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# *The Special Court for Sierra Leone: Some Preliminary Comments*

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## **Abstract**

*The United Nations and the Government of Sierra Leone will shortly conclude a bilateral agreement establishing an ad hoc criminal court to try persons allegedly responsible for the commission of serious crimes perpetrated during the Sierra Leone civil conflict. The Special Court for Sierra Leone, as envisaged, is a mixed tribunal. It will be composed of international and Sierra Leonean personnel and will have jurisdiction over both international crimes and crimes prohibited under Sierra Leonean criminal law, thus notably differing from the International Criminal Tribunals for the Former Yugoslavia and Rwanda. This paper analyzes the dual nature of the Special Court and the major consequences it entails. The treatment of juvenile offenders was one of the crucial issues of the negotiations between the United Nations and Sierra Leone. The parties agreed that the Special Court should have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime. However, children between 15 and 17 years of age must be tried in accordance with the internationally recognized standards of juvenile justice and may not be punished with imprisonment; they should be rehabilitated and assisted to find a constructive role in society.*

## **1 Introduction**

On 4 October 2000, the UN Secretary-General transmitted to the Security Council the text of an Agreement between the Government of Sierra Leone and the United Nations establishing a Special Court for Sierra Leone. The Agreement includes, as an integral part, the Statute of the Special Court:<sup>1</sup> the first ad hoc criminal tribunal based upon an agreement between the UN and the government of a member state.

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<sup>1</sup> See the *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, Annex and Enclosure.

In June 2000, the President of Sierra Leone officially requested the assistance of the United Nations to try those responsible for ‘crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages’.<sup>2</sup> Following an information-gathering mission which suggested the creation of a national court with a strong international component,<sup>3</sup> the Security Council requested that the Secretary-General negotiate an agreement with the Government of Sierra Leone for the establishment of an independent special court competent for trying those bearing the greatest responsibility for crimes against humanity, war crimes and other violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law.

This paper offers a few tentative observations on the Statute and the relevant provisions of the Agreement between the UN and the Government of Sierra Leone which represent the constitutive instruments of the Special Court. Although the Agreement is not yet in force and there remain some crucial questions to be answered,<sup>4</sup> it may prove useful to examine the distinctive traits of the Special Court and to attempt a preliminary assessment of its merits and possible flaws.

## 2 The Legal Nature of the Special Court for Sierra Leone

Whereas the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) find their legal bases in Security Council Resolutions 827 and 955 respectively — thus being international organs or, more precisely, UN subsidiary organs — the Special Court for Sierra Leone represents *the first treaty-based ad hoc criminal court*.

Two unique features of the Special Court should be emphasized. First, there is the composition of its organs: the judges are to be appointed partly by the Government of Sierra Leone and partly by the United Nations,<sup>5</sup> after mutual consultation. The Prosecutor is to be appointed by the Secretary-General after consultation with the

<sup>2</sup> President Kabbah explicitly named Foday Sankoh and other senior members of the Revolutionary United Front (RUF); see the letter from the President of Sierra Leone to the UN Secretary-General, UN Doc. S/2000/786, Annex.

<sup>3</sup> For further details, see the *Report of the Secretary-General on the United Nations Mission in Sierra Leone*, UN Doc. S/2000/751, paras 9–11.

<sup>4</sup> For instance, the parties are still negotiating on the financial mechanism of the Special Court. The Security Council, in Resolution 1315, recommended the financial mechanism of the Court to be based entirely on voluntary contributions by member states. On the other hand, the Secretary-General thinks that the only realistic solution is financing through assessed contribution. See the *Report of the Secretary-General*, *supra* note 1, paras 68–72.

<sup>5</sup> The judges nominated by the UN will be appointed by the Secretary-General upon nominations forwarded by states, and in particular the member states of the ECOWAS and the Commonwealth: see the Agreement between the United Nations and the Government of Sierra Leone, Article 2 (‘Composition of the Special Court and appointment of judges’). The Court will be composed of two Trial Chambers and an Appeals Chamber. In its Resolution 1315, the Security Council had envisaged the possibility of the Court sharing the Appeals Chamber of the ICTY and the ICTR, but this option was rightly deemed legally unsound and impracticable. For further details, see the *Report of the Secretary-General*, *supra* note 1, paras 40–46.

Government of Sierra Leone, while the Deputy Prosecutor is to be appointed by the Government of Sierra Leone, after consultation with the United Nations.<sup>6</sup>

What is more significant, the Court's jurisdiction embraces both international crimes and crimes of a national character. Articles 2–4 grant the Court jurisdiction over crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of international law. Article 5 concerns crimes under Sierra Leonean law, in particular offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to wanton destruction of property under the 1861 Malicious Damage Act. As a consequence, the Court's applicable law includes both international and Sierra Leonean norms.

