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SIERRA LEONE

Recommendations on the draft Statute of the Special Court

1. Introduction

The internal armed conflict in Sierra Leone has been characterized by widespread killings, amputations and rape, and the extensive use of child soldiers. The international community has made significant efforts to end the conflict and promote peace and reconciliation in Sierra Leone. The establishment of a Special Court for Sierra Leone to try those who are most responsible for the brutality of the past years has an important role in this process.¹

Amnesty International welcomes the decision by the United Nations (UN) Security Council in Resolution 1315 (2000) of 14 August 2000 to establish a Special Court for Sierra Leone as an important step towards ending impunity. The draft Statute of the Special Court, however, is seriously flawed and requires extensive revision.² The draft Statute lacks much of the detail of the Rome Statute of the International Criminal Court; in particular, it omits several crimes recognized in the Rome Statute. Amnesty International believes that the Rome Statute is a key mechanism for the protection of human rights and for enforcing the rights of victims to justice and appropriate reparation. The Rome Statute reflects a broad international consensus: 120 states voted for it and 155 states have already signed it. Any dilution of the standards in the Rome Statute is unacceptable.

A vital concern in resolving the conflict in Sierra Leone is obtaining justice for children who have been recruited to armed groups under the age of 15. Unlike the Rome Statute, which criminalizes **all** recruitment of children under 15, the Special Court will have jurisdiction only over those who recruited children under 15 using force or abduction. This is an unacceptable dilution of the standard in the Rome Statute. If such a provision remains in the final Statute, this will deny justice to the children who were illegally recruited into armed groups.

Other serious flaws in the draft Statute include:

- the inclusion of reference to Sierra Leonean laws which are an unnecessary addition to the international law provisions and which contain retrogressive assumptions about crimes of sexual violence;

¹See *Sierra Leone: Ending impunity - an opportunity not to be missed* (AI Index: AFR 51/60/00), published by Amnesty International on 26 July 2000.

²The draft Statute is included in the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915.

- the failure to expressly include the war crime of slavery and the slave trade, and the omission of certain categories of crimes against humanity and war crimes which undermines the certainty of international criminal law;
- the omission of vital fair trial protections recognized in the Rome Statute.

This report sets out Amnesty International's main concerns about the draft Statute of the Special Court and makes recommendations to the UN Security Council.

2. Who should be prosecuted?

a) Concerns about defining the margins of the period which the Special Court can consider

The date currently specified in the draft Statute for the start of the Special Court's temporal jurisdiction is 30 November 1996. It had been initially proposed by the government of Sierra Leone that the court prosecute those responsible for crimes committed after 7 July 1999, the date of the peace agreement signed in Lomé, Togo, between the government and the armed opposition Revolutionary United Front (RUF). By opting for 30 November 1996, the jurisdiction of the Special Court would clearly include crimes committed by the Armed Forces Revolutionary Council (AFRC) which came to power following a military coup on 25 May 1997.³ Amnesty International had been concerned that these crimes might not be included, especially as the leader of the AFRC, Johnny-Paul Koroma, has been allied to the government since the peace agreement. So, on one level, the choice of 30 November 1996 as the starting date of the Special Court's jurisdiction is to be welcomed.

Amnesty International is concerned about this date, however, because the Special Court will not have jurisdiction over the period when a previous military authority, the National Provisional Ruling Council (NPRC), was in power (from April 1992 to February 1996). During this time serious human rights violations were committed and have been documented in Amnesty International reports.⁴

³ For further information, see *Sierra Leone: A disastrous set-back for human rights* (AI Index: AFR 51/05/97), published by Amnesty International on 20 October 1997.

⁴ For further information, see in particular *Sierra Leone: Towards a future founded on human rights* (AI Index: AFR 51/05/96), published by Amnesty International on 25 September 1996, *Sierra Leone: Human rights abuses in a war against civilians* (AI Index: AFR 51/05/95), published by Amnesty International on 13 September 1995, and *Sierra Leone: The extrajudicial execution of suspected*

During the early months of 1996, for example, before the presidential and parliamentary elections, the phenomenon of deliberate amputations of limbs, which has characterized the internal armed conflict in Sierra Leone, first became widespread. Although many amputations were perpetrated by the RUF, government-controlled soldiers of the NPRC were also responsible.

Human rights abuses by forces of the RUF have been committed throughout the period of the internal armed conflict which began in March 1991.

