INTERPRETING CONSTITUTIVE INSTRUMENTS OF INTERNATIONAL CRIMINAL TRIBUNALS: REFLECTIONS ON THE SPECIAL COURT FOR SIERRA LEONE

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I. Introduction

In 2000, the United Nations entered into a bilateral agreement with the government of Sierra Leone, which established a Special Court to try those responsible for the most serious atrocities committed during the Sierra Leone conflict.\(^1\) In October 2009, the Special Court delivered its last but one decision, in relation to the atrocities arising out of the civil war in that country.\(^2\) In the one outstanding case, the court has disposed of the preliminary issues relating to its legal basis under the constitutive treaty.\(^3\) It is therefore an appropriate moment to assess the Court’s contribution to the interpretation of its constitutive instrument, in this collection of essays that reflect on 30 years since the entry into force of the Vienna Convention. The competence of the UN to enter into the agreement of this kind, although unprecedented, was not in doubt, the UN having characterised the situation in Sierra Leone as constituting a threat to international peace and security, it was conceivably free to determine what it regarded as an appropriate response in the exercise of its powers under the Charter, including the establishment of an international criminal tribunal.\(^4\)

Yet as is apparent from the first line of cases considered by the Special Court, the legal basis of the tribunal has not been free from controversy. It has raised in a profound manner, the relationship between the constitutive instrument of an

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\(^1\) 2002 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, available at the Special Court for Sierra Leone website: <www.sc-sl.org/LinkClick.aspx?fileticket=CLkIrMQtCHg%3d&tabid=176>. (last accessed on 1 November 2009).


\(^3\) Prosecutor v. Charles Taylor, Appeals Chamber Decision of 31 May 2004, Special Court for Sierra Leone, (SCSL-03-01-I-059).

\(^4\) In Prosecutor v. Charles Taylor, the Special Court observed that it was: certain that the power of the security council to enter into an agreement for the establishment of the Court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as did by resolution 1315, the establishment of the Special Court by agreement with Sierra Leone.
international criminal tribunal and Security Council powers under the UN Charter. The Court was asked to consider the competence of the UN to conclude a treaty on apparently equal terms with a member state, calling for a consideration of the hierarchical relationship between the UN Charter and a bilateral treaty of the kind concluded with the government of Sierra Leone. It has also brought to the fore the extent to which the *lex specialis* character of constitutive instruments affects their interpretation and whether this may require a departure from accepted canons of treaty interpretation. It also calls for an examination of the extent to which due process concerns, including fairness, assume a particular prominence in the interpretation of treaties in the field of international criminal justice, and whether the liberties of the individual at the centre of these instruments are in principle compatible with other canons of treaty interpretation such as the subsequent practice of the parties. For instance, what is to be the relationship between the *nullum crimen* (non-retroactivity of penal laws) and the rule that a treaty has to be interpreted in context, which may require the interpretation to take into account subsequent developments in general international law, including changes in the substantive content of the law?

The Special Court had to confront this issue in relation to the question of criminality of child soldiers, and whether the *lex lata* content of international criminal law in this area had crystallized by the time of the Sierra Leonean civil war. The article addresses the legal status of peace agreements, including the legal consequences of an agreement between a state and a rebel organisation. It reflects on the legal significance as a matter of treaty law of having third parties signing a treaty as moral guarantors and the implications for enforcement. The jurisprudence of the Special Court has also highlighted the continuing uncertainty on how international law deals with conflicts of norms especially those that arise in relation to international criminal law and those of a general character under customary international law. The debate whether accountability for international crimes as contained in the applicable treaties should take precedence over the developed law of state immunity is an area where this conflict has been particularly pronounced. The Sierra Leone cases also indirectly raise the question of coherence in the normative framework of international law. They involve a consideration of the development of international criminal law and the extent to which this can be achieved within the ideological milieu of general international law, including principles on treaty interpretation.

This chapter is not intended as a critique of the substantive law coming within the Court’s jurisdiction or the application of that law in the jurisprudence of the Court. This has been exhaustively dealt with elsewhere. Instead it