

*Geoffrey Robertson* *and* *Paul Hirsch*

# Powerful Enough to Bring Justice

## Setting Up the Special Court for Sierra Leone

By Geoffrey Robertson

**W**ar in Sierra Leone broke out in 1992 and ended with an uneasy peace in 2002. Over that terrible decade, some 75,000 civilians are believed to have been killed and half a million made refugees. Atrocities, in some respects unique in their grotesquery, have been reported: chopping off the hands of civilians who had cast electoral votes, kidnapping children for use as gunmen or sex slaves; butchering prisoners; and so on. It is a poignant irony that these things should happen where the world's first humanitarian mission took place—in Freetown, where the British navy in the nineteenth century set free the slaves.

On 12 June 2000, the President of Sierra Leone asked the United Nations to set up a court powerful enough to bring justice to his country. The Security Council responded in August with resolution 1315 (2000), declaring that the situation in Sierra Leone constituted a threat to international peace and requesting Secretary-General Kofi Annan to negotiate an agreement with the Government to set up an independent Special Court, as well as recommending that its jurisdiction should include crimes against humanity, war crimes and other serious violations of international humanitarian law, and crimes under Sierra Leonean law committed within the territory. There was no precedent for such a body: Nuremberg had been a military tribunal run by the four victorious powers, and the tribunals dealing with war crimes in Yugoslavia and Rwanda had not been set up through any agreement with the countries concerned.

The Special Court Agreement was signed by the Government and the United Nations in January 2002 and ratified by the parliament of Sierra Leone in March 2002. The Statute of the Special Court, which forms part of the Agreement, provides that the Court shall "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 since 30 November 1996 (the date of the Abidjan Peace Accord, which unsuccessfully offered an amnesty to rebel combatants). These crimes include:

- ▶ Crimes against humanity, i.e., murders, rapes, torture and other inhumane acts if committed systematically against civilians.
- ▶ War crimes, including violations of the Geneva Conventions and acts of terrorism and maltreatment of prisoners committed in the course of an armed conflict.
- ▶ Other serious violations of international humanitarian law, such as intentionally directing attacks against civilians, attacks against humanitarian or peacekeeping personnel, and enlisting children under 15 into armed forces or groups.
- ▶ Certain crimes under Sierra Leonean law, such as sexual violence against children and malicious damage to property.

**T**he Court comprises five appeal judges, headed by the President, and a trial chamber of three judges. Two trial chamber judges and three appeal judges are appointed by the United Nations, and the others by the Government. The Prosecutor is appointed by the Secretary-General, but acts independently as a separate organ of the Special Court. The Registrar is also appointed by the Secretary-General and is a staff member of the United Nations. The Offices of the Prosecutor and Registrar are assisted by local lawyers and administrative staff, as well as by experienced international officials and counsel.

The Prosecutor may only indict those whom he alleges "bear the greatest responsibility" for those crimes listed in the Statute of the Court. The Special Court has jurisdiction to try them wherever they may reside at the time of their indictment and irrespective of their nationality or political affiliation. It takes precedence over Sierra Leone courts and may thus take over the prosecution of persons already in jail. The Prosecutor cannot, however, indict a person who was under 15 years of age at the time of the alleged crime. Arrested defendants may apply for bail and are entitled to counsel of their choice or to defend themselves. If they are too poor to retain counsel, the Court itself is under a duty to provide adequate professional legal assistance free of charge. The initial indictments should be tried and all appeals dealt with by December 2005, i.e., three years after the judges took their oath of office.

The Statute requires the judges to be persons of high moral character, impartiality and integrity, who possess qualifications for appointment to the highest judicial office in their own countries. They must be independent of the Government, the United Nations and any other source. The trial chamber judges commenced their work in March 2003, and the Appeal judges will be available whenever necessary until the trials are over when they will deal with appeals. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR) apply mutatis mutandis to the conduct of legal proceedings before the Special Court, but may be amended as appropriate by the Special Court judges who promulgated the first amended set of rules on 7 March 2003.

