

**Beiträge zum Internationalen und
Europäischen Strafrecht**

**Studies in International and
European Criminal Law and Procedure**

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**The Contribution of
the Special Court for Sierra Leone
to the Development of International
Humanitarian Law**

By

Ousman Njikam



Duncker & Humblot · Berlin

OUSMAN NJIKAM

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Foreword

International criminal law has in the recent past developed rapidly with the establishment of several international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as the so-called mixed or hybrid tribunals (Special Panels for Serious Crimes of the District Court of Dili in East Timor; ‘Regulation 64’ Panels in the Courts of Kosovo and the Special Court for Sierra Leone.

The jurisprudence emanating from these institutions has contributed greatly to the development of international criminal law. The author of this book explores the contribution of one of these institutions: The Special Court for Sierra Leone (“Special Court”). This hybrid court was set up to try those most responsible for the grievous crimes committed during – albeit with a limited mandate *ratione temporis* – the armed conflict in Sierra Leone, bring justice to the victims and to lay the foundation for building respect for the rule of law in the Sierra Leonean post-conflict society.

The Special Court Statute provides for the prosecution of crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law, including crimes against peacekeepers and the recruitment of children.

The Special Court therefore was in a position to play a vital role in the field of international humanitarian law. It was in a position, on the one hand, to apply the existing jurisprudence of the *ad hoc* Tribunals thereby consolidating the law and on the other hand, to contribute in further developing international humanitarian law.

This book analyses the jurisprudence of the special Court from this standpoint and assesses what, if any, contribution the Special Court has made to the development of international humanitarian law. Such an assessment obviously requires the current jurisprudence of other international criminal tribunals to be taken into account and this is exactly what the author does by comparing the jurisprudence of the Special Court with that of the ICTY, ICTR and ICC.

This book provides a broad and critical analysis of the jurisprudence of the Special Court and is of vital importance to any keen reader in the field of international criminal law. The work is commendable to learned scholars, students, judges and practitioners in the field.

This work represents in itself the legacy of the Special Court and is laudable for its thorough analysis.

The Hague,
27 November 2012

H. E. Hon. Bakone Justice Moloto,
Judge UNICTY

Preface

The study at hand was accepted as a dissertation at the Faculty of Law of the Georg-August University of Göttingen in November 2011.

I would like to first express my sincere thanks to my supervisor Professor Dr. Kai Ambos, Judge at the State Court Göttingen, for his encouragement and support. This book would never have been published without his availability, his patience and the immense trust he bestowed upon me. I would like to as well express my thanks to the second referee Professor Dr. Peter-Tobias Stoll.

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Ousman Njikam

Table of Contents

Chapter 1

Introduction 23

Methodology/Objective of Study	30
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Chapter 2

Politico-Historical Context of Sierra Leone prior to and during the Conflict 34

I. Pre-Colonial Phase	34
II. Post-Colonial Phase	35
III. The Peace Settlements	37
IV. The Parties to the Conflict	39
1. The Republic of Sierra Leone Military Forces and Assimilated	39
a) Republic of Sierra Leone Military Forces	39
b) The Armed Forces Revolutionary Council	39
2. The Revolutionary United Front	40
3. The National Patriotic Front for Liberia	40
4. The Civil Defence Force	41
5. Private Military Companies	42
6. [International] Peacekeeping Forces	43

Chapter 3

The Objective, Establishment, Jurisdiction and Organization of the Special Court 45

I. The Objective/Aim of the Special Court	45
1. Political Objective	45
2. Humanitarian Objective	46
3. Legal Objective	48

II. Establishment	50
III. Organization of the Special Court	52
1. The Chambers	54
2. The Office of the Prosecutor	57
3. The Registry	59
IV. Jurisdiction (Concurrent, Primary and Complementary)	62
1. General Remarks	62
a) Genuine Unwillingness or Inability of Sending State	67
b) Security Council Authorization	69
c) Security Council Authorization based on any State Proposal	69
2. Substantive Jurisdiction (<i>rationae materiae</i>)	70
a) Crimes against Humanity	71
b) Violations of Article 3 Common to the Geneva Conventions and of AP II ...	72
c) Other Serious Violations of International Humanitarian Law	73
d) Crimes under Sierra Leonean Law	74
3. Personal Jurisdiction (<i>rationae personae</i>)	74
4. Temporal Jurisdiction (<i>rationae temporis</i>)	80
5. Territorial Jurisdiction	81
6. The Cases before the Special Court	81
7. Conclusion	85