Thus, the Special Court is a *mixed tribunal* exercising *mixed jurisdiction*. It may act both *qua* a domestic court of Sierra Leone when it applies Sierra Leonean criminal law to offences under that law, and as an international criminal tribunal when it applies international law to offences enumerated as punishable crimes in the Court's Statute.

The dual nature of the Special Court and the applicability of two systems of law entail a number of consequences. First, as to the Court's *ratione temporis* jurisdiction, the Special Court will have jurisdiction over crimes committed in the territory of Sierra Leone after 30 November 1996.<sup>7</sup> Before determining this date, the UN and the Government of Sierra Leone had to consider the question of the validity of the amnesty granted under the Lomé Peace Agreement.<sup>8</sup> During the negotiations of the Lomé Agreement, the parties agreed that the amnesty should not apply to those international crimes proscribed by the Special Court's Statute and therefore decided to insert a norm into the Court's Statute expressly excluding the Agreement's application.<sup>9</sup>

It follows that the temporal jurisdiction of the Special Court is twofold. The amnesty does not cover crimes committed under international law, but may well cover crimes committed under Sierra Leonean law: it may thus happen that someone being charged 'only' for offences under Article 5 committed before 7 July 1999 cannot be prosecuted by the Special Court. In other words, one may argue that the temporal jurisdiction of the Special Court starts on 30 November 1996 for crimes listed under Articles 2–4, but on 7 July 1999 for crimes under Article 5.

Furthermore, the dual subject-matter jurisdiction of the Special Court will require specific adjustments concerning trial proceedings. The Statute establishes, under Article 14, that the rules of procedure and evidence of the ICTR will be applicable,

<sup>6</sup> The Prosecutors will be assisted by both international and Sierra Leonean staff: see the Agreement between the United Nations and the Government of Sierra Leone, Article 3 ('Appointment of a Prosecutor and a Deputy Prosecutor').

<sup>7</sup> The date of 30 November 1996 coincides with the first comprehensive peace agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF). The reasons for choosing this specific date, as well as the reasons for leaving the temporal jurisdiction open-ended, are clearly explained in the *Report of the Secretary-General*, *supra* note 1, paras 25–28.

<sup>8</sup> See the Lomé Peace Agreement, Article IX ('Absolute and free pardon'), UN Doc. S/1999/ 777, Annex.

<sup>9</sup> Article 10: 'An amnesty granted to any persons 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.'

*mutatis mutandis*, to the Special Court. Some of these provisions though, ought to be amended, since they will apply to crimes of a different nature. For instance, rule 89 states that the ICTR Trial Chambers shall not be bound by national rules of evidence.<sup>10</sup> The Special Court instead, when dealing with offences contemplated under Sierra Leonean law, should apply the rules of evidence established by Sierra Leonean criminal law. The Special Court's judges will thus have to amend this rule with respect to crimes under Article 5.<sup>11</sup>

### 3 Legal Consequences of the Establishment of the Special Court by Means of a Bilateral Agreement

One may ask why the United Nations decided to proceed to establish the Special Court by bilateral negotiation, instead of adopting a Security Council resolution under Chapter VII of the Charter as happened with the ICTY and the ICTR. A principal reason could be to involve the state concerned as far as possible in the establishment, composition and functioning of the Special Court. In other words, rather than opting for a unilateral and 'authoritarian' decision by the Security Council, as in the case of the ICTY and the ICTR (even if in the latter case the establishment of the Tribunal was based on a request by the Government of Rwanda), it was decided to take into account as far as possible the concerns, views and demands of the state where the crimes were allegedly perpetrated.

The establishment of the Special Court through a bilateral agreement entails a number of important consequences. International crimes involving individual criminal liability must be prosecuted at both the national and the international level. Accordingly, international criminal tribunals may share the exercise of their jurisdiction with national courts.

Concurrent jurisdiction characterizes the ICTY and the ICTR on the one hand, and the new International Criminal Court (ICC) on the other, albeit with a relevant difference. The two ad hoc Tribunals have primacy over national courts of all states, whereas the ICC is based on the principle of complementarity.<sup>12</sup> The Special Court for Sierra Leone will have concurrent jurisdiction with the national courts of Sierra Leone and will have primacy *only* over those courts, that is to say it is entitled formally to request a deferral only to Sierra Leonean courts, which are obliged to comply with such a request.<sup>13</sup> In other words, it asserts a *limited primacy*.

