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# THE STATUS OF CHILD OFFENDERS UNDER INTERNATIONAL CRIMINAL JUSTICE: LESSONS FROM SIERRA LEONE

JOHN R MORSS\*

## I INTRODUCTION

Most violations of international humanitarian law are now committed in civil wars, rather than in international conflicts. They are often carried out by un-disciplined and uncontrolled rebel fighters, often children...<sup>1</sup>

International criminal proceedings, especially those in the African continent, have recently highlighted the significance of children and young people as perpetrators of genocide, crimes against humanity and war crimes. Complex issues are raised by the indictment of such child offenders.<sup>2</sup> These issues overlap with the still unre-

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\* Lecturer, School of Law, Deakin University. This paper is derived from my Honours Dissertation at the Law School, University of Otago, New Zealand (2002). I wish to acknowledge the invaluable guidance and encouragement of Kevin Dawkins.

<sup>1</sup> Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (1999) 203.

<sup>2</sup> Where unspecified, the word "children" will refer to young persons under eighteen years as in the United Nations Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child 1990: Dele Olowu, 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127, 130. "Child offender" will be used to indicate a person who was aged under eighteen when an *alleged* offence was committed, irrespective of their age when indicted. Presumption of innocence in an individual case is not displaced by this usage which is for clarity only. "Child defendant" refers to a person aged under eighteen at time of trial.

solved issues raised when children are indicted for crimes of violence in municipal settings.<sup>3</sup>

It has been suggested by one commentator<sup>4</sup> that there exist international prohibitions on the prosecution of children for international crimes. It will be argued here that this claim is not substantiated in respect either of customary or treaty-based international obligations. It will instead be submitted that unless expressly provided in a relevant instrument (such as the Statute of a Special Court or International Criminal Tribunal) the indictment and prosecution of an alleged offender for an international crime may proceed irrespective of the chronological age (at the relevant time) of the person accused.

It might be considered desirable by the international community that children below a certain age should not be prosecuted for crimes against humanity or certain other international crimes. Such a threshold age, if desired at all, might in principle be set anywhere between zero and eighteen years. Whether or not some threshold is thought desirable, it is important to establish whether existing international law does or does not prohibit such prosecutions. A prohibitionist campaign for example would need to recognize current realities. In examining these issues, the focus of the present paper is on the process recently commenced in Sierra Leone and to a considerably lesser extent, on the experience of the International Criminal Tribunal for Rwanda.<sup>5</sup>

The Special Court for Sierra Leone is the most recent of the judicial institutions established under the aegis of the United Nations in order to prosecute war crimes and crimes against humanity in particular states or regions. Its establishment results from civil war in Sierra Leone between approximately 1991 and 2000 during which numerous atrocities were committed.<sup>6</sup> With a Prosecutor and a Bench established, the Special Court was officially opened on 10<sup>th</sup> March 2004.

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<sup>3</sup> Lisa Bradley, 'The Age of Criminal Responsibility Revisited' (2003) 8 *Deakin Law Review* 73; Julia Fionda, 'Youth and Justice,' in Julia Fionda (ed.) *Legal Concepts of Childhood* (2001) 77, 88.

<sup>4</sup> Chen Reis, 'Trying the future, avenging the past: The implications of prosecuting children for participation in internal armed conflict' (1997) 28 *Columbia Human Rights Law Review* 629.

<sup>5</sup> Andre Klip and Goran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals 2: The International Criminal Tribunal for Rwanda 1994-1999* (2001).

<sup>6</sup> Diane Amann, 'Message as medium in Sierra Leone' (2001) 7 *ILSA Journal of International and Comparative Law* 237; Stuart Beresford and A S Muller, 'The Special Court for Sierra Leone: An initial comment' (2001) 14 *Leiden Journal of International Law* 635; Abdul Tejan-Cole, 'The Special Court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107. Introductory accounts of the Special Court are given by Robert Cryer, 'A "Special Court" for Sierra Leone' (2001) 50 *International and Comparative Law Quarterly* 435; Micaela Frulli, 'The Special Court for Sierra Leone' (2000) 11 *European Journal of International Law* 857.

