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Problems related to the establishment and relation of the Special Court and the Truth and Reconciliation Commission for Sierra Leone

The reconciliation body of Sierra Leone has a special significance in the series of the Truth and Reconciliation Commissions. It was working beside a criminal court created by national legislation after the civil war with international support and influence. These two institutions should have supported the efficient work of each other. In practice, lack of appropriate regulation of the relation between them caused fundamental confusion related to their role and authority. The efficient work of the Court has an outstanding importance in calling to account perpetrators of the most serious crimes committed during hostilities. On the other hand, the Commission could have served the aim of revealing the facts and reasons relevant to these crimes and all the unexplained events of the conflict in Sierra Leone.

The main ground of the civil war could be found in economic differences that are dominant beyond ethnic differences in most of the African conflicts. After the survey of the United Nations Development Program Sierra Leone is one of the last countries on the Development Index.¹ Appropriate life quality and education is available only for a narrow layer of the society. On the other hand, majority of the people leads a life of extreme poverty. Beside sharp economic differences, the most significant direct reason of the conflict was the fight for diamond resources as it is explained by the general approach. However, the Truth and Reconciliation Commission emphasized after its two year function that it is only one among several further reasons which can be mentioned. Beyond the inappropriate government of the country, lack of democracy and constitutionality, corruption, systematic violation of human rights together caused disastrous differences in the society, and lead to an unavoidable conflict.²

During the eleven years of hostilities approximately 150 thousand people died, 600 thousand refugees (12 percent of the population) sought asylum in the neighbouring countries, more than 200 thousand women became a victim of sexual violence and about 1000 people suffered the amputation of one or more limbs.³ Armed conflict began in 1991, when the Revolutionary United Front (RUF) entered the country from Liberia in order to overthrow the government of Joseph Momoh with the help of National Patriotic Front of Liberia (NPFL) lead by Charles

¹ Richards, Paul (2005): Sierra Leone. *Encyclopedia of Genocide and Crimes Against Humanity* (Ed.: Dinah L. Shelton). Macmillan Reference USA. page 952

² Overview of the Sierra Leone Truth and Reconciliation Commission Report.
www.unigalway.ie/human_rights/Docs/Publications/Sierra%20Leone%20Report/SL_TRC_Overview.pdf
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³ Richards, Paul: *supra* note 33 page 946

Taylor. Although Momoh invited Guinean and Nigerian troops to constitute the basis of the main defensive functions, his power was overthrown by a faction of young military officers. In this way, Captain Strasser took over the position of the president and held it for four years from 1992 to 1996. He used the support of South African mercenaries, several tribal militias and the Civil Defence Force (CDF) to fight against his opponents.⁴ Fighting came to an end with a democratic change inspired by the stronger and stronger international pressure. The other reason of change was the widespread civilian protest against the military regime that was strengthened by raids conducted by members of the RUF wearing stolen army uniform.

Sierra Leone Peoples Party (SLPP) won the election in 1996 that lead to the presidency of its leader, Ahmad Tejan-Kabba. Although Kabba concluded a cease-fire agreement with the RUF, the Civil Defence Force used by the president went on with attacks against its main forest camps. In this way, fighting continued and RUF fighters reorganized themselves in the northern and central part of the country. In May 1997 government of Kabba was forced into exile. Major Johnny Paul Koroma jailed by them and released after their fall organized a new regime, the Armed Forces Revolutionary Council (AFRC).

The UN Security Council imposed sanctions of oil and weapon embargo on Sierra Leone and charged the regional peacekeeping forces of ECOMOG (armed group of the Economic Community of West African States) with ensuring the enforcement of these sanctions. After successful military actions President Kabba could return to Sierra Leone and the Security Council lifted the embargo. On the other hand, RUF concentrated its forces at the borderline of Liberia and strengthened its links with the Taylor-regime. In October 1998 they battled Nigerian ECOMOG troops in order to seize the main diamond-mining district of Kono, and in December they began the attempt to take Freetown. Junta fighters entered the territory of Freetown and pushed out the ECOMOG troops for three weeks. 7-8000 civilians died during this period, numerous households were burnt and approximately 150 thousand people were forced to leave their homes. Peacekeeping soldiers were responsible for numerous atrocities as well carrying out summary executions of young people suspected of RUF membership. After winning back the town but having no army President Kabba had only one alternative to suggest a peace agreement.⁵