Amnesty International calls for all perpetrators of crimes against humanity, war crimes and other serious violations of international humanitarian law to be brought to justice. Although the jurisdiction of the Special Court needs to be limited if it is not to be overburdened with work which would delay trials, it is vital that prosecutions are brought wherever there is strong evidence that crimes were committed. The temporal jurisdiction of the Special Court must be fixed so that all political groups who have committed or encouraged such crimes since the conflict began in March 1991 face the prospect of prosecution. Although it has been argued that too wide a period for the Special Court's jurisdiction would overload the court, the Prosecutor has a discretion to prosecute those "most responsible" for crimes and thus will be able to assess which are the most appropriate cases to bring. The Special Court must not be established in a way which results in the perpetrators of the most serious crimes, at any time during the conflict, being able to escape prosecution on technicalities.

b) Who are those "most responsible"?

The Special Court should not be overburdened as this would lead to unacceptable delays in securing justice for the victims, and would deny the accused a fair trial. Therefore, the UN Secretary-General's recommendation that only those "most responsible" should be prosecuted is welcomed. Amnesty International notes that the UN Secretary-General's report on the establishment of a Special Court for Sierra Leone identifies the following characteristics as principles to guide the Prosecutor in identifying those "most responsible": holding a position of leadership or authority, and a sense of the gravity, seriousness or massive scale of the crime.

Amnesty International supports the use of such principles, provided that all investigations and prosecutions are undertaken so that crimes committed by all parties to the conflict are addressed appropriately and given equal weight, and that there are no politically motivated prosecutions. The Prosecutor should be fully independent and the defendants'

rebels and collaborators (AI Index: AFR 51/02/92), published by Amnesty International on 29 April 1992.

right to be tried by a competent, independent and impartial tribunal should be respected at all times.

Since the Special Court will only be able to try a limited number of people, the international community must ensure the speediest possible reconstruction of the Sierra Leonean criminal justice system so that it can bring to justice **all** those responsible for crimes under international law whom the Special Court will be unable to try. Trials under the domestic jurisdiction of Sierra Leone should have full fair trial guarantees. The death penalty should not be imposed as a punishment. In addition, all those held in prison awaiting trial or after conviction, should be held in conditions which conform to international standards for the protection of the human rights of prisoners, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners. The international community must provide funds so that these standards can be maintained and so that suspects and convicts are not held in conditions which amount to cruel, inhuman and degrading treatment. Currently, there are grave concerns that prison standards in Sierra Leone are unacceptable. In his report, the UN Secretary-General notes that detention facilities are inadequate⁵ and Amnesty International has also raised concerns about conditions of detention in Sierra Leone.⁶

3. Concerns about crimes under the jurisdiction of the Special Court

a) Genocide is omitted

Genocide is not included in the draft Statute of the Special Court. In his report, the Secretary-General states that genocide has not been included because there was no evidence that large-scale killings were perpetrated against a specific national, ethnic racial or religious group.⁷ While this may be the case, Amnesty International believes that this is a decision for an independent Prosecutor to make on the basis of evidence presented to him or her, and is not a decision that should be made when drafting the Statute.

The omission of genocide from the jurisdiction of the Special Court is also an unacceptable dilution of the standards of the Rome Statute. Any international court which is now established should contain, as a minimum basis, all the standards of the Rome Statute. It should uphold the standards of criminal justice of the Rome Statute and maintain certainty

⁵Paragraph 62 of the UN Secretary-General's report.

⁶See *Sierra Leone: Ending impunity - an opportunity not to be missed* (AI Index: AFR 51/60/00), published by Amnesty International on 26 July 2000.

⁷ Paragraph 13 of the UN Secretary-General's report.

about the definition and substance of international criminal law. Amnesty International therefore opposes the omission of genocide from the draft Statute of the Special Court.

b) Omission of several categories of crimes against humanity

The Special Court's provision on crimes against humanity does not include the detail of the Rome Statute. It states that 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:⁸ ...

(d) Deportation

⁸ This provision of the Statute omits a key phrase of the Rome Statute definition which describes the intentional element of the crime "with knowledge of the attack" (Article 7 (1) Rome Statute).

(e) Imprisonment”.⁹

whereas the Rome Statute defines the parallel provisions in its text on crimes against humanity as: “Deportation or forcible transfer of population”¹⁰; and “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”¹¹.

The wording in the draft Statute would exclude from the definition of crimes the forced displacement of population within Sierra Leone and a wide variety of deprivations of physical liberty not amounting to imprisonment.

The definitions agreed in the Rome Statute should be maintained in the draft Statute of the Special Court, not simply for consistency in maintaining the international consensus concerning the definitions of crimes against humanity, but also because the definitions in the Rome Statute would provide redress to those who are victims of the crimes under the more extensive definitions. Similarly, the provisions in the draft Statute omit “enforced sterilization” and “disappearance” as crimes against humanity, when both of these were included as crimes against humanity in the Rome Statute.