## II OVERVIEW OF THE SIERRA LEONE PROCESS

Sierra Leone has had the status of a republic since 1971. Like its neighbour Liberia, the site of inter-related conflict and political change, Sierra Leone was founded as a plantation-type settlement for freed or escaped slaves from the Americas - hence the name Freetown for the capital, and the significance of creole as a language alongside English and aboriginal languages. Civil war broke out in Sierra Leone in 1991 between two competing military factions. One of these was led by the President, Major-General Momoh, whose All Peoples Congress party had been in power as a civilian government<sup>7</sup> in the one-party state proclaimed in 1978. The rebel force, the Revolutionary United Front [RUF] entered Sierra Leone from Liberia. It was led by Foday Sankoh who is alleged to have received training in Libya.<sup>8</sup> After two more military coups<sup>9</sup> affecting the Presidency, democratic elections in 1996 brought Ahmed Kabbah to power as President.

A peace accord known as the Abidjan agreement was brokered by the Organisation of African Unity and signed with Sankoh on 30 November 1996, the date now established as the starting point for jurisdiction of the Special Court. However in May 1997 Kabbah was deposed and fled to Guinea. This Armed Forces Revolutionary Council [AFRC] coup involved<sup>10</sup> elements of the Sierra Leone Army as well as rebel military forces and gave rise to conflict with troops loyal to the Kabbah government and with Economic Community of West African States [ECOWAS] peace-keeping forces already in the country.<sup>11</sup>

A week after the coup of May 1997, the Organisation of African Unity authorised ECOWAS military action,<sup>12</sup> a step endorsed by the United Nations Security Council which subsequently invoked non-military sanctions under Chapter VII of the Charter.<sup>13</sup> Sierra Leone was suspended from the Commonwealth. During 1998 the United Nations condemned RUF actions<sup>14</sup> and imposed an arms embargo.<sup>15</sup> After signing an abortive agreement with the AFRC/RUF<sup>16</sup> Kabbah was restored to power

<sup>7</sup> Set in place by military coup in 1968.

<sup>8</sup> Sankoh is also believed to have been a "trafficker in diamonds, Sierra Leone's main source of wealth": Amann, above n 6.

<sup>9</sup> RUF-based, David Schweigman, *The Authority of the United Nations Security Council under Chapter VII of the UN Charter* (2001) 143.

<sup>10</sup> Beresford and Muller, above n 6, 637.

<sup>11</sup> Sankoh himself had been arrested in early 1997 and sentenced to death after conviction for treason in 1998: Abdul Tejan-Cole, 'Painful peace: Amnesty under the Lome Peace Agreement in Sierra Leone' (1999) 3 *Law, Democracy and Development* 239, 243; Tejan-Cole, above n 6, 116.

<sup>12</sup> Questions about the legitimacy of this intervention are discussed by Brad Roth, *Governmental Illegitimacy in International Law* (2000) 406.

<sup>13</sup> Security Council Res. 1132, UN Doc. S/RES/1132 (1997), 8 October 1997; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001) 186.

<sup>14</sup> Security Council Res. 1181, UN Doc. S/RES/1181 (1998).

<sup>15</sup> Security Council Res. 1196, UN Doc. S/RES/1196 (1998).

<sup>16</sup> Beresford and Muller, above n 6, 637.

in 1998 as a result of large-scale intervention by Nigerian-led ECOMOG forces,<sup>17</sup> together with alleged non-governmental arms supplies to Kabbah's military forces from the United Kingdom.<sup>18</sup> The result was welcomed on 17 April by the United Nations Security Council which established the non-military UNOMSIL in July 1998. In 1999 this was replaced by the military United Nations Mission in Sierra Leone [UNAMSIL].<sup>19</sup>

By the end of 1998 the RUF had controlled more than half of the territory of Sierra Leone.<sup>20</sup> Parts of Freetown were briefly recaptured by RUF forces in early 1999. Following the RUF withdrawal a peace agreement was signed in Lomé, capital of Togo, on 7 July 1999 under which amnesty was assured specifically for RUF leader Sankoh and others, together with political posts being allocated to several rebel leaders.<sup>21</sup> During 2000, the actions of Sankoh and of independent para-military groupings such as the "West Side Boys" resulted in the hostage-taking of United Nations and of UK troops. These situations were resolved by the end of 2000, with disarmament of the rebels by a combination of United Nations and Sierra Leonean forces completed by January 2002.

In May 2000, civilian peace demonstrators were shot dead at Sankoh's residence in Freetown.<sup>22</sup> Sankoh was rearrested on May 18 of that year<sup>23</sup> and was placed on trial in the High Court of Sierra Leone, with some 48 co-defendants.<sup>24</sup> He died of natural causes while in custody during 2003.