The peace agreement finally was signed in Lome on 7th July 1999. The already existing death sentence of Sankoh was cancelled and he enjoyed together with the other members of the RUF absolute and free pardon.⁶ On the other hand, the UN Security Council ordered that no amnesty can be ensured in the cases of genocide, crimes against humanity and other grave breaches of international humanitarian law.⁷ In order to facilitate reconciliation and prevention of further violence the necessity of the establishment of a Truth Commission was mentioned already in the Lome Accord. The main aim of this idea was to ensure a forum for victims and perpetrators to clarify the details of the conflict.⁸

⁴ Sulyok, Gábor (2004): *A humanitárius intervenció elmélete és gyakorlata. (Theory and practice of humanitarian intervention)* Budapest: Gondolat Kiadó. page 299

⁵ Richards, Paul (2005): *supra* note 40 page 946-949

⁶ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front, Lomé, 7 July 1999. www.sierra-leone.org/lomeaccord.html Art. IX

⁷ S. C. Res. 1315, 14 August 2000, U. N. Doc. S/RES/1315 (2000)

⁸ Peace Agreement: *supra* note 38 Art. XXVI

Nevertheless, the expected consolidation did not come as numerous RUF units went on with military actions. As a consequence of these events, the United Nations Mission in Sierra Leone (UNAMSIL) took over the functions of ECOMOG. The blue helmet peace keepers attempted to force the RUF units to give up their military activities, although they could not been called well-informed about the exact function and structure of these armed groups. As a result of the counter-attacks of the rebels, around 500 peacekeepers were taken as hostages till May 2000. At the end, with help of the paratroops from the United Kingdom UNAMSIL could avoid the total defeat, and later the staff of the mission was increased. In November the belligerent parties concluded a new cease-fire, the Abuja Agreement.⁹ Disarmament process was finished at the end of 2001 and President Kabba declared the end of war on 18th January 2002.

International elements in the establishment of the Special Court

At the end of hostilities it became a significant question how to call to account the persons responsible for the most serious crimes of an international character, how to ensure the appropriate and efficient procedure in their cases. The jurisdiction of the International Criminal Court was excluded as it applies only to the crimes committed after 1st July 2002 when the Rome Statute entered into force. A special solution must have been found which was later declared in the agreement between the UN and the government of Sierra Leone on 16th January 2002. It was the intent to establish a Special Court. UNAMSIL had the task to ensure the safety of function and the personnel of the court and the government was obliged to co-operate with the judicial body and support it in any part of the procedures such as in case of identification or location, arrest and detainment of perpetrators, transfer of them and necessary documents to the Court.¹⁰

As opposed to the creation of the already existing *ad hoc* tribunals of an international character (ICTY, ICTR) this judicial body was established with a mixed character, including national and international elements. The reason for this kind of establishment was the will of the government to ensure the possibility to influence the function of the Court. On the other hand, the establishment of a new and expensive international tribunal would not have been supported either by the international community. The obvious disadvantage was that not having been established after the Chapter VII's power of the Security Council, it was not able to issue binding orders to states, so the will of states to co-operate played a more significant role.¹¹

The mixed character can be seen also on the structure of the Court. One of the three judges of the Trial Chamber has been appointed by the government of Sierra Leone, and two of them by the Secretary-General of the UN. In the case of the five judges of the Appeals Chamber, two judges have been appointed by the government and three by the Secretary-General. The

⁹ Sulyok, Gábor (2004): *supra* note 36 page 303

¹⁰ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. 16 January 2002. www.specialcourt.org/documents/Agreement.htm Art. 16-17

¹¹ McDonald, Avril (2005): Sierra Leone Special Court. *Encyclopedia of Genocide and Crimes Against Humanity* (Ed.: Dinah L. Shelton). Macmillan Reference USA. page 955

personal question of the Prosecutor and also of the Secretary of the Court has been decided by the Secretary-General.¹²

Beyond the appointment of Court officials, the international character can be recognised in the fact that especially related to the creation of procedural rules, the function of the ICTY and ICTR was a sample to follow.¹³ Although the Security Council had asked the Secretary-General to consider the possibility that the Court could share the judges of the Appeals Chamber of the two already existing *ad hoc* tribunals, but he rejected this proposal.¹⁴ However, decisions of the Appeals Chamber of the ICTY and ICTR became influential on the jurisdiction of the Appeals Chamber of the Special Court.¹⁵

¹² Statute of the Special Court for Sierra Leone. 16 January 2002. www.sierra-leone.org/specialcourtstatute.html 11, Art. 15-16

¹³ Statute of the Special Court: *supra* note 44 Art. 14 (1)

¹⁴ McDonald, Avril: *supra* note 43 page 956

¹⁵ Statute of the Special Court: *supra* note 44 Art. 20 (3)

Necessity for an alternative procedure system in case of juvenile and child perpetrators

The Special Court was given jurisdiction over persons most responsible for serious violations of international humanitarian law and Sierra Leone law committed after 30th November 1996.¹⁶ Among the problematic issues of personal jurisdiction, the case of members of peacekeeping forces was quite clear. Sending states had exclusive jurisdiction over them.¹⁷ Opposite to them, the situation of juvenile and child perpetrators caused a more intensive debate.