<sup>10</sup> Rule 89: 'The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.'

<sup>11</sup> In doing so, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone, as provided in Article 14(2) of the Statute.

<sup>12</sup> Benvenuti, 'Complementarity of the International Criminal Court to National Jurisdictions', in F. Lattanzi and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999) 21–50.

<sup>13</sup> Article 8: '1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction. 2. The Special Court shall have the primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.' Articles 9 and 8, respectively, of the ICTY and ICTR Statutes establish that the jurisdictions of the International Tribunals prevail over the jurisdiction of *national courts of all states*.

In addition, the application of the *ne bis in idem* principle is limited to the relationship between the Special Court and national courts of Sierra Leone. Article 9 provides that nobody can be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court. Conversely, a person already tried by a national court for the acts referred to in Articles 2–4 may subsequently be tried before the Special Court where the acts alleged were classed as ordinary crimes or in the event that national court proceedings were not impartial or independent or the case was not diligently prosecuted. Hence, the exceptions to the principle do not apply to crimes under Article 5, i.e. offences of a national character.<sup>14</sup>

The bilateral treaty-based nature of this body brings about even stronger effects in the field of *international cooperation and judicial assistance*. The Agreement between the Government of Sierra Leone and the United Nations establishes that the Government of Sierra Leone has the duty to cooperate with all organs of the Special Court at all stages of the proceedings. More precisely, the Government must comply, without undue delay, with any request for assistance or an order issued by the Special Court, including the identification and location of persons, the service of documents, the arrest or detention of persons, and the transfer of an indictee to the Court.<sup>15</sup> The Statute contains no provisions imposing an *obligation to cooperate* upon other states, thus sensibly differing from the ICTY and ICTR Statutes, which contain comprehensive obligations binding all states.<sup>16</sup>

This is not surprising, since the Special Court is neither an organ mandated by an international organization having the power to impose obligations upon states (as are the ICTY and the ICTR), nor is it based on a multilateral treaty (as is the ICC).<sup>17</sup> On the

<sup>14</sup> Article 9: '1. 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. 2. A person who has been tried by a national court for the acts referred to in Articles 2 and 4 may subsequently be tried before the Special Court if: (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from the international criminal responsibility or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.' It has to be noted that paragraph 2 refers to 'acts referred to in Articles 2 and 4', when it was probably intended to refer to 'acts referred to in Articles 2–4'. The corresponding provisions contained in the Statutes of the two ad hoc Tribunals refer instead to the national courts of all states: see Articles 10 and 9, respectively, of the ICTY and ICTR Statutes.

<sup>15</sup> Article 16 of the Agreement: '1. The Government shall cooperate with all organs of the Special Court at all stage of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for investigation. 2. The Government shall comply, without undue delay, with any request for assistance by the Special Court or an order issued by the Chambers, including but not limited to: (a) Identification and location of persons; (b) Service of documents; (c) Arrest or detention of persons; (d) Transfer of an indictee to the Court.'

<sup>16</sup> Articles 29 and 28, respectively, of the ICTY and ICTR Statutes, establish a duty of cooperation for all states. Article 16 of the Agreement is largely based on the former provisions, though limited of course to the Government of Sierra Leone. It has to be noted, though, that in the text of Article 16, an important paragraph is missing. It does not explicitly provide for the duty to cooperate for the taking of testimony and the production of evidence, which is, on the contrary, a very important step in the trial proceedings.

<sup>17</sup> The ICC Statute contains a very detailed set of rules on cooperation: see the ICC Statute, Part 9 ('International cooperation and judicial assistance').

contrary, it is established by a bilateral agreement, which cannot bind third parties (*pacta tertiis nec nocent nec prosunt*). Accordingly, the Special Court is not entitled to request the authorities of states other than those of Sierra Leone to cooperate in the investigation and prosecution of persons charged under its Statute. This could prove to be one of the main deficiencies of the Special Court, since a large number of criminals could flee the country and find shelter in neighbouring states, making a mockery of the Tribunal.<sup>18</sup>

However, there might be a way to avoid this problem. It can be suggested that the UN Security Council should endorse the Agreement establishing the Special Court and, acting under Chapter VII, *impose on states the duty to cooperate with the Tribunal in the investigation and prosecution of crimes within its jurisdiction*. All states should be under an obligation to cooperate with the Special Court not only in respect of the surrender or transfer of the accused to the Court, as suggested by the Secretary-General in his report,<sup>19</sup> but also in respect of the collection of evidence, the taking of testimony, the identification and locating of persons and the arrest and detention of suspects.