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<sup>17</sup> Nigerian forces have been described as of "almost equal ferocity" to the RUF: Nicole Fritz and Alison Smith, 'Current apathy for coming anarchy: Building the Special Court for Sierra Leone' (2001) 25 *Fordham International Law Journal* 391, 396. By their endorsement of ECOWAS action – the "post hoc ratification of the regional organization's forcible acts" – the UN appeared to define a coup against an elected government as in itself a violation of international law, justifying remedial intervention: Roth, above n 12, 407. The proactive role of ECOWAS/ECOMOG is also considered by Chesterman, above n 13, 186.

<sup>18</sup> Ingrid Detter, *The Law of War* (2<sup>nd</sup> ed, 2000) 122.

<sup>19</sup> A maximum deployment of 6000 troops was initially approved: Security Council Res. 1270, UN Doc. S/RES/1270 (1999), 22 October 1999; the force had a strength of 17,000 as of September 2002: Secretary-General's Fifteenth Report on the UN Mission in Sierra Leone, above n 6, Annex.

<sup>20</sup> Fritz and Smith, above n 17 at 396; Abdul Tejan-Cole, 'Human rights under the Armed Forces Revolutionary Council (AFRC) in Sierra Leone – A catalogue of abuse' (1998) 10 *African Journal of International and Comparative Law* 481.

<sup>21</sup> For example, Sankoh was given the job of overseeing the diamond industry: Amann, above n 6, 240. The Special Court ruled on 13 March 2004 that the amnesty is generally ineffective in relation to its indictments.

<sup>22</sup> Tejan-Cole, above n 6, 108.

<sup>23</sup> Daniel Macaluso, 'Absolute and free pardon: The effect of the amnesty provision in the Lomé Peace Agreement on the jurisdiction of the Special Court for Sierra Leone' (2001) 27 *Brooklyn Journal of International Law* 347, 351.

<sup>24</sup> The High Court hearing was adjourned and deferred several times, and it was suggested that Sankoh's prosecution would be transferred to the Special Court: Sierra Leone News 5 June 2002, <<http://www.sierra-leone.org/slnews.html>> accessed 9 June 2002. On 18 September 2002 Sankoh failed to appear in the High Court, on the basis of an unspecified illness; the process was once more adjourned, until October 8<sup>th</sup> 2002 again in the High Court: Sierra Leone News, <<http://www.sierra-leone.org/slnews.html>> accessed 18 September 2002.

### III CHILD SOLDIERS IN SIERRA LEONE AND ELSEWHERE

There was extensive involvement of children in Sierra Leone's civil war and its related atrocities. Child combatants "were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn."<sup>25</sup> Such practices were by no means unique within Africa.<sup>26</sup>

Whereas the United Nations Convention on the Rights of the Child 1989 provides at Article 38 the age of 15 as a minimum for recruitment, the age of 18 is provided in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.<sup>27</sup> The issue of child recruitment as such is not the focus of this paper. Numerous non-international conflicts of recent decades have involved children as combatants, including conflicts in Uganda<sup>28</sup> and in Mozambique<sup>29</sup> where 28 percent of combatants were under eighteen years of age at recruitment.<sup>30</sup> Similar proportions are reported in the case of Liberia.<sup>31</sup> Allegations of the drugging and other coercion of child combatants have been made, for example, in the case of the Renamo forces in Mozambique.<sup>32</sup> Some of the genocidal atrocities in Rwanda in 1994 were carried out by children,<sup>33</sup> with very large numbers of children brought into custody in Rwanda on the basis of their alleged involvement. Nonetheless, it does not seem likely, on the basis of its indictments issued thus far, that the International Criminal Tribunal for Rwanda, based in Arusha, Tanzania, will proceed with the prosecution of child defendants.

The Sierra Leone Statute<sup>34</sup> provides for the special treatment of juvenile offenders, ie persons aged between fifteen and eighteen at the time of alleged offences, in relation to conditions of detention and sentencing. There is no indication of what process if any shall be applied to those who were under fifteen years of age when offences were committed, fifteen years being the minimum age for individual

<sup>25</sup> Secretary-General's Report on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000) para 32.

<sup>26</sup> General issues raised by the phenomenon of the child soldier are discussed by Ann Sheppard, 'Child soldiers: Is the optional protocol evidence of emerging "straight-18" consensus?' (2000) 8 *International Journal of Children's Rights* 37.