During their services in the frame of armed forces also child-soldiers committed war crimes and grave breaches of IHL. Nevertheless, their case is different than the one of adults. Mostly they are manipulated, forced to commit crimes. It is why the Statute of the Special Court declared that it has no jurisdiction over any person who was under the age of 15 at the time of the commission of the crime. Special rules apply for persons between the ages of 15 and 18 at the relevant time. In their cases the Court has the power to prosecute, but has to take into account the main aim of their reintegration into their community. Special measures can be ordered for them by the Court, such as community service orders, counselling, correctional, educational and vocational training programmes, approved schools, etc.¹⁸ The Statute recommends rather the truth and reconciliation mechanisms, where appropriate in the case of juvenile offenders.¹⁹ It seemed to be an optimal alternative, especially because the system of juvenile justice has not worked sufficiently in Sierra Leone.

The age of criminal responsibility is 10 years under domestic law, which age is too low taking into consideration the international standards. The Children and Young Persons Act of Sierra Leone does not prohibit the imposition of life imprisonment on a juvenile, and the domestic courts often use this punishment in case of young offenders. The other weak point of the system is that persons between the ages of 14 and 17 can be sent to an adult prison. Detained juveniles who wait for their trials are not always tried as quickly as they should be. Because of this delay, they must spend much more time detained than it is legally permitted. The magistrates working at juvenile courts do not receive specialist training on children's rights and issues of juvenile justice. Beyond this lack of special knowledge required to a fair trial, in most cases juveniles are not represented in court and do not receive legal advice when they are arrested and during their detention in police cells.²⁰

With all of these circumstances, the function of authorities for juvenile justice seriously violates international standards included in the Convention of the Rights of Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice. The latter document includes general and also more specific rules, and in both categories several norms can be found which are seriously violated by the system in Sierra Leone. After the "Beijing Rules" young people "require particular care and assistance with regard to physical, mental and social development". In order to reach this aim, professional training and refresher courses shall be

¹⁶ Statute of the Special Court: *supra* note 44 Art. 1 (1)

¹⁷ Statute of the Special Court: *supra* note 44 Art. 1 (2)

¹⁸ Statute of the Special Court: *supra* note 44 Art. 7

¹⁹ Statute of the Special Court: *supra* note 44 Art. 15 (5)

²⁰ Harvey, Rachel (2000): *Juvenile Justice in Sierra Leone. An Analysis of Legislation and Practice*. The Children and Armed Conflict Unit. www.essex.ac.uk/armedcon/story_id/000013.htm

ensured for all the personnel dealing with juvenile cases.²¹ Beyond these rules, that the Sierra Leone juvenile justice system is not appropriate for, Beijing Rules contain a specific provision that endeavours states to prefer diversion against criminal proceeding if it is possible.²² The Commentary of this article emphasises that in many cases non-intervention is the best solution, and recommend redirection of young offenders to community support services instead of criminal process to avoid the negative effects of such a proceeding (for instance the stigma of conviction and sentence).

In these cases an optimal solution can be the truth and reconciliation process, which can be a forum for former child-soldiers to clarify before their community what and why they had committed, so that they can get a chance to reconcile with the society and return to it.

Attempt for prompter reintegration and fact-finding procedure: establishment of the Truth and Reconciliation Commission

The aim to arrange the emerging situation of former young and child soldiers was only one of the numerous good reasons to establish a Truth and Reconciliation Commission. Finally, the Act on its creation was adopted one year after the Lomé Peace Agreement in 2000. The provisions of the Act reflected the recommendations made by the representatives of the Office of the UN High Commissioner for Human Rights.²³ The TRC was established as a national institution by internal legislation but it did not lack international character. The Selection Coordinator for the appointments of TRC officials was the UN Special Representative of the Secretary-General in Sierra Leone.²⁴ President of Sierra Leone appointed the Chair for the Commission according to the recommendation of the Selection Coordinator and the UN High Commissioner for Human Rights. Beyond them, the Selection Panel composed of dominant institutions of Sierra Leone²⁵ was working on the initial and also further appointments of the most optimal persons for the official positions at the TRC.²⁶

