Concurrence of Judicial and Quasi-Legislative Capacities within the International and Internationalized Criminal Courts: Compliance with the Doctrine of Separation of Powers?

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1. Introcuction: Rules of Procedure and Evidence as Quasi-Legisaltion

One of the characteristics of several of the international and internationalized criminal courts is that the judges create their own binding rules of procedure and evidence. Clear examples hereof are the Rules of Procedure and Evidence of the ICTY and ICTR, which rules were enacted by the judges pursuant to Article 15 of the respective Statutes.(1) In a certain sense these judges therefore act in a quasi-legislative power while at the same time applying these rules of procedure and evidence in their judiciary function.

The same concurrence of both semi-legislative and judicial functions is to be seen before the first internationalized criminal court, the Special Court for Sierra Leone (SCSL).

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Article 14(2) of the Statute of the SCSL provides that the "judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules." Rule 6 of these rules of procedure and evidence envision a two-step procedure; first there must be a proposal for amendment, which proposal may come from a judge, the prosecutor, the registrar, the defense office, the Sierra Leone Bar Association or any other entity invited by the President of the SCSL to make such a proposal. Second, this proposal must be adopted by the judges of the SCSL at a plenary meeting or approved unanimously by the judges via any appropriate means, which if not in writing, must be confirmed in writing.(2) According to Rule 6(D), upon adoption or unanimous approval, the amendment enters into force immediately, unless otherwise indicated.

The question arises whether this quasi-legislative power extends, and if so, in a justified way, to the application and interpretation of the *ratione materiae* jurisdiction of these courts.

The focus of this article will therefore be the implications of this quasi-legislative role of judges of international and internationalized criminal courts and the manner in which this power is utilized by these judges. Particular emphasis will be put on the application of this apparent quasi-legislative power through the creation of jurisprudence. In this context, the recent jurisprudence of the SCSL will be reviewed as to the interpretation of the jurisdiction *ratione materiae* of this internationalized criminal court. Finally, this article will assess whether the functioning of these judges in this quasi-legislative capacity fits within the doctrine of the separation of powers and whether this is beneficial to the development of international criminal justice.

2. The Process of the Establishment of the SCSL

2.1. Legal Basis of the Special Court

Before going into the question whether and to which extent the jurisprudence of the SCSL serves as a quasi-legislative source in terms of the delineation of the *ratione materiae* jurisdiction, it is pertinent to first examine the way

this special court came into existence in order to assess its judicial powers.[3]

The Special Court for Sierra Leone is a unique treaty-basis institution established by an agreement between the United Nations and the Government of Sierra Leone. Unlike the ICTY and ICTR, the Special Court has its legal basis in a bilateral agreement between the UN and a member State, Sierra Leone. Also unlike the ICTY and ICTR, the Special Court is located in Freetown, the capital of the State in which the violations occurred. Nonetheless, the Court operates outside of and independently from Sierra Leone's judiciary. The Court thus differs from the proposed Extraordinary Chambers for Cambodia and the Serious Crimes Panels for East Timor, conceived as courts operating with international funding and support within the existing domestic judicial systems.

The particular nature of the Special Court, reflected in all aspects of its operations, was the outcome of the lengthy negotiations on its mandate and structure; the main stages of these negotiations are marked by the Court's fundamental documents. It is the aim of the next part of the article to review the most relevant aspects of these documents in view of the question whether these documents give leeway to any quasi-legislative power of the SCSL.

2.2. Letter from the President of Sierra Leone to the President of the United Nations Security Council

On June 12, 2000, H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, addressed a letter to the U.N. Secretary-General requesting the assistance of the United Nations to establish a special court for Sierra Leone. The letter was subsequently forwarded formally to the President of the U.N. Security Council and on August 10, 2000, it was issued as a U.N. document.

