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ROUTING SLIP

FICHE DE TRANSMISSION

| | | |
|-------------------------|-------------------------------------|----------------------------|
| TO: A: | Mr. RIZA | |
| FROM: DE: | M. CORELL | |
| Room No. - No de bureau | Extension - Poste | Date |
| | | 12/1/2001 |
| FOR ACTION | | POUR SUITE A DONNER |
| FOR APPROVAL | <input checked="" type="checkbox"/> | POUR APPROBATION |
| FOR SIGNATURE | <input checked="" type="checkbox"/> | POUR SIGNATURE |
| FOR COMMENTS | | POUR OBSERVATIONS |
| MAY WE DISCUSS? | | POURRIONS-NOUS EN PARLER ? |
| YOUR ATTENTION | | VOTRE ATTENTION |
| AS DISCUSSED | | COMME CONVENU |
| AS REQUESTED | | SUITE A VOTRE DEMANDE |
| NOTE AND RETURN | | NOTER ET RETOURNER |
| FOR INFORMATION | | POUR INFORMATION |

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21-00618
EXECUTIVE OFFICE
OF THE SECRETARY-GENERAL

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ROUTING SLIP

FICHE DE TRANSMISSION

| | | |
|--|-------------------------------------|--------------------------------|
| TO: A: The Secretary-General <i>(direct)</i> | | |
| FROM: DE: Lamin J. Sise <i>[Signature]</i> | | |
| Room No. - No de bureau S-3830 | Extension - Poste 3-1292 | Date 12 January 2001 |
| FOR ACTION | | POUR SUITE A DONNER |
| FOR APPROVAL | | POUR APPROBATION |
| FOR SIGNATURE | <input checked="" type="checkbox"/> | POUR SIGNATURE |
| FOR COMMENTS | | POUR OBSERVATIONS |
| MAY WE DISCUSS? | | POURRIONS-NOUS EN PARLER ? |
| YOUR ATTENTION | | VOTRE ATTENTION |
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| NOTE AND RETURN | | NOTER ET RETOURNER |
| FOR INFORMATION | | POUR INFORMATION |

This looks fine. Mr. Corell specifically requested that your attention be drawn to paragraph 11 (funding mechanism) to see if its provisions accurately reflect your views.

Thank you.

PRIORITY



THE SECRETARY-GENERAL

12 January 2001

Dear Mr. President,

1. I have the honour to refer to the letter of 22 December 2000 addressed to me from the President of the Security Council, by which Members of the Council conveyed their views on my report on the establishment of the Special Court for Sierra Leone, and proposed amendments to the Draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute annexed thereto. In incorporating the proposed amendments in the two documents, I wish to put before the Members of the Council my understandings of the meaning, scope and legal effect of some of the proposals made. My intention is then to present them in that spirit to the Government of Sierra Leone. These understandings pertain to the personal jurisdiction of the Special Court, the funding and the reduced size of the Court.

A. Personal jurisdiction - article 1(a) of the draft Statute

2. Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000) extending the personal jurisdiction of the Court to "persons who bear the greatest responsibility", thus limiting "the focus of the Special Court to those who played a leadership role". However, the wording of article 1(a) of the draft Statute, as proposed by the Security Council, does not

His Excellency
Mr. Kishore Mahbubani
President of the Security Council
New York

mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor and ultimately to the Special Court itself. Any such determination will have to be reconciled with an eventual prosecution of juveniles and members of a peacekeeping operation, even if such prosecutions are unlikely.

3. Among those who bear the greatest responsibility for the crimes falling within the jurisdiction of the Special Court, particular mention is made of "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone". It follows from paragraph 2 above, that it is my understanding that "threatening the establishment of and implementation of the peace process" is not an element of the crime, but a guidance to the prosecutor in determining his or her prosecutorial strategy. Consequently, the commission of any of the Statutory crimes without necessarily threatening the establishment and implementation of the peace process, would not detract from the international criminal responsibility otherwise entailed for the accused.

4. In paragraph 1(b) and (c) of article 1 of the draft Statute as revised, the Council proposes to deal in a comprehensive manner with all perpetrators of crimes falling within the jurisdiction of the Special Court, including peacekeeping personnel present in Sierra Leone at the relevant period. While recognizing the primary jurisdiction of the sending State over its peacekeeping personnel, the Council recognizes the need for authorizing the Special Court to exercise its jurisdiction in the event that the sending State is unwilling or unable to carry out an investigation or prosecution. The amended article, however, falls short of inducing the unwilling State to surrender an accused situated in its territory, with the result that a State who is unwilling to prosecute a person in its own courts would in all likelihood be unwilling to surrender that person to the jurisdiction of the Special Court.

5. In order to give full effect to the amended provision and avoid politicization of a legal process by allowing third States to intervene and determine whether the sending State is unable or unwilling to investigate and prosecute, I suggest that a procedure similar to the one adopted in the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), be adopted in the case of the Sierra Leone Special Court. Accordingly, the President of the Special Court, if convinced that the sending State is unable or unwilling to prosecute, may notify the Security Council and seek its intervention with the State in question to induce it to investigate and prosecute, or to surrender the accused to the jurisdiction of the Court. I suggest that the following formulation replace the one presently contained in sub-paragraph (c) of article 1:

"In the event that the President of the Special Court is convinced that the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, he or she shall notify the Security Council and seek its intervention with the sending State in order to induce it to conduct the investigation and prosecution in its own courts, or to surrender the accused to the jurisdiction of the Special Court."