The main aim of the function of the TRC was declared already in the Lomé Peace Agreement which is “to address impunity, break the cycle of violence, provide a forum for both victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.”²⁷

The Commission was composed of two organisational units: the Information Management Unit having research and investigation functions, and the Legal and Reconciliation Unit

²¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice. „The Beijing Rules” 29 November 1985 A/RES/40/33 Art. 22

²² “The Beijing Rules”: *supra* note 53 Art. 11

²³ Bennett, Richard (2001): *The Evolution of the Sierra Leone Truth and Reconciliation Commission*. www.sierra-leone.org/trcbook-richardbennett.html

²⁴ The Truth and Reconciliation Act. 22 February 2000. www.sierra-leone.org/trcact2000.html Part I Art. 1

²⁵ Members of the Selection Panel: the President of Sierra Leone, the RUF, the AFRC, the Inter-religious Council, the National Forum for Human Rights and the National Commission for Democracy and Human Rights.

²⁶ The Truth and Reconciliation Act: *supra* note 56 *Schedule: Procedure for the Selection of Nominees for Appointment to the Commission*.

²⁷ Peace Agreement: *supra* note 38 Art. XXVI

collecting testimonies, conducting hearings and creating reports. The reconciliation body collected more than 7000 statements. At the end of its two year function it published its Final Report in October 2004 which had chapters on the main issues related to the conflict and consolidation.²⁸

Turning back to the issue of child and young perpetrators it must be mentioned that TRC treated child perpetrators primarily as victims and gave special attention to girls and gender-based violence. In the case of children it primarily took the form of giving confidential statement and ensured the support of psychosocial workers and the presence of parents. The TRC staff included experts on children's issues. The Commission used also traditional ceremonies, which could be a symbolic gesture that the child is accepted back to the community. For example, in northern Sierra Leone village members washed the soles of children's feet and their mothers then drank the water.²⁹ At the end of its function it published also a child version of its Final Report, written with the assistance of children, to facilitate the better understanding of the Report.³⁰

Beyond analysing the past, the Commission concentrated also on the future with the hope of a possible consolidation. It created recommendations related to the protection of Human Rights, constitutionality, fight against corruption, protection of children, youths and women and other issues relevant for development. The categories of compensation determined by the TRC were: health, pensions, education, skills training, community and symbolic reparations.³¹

On the other hand, it clearly declared that process of reconciliation and consolidation would need very long time, and in order to reach the main aims, it was inevitable that all members of the population felt personal responsibility for prevention of future conflicts.

Lack of proper regulation on the relation of the two institutions

The circle of affected persons and the period of work of the two institutions were quite clearly defined, but little confusion among these rules and lack of regulation related to functions and exchange of information caused serious obstacles in the course of consolidation.

The Statute of the Special Court is unambiguous on the issue of personal jurisdiction. All those persons who were not most responsible for serious crimes or were under the age of 15 at the time of the commission of the crime do not fall under the jurisdiction of the Court but under the authority of the Truth and Reconciliation Commission. On the other hand, the persons responsible for the most serious crimes fall under its exclusive jurisdiction, the Commission

²⁸ Overview of the Sierra Leone Truth and Reconciliation Commission Report.

www.nuigalway.ie/human_rights/Docs/Publications/Sierra%20Leone%20Report/SL-TRC-Overview.pdf page 3

Chapters of the Final Report: Historical Antecedents to the Conflict, Governance, Military and Political History, Nature of the Conflict, Mineral Resources, External Actors in the Conflict, Women, Children, Youths and the Armed Conflict, The TRC and the Special Court for Sierra Leone, National Vision for Sierra Leone.

²⁹ *International Criminal Justice and Children*. Rome: No Peace Without Justice – UNICEF Innocenti Research Centre, 2002 page 135

³⁰ Overview of the Sierra Leone Truth and Reconciliation Commission Report. *supra* note 60

³¹ Overview of the Sierra Leone Truth and Reconciliation Commission Report. *supra* note 60 page 13

was not entitled to hear these persons. In this way, its mission to create a clear and whole picture about the past was obviously undermined.

The Commission could examine the events occurred from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement in 1999.³² The period falling under the jurisdiction of the Court was not determined quite consequently. It can proceed in cases of crimes committed in the period after 30th November 1996.³³ In this way, the persons responsible for the most serious crimes committed in the five year period from 1991 to 1996 could not be called to account.