Chapter 4

The Special Court's Case Law on Crimes against Humanity	86
I. Notion and Development of Crimes against Humanity	86
II. The Special Court's Definition and Rationale of Crimes against Humanity	89
III. The Contextual Elements (Part of a Widespread or Systematic Attack against any Civilian Population)	90
1. A Widespread or Systematic Attack	91
a) The Word Attack	91
b) The Phrase Widespread or Systematic	94
2. Any Civilian Population	97
3. 'Part of'	100
IV. The Mental Element (<i>mens rea</i>)	101
1. The Discriminatory Element	102

V. The Elements of the Acts Enumerated in Article 2 SCSL Statute	102
1. Murder	102
2. Extermination	104
3. Enslavement	107
4. Deportation	111
5. Imprisonment	113
6. Torture	114
7. Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy and any other Form of Sexual Violence	117
a) Rape	118
aa) The Characterization of Rape in International Criminal Law	119
b) Sexual Slavery	123
aa) Substantive Elements (<i>actus reus</i>)	125
bb) Mental Element (<i>mens rea</i>)	126
c) Enforced Prostitution	127
d) Forced Pregnancy	127
e) Other Forms of Sexual Violence	129
8. Persecution on Political, Racial and Religious Grounds	130
9. Other Inhumane Acts	131
VI. Conclusion	134

Chapter 5

The Special Court's Case Law on War Crimes	136
I. The Notion of War Crimes	136
II. The Regulation of International and Non-international Armed Conflicts	137
III. The Applicability of Article 3 of the SCSL Statute	144
IV. The Nature of the Conflict in Sierra Leone	145
1. International or Non-international Armed Conflict?	146
a) General Remarks	146
b) Special Court Jurisprudence	148
2. The Impact of the ECOMOG and UNAMSIL Intervention	153
a) ECOMOG Intervention	153
b) UNAMSIL Intervention	157

3. The Involvement of Foreign Mercenaries	158
4. The British Intervention	159
5. Evaluation of Special Court Characterization of the Nature of the Conflict in Sierra Leone	160
V. Temporal and Territorial Applicability of Common Article 3 and AP II	161
VI. Nexus to Armed Conflict	162
VII. The Elements of the Acts Enumerated in Article 3 of SCSL Statute	163
1. Violence to Life, Health and Physical or Mental Well-being of Persons, in Particular Murder as well as Cruel Treatment such as Torture, Mutilation or any Form of Corporal Punishment	164
2. Collective Punishments	165
3. Taking of Hostages	166
4. Acts of Terrorism	169
5. Outrages upon Personal Dignity, in Particular Humiliating and Degrading Treatment, Rape, Enforced Prostitution and any Form of Indecent Assault	171
6. Pillage	173
7. The Passing of Sentences and the Carrying out of Executions without Previous Judgment Pronounced by a Regularly Constituted Court, Affording all the Judicial Guarantees which are Recognized as Indispensable by Civilized Peoples ...	174
VIII. Conclusion	175

Chapter 6

The Special Court's Case Law on other Serious Violations of IHL	176
I. The Notion of Customary International Law	177
II. Intentionally Directing Attacks against Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations	177
1. Treaties and other Legal Instruments	179
2. Protection Given to Civilians and Civilian Objects	183
3. The Practice of the Special Court	185
a) The Accused Directed an Attack against Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations	188
b) The Accused Intended such Personnel, Installations, Material, Units or Vehicles to be the Object of the Attack	190

c) Such Personnel, Installations, Material, Units or Vehicles were Entitled to that Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict	191
d) The Accused Knew or had Reason to Know that the Personnel, Installations, Material, Units or Vehicles were Protected	192
III. Conscripting or Enlisting of Children under the Age of 15 Years into Armed Forces or Groups or Using them to Participate Actively in Hostilities	194
1. General Remarks	194
2. Foundation of the Crime	197
3. The Conscripting or Enlisting of Children under the Age of 15 Years into Armed Forces or Groups or Using them to Participate Actively in Hostilities as Customary International Law?	198
4. The Jurisprudence of the Special Court	205
a) Material Elements	209
aa) Conscription and Enlistment	209
bb) (National Armed Forces), Armed Forces and Armed Groups	212
cc) Active Participation in Hostilities	213
b) Mental Elements – The Knew or should have Known Test	217