<sup>27</sup> UN Doc A/54/L84 (16 May 2000); Diane Amann, 'Calling children to account: The proposal for a juvenile chamber in the Special Court for Sierra Leone' (2001) 29 *Pepperdine Law Review* 167.

<sup>28</sup> Irmgard Nubler, 'Human resource development and utilization in demobilization and reintegration programmes', in Kees Kingma (ed) *Demobilization in Sub-Saharan Africa* (2000) 45, 67.

<sup>29</sup> Richard Synge, *Mozambique: UN Peace-keeping in Action 1992-94* (1997) 97.

<sup>30</sup> Irae Baptista Lundin, Martinho Chachiuva, Antonio Gaspar, Habiba Guebuza and Guilherme Mbilana, "'Reducing costs through an expensive exercise': The impact of demobilisation in Mozambique' in Kees Kingma (ed.) *Demobilization in Sub-Saharan Africa* (2000) 173, 195.

<sup>31</sup> Reis, above n 4, 650

<sup>32</sup> Ibid, 629.

<sup>33</sup> Ibid.

<sup>34</sup> Article 7, Statute of the Special Court for Sierra Leone, Enclosure to Secretary-General's Report on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 2000); also see Daryl Mundis, 'New mechanisms for the enforcement of international humanitarian law' (2001) 95 *American Journal of International Law* 934, 937.

jurisdiction. It should be noted that there are major difficulties in establishing accurate birthdates (and therefore chronological ages) for young people in Sierra Leone, because of disruptions during the civil war.<sup>35</sup>

#### IV INTERNATIONAL LAW AND JUVENILE JUSTICE

Quite apart from practical issues, matters of international law are raised by the possibility of prosecuting children. It will be argued here that the position of Reis<sup>36</sup> confuses settled law with policy in this respect. Reis argues that evidence for an international prohibition on child prosecutions is to be found in the United Nations Convention on the Rights of the Child 1989,<sup>37</sup> which has been ratified both by Rwanda, which is the main focus of Reis' discussion, and by Sierra Leone. Under Article 40 of the Convention, states parties are obligated to ensure that children are not to be accused of having breached any penal law by reason of acts "not prohibited by national or international law at the time they were committed." This "acts not prohibited" exemption would seem to be derived from the similarly worded Article 15 of the International Covenant on Civil and Political Rights 1966.<sup>38</sup>

For Reis, the existence of an age of criminal responsibility of fourteen years in Rwanda fulfills the criterion of defining relevant "acts not prohibited" on a national level. Reis' claim, that is to say, is that the non-prohibition exemption under the voiding clause in Article 40 of UNCRC, allowing children to be exempt from prosecution, is satisfied by such national legislation. However, the counter to Reis' claim is in the second part of Article 15 of ICCPR, which provides<sup>39</sup> as follows:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations.

An act constituting genocide,<sup>40</sup> a crime against humanity or war crime would seem to fit this definition, preventing the operation of the voiding clause represented by Article 40(2)(a) of UNCRC and Article 15(1) of ICCPR.

Indeed Reis' claim is probably answered by Article 15(1) of ICCPR itself, as well as by 15(2). As noted above, it is stated there that valid offences, ie offences not

<sup>35</sup> Fritz and Smith, above n 17, 409

<sup>36</sup> Reis, above n 4.

<sup>37</sup> Hereafter UNCRC.

<sup>38</sup> "No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed..." Article 15(1) International Covenant on Civil and Political Rights 1966 (hereafter ICCPR).

<sup>39</sup> Thereby emphasising and broadening the provisions of the first section of that Article.

<sup>40</sup> Central to Reis' discussion of the Rwanda situation.



subject to exemption, are those recognised “under national or international law.”<sup>41</sup> Reis has suggested, as he must, that the non-prohibition exemption can be satisfied at the international as well as at the national level. Offences such as genocide are said by Reis to be recognised internationally as exempting children. But this claim cannot be substantiated.

Reis may at best be taken to be making a claim concerning customary law. His argument relates to intent. Genocide requires genocidal intent<sup>42</sup> but according to Reis, children are incapable of conceptualising such complex forms of intent.<sup>43</sup> Consideration of the elements for genocide, including relevant *mens rea*, raises complex issues<sup>44</sup> but there seems no justification for reading any precise chronological-age threshold into the *mens rea* requirement for the offence.<sup>45</sup> If anything, the practice of states is to deal with children *more* like adult offenders, not less, when offences are most serious.<sup>46</sup> Historically,<sup>47</sup> war-crimes tribunals have passed sentence on persons as young as fifteen years of age.