Beyond these matters, also the lack of appropriate regulation on the relation between the two institutions caused serious problems. Although their founding documents do not mention this issue in a concrete way, the Act on the establishment of the TRC declared the absolute independence of the Commission. Besides, the priority of the Special Court to the national judicial bodies ensured by its Statute could not apply to the Commission as it was not a judicial body. In this way, they were working totally separately from each other that led to the duplication of work, waste of time and financial resources. On the other hand, the people themselves living in Sierra Leone were confused about the relation and separation of the two institutions. A short practical story about this kind of confusion: someone ordered a taxi told the driver he was going to the Special Court, and the driver took him to the TRC office.³⁴

One of the most significant questions related to the co-operation of the two bodies was the regulation of exchange of information. Despite the theoretical independence, the government gave a narrow discretion power to the Court to ask information from the Commission. In this case three conditions must have been fulfilled: the information requested must have been specific, essential to a fair determination of the innocence of the accused and it could not reasonably be obtained from any other source.³⁵ The problem was that it was not clarified who is entitled to determine whether these conditions were met.

This regulation served the so-called “conditional information sharing model”, but in practice after the survey of the Sierra Leonean non-governmental organization of PRIDE³⁶, the lack of concrete determination of conditions caused free exchange of information mainly towards the Special Court.³⁷ It was a significant obstacle related to the participation of ex-combatants to the reconciliation process. Many of them were afraid that their statements given to the Commission would be used against them, or after these statements they would be subpoenaed to the Special Court as a witness in the proceeding of their commanders whom they were still

³² The Truth and Reconciliation Act: *supra* note 56 Part III Art 6 (1)

³³ Statute of the Special Court: *supra* note 44 Art. 1 (1)

³⁴ Tejan-Cole, Abdul (2002): The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission *Yearbook of International Humanitarian Law*, Volume 5 (2005) The Hague: T. M. C. Asser Press. page 323

³⁵ Tejan-Cole, Abdul (2002): *supra* note 66 page 327

³⁶ PRIDE: Post-conflict Reintegration Initiative for Development and Empowerment. The organization was created in April 2001 with the main task of examining the post-conflict judicial and reconciliation system related to ex-combatants in order to facilitate the communication between policy-makers and the perpetrators of the conflict in Sierra Leone.

³⁷ PRIDE (2002): *Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone*. Freetown. www.ictj.org/downloads/PRIDE%20report.pdf page 18

depended on. At the same time, participation of the ex-combatants had an outstanding importance. It was inevitable to reintegrate the more than 50 thousand persons having taken part in hostilities into their former communities.³⁸ On the other hand, how could the victims be reconciled with perpetrators who are not present at the proceedings? Without reconciliation and reintegration one alternative remained for ex-combatants: the way back to armed groups that could have led to continuation of the conflict. Besides, it cannot be forgotten that ex-combatants had inevitable information about the details of the conflict, the reasons of spread of hostilities, which information was fundamentally necessary for creating a clear and whole picture about the past events.

Furthermore, the appropriate dissemination of information about the Commission and the Special Court should have been better ensured. Numerous members of the CDF thought that jurisdiction of the Court did not apply to them as the aim of their military actions ensured immunity for them. In order to avoid this kind of misunderstandings, the radio and personal meetings should have played more central role in the activity of information dissemination. The TRC Working Group tried to organize as many meetings as possible and in this activity it was supported by the UNAMSIL Human Rights Section to a large extent.³⁹ These meetings increased the number of supporters of the function of the Commission and the Court. According to the 2001 survey of the PRIDE 53 percent of the participants supported the function of the Commission before the meetings which rate increased to 85 percent after the meetings. The same examination showed an increasing from 59 percent to 79 percent related to the Special Court.⁴⁰ For instance, during these meetings it became clear for several combatants that reconciliation can give them a chance to clarify before their communities the reasons why they joined armed groups and took part in hostilities and in this way, to return to their homes.

Duplication of work, waste of time and money shall not be accepted in the system of criminal jurisdiction and fact-finding after a civil war like the one in Sierra Leone. Lack of appropriate legal regulation shall not hinder the process of reconciliation that is inevitable to rebuild and heal the local communities and the whole society. Analysis of the mistakes made in Sierra Leone shall be used by future decision-makers for drawing the necessary conclusions in order to accomplish as efficient and proper consolidation as possible in post-conflict societies.

³⁸ PRIDE (2002): *supra* note 69 page 11

³⁹ Bennett, Richard (UNAMSIL): *supra* note 55

⁴⁰ PRIDE (2002): *supra* note 69 page 5

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