Chapter 7

Crimes under Sierra Leonean Law	219
--	-----

Chapter 8

The Legacy of the Special Court	225
I. Jurisprudence on Amnesty	226
1. What is an International Crime?	226
2. The Concept of Amnesty	227
3. International Criminal Law Conventions	235
4. General Human Rights Conventions	237
5. Soft Law Documents	241
II. Jurisprudence on Forced Marriage	246
1. General Remarks	246
2. The Concept of Forced Marriage	247
3. The Requirement of Consent	254

III. Jurisprudence on Head of State Immunity	256
1. Jurisdictional Requirement	259
2. Internationality Requirement	261
a) Head of State Immunity as a Bar to Criminal Proceedings?	261
b) The Obligation of Third States to Cooperate	266
c) What are the Common Factors /Criteria for an International Criminal Court?	269
IV. Jurisdiction over Children between 15 and 18 Years of Age	271
V. Jurisprudence on Sentencing	273
1. Primary Objectives of Sentencing	273
a) Retribution	274
b) Deterrence	275
2. The Regulatory Framework for Sentencing at the Special Court	277
3. The Practice of Sentencing at the Special Court	278
VI. Outreach Section	280
<i>Chapter 9</i>	
General Conclusion	282
German Summary: Der Beitrag vom Sondergerichtshof für Sierra Leone zu der Entwicklung von Völkerrecht	285
Bibliography	290
Special Court Judgments, Decisions and Other Documents	307
1. Appeal Judgments (A)	307
2. Trial Judgments (T)	307
3. Appeal Decisions (Decision on Interlocutory)	307
4. Decisions	308
5. Indictments	309
ICTY Judgments, Decisions and Indictments	310
1. Appeal Judgments (A)	310
2. Judgments (T)	310
3. Appeal Decisions	312

4. Decisions (T)	312
5. Indictments	312
ICTR Judgments and Indictments	313
1. Appeal Judgments (A)	313
2. Judgments (T)	313
3. Indictments	314
Other Jurisprudence and Documents	315
1. International Court of Justice	315
2. International Criminal Court	315
3. Special Tribunal for Lebanon	316
4. African Court on Human and Peoples' Rights	316
5. European Court of Human Rights	317
6. Inter-American Court of Human Rights	317
7. Inter-American Commission of Human Rights	317
8. Nuremberg Tribunal	317
9. Israel	317
10. Malaysia	317
11. United Kingdom	317
12. United States of America	318
13. Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery	318
United Nations Documents	319
1. United Nations Security Council Resolutions	319
2. United Nations General Assembly Resolutions	320
3. United Nations Secretary-General Reports	320
4. Other United Nations Documents	320
Table of other Authorities	323
1. Domestic Laws	323
2. International Legal Instruments and Commentaries	324

3. List of other Legal Authorities	325
4. Statutes of International Criminal Courts	328
Index	329

Table of the Charts

Chart 1: Chart of the Organisation of the Special Court	54
Chart 2: Chart of the Organisation of Chambers	57
Chart 3: Chart of the Office of the Prosecutor	59
Chart 4: Chart of the Office of the Registrar	63

Abbreviations

1899 Hague Convention	Convention with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, 26 Martens (2d) 949, 32 Stat. 1803, T.S. No. 403. Reprinted in 1 AJIL 129 (1907).
1907 Hague Convention	Convention Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, 3 Martens (3d) 461, 36 Stat. 2277, T.S. No. 539. Reprinted in 2 AJIL 90 (1908).
ACCORD	African Centre for the Constructive Resolution of Disputes
ACHPR	African Charter on Human and Peoples' Rights
A/Conf.	annual <i>conference</i>
AFRC	Armed Forces Revolutionary Council
Afr. Hum. Rts. L. J.	African Human Rights Law Journal
AMIS	African Union Mission in Sudan
Am. J. Int'l L.	American Journal of international Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
APC	All People's Congress
ASIL	American Society of International Law
ASP	Assembly of States Parties
AU	African Union
BGH	Bundesgerichtshof
BOFAXE	Newspaper
Brook. J. Int'l L.	Brooklyn Journal of International Law
BWV	Berliner Wissenschafts-Verlag
CAH	Crimes Against Humanity
CDF	Civil Defence Forces
CDU	Civil Defence Units
Cf.	Confer
CJ	Chief Judge
CLF	Criminal Law Forum