The voiding clause found in UNCRC and in ICCPR — no conviction where no prohibition — is a derivative of the general principle against retrospective indictment, *nullum crimen sine lege*. That principle affirms that a prohibition must pre-exist any prosecution for a breach.<sup>48</sup> In the international domain a relevant treaty-based or customary prohibition must thus exist in order that any valid charge may be made out. This analysis is consistent with the advisory Beijing Rules on Juvenile Justice<sup>49</sup> which offer guidelines for the treatment of offenders classed as juvenile. The Beijing Rules define “juvenile” only by reference to respective state practice: from Rule 2(2)(a) “A juvenile is a child or young person who under the respective legal system may be dealt with ... in a manner which is different from an adult.”<sup>50</sup>

Van Bueren is in a sense correct to describe this definition as “circular” but it can be defended on theoretical as well as on merely pragmatic grounds. If “juvenile” cannot be adequately defined in absolute terms (eg in terms of psychological development) then the circularity is unavoidable.<sup>51</sup> Indeed further clauses in Article 40 of

<sup>41</sup> Emphasis added.

<sup>42</sup> Convention on the Prevention and Punishment of Genocide 1948.

<sup>43</sup> Reis, above n 4, 645.

<sup>44</sup> David Nersessian, ‘The contours of genocidal intent’ (2002) 37 *Texas International Law Journal* 231.

<sup>45</sup> Background conceptual issues are discussed by John R Morss, ‘The several social constructions of James, Jenks, and Prout: A contribution to the sociological theorization of childhood’ (2002) 10 *International Journal of Children’s Rights* 39; John R Morss, *Growing Critical* (1996).

<sup>46</sup> For example, in the USA children accused of murder are dealt with as if of adult age, according to Geraldine Van Bueren, *The International Law on the Rights of the Child* (1995) 200 n12.

<sup>47</sup> Virginia Morris and Michael Scharf, *The International Criminal Tribunal for Rwanda* Vol 1 (1998) 281.

<sup>48</sup> Theodor Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 *American Journal of International Law* 554, 566.

<sup>49</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) adopted by the General Assembly of the UN 1985: Van Bueren, above n 31, 170.

<sup>50</sup> *Ibid* 171.

<sup>51</sup> See in general above n 45; also Morris and Scharf, above n 47, 282.

the UN Convention on the Rights of the Child address matters concerned with the processing of juveniles,<sup>52</sup> there defined as those below eighteen years of age.

The prosecution of under-eighteens is thus not merely envisaged but, subject to recommended conditions, apparently endorsed in these international instruments. Certainly it is recommended<sup>53</sup> that a minimum age for presumption of capacity be established in states parties, although no attempt is made to recommend a uniform age, against a background of vast differences in actual state practice.<sup>54</sup> A presumption can in any event be reversed by evidence. Therefore a statutory minimum age for criminal responsibility, even if internationally uniform, would not assist in the satisfaction of "acts that were not prohibited" in the UNCRC. Moreover Article 15 of ICCPR is not qualified in relation to capacity or in any other sense.

The Sierra Leone Government sought a lower limit of seventeen years for the jurisdiction of the Special Court, consistent with its municipal enactment on the age of criminal responsibility, but as reported the United Nations Office of Legal Affairs insisted on fifteen- to eighteen-year-olds being included under the Statute of the Special Court.<sup>55</sup> There is no jurisdiction for under-18s in the International Criminal Court.<sup>56</sup> Reis seeks an international basis for a juvenile, or at least an under-fourteen, immunity. Certainly, judicial procedures with respect to young people are prescribed in many instruments, and the Statute for the Special Court restricts jurisdiction to those aged fifteen years and over when acts were committed. This statutory fact, while definitive for the Sierra Leone process in itself, does not resolve the general proposal put forward by Reis who seeks not individual, treaty-based child immunities but a universal exemption. Whether or not this is desirable, such a blanket exemption just does not exist in international law.<sup>57</sup>

<sup>52</sup> Article 40(1), UNCRC; Article 14(1) and (4), ICCPR 1966.

<sup>53</sup> Article 40(3)(a), UNCRC.