The inclusion of these crimes in the Rome Statute is a vital addition to the fight against impunity, and the development of international criminal law. The UN should not retreat from the current definition of crimes against humanity, as recognized in the Rome Statute.

Amnesty International calls for this provision in the draft Statute to be amended to be fully consistent with the provisions of the Rome Statute.

c) Failure to expressly include “slavery and the slave trade in all their forms” as a war crime

⁹Article 2 of the draft Statute.

¹⁰ Rome Statute, Article 7 (1)(d).

¹¹ Rome Statute, Article 7 (1)(e).

Amnesty International is concerned that Article 3 of the draft Statute does not expressly include an important provision of Additional Protocol II of the Geneva Conventions, which specifies that “slavery and the slave trade in all their forms” shall be prohibited,¹² even though the title of Article 3 of the draft Statute (“Violations of article 3 common to the Geneva Conventions and of Additional Protocol II”) shows that slavery is included. The failure, however, to list expressly the provision on slavery is inconsistent with the important trend in international criminal law to identify and define carefully the content of crimes. This respects the principle of legality, which requires that no one should be prosecuted for a crime which was not clearly defined as criminal at the time it was committed.

This is a serious fault in the draft Statute, particularly as it has been widely documented by many organizations, including Amnesty International, that many people, including children, have been forced to act as slaves.¹³ Although the crime of “enslavement” is included in Article 2 of the draft Statute as a crime against humanity, it is important that it is also expressly and clearly included in Article 3 as a war crime. This is not just for consistency and to include expressly the complete range of offences set out in Additional Protocol II, but also because there have been many instances of slavery being practised during the conflict in Sierra Leone which could only be prosecuted as a war crime, and not as a crime against humanity, because isolated incidents of slavery may not satisfy the definition required of a crime against humanity, that is, they may not constitute a “widespread or systematic attack against any civilian population”.¹⁴ The recognition of slavery as a war crime allows those who perpetrated isolated instances of the practice of slavery, or those who enslaved former combatants, to be prosecuted.¹⁵

Although the provisions on war crimes of the Rome Statute (Article 8) do not include slavery as a war crime, this is not a valid reason to omit this element of Additional Protocol II

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, Article 4 (2) (d).

¹³ For further information, see in particular *Sierra Leone: Childhood – a casualty of conflict* (AI Index: AFR 51/69/00), published by Amnesty International on 31 August 2000, *Sierra Leone: Rape and other forms of sexual violence against girls and women* (AI Index: AFR 51/35/00), published by Amnesty International on 29 June 2000, and *Sierra Leone: 1998 – a year of atrocities against civilians* (AI Index: AFR 51/22/98), published by Amnesty International in November 1998.

¹⁴Rome Statute, Article 7(1).

¹⁵ Captured combatants are defined as “protected persons”, not civilians, under the terms of international humanitarian law. Therefore, the definition of crimes against humanity cannot be applied to crimes committed against them.

from the draft Statute of the Special Court for Sierra Leone. Amnesty International supports the Rome Statute as a bedrock standard for international criminal justice. Its provisions should not be diluted, but this does not mean that existing protections for victims of breaches of international humanitarian law, such as Additional Protocol II, should not be fully and expressly included in the list of crimes in the jurisdiction of the Special Court for Sierra Leone.

d) Failure to include other war crimes in the draft Statute

Article 3 of the draft Statute is entitled “Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”, which will mean that the Special Court only has jurisdiction over crimes committed in non-international armed conflict. Under international humanitarian law, the rules applying to non-international armed conflicts are a smaller and less detailed subset of the rules applying to international armed conflict.

The determination of whether a conflict is international or non-international therefore makes a great difference as to which crimes can be prosecuted. For example, certain war crimes, such as treacherously killing or wounding an adversary and denial of quarter (giving an order that all survivors of a battle must be killed) are specified as crimes in international armed conflicts, but not non-international armed conflicts. The law of international armed conflict also contains more detailed rules about who is a “protected person” (a civilian in an occupied country, a prisoner of war, the sick and injured) and specifies that it is a grave breach to harm such people, whereas the definitions in the law of non-international armed conflict are more vague.

Therefore, there is a risk that specifying that the Special Court will only have jurisdiction over war crimes under the law of non-international armed conflict could lead to impunity for certain war criminals. If the Special Court were to determine that any aspect of the armed conflict in Sierra Leone was governed by international humanitarian law with respect to international armed conflict, it would not be possible to charge persons for violations of common Article 3 of the Geneva Conventions or violations of Additional Protocol II (which at the moment is all that the draft Statute includes). Therefore, the draft Statute should allow jurisdiction over the full range of international humanitarian law relating to both international and non-international armed conflict. The determination of which particular war crimes may have been committed is one which must be made by the Prosecutor, not by the UN Secretariat or the Security Council.