In the letter, President Kabbah requests, "[o]n behalf of the Government and people of the Republic of Sierra Leone", that a court be set up in order "to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for taking of United Nations peacekeepers as hostages." The merit of the court would be, according to

President Kabbah, to bring and maintain peace in Sierra Leone and the sub-region through accountability. The Special Court also would remedy the difficulty of Sierra Leone trying the crimes committed during 10 years of conflict in its national courts, due to lack of resources and expertise, the existence of an amnesty and gaps in Sierra Leonean criminal law. It would further ensure that the trials be and be seen as fair, impartial and transparent. President Kabbah invited the Security Council to consider creating a court along the lines of the international tribunals for the former Yugoslavia and for Rwanda.

2.3. UN Security Council Resolution 1315

Immediately after the publication of the letter of President Kabbah as an official U.N. document, members of the U.N. Security Council started informal consultations on a response. Following successive discussions of drafts tabled by the United States and informal talks with the Government of Sierra Leone, the U.N. Security Council adopted Resolution 1315 (2000) on the establishment of a Special Court for Sierra Leone (Resolution 1315) in August 2000.

Resolution 1315 endorsed President Kabbah's request to create an accountability mechanism in Sierra Leone and outlined the basic elements recommended for the functioning of a special court. In addressing the question of the United Nations' involvement in the process, however, Resolution 1315 openly refused the option of creating a special court as another international tribunal or a body operatively and financially sustained by the United Nations. Different factors contributed to this view. It should be recalled that there was widespread discontent with the two international tribunals among members of the Security Council. In addition, a few members, while ready to support the resolution, were not prepared to accept the financial and other responsibilities deriving from the creation of a special court as a U.N. subsidiary body. At the same time, the lack of resources and expertise, the gaps in the domestic criminal system and the existence of an amnesty were significant barriers to the establishment of a special court as part of the Sierra Leonean judiciary. Resolution 1315, therefore, puts

forward the idea of a special court as an innovative model and a hybrid or mixed tribunal.

The preambular paragraphs of Resolution 1315 recall, among other things, the principle of individual criminal responsibility and the determination of the international community to bring to justice those responsible for serious violations of international humanitarian law. The preamble further states, accepting the view that justice is an essential component of lasting peace, that in the case of Sierra Leone the creation of "a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."

The preamble also refers to the Lomé Peace Agreement, its amnesty provisions and its relationship with the jurisdiction of a special court. Preambular paragraph 5 recalls that in signing the Lomé Peace Agreement, the Special Representative of the Secretary-General appended a statement clarifying that the United Nations does not recognise the amnesty provisions in the peace agreement as being applicable to crimes under international law, namely genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

Finally, the last preambular paragraph recognises that the situation in Sierra Leone "continues to constitute a threat to international peace and security in the region" without, however, an explicit reference to Chapter VII of the U.N. Charter. A reference to Chapter VII, which appeared in the first draft of the Resolution, was deleted from the final text contrary to the wishes of the Government of Sierra Leone and the U.N. Secretary-General. The language of Resolution 1315, by omitting such a statement, falls short of creating a legal obligation for Member States to cooperate with the establishment and functioning of a special court.

2.4. Report of the Secretary-General in the Establishment of a Special Court for Sierra Leone

On October 4, 2000, pursuant to Resolution 1315, the Secretary-General submitted his report on the establishment of a Special Court for Sierra Leone

(the Report of the Secretary-General). The report describes the progress of negotiations between representatives of the Secretary-General and the Government of Sierra Leone in New York and in Freetown, clarifies the implications of the decisions taken in Resolution 1315 and makes suggestions with regard to matters that the Security Council requested to be considered or had left open. Annexed to the report is a draft agreement and Statute establishing the Special Court.

2.5. Agreement on the Special Court for Sierra Leone

The agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (the Agreement), to which the Statute of the Special Court for Sierra Leone (the Statute) was annexed, was signed in Freetown on January 16, 2002. The Agreement and Statute of the Special Court were later issued as Appendix II to the Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone. In accordance with its Article 21, the Agreement entered into force on April 12, 2002.