*Geoffrey Robertson, Q.C. is President of the UN War Crimes Court for Sierra Leone. He has argued many landmark media law cases in British and Commonwealth courts and in the European Court of Human Rights. A Visiting Professor at the University of London, he has written several law books, among them Media Law, recognized in the British Commonwealth as the leading text on the subject.*



The Court will have its main building in Freetown, but the judges may sit elsewhere, within or outside the country. They have powers of imprisonment and may order the forfeiture and return of property, but they cannot impose the death sentence. Imprisonment is to be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States that have concluded with the International Tribunal for the former Yugoslavia (ICTY) and the ICTR agreements for the enforcement of sentences, as well as those States that have concluded similar agreements with the Special Court.

As far as the recent work of the Court is concerned, Registrar Robin Vincent and Prosecutor David Crane arrived in Freetown in August 2002 and secured offices, selected staff and began their respective tasks of constructing the Court and investigating suspects. In December, the judges were sworn in and elected the President. In January 2003, the Management Committee approved plans for hiring a Principal Defender and defence counsel. In February, it declared the British firm of Norman and Dawbarn, which has extensive experience in building in Africa, the winner of the tender to design and build the courthouse. The first indictments were approved by Judge Bankole Thompson on 7 March 2003 and some defendants were arrested in the weeks which followed. Preliminary hearings have already taken place and the first trial should be under way soon.

The Sierra Leone Special Court is the latest model for delivery of justice in respect of violations of international criminal law. It is

a unique institution, different in many ways from the ICTY and ICTR which were established by the Security Council; but the Special Court is established by an agreement between the United Nations and the sovereign Government of Sierra Leone. It is thus a treaty-based institution and not a subsidiary organ of the United Nations. Other special features of the Court include:

- It will sit in the country where the crimes within its jurisdiction were committed, unlike the ICTY, the ICTR and the International Criminal Court.
- It has an outreach programme, comprising lectures and meetings, and plans to include theatre and films. Its proceedings will be communicated throughout the country by radio and television.
- It is independent of the United Nations. Its judges and staff are not paid from the UN budget, but from funds donated voluntarily by individual States.
- Its funding and non-judicial policy are managed by a Management Committee, comprising representatives from Canada, the Netherlands, Nigeria, Lesotho, Sierra Leone, the United Kingdom, the United States and the UN Secretariat.
- Preliminary motions will be "fast-tracked" to the Appeal Chamber, preventing trial delays. Problems of

"fee-splitting" and inadequate defence will be obviated by appointing a distinguished counsel as Principal Defender to ensure that defendants who are too poor to hire their own advocates are represented by experienced advocates.

- Under Sierra Leonean law, the Special Court takes precedence over local courts. It will be able to take custody of, and prosecute under international law, any indictees already awaiting trial in the local courts.

- It cannot impose the death penalty, but it is otherwise unlimited in deciding the length of sentences.

Unlike the ICTR and ICTY, the Special Court has no Chapter VII powers and therefore has no legal basis to ask other States to enforce its indictments and arrest warrants, as has been encountered in respect of the Prosecutor's indictment of Charles Taylor, the former President of Liberia.

When the Secretary-General originally reported to the Security Council on the establishment of the Court, he said (at paragraph 10): "In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court."

This suggestion was not taken up by the Council at the time, but recent events have demonstrated the need for the Court to obtain the cooperation of other States. In the absence of Chapter VII puissance powers, the Court will have to fall back on moral persuasion to achieve bilateral agreements. This is one matter

which needs resolution before the Sierra Leone model of a "Special Court" can be recommended for other countries. In principle, it would serve as an effective model wherever there is international consensus that war crimes in a particular State should be prosecuted and the Government of that State is willing to accept international assistance to do so effectively and fairly.

In conclusion, I wish to point out that a war crimes court in a war-torn country so soon after the end of the conflict carries obvious risks, especially for its personnel. Their living conditions are fairly basic and they are vulnerable to equatorial diseases, especially malaria. Operations in Freetown are logistically challenging at times, but the advantages of delivering justice when and where it matters—where it can be seen to be done by those who need it most—are very important. Not only does the presence of the Court in Freetown symbolize the nation's emergence from the moral and physical degradation of the war, but the process of prosecution and punishment of those centrally responsible permits some sense of closure for all living victims. In the end, the country's return to legality will advance the broader goal of a sustainable peace, whilst the advance of international criminal justice may deter military and political leaders from directing atrocities. □



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