CODESRIA	Council for the Development of Social Science Research in Africa
Denv. Int'l L & Poly	Denver Journal of International Law and Policy
Doc.	Document
Drake L. Rev.	Drake Law Review
DRC	Democratic Republic of Congo
Duke J. Comp. & Int'l L	Duke Journal of Comparative and International Law
ECCC	Extraordinary Chambers in the Courts of <i>Cambodia</i>
ECOMOG	Economic Community of West African States Cease-Fire Monitoring Group
ECOWAS	Economic Community of West African States
edn.	edition
ed(s).	editor(s)
EJIL	European Journal of International Law
et al.	and others (<i>et alii</i>)
et seq.	and the following (<i>et sequens; et sequentes</i>)
FICHL	Forum for International Criminal and Humanitarian Law Publication Series
Fla. J. Int'l L.	Florida Journal of International Law
GAOR	(United Nations) General Assembly Official Records
G. A. Res.	(United Nations) General Assembly Resolutions
GSG	Gurkha Security Guards Limited
Harv. Int'l L J.	Harvard International Law Journal
HCJ	High Court of Justice
HRC	Human Rights Council
HRW	Human Rights Watch
Ibid.	in the same place (<i>ibidem</i>)
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLR	International Criminal Law Review
ICRC	International Committee for the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for the Prosecution of Person Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Serious Violations

	of International Humanitarian Law Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTR Statute	Statute of the International Tribunal for Rwanda, UN Doc. S/RES/955 (1994)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704
IDF	Israeli Defence Force
i.e.	that is (<i>id est</i>)
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Materials
ILSA	International Law Students Association
ILSA J. Int'l & Comp. L	International Law Students Association Journal of International and Comparative Law
IMT	International Military Tribunal (Agreement for the Prosecution and Punishment of major War Criminals of the European Axis, 8 August 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 UNTS 279, 284)
IMTFE	International Military Tribunal for the Far East. Special Proclamation: Establishment of an International Military Tribunal for the Far East, 19 January 1946, T.I.A.S. No. 1589, at 3,4 Bevans 20
Ind. Int'l & Comp. L. Rev.	Indiana International and Comparative Law Review
Inter-Am. C.H.R	Inter-American Court of Human Rights
INTERPOL	International Criminal Police Organization
Int J Refugee Law	International Journal of Refugee Law
Int J Transitional Justice	International Journal of Transitional Justice
Int'l L. Rev.	International Law Review
IRIN West Africa	Integrated Regional Information Network West Africa
ISAF	International Security Assistance Force
ISISC	International Institute of Higher Studies in Criminal Sciences
Isr. L. Rev.	Israeli Law Review
IStGH	Internationaler Strafgerichtshof, Den Haag
JICJ	The Journal of International Criminal Justice
KBE	Knight Commander of the Order of the British Empire

KCB QC	Knight Commander of the Order of the Bath, Queen's Counsel
L. & Contemp. Probs	Law and Contemporary Problems
LGDJ	Librairie Générale de Droit et de Jurisprudence
LJIL	Leiden Journal of International Law
LRA	Lord's Resistance Army
mn.	marginal number
mtg.	meeting
NGO	Non Governmental Organisation
NJW	Neue Juristische Wochenschrift
No.	Number
Nova L. Rev.	Nova Law Review
NPFL	National Patriotic Front for Liberia
NPRC	National Provisional Ruling Council
NW U.J. Int'l Hum. Rts.	Northwestern University Journal of International Human Rights
N. Y.	New York
N.Y. Int'l L. Rev.	New York International Law Review
OAU	Organisation of African Unity
OEA	Organisation of American States (Organizacion de los Estados Americanos)
OED	Oxford English Dictionary
OLAD	Office for Legal Aid and Detention
OLG	Oberlandesgericht
OTP	Office of the Prosecutor
OUP	Oxford University Press
p.	page
para.	paragraph
paras.	paragraphs
pp.	pages
PTC	Pre-Trial Chamber
RCADI	Recueil des Cours de l'Academie de Droit International
RDC	République Démocratique du Congo
Res.	Resolution
Rev.	Review
RPE	Rules of Procedure and Evidence
RPF	Rwandese Patriotic Front
RSLMF	The Republic of Sierra Leone Military Forces
RUF	Revolutionary United Front