The Agreement consists of 23 Articles on the terms of the establishment of the Special Court. The annexed Statute consists of 25 Articles that govern the Court's functioning. The matters addressed in the Agreement and Statute encompass not only the functioning of the legal process but also the various practical arrangements necessary for the operation of the Court. Matters related to the legal process include: the Court's jurisdiction; principles of individual criminal responsibility, rights of the accused; forms of judgment and penalties; terms of enforcement of sentences; procedures for appeal, review of judgments and pardon or commutation of sentence; and working language. Matters relating to the practical arrangements necessary for the operation of the Court include: the organisation of Court; the responsibilities of the organs and officials of the Court; qualifications and procedures for appointment of the Court's officials; the privileges and immunities of the Court's appointed official, staff, counsel, witnesses and experts; the terms of the Government of Sierra Leone's cooperation with the Court; the Court's judicial capacity; the seat of the Court; the Court's security arrangements.

3. Jurisprudence of the SCSL on the *Ratione Materiae* Jurisdiction

3.1. Introduction

After having examined the legal basis of the Special Court and the way it came into existence, this article now arrives at some specific international crimes the Special Court is able to deal with. We should bear in mind though the jurisdictional scope of the Special Court before assessing two specific crimes, namely the recruitment and use of child soldiers and the crime of "forced marriage".

In his letter of June 12, 2000, the President of Sierra Leone suggested that the Special Court have as its applicable law a blend of international and domestic Sierra Leone law. Security Council Resolution 1315 (2000) therefore recommended that the Special Court was to have jurisdiction over crimes under international law and selected crimes under Sierra Leonean law. Pursuant to the Statute of the Special Court, the crimes under international law fall under the broad categories 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 use of child soldiers. These are crimes under international humanitarian law that were considered to have had the status of customary international law at the time the alleged crimes were committed. Violations of Common Article 3 and Additional Protocol II and the "other serious violations of international humanitarian law" all require the existence of an armed conflict as a condition of applicability. Therefore this will be discussed separately at the beginning of this section.

The crimes under Sierra Leonean law cover offences relating to the abuse of girls and wanton destruction of property, taken from Sierra Leone legislation dating from 1926 and 1861 respectively; these are the only crimes under Sierra Leone law over which the Special Court has jurisdiction. This selection of subject matter jurisdiction was done to pre-empt any challenge to the Court's legality on the basis of the principle of *nullum crimen sine lege*, since the acts these provisions are purporting to address had been

criminalised at the time those acts were alleged committed. It should be emphasised that the Statute of the Special Court does not create the crimes to which it refers: rather, Articles 2 to 5 of the Statute simply provide that the Special Court has jurisdiction over pre-existing crimes. Therefore, an examination of the applicability and content of the norms referred to within the Statute – whether as a result of customary international law or voluntary adoption of norms by Sierra Leone – is necessary to determine the elements of the crimes.

According to the Statute, the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda"; furthermore, it is also in the interests of certainty of the law and consistency of the application of its provision that the Special Court for Sierra Leone follow these decisions.

The Statute of the Special Court for Sierra Leone states that its temporal jurisdiction runs from November 30, 1996 to a future date as yet undermined. This date was selected on the basis of three considerations during the negotiations:

a. the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded;

b. the starting date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and

c. it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.

Three different dates were discussed in this context:

a. November 30, 1996 (i.e., the date of the failed Abidjan Peace Accords);

b. May 25, 1997 (i.e., when the AFRC launched its *coup d'etat* against the government of Sierra Leone); and

c. January 6, 1999 (i.e., when the AFRC and RUF launched their attack ion Freetown).

The date of May 25, 1997, was rejected as having too many political overtones, while January 6, 1999 was rejected as giving the impression of

favouring Freetown over the provinces. The date of November 30, 1996 was therefore considered the most appropriate, as it represented the first time the fighting factions had attempted to reach a peaceful settlement of the conflict. Additionally, it was considered to encompass the most serious crimes committed in the provinces, thereby ensuring the Court would not be too "Freetown-centred." Sierra Leone and the United Nations therefore agreed that this would be a suitable starting date for the Court. It has to be queried whether these reasons provide sufficient justification for setting a starting date for the Court that is halfway through the conflict, a compromise criticized by Sierra Leoneans from along the social, political and professional spectrum. The perception in Sierra Leone is that the Statute unjustly favours Freetown over the provinces, as the November 1996 date corresponds to the time when the capital first became a target attack. For the provinces, the conflict has generally been one long, continuous experience from the beginning of the 1990's, whereas Freetown witnessed intermittent, although extreme, episodes of violence only from the mid-1990's onwards.