The Prosecutor of the Special Court must have the fullest possible legal framework to assess the evidence of the situation in Sierra Leone and bring whichever charges are most appropriate. Making a determination that only crimes under the laws of non-international armed conflict can be prosecuted in the Special Court could lead to impunity for some crimes committed during the conflict.

e) Serious flaws in the definition of the crime of recruitment of child soldiers

The draft Statute defines as a serious violation of international humanitarian law falling within the jurisdiction of the Special Court the “[a]bduction 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.”¹⁶

Although Amnesty International welcomes measures to criminalize those who recruit child soldiers, it strongly opposes this definition for three reasons: it is inconsistent with contemporary international law; there is no valid reason to have a definition which undermines the current state of the law on this issue; and the current definition in the draft Statute is profoundly flawed.

¹⁶ Article 4(c) of the draft Statute.

The Rome Statute defines **any** recruitment of children under 15, whether such recruitment is voluntary or forced, to be a crime.¹⁷ Moreover, the Rome Statute is merely the latest international instrument to recognize that children under 15 should not be recruited into armed forces. This rule is recognized in the Convention on the Rights of the Child¹⁸, Additional Protocol I to the Geneva Conventions which applies in international armed conflicts¹⁹, and Additional Protocol II to the Geneva Conventions which applies in civil wars and other non-international armed conflicts²⁰.

¹⁷ “War crimes”

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.*

2. *For the purpose of this Statute, “war crimes” means:*

... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts...

A8(2)(b) (xxvi): Conscripting or enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities.

...(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts...

A8(2)(e)(vii): Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”

During the negotiations on the Rome Statute, it was accepted that “participation” would include direct participation in combat, and military activities linked to combat such as scouting, spying, sabotage, and use of children as decoys, couriers and at military checkpoints; and also using children for any activities (even transporting food) at the front line. See PrepCom draft Statute, p. 21, cited in R.Lee (ed) “The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results.” (1999, Kluwer Law International) p 117.

¹⁸Article 38(3) of the Convention on the Rights of the Child states: “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces”.

¹⁹Article 77(2) of Additional Protocol I states: “The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces”.

²⁰Article 4(3)(c) of Additional Protocol II states: “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”.

Sierra Leone acceded to the Additional Protocols to the Geneva Conventions on 21 October 1986.²¹ Common Article 1 of the Geneva Conventions legally obliges states to ensure respect for international humanitarian law. Also, Article 38(1) of the Convention on the Rights of the Child²², which has been ratified by all UN member states except the United States and Somalia, states: “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child”.

Thus, the armed forces and armed groups in Sierra Leone should have been aware that any recruitment (whether forced or “voluntary”) was illegal, as international humanitarian law requires states parties to inform their population about its provisions.

In his report, the UN Secretary-General contends that the Rome Statute definition of the crime of recruiting child soldiers has not been included as it is of “doubtful customary nature” and that therefore it would breach the principle which prohibits retroactive application of criminal laws to bring prosecutions in the Special Court for recruitment of child soldiers unless it was forced.²³ The report fails to cite any evidence for this assertion, and there is substantial evidence that any recruitment of a child under 15 is a criminal act under international law, and has been for a long time.

Amnesty International disagrees strongly with the position taken by the UN Secretary-General in his report, and notes that definitions of the elements of crimes in Rome Statute have been described by the representatives of states parties, including the United States, as customary law.²⁴ The prohibition of recruitment of child soldiers is part of international humanitarian law, and has been so for almost a quarter of a century. It is therefore unreasonable to consider that prosecuting those who have recruited children under 15 to fight (even if force was not used) would be perpetrating an injustice upon them.²⁵

²¹ There are currently 157 states parties to Additional Protocol I, and 150 states parties to Additional Protocol II.

²² Sierra Leone ratified the Convention on the Rights of the Child on 18 June 1990.

²³ Paragraph 18 of the UN Secretary-General’s report.

²⁴ The adoption of the draft Elements of Crimes, was described by the United States delegate Lt. Col. William Leitzau, as “an historic accomplishment that cannot be overstated”. He added that the United States was “happy to join the consensus in agreeing that this elements of crimes document correctly reflects international law”. Article 4(4) of the Canadian Crimes against Humanity and War Crimes Act expressly recognizes that “crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute (which includes the prohibition of the recruitment of all child soldiers under 15 years, whether or not they have been recruited by force) are, as of July 17 1998, crimes according to customary international law”.

²⁵ In a leading case on the principle that the criminal law should not be applied retroactively, *SW v UK*, case number 47/1994/494/576, (27 October 1995) at paragraph 34, the European Court of Human Rights said that: “The guarantee enshrined in Article 7 (art. 7)[the prohibition of the application of

retroactive criminal law], which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) [of the International Covenant on Civil and Political Rights] in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”.