SC-Res.	Security Council Resolution
SCSL Statute	Statute of the Special Court for Sierra Leone, 16 January 2002, available at http://www.sc-sl.org
SEAPA	Section for Evidence, Archiving and Post Operations Access
Sess.	Session
SL	Sierra Leone
SLA	Sierra Leone Army
Special Court	Special Court for Sierra Leone
StGB	Strafgesetzbuch (German Penal Code)
STL	Special Tribunal for Lebanon
Suffolk Transnat'l L. Rev	Suffolk Transnational Law Review
TC	Trial Chamber
TIAS	Treaties and other International Acts Series
TRC	Truth and Reconciliation Commission
U.C. Davis J. Int'l L. Pol'y	University of California Davis Journal of International Law and Policy
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
ULIMO	United Liberian Movement for Democracy
ULIMO-J	United Liberian Movement for Democracy (FREETOWN)
ULIMO-K	United Liberian Movement for Democracy (LIBERIA)
UN	United Nations
UNAMET	United Nations Mission to East Timor
UNAMSIL	United Nations Mission in Sierra Leone
UN Doc.	United Nations Document
UNGA	United Nations General Assembly
UNGA Res.	United Nations General Assembly Resolutions
UNICEF	United Nations Children's Fund
UNPROFOR	United Nations Protection Force in Bosnia
UNSC	United Nations Security Council
UNSC Doc.	United Nations Security Council Document
UNSCR	United Nations Security Council Resolution
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
USA	United States of America
USC	United States Code
USSR	Union of Soviet Socialist Republic

v.	versus
VCLT	Vienna Convention on the Law of Treaties, 1969.
Vol.	Volume
WW I	First World War
WW II	Second World War
Yearbook Int'l L. Comm'n	Yearbook International Law Commission
YIHL	Yearbook of International Humanitarian Law
ZIS	Zeitschrift für internationale Strafrechtsdogmatik

“All Sierra Leoneans, at home and abroad, suffered considerable loss. Some lost their cherished and loved ones, others their belongings, and still others, their dignity and honour. The bitter experience of armed conflict will linger in our memories for as long as we need to remind ourselves of the mistakes that we should never ever make again.”¹

Chapter 1

Introduction

The African continent has emerged in the eyes of the international community not only as the “forgotten poor continent” but also as a war continent. The conflicts are of various natures: internal conflicts, regional conflicts, ethnic conflicts and civil wars. They cause more civilian victims than military victims. Moreover, during these conflicts serious violations of international humanitarian law occur, which more often than not remain unpunished.

History has shown that in the aftermath of such conflicts, simply turning away from the past does not provide a transition to peace and stability but rather maintains a *status quo* which ultimately could lead to a repetition of the wrongs of the past. In order to avoid impunity and ensure accountability after such conflicts, there have been several post-conflict mechanisms applied such as criminal prosecutions both at the national and international level; truth commissions; commissions of inquiry; restitution or reparations; vetting or lustration; institutional reforms and other less structured or institutionalized approaches (*e.g.* the establishment of national days of memory, apologies and the construction of monuments) as well as traditional, indigenous, and religious approaches. Although each of these approaches may be applied individually and yield success, some academics suggest that the larger objective of post-conflict justice is best achieved through a coordinated, coherent and comprehensive approach.²

Criminal prosecution at the international level is thus just one of the several post-conflict mechanisms that exist in dealing with past violations of human rights and humanitarian law.

¹ Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, Opening Speech at the Official Opening of the Parliament of the Third Republic, 12 July 2002, available at <http://www.sierra-leone.org/Speeches/kabbah-071202.html> (all websites in this study last visited 09.05.2012).

² Cherif Bassiouni, *The Chicago Principles on Post-Conflict Justice*, International Human Rights Law Institute, USA; 2008, p. 27.

After the Nuremberg³ and Tokyo⁴ trials in 1945 and 1946 respectively, international humanitarian law has developed with the establishment of the International Criminal Tribunal for the former Yugoslavia (“ICTY”),⁵ the International Criminal Tribunal for Rwanda (“ICTR”),⁶ the so-called mixed Tribunals (Special Court for Sierra Leone, the East-Timor Special Panels,⁷ the Extra-ordinary Chambers in the Courts of Cambodia⁸ and the Special Tribunal for Lebanon⁹), as well as the International Criminal Court (“ICC”).¹⁰

³ Cf. Agreement for the Prosecution of Major Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), 8 August 1945, 82 UNTS (1951), p. 279. The IMT was established pursuant to a multilateral treaty between the United Kingdom, the United States of America, the Union of Soviet Socialist Republic and France. The Charter was annexed to the London Agreement and constituted an integral part of it. Nineteen states later subscribed to the London Agreement: for example Austria, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, The Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay and Venezuela.

⁴ Cf. International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946; Charter dated 19 January 1946, 1589 TIAS 3, reprinted in Charles I. Bevans (ed.), *Treaties and Other International Agreements*, vol. 4, 1970, p. 20, amended 26 April 1946, *ibid.*, p. 27.