3.2. Specific Crimes under the Statute of the SCSL

This section will now address some specific crimes which fall within the jurisdiction of the Special Court. Articles 2 to 5 of the SCSL Statute comprise these crimes. Article 2 defines crimes against humanity, whereas Article 3 deals with violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Article 4 relates to other serious violations of international humanitarian law. Finally Article 5 brings certain crimes under Sierra Leonean law within the jurisdictional scope of the SCSL, among which,

a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

   i. Abusing a girl under 13 years of age, contrary to section 6;

   ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;

   iii. Abduction of a girl for immoral purposes, contrary to section 12.

b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;

ii. Setting fire to public buildings, contrary to sections 5 and 6;

iii. Setting fire to other buildings, contrary to section 6.[(4)]

3.3. Assessment of Article 4 c: The Recruitment and Use of Child Soldiers

According to the SCSL Statute, the elements of the war crime of the recruitment and use of child soldiers are:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered. This crime was first included in Additional Protocol II, Article 4(3) c and subsequently in other instruments, including the Convention on the Rights of the Child 1989, Article 38(3) and the Rome Statute for the ICC, Article 8(2)(e)(vii). An examination of State and *opinio juris* in this area, which is beyond the scope of this article, demonstrates that the act of conscription, enlistment and use of child soldiers is a crime under customary international law.

3.4. Assessment of Article 5: Abuse of Girls and Wanton Destruction of Property

Security Council Resolution 1315 (2000) explicitly refers to Sierra Leonean law as being among the provisions over which the Special Court should have jurisdiction. The provisions were selected to cover specific situations that were "considered to be either unregulated or inadequately regulated under international law." The elements of these crimes are governed by Sierra Leone Statute and case law and, as such, do not require any connection with an armed conflict.

A. Abuse of Girls

The provisions of the *Prevention of Cruelty to Children Act, 1926* listed in the Statute of the Special Court are designed to protect girls under the age of 16 from sexual abuse and exploitation. They vary in terms of the ages of the children they protect, from under 13 in the case of section 6, through between 13 and 14 in the case of section 7, to under 16 in the case of section 12. The different crimes are considered to have different levels of seriousness and entail different penalties under Sierra Leone law, from 15 years in the case of section 6, which is a felony, to 2 years in the case of sections 7 and 12, which are misdemeanours.

The elements for the crimes under sections 6 and 7 are that the accused "unlawfully and carnally" knew and abused a girl within the stated ages. The elements for section 12 are that the accused took or caused to be taken an unmarried girl under the age of 16 out of the possession of and against the will of her father or mother or any other person having lawful charge of her.

There are two possible defences to the crimes under these provisions. First, "belief of age" is a defence to the charge: thus if the accused can prove that he had reasonable cause to believe the victim was of or over the required age, this will be a complete defence. In addition, in keeping with the common law applicable in Sierra Leone related to these types of crimes, if the accused can show that the victim was his wife particularly under the customary law of Sierra Leone, this will also be a defence. However, consent of the girl is no defence to the crime, as lack of consent is not an element of crime.

B. Wanton Destruction of Property

These provisions only cover setting fire to specific buildings, namely dwelling houses, public buildings and "other" buildings, which include any type of building not explicitly mentioned elsewhere in the *Malicious Damage Act, 1867*. It should, however, be emphasised that setting fire to a house will only fall within the jurisdiction of the Special Court should a person actually be inside, due to the elements of section 2 of the *Malicious Damage Act, 1867*. Furthermore, the Statute of the Special Court does not incorporate the other provisions of the *Malicious Damage Act, 1867*, thereby excluding setting fire to buildings other than those listed above and excluding other types of damage to all buildings.