<sup>54</sup> From seven years of age in Ireland upwards. See Van Bueren, above n 46, 173; fourteen years for Rwanda and seventeen for Sierra Leone. See Fritz and Smith, above n 17, 415.

<sup>55</sup> Fritz and Smith, above n 17, 414.

<sup>56</sup> Article 26, Statute, see Leila Sadat, *The International Criminal Court and the Transformation of International Law* (2002); see also Per Saland, 'International Criminal Law Procedures' in Roy Lee (ed) *The International Criminal Court: The making of the Rome Statute* (1999) 189, 200.

<sup>57</sup> It is clear at least that the death penalty is not available for persons aged under eighteen at the time of the act, Article 6(5), ICCPR.

## V LOCAL VIEWPOINTS AND COMMENTATORS' PERSPECTIVES

Reis' argument concerning juvenile immunity is constructed in opposition to a contrasting viewpoint that he describes as being common in the Rwanda community. That viewpoint is that a child who has demonstrated the competence to murder another person is patently competent to be prosecuted for doing so. Reis treats this local viewpoint as a rather primitive and unreflective one.. Similarly, the Government and some others within Sierra Leone argued that all those indicted should be dealt with by judicial process, irrespective of age at the time of alleged offences. On the other hand, international agencies such as UNICEF, as well as some groupings within Sierra Leone, argued that these young persons should be dealt with only by the Truth and Reconciliation Commission.<sup>58</sup>

Reis' repudiation of the local viewpoint, in which he accuses local United Nations officials of conniving, can be questioned on several grounds. It might be suggested that the views of the local community are intrinsically worthy of consideration whenever there is local participation in international justice. This would be the case irrespective of the congruence or otherwise of such views with those of international organs. Particularly in the context of the Truth and Reconciliation process in Sierra Leone, but also with regard to the Special Court, issues of communication and of public awareness and acceptance have been generally emphasised. Of course the views of the local community may well be diverse and difficult to establish.

## VI THE TRUTH AND RECONCILIATION PROCESS

A Truth and Reconciliation process was put in place in Sierra Leone alongside the criminal justice procedure. As well as the hybrid character of the Special Court with respect to categories of crime (with both domestic and international crimes being included in its Statute), the Sierra Leone process is thus a hybrid in its amalgamation of prosecution with a Truth and Reconciliation procedure. A form of this combination was employed in Argentina but in that case the criminal justice component was uncertain and unsystematic.<sup>59</sup> A variant is also being implemented in East Timor under United Nations guidance.<sup>60</sup>

Because of its possible relevance for the issue of juvenile offenders, something needs to be said about this process. Sierra Leone's Truth and Reconciliation Com-

<sup>58</sup> Amann, above n 27; Tejan-Cole, above n 6, 117.

<sup>59</sup> Alexandra Barahona de Brito, 'Truth, justice, memory, and democratisation in the Southern Cone' in Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar (eds) *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001) 122.

<sup>60</sup> Carsten Stahn, 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 952, 953. Stahn describes how parallel criminal proceedings are established under special Panels of the Dili District Court by the UN Transitional Administration in East Timor [UNTAET].

mission [TRC<sup>61</sup>] was established by the Truth and Reconciliation Commission Act of 2000. It carried out its enquiries during 2002-2003. The purpose of the Commission is:

[T]o create an impartial historical record of violations and abuses of human rights and international humanitarian law ... to address impunity; to respond to the needs of victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.<sup>62</sup>

The temporal scope is "from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement [ie July 1999]," that is to say a period commencing some five years before the commencement of jurisdiction for the Special Court, but with a termination date unlike the latter. The TRC is to have power of subpoena and other forms of compulsion to attend,<sup>63</sup> and power to compel the production of relevant information.<sup>64</sup>

"Restorative" justice, it has been argued, represents the appropriate response to periods of civil unrest in the interests of future stability.<sup>65</sup> It is said to share with retributive justice the process of holding perpetrators accountable for their actions. However the form of accountability employed makes it possible, in a manner that contrasts with criminal accountability, to treat perpetrators and victims as "equals" in that perpetrators are "analogized to victims."<sup>66</sup> This re-description of offenders as victims is one way in which issues arising from the Truth and Reconciliation process overlap with issues concerning juvenile offenders. It arguably requires justification, or at least clarification, in both contexts.