The prosecution of an act which has been contrary to general principles of international humanitarian law for so long cannot be construed as arbitrary or contrary to the rule of legality, that is, that no-one should be prosecuted or punished for an act that was not defined as an offence at the time it was committed (Article 15 of the International Covenant on Civil and Political Rights).

In addition to this, the wording of Article 4(c) of the draft Statute is seriously flawed. Its current wording is: “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**”. (Emphasis added.)

This strongly implies that prosecutions will only be brought if a child was recruited expressly in order to fight. Amnesty International opposes **any** use of children under 15 in any armed forces. The current wording implies that forced abduction of a child to undertake tasks which do not involve fighting, such as carrying equipment, cooking food or carrying out domestic tasks, or being used as a sexual slave²⁶ would be legal.

It also implies that using a child under 15 to participate actively in hostilities, without actually recruiting the child to the armed force or group, would also be legal.

Amnesty International urges the Security Council to change the definition of the crime of recruiting children under 15 in the draft Statute so that it conforms with the standard in the Rome Statute, and also makes clear that non-state forces are also bound by the same standard.

f) Needless inclusion of certain crimes under Sierra Leone law

Article 5 of the draft Statute states that provisions of two Sierra Leonean Statutes, the Prevention of Cruelty to Children Act 1926 and the Malicious Damage Act 1861, will also be part of the jurisdiction of the Special Court.

²⁶ This is an issue of particular concern in the Sierra Leone conflict, as many girls have been abducted and forced to be “wives” of combatants. Clearly, using any person as a sexual slave is recognized as criminal in itself under international law and in the draft Statute. The draft Statute, however, would not make criminal the act of abducting a person with the aim or intention of causing that person to be used as a sexual slave.

Amnesty International is concerned at the inclusion of the provisions of the Prevention of Cruelty to Children Act 1926 as being inappropriate in a modern, international criminal court. The inclusion of these provisions discriminates against boys who may have been victims of sexual assault during the armed conflict in Sierra Leone, as these laws only apply to sexual assaults on girls. This inclusion also implies that sexual assaults on girls over 14 is not a serious crime. Indeed, the content of two provisions clearly shows that the law implies a sliding scale of seriousness according to the victim's age, as the offence of abusing a girl under 13²⁷ is described as a "felony" with a penalty on conviction of up to 15 years imprisonment, whereas the offence of abusing a girl between 13 and 14 years²⁸ is described less seriously as a "misdemeanour" with a much lighter penalty of imprisonment up to two years only.

Amnesty International believes that all sexual assaults - whether committed against women or girls of any age, or whether committed against men or boys - should be treated as grave crimes.

Such offences are described in a gender-neutral and age-neutral manner in the provisions on crimes against humanity and war crimes in the draft Statute.²⁹ This satisfies the aim of the Sierra Leonean legislation, which is to punish those who sexually assault very young girls. Similarly, the offences under the Malicious Damage Act relating to various offences of setting fire to property could be more effectively covered by including the entire provision on war crimes from the Rome Statute.³⁰

4. Is there sufficient protection to ensure fair trials?

a) Definition of individual criminal responsibility

²⁷ Article 6 of the Prevention of Cruelty to Children Act 1926.

²⁸ Article 7 of the Prevention of Cruelty to Children Act 1926.

²⁹ Article 2(g) of the draft Statute recognizes that crimes against humanity include "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence". Apart from the omission of the crime of enforced sterilization, this reflects the provision in the Rome Statute. Article 3(e) of the draft Statute recognizes that war crimes include "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of sexual assault".

³⁰ Article 8 of the Rome Statute recognizes and reaffirms the following provisions of international humanitarian law: that intentionally directing attacks against civilian objects, that is, objects which are not military objectives (Article 8(2)(b)(ii)), especially if they are not defended (Article 8(2)(b)(v)), and intentionally launching a disproportionately destructive attack causing incidental loss of life to civilians (Article 8(2)(b)(iv)) are all criminal acts.

The provisions in Article 6 of the draft Statute on individual criminal responsibility lack the careful detail of the parallel provision in Article 25 of the Rome Statute. Article 25(3)(a) of the Rome Statute would be particularly useful in the context of the conflict in Sierra Leone, given that it makes it clear that someone who uses a person who is not criminally responsible (a very young child, for example) to commit a crime will be held responsible for that crime and cannot place the blame elsewhere. The failure to spell out the international principles of criminal responsibility should be remedied.

b) Fair trial concerns

The provision in the draft Statute reflects only the provisions of Article 14 of the International Covenant on Civil and Political Rights, and does not include many important rights such as the right to challenge the legality of an individual's detention, and the right to be brought promptly before a judge.