#### 4 The Influence of the International Criminal Court's Statute on the Special Court

On a close reading, a few features of the Special Court seem to have derived directly from the Rome Statute on the establishment of an International Criminal Court. First, as regards personal jurisdiction, the Special Court will have the power to prosecute 'persons most responsible' for serious violations of international humanitarian law.<sup>20</sup> This wording is used for the first time; corresponding norms in the Statutes of the two other ad hoc Tribunals refer to jurisdiction over natural persons.<sup>21</sup> The formula mentioning 'persons most responsible' was introduced to respect Security Council Resolution 1315, indicating that the jurisdiction of the Court should extend to those who bear the greatest responsibility for the commission of the crimes. Therefore, it is meant to be an indication in the sense of limiting the number of accused persons by reference to their position in the chain of command and to the gravity or scale of the crime committed.<sup>22</sup>

This leads us to Article 1 of the ICC Statute, which establishes that the ICC will

<sup>18</sup> Antonio Cassese wrote, with respect to the refusal of state authorities to cooperate with the ICTY, that the Tribunal remains 'a giant without arms and legs': Cassese, 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Law', 9 *EJIL* (1998) 13.

<sup>19</sup> See the *Report of the Secretary-General*, *supra* note 1, para. 10.

<sup>20</sup> Article 1: 'The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.'

<sup>21</sup> The ICTY and ICTR Statutes provide identical norms (Articles 6 and 5 respectively) which state: 'The International Tribunal shall have jurisdiction *over natural persons* pursuant to the provisions of the present Statute' (emphasis added).

<sup>22</sup> See the *Report of the Secretary-General*, *supra* note 1, paras 29–31. In any case, this limitation does not constitute a distinct jurisdictional threshold.

exercise its 'jurisdiction over persons for the most serious crimes of international concern'. Accordingly — and due to the complementarity principle — Article 8 establishes that the ICC will prosecute war crimes *in particular when committed on a massive scale or as part of a plan or policy*.<sup>23</sup> One of the underlying reasons for this limitation is the concern not to put too heavy a burden on the Court, a concern which also applies to the Special Court. In other words, in the Statute of the Special Court a possible limitation in favour of national jurisdictions dealing with cases of a lesser scale was introduced through the norms relating to the *ratione personae* jurisdiction, whereas in the ICC Statute it principally appears in norms referring to the *ratione materiae* jurisdiction.

The impact of the ICC Statute is also evident in several norms concerning the Special Court's subject-matter jurisdiction. The Special Court's Statute places *sexual crimes* among crimes against humanity.<sup>24</sup> Under Article 2(g), it enumerates rape, sexual slavery, enforced prostitution, forced pregnancy and any other forms of sexual violence, thus notably differing from the Statutes of the ICTY and the ICTR which expressly proscribe only rape. Sexual offences could nonetheless be prosecuted under the ICTY and ICTR Statutes, since they both contain a default norm prohibiting other inhuman acts. Nevertheless, as ICTY and ICTR case law has clearly demonstrated,<sup>25</sup> sexual crimes bear a specificity which is better covered by a specific norm.<sup>26</sup> Consequently, the ICC Statute, in Article 7(g), contains a very detailed list of sexual

<sup>23</sup> ICC Statute, Article 8(1): 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.' It is universally recognized that plan, policy and scale are not inherent elements of war crimes: see Fenrick, 'Article 8(1) Jurisdiction in Respect of War Crimes', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (1999) 181.

<sup>24</sup> Article 2: 'Crimes against humanity. 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) Persecution on political, racial, ethnic or religious grounds; (i) Other inhumane acts.'

<sup>25</sup> The ICTY judges stated that: 'International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity': *Prosecutor v. Furundzija*, 10 December 1998, para. 186. In *Akayesu*, the ICTR Trial Chamber I affirmed that: 'The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.' The accused was criminally responsible, under Article 3(i), for the forced undressing of women, for forcing them to march naked in public, and for forcing them to perform exercises, naked in public (count 14). See *Prosecutor v. Akayesu*, 2 September 1998, para. 697. It must also be noted that the ICTY and ICTR judges introduced the wider term 'sexual assault' in their Rules of Procedure and Evidence (rule 96, 'Evidence in cases of sexual assault').