The Truth and Reconciliation Commission in Sierra Leone was not initially intended to co-exist with a special criminal prosecution system. This duality emerged when the Special Court was established. According to UN Secretary-General Annan the criterion of "the greatest responsibility" provided for personal jurisdiction under the Statute would not necessarily exclude under-eighteens.<sup>67</sup> The Secretary-General initially proposed a Juvenile Chamber within the Special Court, to deal with those aged under eighteen at time of trial, but this proposal was rejected by the Security Council.<sup>68</sup>

<sup>61</sup> The acronym TRC will be used to refer specifically to the Sierra Leone institution; "Truth and Reconciliation" will be used to refer to the general process as adopted in many states.

<sup>62</sup> *Truth and Reconciliation Commission Act 2000* [SL] s 6(1). Available at <<http://www.sierra-leone.org/trcact2000.html>>. Accessed 14 June 2002.

<sup>63</sup> *Truth and Reconciliation Commission Act* s.8(1)(d),(g)

<sup>64</sup> *Ibid*, s. 8(1)(a).

<sup>65</sup> Stuart Wilson, 'The myth of restorative justice' (2001) 17 *South African Journal of Human Rights* 531.

<sup>66</sup> Ruth Teitel, *Transitional Justice* (2000) 86.

<sup>67</sup> Secretary-General's Report on the Establishment of a Special Court for Sierra Leone, above n 25, para 36.

<sup>68</sup> Amann, above n 27.

Relationships between the two institutions<sup>69</sup> are of course not indicated in the Truth and Reconciliation Commission Act 2000, which pre-dated the agreement with the United Nations establishing the Court; nor are they expressly indicated in the Statute for the Special Court. It subsequently became necessary to establish a relationship between the Special Court and the TRC.<sup>70</sup> It has been stated that the purposes of the Special Court are identical with the purposes of the Commission as set down in the Truth and Reconciliation Commission Act.<sup>71</sup> The suggestion is made that the distinctiveness is a matter of scale, with the Special Court prosecuting “only very few defendants who ‘bear the greatest responsibility’” (in accordance with its Statute), while the Commission will be “for everybody else.” On this view, the TRC might be expected to take responsibility for allegations considered to be of a less serious nature than those to be dealt with by the Special Court.

It should be noted that the Prosecutor for the Special Court is required to make use of truth and reconciliation measures, where appropriate and available, with respect to juvenile offenders.<sup>72</sup> It may thus have been envisaged that the Prosecutor of the Special Court would refer certain juvenile matters to the Commission, during the Commission’s investigatory phase. Certainly, pragmatic or policy reasons may well dictate that prosecution by the Special Court for Sierra Leone will be limited to (a small number of) adult offenders.<sup>73</sup> But the question of the articulation of truth and reconciliation processes with criminal justice processes, in the context of juvenile offenders, remains unresolved. This question raises complex issues of purported therapeutic, educational and otherwise rehabilitative purposes of the community’s treatment of criminal actors, both in terms of procedure and in terms of sentencing options. Examples of serious criminal offences such as murder being carried out by children inevitably raise such concerns.<sup>74</sup>

## VI CONCLUSIONS: YOUTH AS MITIGATION?

The foregoing discussion suggests the following: a case might be articulated for criminal prosecution to be determined on the basis of the offence *per se*, with chronological age at the time of offence (or indeed at trial) being admitted only as a

<sup>69</sup> Tejan-Cole, above n 6; Fritz and Smith, above n 17, 422.

<sup>70</sup> Tejan-Cole above n 6, 119.

<sup>71</sup> Office of the Attorney General and Ministry of Justice [for Sierra Leone], Special Court Task Force: Briefing Paper, “Relationship between the Special Court and the Truth and Reconciliation Commission”: Legal analysis and policy considerations of the Government of Sierra Leone for the Special Court Planning Mission, January 2002 available at <<http://www.sierra-leone.org.html>>. Accessed 20 May 2002. The author of this document appears to be a representative of No Peace Without Justice, an international non-governmental organisation, seconded to the Ministry of Justice.

<sup>72</sup> Article 15(5), Statute of the Special Court. “Juvenile offenders” are defined as those aged between fifteen and eighteen years when the alleged offence was committed, from Article 7.

<sup>73</sup> Prosecutor David Crane was reported as announcing that no children or juveniles would face prosecution in the Special Court. See Sierra Leone News, 2 November 2002 <<http://www.sierra-leone.org/slnews.html>>. Accessed 15 November 2002.