⁵ Cf. UN Security Council Resolution 808, Doc. S/RES/808, 22 February 1993, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of SC Resolution 808 (1993), 3 May 1993, UN Doc. S/25704 and Add.1.

⁶ Cf. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, UN SC Res. 955, 8 November 1994, UN SC Doc. S/RES/955 (1994); reprinted in 33 ILM 1602 (1994).

⁷ Cf. UN Security Council (UNSC) Resolution 1272, Doc. S/RES/1272, 25 October 1999, establishing the United Nations Transitional Administration in East Timor (UNTAET) and granting it a mandate to “exercise all legislative and executive authority, including the administration of justice”. The precursor of UNTAET was the United Nations Mission to East Timor (UNAMET), which organised and oversaw the 1999 referendum which led to the establishment of the new state of East Timor. The East Timor Special Panels for Serious Crimes were established as part of the transitional court system by the UNTAET within the District Court of Dili, pursuant to Section 10 of UNTAET Regulation 2000/11 as amended by UNTAET Regulation 2001/25 (on the Amendment of UNTAET Regulation No. 2000/11 on the Organization of Court in East Timor and UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure, 14 September 2001).

⁸ Cf. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), [ECCC Statute], available at <http://www.eccc.gov>.

⁹ Cf. UN Security Council Resolution 1664, Doc. S/RES/1664, 29 March 2006, requesting the UN Secretary-General to negotiate an agreement with the government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice. These negotiations resulted in ‘the Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon’, signed by the Government of Lebanon and the UN respectively on 23 January and 6 February 2007. See

The Special Court for Sierra Leone (“Special Court”), which is the subject of this thesis, was created in the context of what observers described as ‘tribunal fatigue’ on the part of the UNSC.¹¹ However, despite this fatigue, the international community was faced with the need to act in light of the alleged atrocious crimes that had been perpetrated in the course of the conflict in Sierra Leone.¹² Accountability for serious human rights crimes, like those committed during Sierra Leone’s war, is essential for several reasons: to bring justice to the victims, to punish the perpetrators, and to lay the foundation for building respect for the rule of law in post-conflict societies.¹³

The Special Court was established in 2002 by an agreement between the government of Sierra Leone and the UN¹⁴ following a request from the President of the Republic of Sierra Leone, Dr. Ahmad Tejan Kabbah and pursuant to UNSC Resolution 1350 (2000) of 14 August 2000.¹⁵ This UNSC Resolution expressly authorized the UN Secretary-General to negotiate an agreement to set up a special court.¹⁶ In doing so, the UNSC outlined the “negative impact of the security situation on the

also UNSC Resolution 1757, Doc. S/RES/1757, 30 May 2007, which contains both the above mentioned agreement and the statute of the Special Tribunal for Lebanon.

¹⁰ Cf. Rome Statute of the International Criminal Court, Text circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, 2187 U.N.T.S. 90 (entered into force 1 July 2002) (hereinafter ICC Statute).

¹¹ See for example: The UN Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?: Hearing Before the H. Comm. On Int’l Relations, 107th Cong. 20 (2002) (statement of Pierre-Richard Prosper, Ambassador – At-Large for War Crimes Issues, U.S. Dep’t of State), available at www.state.gov/s/wci/us_releases/rm/2002/8571.htm. See also Stephen J. Rapp, The Compact Model in International Criminal Justice: The Special Court for Sierra Leone, 57 Drake L. Rev. 11, 2008, p. 20; Jelka Mayr-Singer, Hybridgerichte – eine neue Generation internationaler Strafgerichte, Der Sondergerichtshof für Sierra Leone, in 56 Vereinte Nationen 2, 2008, p. 69.

¹² Cf. Zsuzsanna Deen-Racsmany, Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity, 18 LJIL 2, 2005, p. 307.

¹³ See generally Joshua A. Romero, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 2 NW U.J. Int’l Hum. Rts. 8, 2004, pp. 1–28.

¹⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

¹⁵ Cf. Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000 (“Report of the Secretary-General, 4 October 2000”).

¹⁶ On 12 June 2000 President Kabbah wrote to the UN requesting its support in creating a court to try perpetrators of the conflict in Sierra Leone. In UNSC Res. 1315 (2000) the Security Council asked the UN-Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law (UN Doc. S/RES/1315, 14 August 2000). Imprinted in: Ambos/Othman (eds.), New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia, Max-Planck-Institut für ausländisches und internationales Strafrecht, edition iuscrim, Freiburg i. Br. 2003, pp. 250 et seq.; see also <www.sc-sl.org>.