<sup>26</sup> 'The sexual element does distinguish them from other crimes of violence because, besides infringing upon the victim's corporal integrity, sexual assaults of any type also violate the victim's sexual integrity': Cleiren and Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues', in R. Clark and M. Sann (eds), *The Prosecution of International Crimes* (1996) 261.

crimes, namely, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity,<sup>27</sup> characterizing them as criminal acts injuring the physical and mental integrity of the victim.<sup>28</sup> The Special Court's provision reflects here the Rome Statute, thus appropriately confirming that sexual crimes other than rape, if committed under given circumstances, are to be considered crimes against humanity, i.e. they are classed among the most serious international crimes entailing individual criminal liability.<sup>29</sup>

Furthermore, at least two of the crimes proscribed under Article 4 mirror the ICC Statute.<sup>30</sup> The wording of Article 4(b), proscribing attacks against peacekeeping and humanitarian missions personnel, exactly reiterates the language of the ICC Statute,<sup>31</sup> which includes this offence among serious violations of the laws and customs of war, applicable in international armed conflicts as well as in conflicts of a non-international character.<sup>32</sup>

Needless to say, many problems of interpretation could arise with respect to this provision, since there is no universally recognized definition of peacekeeping and humanitarian assistance missions. According to this norm, peacekeepers are entitled to the same protection given to civilian or civilian objects.<sup>33</sup> The provision therefore does not apply to peace enforcement operations (the same holds true for the 1994

<sup>27</sup> Article 8(2)(b)(xxii) and (e)(vi) ('War crimes') of the ICC Statute contains the same set of sexual crimes.

<sup>28</sup> It has been rightly stressed that 'existing norms of international humanitarian law allow for prosecution of rape and enforced prostitution, but these norms have been defined as violations of the honour and reputation of women': Boot, 'Rape . . . or Any Other Form of Sexual Violence of Comparable Gravity', in Triffterer, *supra* note 23, at 140.

<sup>29</sup> In the same sense the 1996 International Law Commission Draft Code on Crimes Against Peace and Security of Mankind (A/48/10), Article 18(j) expressly includes enforced prostitution and other forms of sexual abuse in addition to rape.

<sup>30</sup> Article 4: 'Other serious violations of international law. The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: (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; (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.' The choice to introduce these specific crimes (at least offences under paragraphs (b) and (c)) seems to depend on the recurrence of these particular violations during the conflict in Sierra Leone.

<sup>31</sup> It was previously mentioned also in Article 19 of the ILC Draft Code, *supra* note 29.

<sup>32</sup> Article 8(2)(b)(iii) and (e)(iii). At the Rome conference, the original idea was to enumerate, among war crimes, any violation of the 1994 Convention on the Safety of United Nations and Associated Personnel. At a later stage, it was decided not to include treaty-based crimes and this led to the present formulation which has a broader scope encompassing also attacks against non-UN personnel. See Cottier, 'Article 8(2)(iii), Attacks on Humanitarian Assistance or Peacekeeping Missions', in Triffterer, *supra* note 23, at 187.

<sup>33</sup> In this sense: 'The UN peacekeepers and civilians referred to in this indictment were, at all relevant times, persons protected by the Geneva Conventions of 1949.' *Prosecutor v. Karadzic and Mladic*, Indictment of the ICTY, 24 July 1995, para. 14.

Convention on the Safety of UN and Associated Personnel),<sup>34</sup> but it ought to be ascertained whether certain acts performed by peacekeeping or humanitarian personnel in carrying out their mandate may or may not be considered as 'taking part in the hostilities'.<sup>35</sup> It is interesting to note that the Secretary-General, in his report accompanying the text of the Agreement between the UN and Sierra Leone establishing the Statute of the Special Court, clearly states that this provision does not concern peacekeepers-turned-combatants,<sup>36</sup> but he does not give any clarification of the conditions under which peacekeepers are entitled to the protection afforded to civilians and civilian objects. The issue is still controversial and it may come up as a specific problem for the Special Court, since several operations — which could be defined as peacekeeping missions in a broad sense — have been deployed to Sierra Leone and have been endowed with robust powers to implement their mandate.<sup>37</sup>

Article 4(c) prohibits *abduction and forced recruitment of children under the age of 15* into armed forces or groups for the purpose of using them to participate actively in hostilities. This provision too recalls the ICC Statute, which has explicitly classed this crime, for the first time, among those giving rise to individual criminal responsibility.<sup>38</sup>

In this case, the language used in Article 4(c) of the Special Court's Statute differs slightly from that of Article 8(2)(b)(xxvi) and (2)(e)(vii) of the ICC Statute.<sup>39</sup> According to the Secretary-General, the scope of the provisions of the Special Court's

<sup>34</sup> For the text of the Convention, see 34 ILM (1995) 482. Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel', 89 *AJIL* (1995) 621; Emanuelli, 'La Convention sur la sécurité du personnel des Nations Unies et du personnel associé: des rayons et des ombres', 99 *RGDIP* (1995) 849.