An essential element of this crime is that there was actual burning, no matter how slight, of some part of the building or property in respect of which the charge is laid. Each of the crimes listed in Article 5(b) constitute a felony under Sierra Leone law, with penalties ranging from 14 years (section 6), through 16 years (section 5) to life imprisonment (section 2).

The mental element is that the act must be committed "unlawfully and maliciously" in order to constitute an offence. In this instance, "malice" does not mean malevolence or ill will, but refers instead to the intention of the accused. The mental element is therefore that the accused either intended to do the act, without just cause or excuse, or was reckless and foresaw or ought to have foreseen the result, even if that result was not necessarily intended.

3.5. Jurisprudential Developments Within the SCSL on Two Specific Crimes: Forced Marriage and Child Recruitment

After having scrutinised the subject matter jurisdiction of the SCSL this article examines two judgements on the interpretation of the crime of child recruitment and that of forced marriage, which seems new within the arena of international criminal law, which judgements were rendered by the Trial Chamber of the SCSL and the Appeals Chamber. Close reading of these judgements learn that some of the crimes are still rudimentary and may justify the conclusion that the interpretation of the SCSL judges of the

ratione materiae jurisdiction may be perceived as a form of judicial semi-legislating.

3.5.1. The SCSL Trial Chamber Decision of May 6, 2004 in *Prosecution v. Brima/Kamara/Kanu*[5] on the Prosecution Request for Leave to Amend the Indictment

In *Prosecution v Kanu et al*., the prosecution sought to add one new count to the charges, namely "crimes against humanity – other inhumane acts (forced marriage)." Additionally, the prosecution sought to make "corrections and/or modifications" to other counts which include the expansion of time periods, an additional location for all counts relate to sexual violence crimes, and the change of spellings of certain place names. This request was motivated by the argument that the crimes of sexual violence were not simply sexual slavery but should be appropriately characterised as "forced marriages" and that new investigations had clarified the nature of the alleged relationships.

The defence apposed this request by arguing that forced marriage is not to be seen as a crime against humanity and that bringing such a charge violates the principle of legality.

In its decision of 6 May 2004, the Trial Chamber of the SCSL held that the Prosecution, during the investigations that preceded the initial appearances of the accused persons, properly addresses their minds to gender offences.[6]

The Trial Chamber held that by adding the count of forced marriage, a new crime in terms of its being a complete novelty in the arsenal of all the counts in the indictment, was created. It specifically held in par. 52 the following:

> We would like to say here that forced marriage is in fact what we would like to classify, as a 'kindred offence' to those that exist in the consolidate indictment on the view of the commonality of the ingredients needed to prove offences of this nature. Given this consideration and the fact that material related to those gender offences that feature on the consolidate indictment has long been disclosed to the Defence, we are of the opinion that the amendment

> sought is not a novelty that should necessitate fresh investigations as the defence contends. This is only logical because granting I would neither occasions an "undue delay" of the trial of the accused, not a breach of the statutory rights of the accused as provided for under the provisions of Article 17(4)(a) of the Statute and also because it would not consequently as well, either place the prosecution in an unduly advantageous position to the detriment of the defence, nor would it violate the principle of "equality of arms."

Therefore the Trial Chamber accepted the new charge of forced marriage as part of crimes against humanity as meant in Article 2 of the Statute, although it did not go into the argument raised by the defence, namely that forced marriage as such did constitute an international crime according to either conventional nor customary international law.

3.5.2. THE APPEALS CHAMBER JUDGEMENT OF 31 MAY 2004 IN *PROSECUTOR VS. NORMAN*[7] ON THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

A second example relates to the Appeals Chamber decision of the SCSL with respect to the delineation of the crime of child recruitment.

This judgement was issued based on a defence preliminary motion in which it raised the following submissions:

- the SCSL has no jurisdiction to try the accused for child recruitment since this crime was not part of customary international law at the times mentioned in the charges
- the principle of *nullum crimen sine lege* was violated
- no international instruments exists which criminalises such activity
- the ICC Statute criminalises child recruitment but does not codify customary international law

The Appeals Chamber dealt with these submissions in the following way. It first referred to Article 4 of its Statute and observed that the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including child recruitment.