For this reason, it is vital that a provision parallel to Article 21 of the Rome Statute is included in the Statute of the Special Court. Indeed, all the provisions of the Rome Statute to promote fair trials should be included in the final Statute of the Special Court. These include the right to the assistance of a lawyer (whether or not the person questioned is a suspect) while an investigation is taking place,³¹ the right to remain silent without such silence being a consideration in determining guilt or innocence,³² a guarantee that the burden of proof of guilt will always lie on the prosecution on all issues,³³ and the obligation on the prosecution to disclose evidence to the defence that tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.³⁴

These are vital rights for any defendant in any court. Given that the UN is responsible for the establishment of the International Criminal Court, it is disappointing that it is not incorporating all the fair trial guarantees in the Rome Statute in other courts which it is establishing.

c) Omission of a clause on applicable law standards, including international human rights law standards

³¹ Article 55 of the Rome Statute.

³² Article 67(1)(g) of the Rome Statute.

³³ Article 67(1)(i) of the Rome Statute.

³⁴ Article 67(2) of the Rome Statute.

The UN Secretary-General's report specifies that the jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda should guide the Special Court, and that it should also use the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunal for Rwanda.

However, the judges at the Special Court should be empowered to refer to all relevant international human rights standards, not just the jurisprudence of the Tribunals. The draft Statute is silent on whether international standards can be invoked in the Special Court; in contrast, the Rome Statute in Article 21 states explicitly that the International Criminal Court must act consistently with human rights standards and the rules of international law, which include international standards on criminal justice. These should **all** be specifically named as approved authorities for the Special Court.

The government of Sierra Leone is jointly running the Special Court with the UN, and therefore has an obligation to ensure that its obligations under international human rights law are fulfilled.

5. Will child soldiers aged between 15 and 18 years be prosecuted?

The question of whether child soldiers, many of whom were forced to commit serious crimes, should be prosecuted is a vexed moral and legal question which cannot be addressed in detail within the confines of this report.

Amnesty International considers that due to the nature in which child soldiers have most often been used, it will be very clear in most cases that children were not acting voluntarily - in many cases, they were involuntarily drugged - and therefore may not be criminally responsible. In some cases they were threatened and might well be able to assert a defence of duress or have duress taken into account as mitigation of punishment.³⁵

It is vitally important, however, in cases where a person under 18 did act entirely voluntarily, and was in control of his or her actions, that they should be held to account for those actions in an appropriate setting, with due weight given to their age and other mitigating factors. There may be examples of young commanders of units who committed mass atrocities, including murder, mutilation and rape, who were clearly willing and who acted without coercion, and who forced other children to commit such acts. Where an individual can be held responsible for his or her actions, failure to bring them to justice will perpetuate impunity and lead to a denial of justice to the victims.

³⁵For further information, see *Sierra Leone: Childhood - a casualty of conflict* (AI Index: AFR 51/69/00), published by Amnesty International on 31 August 2000.

a) Ambiguous provisions on the mode of trial for crimes committed while a child is under 18

The draft Statute specifies that the Special Court shall have jurisdiction over persons who were between 15 and 18 years old at the time of the alleged commission of the crime. It is not, however, made clear whether all persons who allegedly committed crimes when they were under the age of 18 shall be treated as juvenile offenders. Article 7(3) of the draft Statute implies that only an accused person under the age of 18 at the time of investigation, prosecution and adjudication shall be treated as a juvenile. The final Statute should make the position clear.

b) The choice between prosecution and non-judicial mechanisms

Article 15(5) of the draft Statute states that “[i]n the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-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”.

This provision does not specify the grounds for deciding whether a particular child should be prosecuted before the Special Court or directed towards non-judicial mechanisms such as truth commissions. These could include matters such as the psychological condition of the child and the child’s ability to cope with criminal proceedings. The Prosecutor of the Special Court should consult appropriate experts such as child psychologists, human rights experts and those implementing the child rehabilitation programs, and prepare and make public appropriate guidelines.

Amnesty International calls for all those responsible for crimes under international law such as crimes against humanity, war crimes or torture to be brought to justice. The rights of victims demand no less. To do otherwise results in impunity, that is, those who have perpetrated serious crimes or might consider doing so may be encouraged to commit further atrocities, knowing that the crime will not be investigated, and that consequently they will not be held accountable. It is extremely important to set an example to others.

Amnesty International does not take a position on the use of non-judicial mechanisms such as truth commissions provided that they are not a substitute for justice. However, any truth commission should

respect due process, establish the truth, facilitate reparations to victims and make recommendations to prevent a repetition of these crimes.

c) The decision to prosecute: when is a child acting “voluntarily”?