<sup>35</sup> See Cottier, *supra* note 32, *passim*.

<sup>36</sup> So far, there is no international jurisprudence on this issue. In the *Ntuyahaga* case, the ICTR indicted the accused for the killing of 10 Belgian peacekeepers belonging to UNAMIR (United Nations Mission in Rwanda). Subsequently, the indictment has been withdrawn to allow Belgium to exercise concurrent jurisdiction over the case, *Prosecutor v. Ntuyahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

<sup>37</sup> The first force to intervene in Sierra Leone was ECOMOG (ECOWAS Monitoring Group) in 1998. ECOMOG was deployed in Liberia and its intervention in Sierra Leone was not initially endorsed by ECOWAS. Later, ECOWAS authorized ECOMOG to remain in the country to perform ceasefire monitoring functions. The Lomé Peace Agreement of 7 July 1999 entrusted monitoring functions to a 'neutral peacekeeping force', formed by ECOMOG and UNOMSIL (United Nations Observer Mission in Sierra Leone). The Security Council decided to substitute UNOMSIL with UNAMSIL (United Nations Mission in Sierra Leone) (Security Council Resolution 1270, 1999) in order to cooperate with ECOMOG, which mandate was also renewed (UN Doc. S/1999/1073, Annex). After Nigeria, Guinea and Ghana decided to withdraw their troops from ECOMOG, the Security Council expanded the military component and the mandate of UNAMSIL (Security Council Resolution 1289, adopted under Chapter VII of the Charter). For further details, see the reports of the Secretary-General, UN Docs S/1999/20, S/1999/237, S/1999/645, S/1999/836, S/1999/1003, S/1999/1223 and S/2000/13. For a general overview on ECOWAS and UN forces deployed in Sierra Leone and a specific analysis of the legal classification of their mandates, see Grado, 'Il ristabilimento della democrazia in Sierra Leone', 83 *RDI* (2000) 361.

<sup>38</sup> The recruitment of children below the age of 15 was mentioned in Article 4(3)(c) of the 1977 Additional Protocol II to the Geneva Conventions, and it was reaffirmed in Article 38(3) of the 1989 Convention on the Rights of the Child.

<sup>39</sup> Article 8(2)(b)(xxvi) and (e)(vii): 'Conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities.'

Statute here are broader than the corresponding ICC provisions.<sup>40</sup> I do not entirely share his view. On the one hand, it is true that the terms ‘conscripting’ or ‘enlisting’ imply an administrative act of putting one’s name on a list and a formal entry into the armed forces, whereas the Special Court’s Statute’s language may apply to forced recruitment in a more general sense. On the other hand, though, the ICC Statute prohibits the use of children for active participation in hostilities. Even if it has been agreed that this does not cover the participation of children under the age of 15 in hostilities by their own choice, the validity of their volition will have to be tested on a case-by-case basis.<sup>41</sup> In this sense, the case law developed by the Special Court for Sierra Leone could serve as a reference for future ICC cases dealing with an offence of this kind.

Finally, it should be noted that *procedural error* has explicitly been introduced into the Special Court Statute as a ground of appeal. Whereas the ICTY and ICTR Statutes, in Article 25, list only errors of law and errors of fact as possible grounds of appeal, Article 81 of the ICC Statute also includes procedural errors, which the Statute of the Special Court follows.<sup>42</sup>

## 5 The Special Regime for ‘Juvenile Offenders’

The Special Court will have *jurisdiction over persons who were 15 years of age* at the time of the alleged commission of the crime. Thus, the Statute of the Special Court fills a gap left open in the ICC Statute — which expressly excludes jurisdiction over persons under the age of 18<sup>43</sup> — and settles the problem of crimes committed by combatants between 15 and 17 years of age.<sup>44</sup>

The inclusion of children below the age of 18 has already provoked strong

<sup>40</sup> See the *Report of the Secretary-General*, *supra* note 1, para. 18.

<sup>41</sup> The final draft text of the Elements of Crimes, adopted in June by the ICC Preparatory Commission (UN Doc. PCNICC/2000/INF/3/Add.2), does not shed any light on a possible interpretation. The first two paragraphs of the Elements drafted for Article 8(2)(b)(xxvi) and (e)(vii) read: ‘1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities. 2. Such person or persons were under the age of 15 years.’