The question raised by the Preliminary Motion is whether the crime as

defined in Article 4 c of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused. The Appeals Chamber started with delving into two sources of international law under Article 38 (1) of the Statute of the International Court of Justice:

a. international conventions

b. international custom

Sub a: In scrutinising the available international conventions in this area the court enumerated the following international conventions in order to substantiate the fact that international humanitarian law is violated by the recruitment of children:

- Fourth Geneva Convention of 1994, which Convention was ratified by Sierra Leone in 1965. The Court referred to the following provisions: Article 14, 24 and 51.
- Additional Protocol I and II of 1977, which were both ratified by Sierra Leone in 1986, namely Article 77 of Protocol I and Article 4 of Protocol II.
- Convention on the Rights of the Child of 1989, which Convention entered into force on September 2, 1990 and was on the same day ratified by Sierra Leone. Article 38 in conjunction with Article 4 is relevant.

Sub b: As to customary international law, the Appeals Chamber noted that prior to November 1996 (jurisdiction of the Special Court) the prohibition on child recruitment had also crystallised as customary international law which requires both State practise and *opinio juris*. In order to come to this conclusion the Appeals Chamber mentions several arguments:

1. In par. 20 the Appeals Chamber observes the widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II which provides compelling evidence that the conventional norm entered customary international law well before 1996.

2. Secondly, it referred to the African Charter on the rights and welfare of the child adopted July 11, 1990 which reiterates with

almost the same wording the prohibition of child recruitment in Article 22(2) (see Par. 21)

Sub c: Individual Criminal Responsibility

However, the central question as far as the quasi-legislative issue is concerned, related to the question whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments. In this context the Appeals Chamber referred to the principle of non-retroactivity, sometimes also called *Nullum Crimen Sine lege, Nullum Crimen Sine Poena*, which principle is fundamental as also set out by the ICTY Trial Chamber in a decision of November 12, 2002.[(8)] This principle means that the description of the offence in substantive criminal law must be "foreseeable and accessible to a possible perpetrator that this concrete conduct was punishable."

In the well-known *Tadic* case[(9)] of the ICTY the test to be met for an offence to be subject to prosecution was set out in the following terms:

- the violation must constitute a violation of a rule of international humanitarian law
- the rule must be customary in nature or stemming from treaty law
- the violation must be serious (protecting important values and involving grave consequences for the victim)
- the rule must entail individual criminal responsibility

With respect to the defence argument that it is far less clear whether child recruitment is customarily recognised as a war crime entailing individual criminal responsibility, the Appeals Chamber relied on:

- the recommendations of the Committee on the Rights of the Child of October 21, 1997
- Article 8 of the ICC Statute which includes the crime of child recruitment in both international and internal armed conflict
- The 1999 ILO Convention 182 Concerning the Prohibition and Immediate Section for the Elimination of the Worst Forms of Child Labour (articles 3-4)
- CRC Optional Protocol II of 25 May 2000 to the Convention of the Rights of the Child on the Involvement of children in armed conflict

- The Appeals Chamber Judgement in the *Tadic* Case making a reference to the Nuremberg Tribunal, which Chamber outlined several factors for establishing individual criminal responsibility under international law, among which the criterion of clear and unequivocal recognition of the rules of warfare in international law and State practise indicating an intention to criminalize the prohibition.[10] In this context the Appeals Chamber noted that it is not necessary for individual criminal responsibility to be explicitly stated in a Convention as such responsibility may also be founded on customary international law.
- Finally, the Appeals Chamber referred to the prohibition of child recruitment as constituting a fundamental guarantee and, although it is not mentioned in the ICTY/ICTR Statutes, it shares the same nature and is of the same gravity as the violations that are listed in those Statutes.

In paragraph 39 the Appeals Chamber observes that both the ICTY and ICTR have prosecuted violations of Additional Protocol II which provides further evidence of the criminality of child recruitment before 1996.