The decision to prosecute should be made solely by the Prosecutor of the Special Court, who should be able to act entirely independently. The issue of the criminal responsibility of children is both a complex issue of fact (to which many factors such as the child’s emotional maturity, intelligence, education, make an important contribution) and a complex international legal issue. Amnesty International does not take a position on what is an appropriate age of criminal responsibility. The fixing of any age, however, should take into account the moral and psychological components of criminal responsibility, that is, whether a child has the discernment and understanding to choose certain acts and therefore be held legally responsible for those acts. A balance must be drawn in any judicial system between attributing responsibility appropriately and protecting children from a process which they are too young to understand.

The Prosecutor should prepare guidelines for assessing when it is appropriate to bring a prosecution against a person who was under 18 at the time the offence was committed.

d) Fair trial concerns: the special case of children

Amnesty International calls for all international fair trial standards applicable to children to be implemented in any prosecution by the Special Court of any person who was under 18 at the time the alleged crime was committed.

The draft Statute of the Special Court includes the following fair trial provisions in such cases:

- releasing the child from custody unless the child’s own safety requires that the child is placed under close supervision in a remand home; detention should be a last resort;
- children will be tried by a judge who is specially trained to deal with children in the criminal justice system;
- children will be tried separately from adults;
- the privacy of any child who is prosecuted shall be protected;
- any child who is prosecuted shall receive legal, social and other assistance in preparing his or her case, with the participation of his or her parents or guardians;

· a convicted child shall not be sentenced to prison, but rather to appropriate care and rehabilitation programmes.

The draft Statute also underlines that the guiding principle in any prosecution of a child should be to “treat the child 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”. This echoes the parallel provision in the African Charter on the Rights and Welfare of the Child³⁶, Article 17(1), which reads: “Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”.

Amnesty International welcomes these provisions, which conform to fair trial guarantees recognized in the Convention on the Rights of the Child, Article 40. The Special Court should also be guided by other UN standards relating to the prosecution of children, specifically the Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”).

e) Disposal of cases involving children

The draft Statute does not specify the type of finding that it will make in cases involving children: it does not specify whether a finding of guilt or innocence will be made, or whether the court will be able to make a finding that a child was criminally responsible, but under mitigating circumstances. The final Statute should make clear what findings the Special Court can make. The Special Court should also make provision for specialist reports to be prepared and put forward when it is considering what rehabilitative programs it will order in any specific case.

The draft Statute specifies that if a child is found to have committed an offence under the jurisdiction of the Special Court, that child will receive rehabilitation and education rather than a prison sentence. It does not specify, however, whether the child will be transferred to adult prisons immediately on becoming 18. Neither does it make clear whether any person who committed a crime while under the age of 18 will be given rehabilitative treatment rather than prison, if that person is brought to justice after the age of 18. It is important that the final Statute of the Special Court clarifies these issues.

³⁶ OAU Doc CAB/LEG/24.9/49 (1990).

6. What role for victims and witnesses?

a) Reparation and witness protection

A major achievement of the two *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda is the implementation of witness protection programs. The Rome Statute reflected and endorsed this achievement by including the provision that the Registrar should set up a Victims and Witnesses Unit³⁷ with the authority to advise the Prosecutor and the Court on protective measures, security arrangements and measures to ensure the psychological well-being, dignity and privacy of victims and witnesses.

The draft Statute of the Special Court contains a provision for establishing a similar unit. This is to be welcomed, particularly as it will include experts on trauma related to sexual violence and crimes against children.³⁸ This is particularly important, given the likelihood that children will participate as witnesses in trials at the Special Court, as many children were victims of the most serious crimes during the conflict. Specific procedures to assist child witnesses and victims should be established.

Amnesty International is concerned, however, that there is no provision for reparations to be made to the victims of crimes within the jurisdiction of the Special Court, when there is such a provision in the Rome Statute: Article 79 provides for the setting up of a Trust Fund for victims, and Article 75 mandates the International Criminal Court to establish and develop principles relating to restitution, rehabilitation, and compensation for victims.

³⁷ Article 43(6) of the Rome Statute.

³⁸ Article 16(4) of the draft Statute.

The importance of the role of the victims was confirmed in the international consensus which created the Rome Statute.³⁹ Amnesty International is concerned that this consensus should not be undermined by excluding such provisions from the Statute of the Special Court for Sierra Leone.

b) Amicus curiae briefs

The conflict in Sierra Leone has thrown up complex human rights and sociological issues, as well as psychological and physical health problems. It is likely that expert evidence and assistance from those who have specialist knowledge of these issues would be of great assistance to the judges of the Special Court, and therefore express provision should be made for *amicus curiae* (“friend of the court”) briefs to be submitted. Such a provision is currently lacking in the draft Statute and this should be remedied.