6. The Rules of Procedure and Evidence of the Special Court will have to give effect to the new Statutory provision by setting out the procedure for investigation by the prosecutor, the submission of a request for information on an investigation or prosecution carried out in the sending State or its intention in that regard, the transmittal of the evidence compiled in case of an investigation or prosecution in the sending State, or the submission of an indictment to the Trial Chamber in a manner similar to the one prescribed in Rule 61 of the Rules of Procedure and Evidence of the Rwanda Tribunal.

7. Article 7 of the draft Statute, as amended, retains the principle of juvenile prosecution, but omits any reference to a minimum age or to the guarantees of juvenile justice. On the understanding that Members of the Council did not intend to allow prosecution below the

age of 15, I suggest that article 7 should be amended to read: "The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was, at the time of the alleged commission of the crime, between 15 and 18 years of age come before the Court...". It is also my understanding that persons in this age group, if brought before the Court, will be entitled to all the guarantees stipulated in the draft Statute annexed to my report.

8. In proposing amendments to article 7, the Members of the Council have also omitted any reference to the consequences of sentencing a juvenile, which were regulated in article 7, paragraph 3(f) of the draft Statute attached to my report (cf. also article 19, paragraph 1). Even if it is unlikely that the Court would sentence a juvenile, nevertheless the law must clearly state that the Court is prohibited from applying imprisonment. I therefore propose that paragraph 3(f) be retained as article 7, paragraph 2. Consequently, the text proposed in the previous paragraph becomes article 7, paragraph 1.

9. As pointed out by the Security Council, the Truth and Reconciliation Commission will have an important role to play in the case of juvenile offenders and I will endeavour, in cooperation with the Government of Sierra Leone and other relevant actors, to develop suitable institutions including specific provisions related to children to this end. I am also of the view that care must be taken to ensure that the Special Court and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.

B. Funding - article 6 of the Agreement

10. In my report to the Security Council, I underscored the need for a viable and sustainable financial mechanism and noted that a financial mechanism based on voluntary contributions will not provide the assured and continuous source of funding required for the operation of the Special Court (para. 70). I concluded that a Special

Court based on voluntary contributions would be neither viable nor sustainable. In recognizing the risks involved in commencing the operation of the Special Court on the sole basis of prospects of voluntary contributions, Members of the Council proposed that the process of establishing the Court shall not commence until the UN Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, and pledges equal to the anticipated expenses of the second 12 months.

11. I have examined the proposal made by Members of the Council to defer the commencement of the implementation stage until contributions for the establishment and the first year of operation are in hand and pledges for the second year are obtained. While the necessary funds for the establishment and first year of operation (USD 25 million, according to the rough estimates provided in my report) may be obtained, I would still caution against the establishment of the Court on the basis of availability of funds for one year and pledges for the following year. Such a financial mechanism is not likely to ensure a regular flow of funds in the subsequent years, let alone the viability of the Court throughout its life span. I am therefore obliged to reiterate what I said in my report about the risks associated with the establishment of an operation of this kind with insufficient funds, or without assurances of continuous availability of funds (para. 70).

12. However, in view of the position expressed in the President's letter of 22 December 2000, I am ready to negotiate the conclusion of an Agreement for the establishment of a Special Court on the basis of voluntary contributions as suggested by Members of the Council. I am nevertheless reluctant to engage the responsibility of the United Nations at this stage by concluding an Agreement with the Government of Sierra Leone in the absence of any indication as to whether funds are likely to be made available for the start-up of the Court and its sustained operation thereafter. I would, therefore, propose that the process of establishing the Court shall not commence until the UN Secretariat has obtained sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations, and pledges equal to the anticipated expenses of the

following 24 months. This extension by a further 12 months of the Council's proposal would provide a basis for a functioning Court over three years which, in my view, is the minimum time required for the investigation, prosecution and trial of a very limited number of accused. I suggest, therefore, that as soon as an agreement in principle is reached between Members of the Security Council, the Secretary-General and the Government of Sierra Leone, I will launch an appeal to all States to indicate, within a reasonable period of time, their willingness to contribute funds, personnel and services to the Special Court for Sierra Leone and to specify the scope and extent of their contributions. Upon receipt of concrete information, I will be able to assess whether the process of establishing the Special Court may commence or whether the matter should revert to the Council to explore alternate means of financing the Court.

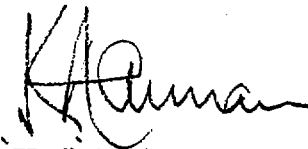
13. In this connection, I welcome the idea of creating a committee to support the Special Court, and in particular, the budgetary process. At the time of its establishment, however, it will be necessary to lay down clearly the criteria for the composition of the committee and its powers and responsibilities, to ensure the efficient and cost-effective functioning of the Special Court in full independence. Pending the establishment of such a committee and until it is otherwise decided, it is my intention to apply the United Nations Financial Regulations and Rules and Staff Regulations and Rules to the financial and administrative activities of the Special Court.

C. The size of the Special Court

14. In reducing the size of the Special Court to a single Trial Chamber and an Appeals Chamber, Members of the Council proposed that the appointment of alternate judges be deferred until such time as the need arises, and not before six months from the commencement of the functioning of the Special Court. While, as rightly indicated in the President's letter, alternate judges were not foreseen in the Statutes of the ICTY and ICTR, the solution adopted by both Tribunals to the problem of absentee judges was to alternate judges between the Trial Chambers, and between the Trial and the Appeals

Chamber. In the reduced structure of the Special Court, this option would neither be possible nor appropriate.

15. I would appreciate the concurrence of Members of the Council to the changes proposed in my letter to articles 1 and 7 of the draft Statute as revised, and in my proposal to seek concrete information from States with respect to their preparedness to contribute funds, services and personnel, before the conclusion of the Agreement with the Government of Sierra Leone.

A handwritten signature in black ink, appearing to read 'K. Annan', with a stylized flourish at the end.

Kofi A. Annan