed conflict.<sup>17</sup> At present, this issue remains unresolved.

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17. Eleventh report of the Secretary-General on the United Nations Mission in Sierra Leone, Sept. 7, 2001, para. 48, U.N. Doc S/2001/857.