7. Can the Special Court run efficiently and fairly?

a) Rules of evidence and pre-trial administration of cases

The draft Statute specifies that the Special Court shall use the rules of procedure used in the International Criminal Tribunal for Rwanda mainly⁴⁰, but these may be supplemented by the rules of evidence under Sierra Leonean law. In the appeals procedure, when considering appeals on charges under Sierra Leonean law, the decisions of the Supreme Court of Sierra Leone may be referred to. Amnesty International does not take a position on whether this kind of “mixed jurisdiction” of international law and domestic law is generally advisable. In this case, however, it seems that the mixture of two different sets of rules of evidence may cause confusion. The rules of the International Criminal Tribunal for Rwanda and of Sierra Leonean law may conflict, and the draft Statute does not currently specify which set of rules will take precedence in the event of such conflict. This may cause confusion when cases are being argued in the Special Court.

³⁹The UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 also contains important principles regarding victims’ rights to participate in judicial processes and the right to compensation and rehabilitation.

⁴⁰Article 14 of the draft Statute.

There is also a gap in the provisions for the functioning of the Special Court regarding tasks that in the International Criminal Court would be carried out by the Pre-Trial Chamber. These tasks include issuing witness protection orders, summonses and arrest warrants,⁴¹ and taking action to secure evidence⁴².

b) Funding and independence of the Special Court

Amnesty International notes that, in his report, the UN Secretary-General expresses concern that the Special Court shall be funded by voluntary contributions by the member states of the UN.⁴³ Amnesty International believes that the Special Court should be adequately and securely funded. With voluntary funding, it is possible that donations from member states will not be sufficient for the Special Court to run properly, and funds may run out before its work is complete. Also, if funding comes mainly from one state or a small group of states, there may be an appearance that the Special Court is not fully independent.

c) Terms of employment for judges and court staff

The draft Statute anticipates that the judges, the Prosecutor and the Registrar will be given four-year contracts of employment, with the option of renewal. Amnesty International notes that the judges and the Prosecutor should have secure contracts of employment in order to safeguard their independence. Also, no staff member should be on a very short-term contract, as the use of such contracts means that there is a quick turnover of staff at all levels, with little opportunity to develop expertise and experience of the work of the Special Court.

d) International cooperation with the Special Court

Finally, the draft Statute contains no special provision to oblige other states to cooperate with the Special Court. This is a serious omission, as suspects, witnesses and evidence may have moved abroad from Sierra Leone and, as it stands, there is no obligation on any state to assist the Special Court in transferring witnesses, seeking out and arresting suspects, or the production of evidence. The Security Council should address this issue when it finalizes the

⁴¹ Article 57 of the Rome Statute.

⁴² Article 56 of the Rome Statute allows the Pre-Trial Chamber of the International Criminal Court to take urgent action to preserve material evidence or the testimony of witnesses which may otherwise be lost.

⁴³ Paragraphs 68-72 of the UN Secretary-General's report.

draft Statute and encourage all states to cooperate fully with the Special Court, and ensure that effective action is taken where states wilfully refuse to cooperate with the Special Court.

8. Amnesty International's recommendations to the UN Security Council

- The starting date of the Special Court's temporal jurisdiction should be amended to 23 March 1991, so that those most responsible for serious crimes throughout the period of the internal armed conflict in Sierra Leone can be prosecuted.
- Since the Special Court will try only those who are "most responsible", the international community should also provide sufficient resources to re-establish the Sierra Leonean domestic court system so that **all** those responsible for serious crimes under international and domestic law can be prosecuted, while respecting fair trial provisions, and without imposing the death penalty, or any other cruel, inhuman and degrading punishment.
- The draft Statute of the Special Court should be amended so that it has jurisdiction over the full range of war crimes and crimes against humanity recognized in the Rome Statute of the International Criminal Court, and should include the crime of slavery.
- It is particularly important that the definition of the crime of recruiting child soldiers is amended so that any recruitment of a child under 15 years - whether forced or voluntary, and whether or not for the purpose of participating directly in hostilities - is included.
- All the fair trial guarantees in the Rome Statute should be included in the Statute of the Special Court.
- The Prosecutor of the Special Court should consult relevant experts and prepare and publish guidelines for assessing whether a child who was aged between 15 and 18 at the time a crime was committed should be prosecuted, or dealt with through a non-judicial forum.
- Funding should be secured by the international community to ensure that the Special Court can run efficiently throughout the period during which it will operate.
- The Statute of the Special Court should include provision to ensure that all states cooperate appropriately with the Special Court.