As a consequence the Chamber concluded that the *nullum crimen* Principle was not breached and held that an additional argument was to be found in national legislation in certain States. In par. 44 it observes that by 2001 already 108 States explicitly prohibited child recruitment, an example even dating back to 1902 (Norway) and a further 15 States that do not have specific legislation did not show any indication of using child soldiers. Accordingly, the list of States in the 2001 Child Soldiers Global report clearly shows that States with quit different legal systems share the same view on the criminality of this matter.

The fact that child recruitment still occurs and is thus illegally practised thus not detract from the validity of the customary status and in the absence of a contrary practise with a corresponding *opinio juris,* child recruitment, in view of the Appeals Chamber, was criminalised before it was explicitly set out a criminal prohibition in Treaty law and certainly by November 1996, the starting point of the time frame relevant before the SCSL. Therefore the

principle of legality and specificity were not violated and the Defense motion was accordingly dismissed.

4. Conclusions: The Doctrine of Separation of Powers at the International Criminal Law Level?

The developments within the subject matter jurisdiction of certain internationalized criminal courts learn that international criminal law is far from crystallised in its final form. At the same time an important task for the judges, prosecution and defence emerges to assess the boundaries of this subject matter jurisdiction. In this article it was observed that in addition to the enactment of Rules of Procedure and Evidence pertaining to international and internationalized criminal courts, the judges of these tribunals contemplate a quasi-legislative role in assessing the boundaries of *ratione materiae* jurisdiction of international tribunals. New internationalized criminal courts, especially those set up in areas where the domestic judicial systems are apparently not capable of achieving international criminal justice, draw attention.

In this context the role of the SCSL was particularly examined. This article observed that the judges of the SCSL seem to perform their judicial and interpretative function also as a quasi-legislative power in order to determine the boundaries of their *ratione materiae* jurisdiction. The question is warranted whether this functioning may infringe the doctrine of the separation of powers.

This doctrine prevents judges in national jurisdictions from legislating and require that they apply existing law.[(11)] Maybe that the functioning on a quasi-legislative level is inherent to the operation of international and internationalized criminal courts. This is evidenced by the fact that the Rules of Procedure and Evidence were initially drafted before any case was tried before the courts.[(12)] In addition, both procedural and substantive international criminal law is still, as observed, in a developing stage. Furthermore, in the absence of an international legislative body on the area of international criminal law, the question arises whether the doctrine of

separation of powers is at all applicable at this level.

As long as the apparent unavoidable quasi-legislative process before international and internationalized criminal courts is made transparent, applied with scrutiny and with respect to the rule of law and rights of the accused, such process seems understandable. Yet, caution is required as judges, also on the level of international criminal law, should as much as possible abstain from a legislative function in order to avoid any interference between the legislative and judicial functioning in its pure form. Such a mixed functioning could be wrongly perceived by the international legal community and accordingly undermine the legitimacy of international criminal justice. In that respect, it is preferable that the judges of the international and internationalized criminal courts adhere to a system of detailed explanation of the reasoning and motivation as to this quasi-legislative functioning.[13] ❖

NOTES:

1. For this phenomenon, *see* Gideon Boas, A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY, in International Criminal Law Developments in the Case Law of the ICTY 1-9 (Gideon Boas and William A Schabas eds., 2003).

2. See Rule 6(B) and (C) of the SCSL Rules of Procedure and Evidence.

3. See Geert-Jan Alexander Knoops, An Introduction to the Law of International Criminal Tribunals: A Comparative Study 11-13 (2003).

4. See for this subject matter jurisdiction of the SCSL John R.W.D. Jones & Steven Powles, International Criminal Practice, 22-25 (2003).

5. *Prosecutor v. Kanu et al.,* Case No. SCSL-2004-16-PT.

6. See paragraph 48 of the Decision.

7. *Prosecutor v. Norman*, Case No. SCSL-2004-14.

8. See paragraph 62.

9. Prosecutor v. Tadic, ICTY Case No. IT-94-I-A, Appeal Chamber Judgment 15 July, 1999.

10. See paragraph 37.

11. See Boas, o.c. at 10.

12. See Boas, o.c. at 31-32.

13. See Boas, o.c. at 32 with respect to the Rules of Procedure and Evidence.