<sup>74</sup> Bradley, above n 3, 75.

potentially mitigating factor, ie in sentencing. Such an approach would challenge the orthodoxy of the special needs of child and juvenile offenders, with all its infra-structural and professional accompaniments in Australia and elsewhere. Yet however counter-intuitive this approach might be the only way in which the recognised procedural shortcomings in juvenile justice<sup>75</sup> might be overcome. That is to say, special treatment for children or juveniles may have the effect of limiting their exercise of inherent rights, by in effect re-inventing a welfare or protectionist orientation.<sup>76</sup> The availability of diversion at the discretion of police, on the basis of chronological age of the alleged offender, also raises complex matters of equity. To the extent that the discretion is implemented in a discriminatory fashion,<sup>77</sup> this supposedly rehabilitative or educational measure functions to entrench the privileges of class and race. The Rule of Law, it might be argued, knows no distinctions based on chronological age.

Such an absolute rejection of the forensic role of chronological age may seem excessive: almost literally throwing the baby out with the bathwater. The question of criminal intent in young children (for example children younger than the municipal statutory age of criminal responsibility<sup>78</sup>) would need to be addressed. The logic of the present argument is that whatever the age of the person accused of a crime, it should be a matter for the prosecution to show both physical (act) and mental (intent) components of the charge as appropriate. If the act can be shown to the appropriate standard then immunity on the basis of youthfulness as such (whether under statute or under *doli incapax*) should not be available to foreclose on the matter of intent. Such a proposal of course can be no more than sketched at this point; but it might be said that it is for the proponents of age-based distinctions in law to show justification for such *prima facie* discriminatory procedures, not least in view of the great diversity of specific cut-off points adopted in different jurisdictions.

The justification for giving consideration to chronological youth is often couched in terms of "rehabilitation". But rehabilitation is an objective not restricted to the treatment of the juvenile offender. In the International Criminal Tribunal for Rwanda a thirty-seven year old was awarded a reduced sentence of fifteen years, following convictions for genocide and crimes against humanity, on the express ground of rehabilitation.<sup>79</sup> In the International Criminal Tribunal for the Former Yugoslavia, Drazen Erdemovic was convicted for war-crimes — killing defenceless civilians — and was given mitigating consideration based (in part) on his age of twenty-three years when the crimes were committed. (The decision to mitigate in this way was displaced but not overruled by the subsequent appeal process.)<sup>80</sup> Also

<sup>75</sup> It is rare for a juvenile not to plead guilty: Ibid 81.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 79.

<sup>78</sup> In Victoria, 10 years: see *Children and Young Persons Act* 1989 (Vic) s 127.

<sup>79</sup> International Criminal Tribunal for Rwanda, *Prosecutor v Serushago*, Case No ICTR-98-39-S, T Ch I, 5 February 1999, Klip/Sluiter/ALC-II-823.

<sup>80</sup> ICTY, Sentencing Judgment, *Prosecutor v Erdemovic*, Case No. IT-96-22-T, T. Ch. I, 29 November 1996, Klip/Sluiter ALC-I-503, 532. Analogy might also be drawn with the issue of duress: duress cannot constitute a defence, but was claimed by Erdemovic in the context of mitigation.

in the ICTY, Furundzija, also aged 23 years when the offences were committed, had this young age taken into account in sentencing.<sup>81</sup> Clearly the rehabilitative functions of sentencing do not rely on specific age-bands.

It is suggested that the effectiveness and impartiality of international criminal justice will be enhanced if special jurisdictional status for child offenders (ie those under eighteen) is reconsidered. The “half-way house” approach of stipulating a cut-off point of say fifteen years, instead of eighteen years, does not resolve the difficulties since any such point would be arbitrary. The African experience has shown that extreme violence in offending knows no such boundaries. It may be that chronological youth, in itself, is itself a matter of mitigation.. But excusing international crime on the basis of an offender’s chronological age will not assist in the more general project of eradicating a culture of impunity and hence curtailing the future incidence of international humanitarian crimes. It should be noted in conclusion that relinquishing the protectionist approach to children and young people would have other consequences. If it were to be accepted that children are competent to be put on trial for murder or for crimes against humanity, then it would seem illogical to deny children the competence to vote.

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<sup>81</sup> ICTY, Judgment, *Prosecutor v Furundzija*, Case No IT-95-17/1-T, 10 December 1998, upheld on appeal, 21 July 2000, ICTY. Available at <<http://www.un.org/icty/index.html>>. Accessed 8 October 2002.