<sup>42</sup> Article 20(1). It is worth mentioning also Article 16(4), which provides the establishment, within the registry, of a Victims and Witnesses Unit. The Unit will set up protective measures, security arrangements, counselling and other appropriate assistance for witnesses and victims who appear before the Court. A similar unit was also established, in respect of ICTY and ICTR, by rule 34 of their Rules of Procedure and Evidence. The wording chosen here, though, exactly reproduces that of Article 43(6) of the ICC Statute, which not only is more specific but also brings the issue directly into the text of the Statute. The ICC Statute goes much further as far as victims’ issues are concerned: see, for instance, Article 68 (‘Protections of victims and witnesses and their participation in the proceedings’).

<sup>43</sup> ICC Statute, Article 26: ‘The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.’ The ICTY and ICTR Statutes are silent in this respect.

<sup>44</sup> As it has been rightly pointed out: ‘A person between 15 and 17 is regarded as a lawful combatant and may commit a crime without being brought to court and punished. A commander could therefore recruit minors into his army expressly for the purpose of forming terrorist units whose members would be immune from prosecution. Moreover, in modern warfare, particularly in developing countries, young persons are more and more involved in armed hostilities and thus increasingly placed to commit war crimes and crimes against humanity.’ Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *EJIL* (1999) 153.

disapproval — for the most part addressed to the UN Secretary-General — especially among international human rights groups and organizations responsible for child-care and rehabilitation programmes.<sup>45</sup> If such criticisms can be understood as a first reaction, it ought to be said that the Special Court's Statute goes far beyond establishing a lower age threshold as to its personal jurisdiction.

Article 7 provides that, at all stages of the proceedings, juvenile offenders (i.e. accused persons under the age of 18) will be treated with 'dignity and a sense of worth, taking into account the desirability of promoting their rehabilitation, reintegration into and assumption of a constructive role in society'. The Special Court's Statute not only shows the way ahead, it also paves the road. Throughout its text, the Statute incorporates international standards of juvenile justice and introduces comprehensive guarantees to protect juvenile offenders, from the constitution of a juvenile chamber to protective measures to ensure the privacy of juveniles.<sup>46</sup> The special regime aimed at protecting juvenile offenders also covers sentencing: the Special Court cannot imprison children below the age of 18 and must always consider their release as a priority.<sup>47</sup>

It is worth mentioning that, in the prosecution of juvenile offenders,<sup>48</sup> the

<sup>45</sup> See Scharf, 'The Special Court for Sierra Leone', *ASIL Insight*, at [www.asil.org/insigh53.htm](http://www.asil.org/insigh53.htm); 'Sierra Leone to Try Juveniles Separately in UN Tribunal Plan', *New York Times*, 6 October 2000; and 'Prosecution of Minors for War Crimes Urged: UN Chief Backs Sierra Leone's Stand', *Washington Post*, 6 October 2000, at A28.

<sup>46</sup> Article 7: '1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime. 2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") 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. 3. In a trial of a juvenile offender, the Special Court shall: (a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort; (b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice; (c) Order the separation of his or her trial, if jointly accused with adults; (d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian; (e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings; (f) In the disposition of his or her case, order any of the following: care, guidance and supervisions 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.' There are other relevant provisions: Article 13(2) expressly provides that in the composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

<sup>47</sup> Article 19: 'Penalties. 1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years ...'

<sup>48</sup> The Office of the Prosecutor, for its part, shall give due consideration to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice. Here as well, notwithstanding their different personal jurisdictions, the Special Court's Statute follows the ICC Statute. Article 42(9) of the ICC Statute reads: 'The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.'

Prosecutor must ensure that the rehabilitation programme is not placed at risk and that, where appropriate, *resort should be had to alternative truth and reconciliation mechanisms*, to the extent of their availability. The rationale behind this norm is the same that underpins all the above-mentioned provisions: in the context of situations such as the one in Sierra Leone, where there has been a protracted and bloody conflict, children are often victims transformed into perpetrators. Thus, they need to be assisted and rehabilitated rather than punished and further traumatized through a criminal trial.<sup>49</sup>

## 6 The Possible Resort to the Truth and Reconciliation Commission

The mention made above to the possibility of resorting to alternative truth and reconciliation mechanisms for juvenile offenders suggests some thoughts on the possible conflict between the Special Court's jurisdiction and the Truth and Reconciliation Commission's range of action. The Lomé Peace Agreement provided for the establishment of both a Human Rights Commission and a Truth and Reconciliation Commission, both dealing with the question of human rights violations. The latter should provide a 'forum for a dialogue between victims and perpetrators in order to facilitate healing and reconciliation'.<sup>50</sup> This mechanism could conflict with the functioning of the Special Court: their respective provinces partially overlap and, upon the establishment of the Special Court, a relationship and cooperation arrangement will need to be concluded between the Prosecutor and the Truth and Reconciliation Commission.<sup>51</sup>

Truth and reconciliation commissions have recently been established at the end of several intra-state conflicts. In most cases, these bodies have been accompanied by amnesty laws: it is precisely this amnesty which prompts the perpetrators to confess their guilt, thus contributing to a process of reaching the truth.<sup>52</sup>

A general amnesty law, though, cannot be adopted in the case of Sierra Leone. I

<sup>49</sup> This regime specifically concerning juvenile offenders offers an invaluable occasion to set up an appropriate system to prosecute children between 15 and 17 responsible for serious international crimes. Sierra Leonean courts may prosecute children between 15 and 17 for a range of crimes much wider than that within the Special Court's jurisdiction. It is hoped that, in these cases also, they will be guided by international standards of juvenile justice and follow the example given by this ad hoc Tribunal.

<sup>50</sup> 'While the Human Rights Commission is designed to strengthen the existing machinery for addressing grievances of the people of Sierra Leone with respect to human rights violations, the Truth and Reconciliation Commission will deal specifically with the question of human rights violations committed since the beginning of the armed conflict in 1991. It is intended to provide a forum for both victims and perpetrators to tell their stories and facilitate genuine healing and reconciliation. The Commission will also recommend measures for the rehabilitation of victims of human rights violations.' *Report of the Secretary General on the United Nations Mission in Sierra Leone*, UN Doc. S/1999/836, para. 18.

<sup>51</sup> See the *Report of the Secretary General*, *supra* note 1, para. 8.

<sup>52</sup> As in the case of South Africa. See Dugard, 'Reconciliation and Justice: The South African Experience', 8 *Transnational Law and Contemporary Problems* (1988) 277. For a general overview on truth and reconciliation commissions established up to 1994, see Hayner, 'Fifteen Truth Commissions — 1974 to 1994: A Comparative Study', 16 *Human Rights Quarterly* (1994) 600.

have already noted that the Statute of the Special Court explicitly provides that the amnesty granted by the 1999 Lomé Peace Agreement does not cover international crimes. It is therefore very unlikely that such an amnesty will be granted in the future. However, the amnesty is applicable to crimes under Sierra Leonean law and the Truth and Reconciliation Commission would be able to deal with the perpetrators of such crimes if they were committed before 7 July 1999. In this way, the two complementary jurisdictional and reconciliation mechanisms could deal with separate areas of concern.

It should be noted that the co-existence of judicial and non-judicial bodies has been envisaged for Cambodia: in 1999 a Group of Experts recommended the creation of an international tribunal to try those responsible for the genocide which occurred between 1975 and 1979, accompanied by a truth and reconciliation commission.<sup>53</sup> The possible creation of a truth and reconciliation commission for Bosnia-Herzegovina is also under consideration, and the ICTY, for its part, is evaluating the advisability of adopting a position on the matter.<sup>54</sup>

## 7 Concluding Remarks

In sum, the establishment of the Special Court represents another positive step in the struggle against impunity. A further step would be the creation of a special tribunal for Cambodia: negotiations are under way to establish, by Cambodian law, a Cambodian Court with a strong international component and endow it with jurisdiction over the most serious crimes perpetrated under the Pol Pot regime.<sup>55</sup>

The International Criminal Court still has a long way to go before becoming a functioning and effective judicial organ. In addition, it will only have jurisdiction over crimes perpetrated *after* its establishment. Meanwhile, it is important to continue prosecuting, wherever possible, those responsible for the commission and, even more importantly, the planning and organization of atrocious crimes. In addition, bearing in mind that the ICC jurisdiction will be complementary to that of national courts, every means of helping states — especially those who have already signed the ICC Statute and are willing to ratify it — to strengthen their judicial systems and their national capacity to enforce the rule of law should be welcomed.

<sup>53</sup> See the *Report of the Group of Experts*, UN Doc. S/1999/231, paras 199–208.

<sup>54</sup> ICTY Press Release, SB/PIS/535, 13 October 2000.

<sup>55</sup> The National Assembly of Cambodia has just passed a draft law on the creation of such a Tribunal. “The new law, passed more quickly than expected by the lower house of parliament, has still to be approved by the country’s Senate and Constitutional Council, before being signed by King Norodom Sihanouk. Under the formula now agreed, Cambodian judges will have a majority of one at each level of the proposed court—but at least one international judge must side with them before a binding judgment can be made.” PICT News, 2 January 2001, available at <http://www.pict-pcti.org/news/news.html>.