

SIERRA LEONE – RESPONDING TO THE CRISIS, PLANNING FOR THE FUTURE: THE ROLE OF INTERNATIONAL JUSTICE IN THE QUEST FOR NATIONAL AND GLOBAL SECURITY

I. INTRODUCTION

The end of the Cold War signaled a significant decline in the threat of large-scale global aggression; however, in the last decade, the world has seen an “explosive proliferation in the size and number of regional conflicts.”¹ The second half of the Twentieth Century witnessed a transformation in conventional warfare; today’s armed conflicts are increasingly internal and often characterized by egregious violations of international humanitarian law as innocent civilians face torture, rape, murder, genocide, displacement, or unjust imprisonment, often at the hands of their own government or by rebel forces.²

According to David Scheffer, the United States Ambassador-at-Large for War Crimes Issues, most of the perpetrators of these atrocities are not keenly aware of international humanitarian law, nor are they concerned about the laws of war.³

Today, 80% of the victims of armed conflicts are civilians. Tidy theories and international conventions on the laws of war seem to mean very little, if they are aware of them at all, to the perpetrators of atrocities. Yet, it is our duty in both the civilian and military chains of command to translate those words into meaningful and enforceable instruments of law. At stake is not our freedom to conduct the just war justly, but the chance to save . . . countless civilians . . . from those whose pursuit of power knows no bounds.⁴

1. Matthew S. Barton, *ECOWAS and West African Security: The New Regionalism*, 4 DEPAUL INT’L L.J. 79, 80 (2000). See also, Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT’L L.J. 1595, 1597-98 (1995) (stressing the difficulties in reacting to the new, complex threats to international order).

2. See David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT’L L. REV. 319, 319-20 (1999) [hereinafter Scheffer, *War Crimes*]; See also Jose A. Baez, *An International Crimes Court: Further Tales of the King of Corinth*, 23 GA. J. INT’L & COMP. L. 289, 291 (1993).

3. See David J. Scheffer, *The International Criminal Tribunal Foreword: Deterrence of War Crimes in the 21st Century*, 23 MD. J. INT’L L. & TRADE 1, 2 (1999)[hereinafter Scheffer, *Foreword*].

4. *Id.* at 1.

For decades, the global community has sought to confront these serious violations of international humanitarian law and to prevent their recurrence in the future.⁵ Advocates of peace through legal means see the increased use of international criminal law as the best hope for deterring this mounting surge of atrocities against civilians in both international and domestic conflicts.⁶ This increased application of international criminal law is due, in large part, to the workings of the ad hoc criminal tribunals established by the United Nations Security Council for the Former Yugoslavia and Rwanda.⁷

Now, the Security Council is working to establish another criminal tribunal, a special court for the small nation of Sierra Leone in West Africa, where rebel groups have waged a reign of terror against innocent civilians throughout the country's nine-year civil war.⁸ On August 14, 2000, the Security Council adopted Resolution 1315, requesting the Secretary-General to submit a report with recommendations for the implementation of a special international criminal court (Special Court) for Sierra Leone to prosecute persons most responsible for crimes against humanity.⁹ The Secretary-General submitted that report on October 4, 2000.¹⁰ The success of this proposed Special Court is crucial to the future of Sierra Leone, as well as to the progress and development of international law itself.

This Note evaluates the recommendations of the Secretary-General in light of the problems, successes, and issues confronted by the tribunals for Rwanda and the Former Yugoslavia, as well as the foreseeable challenges unique to the Sierra Leone Special Court. Part II provides a factual background to the conflict. Part III focuses on the United Nations Security Council involvement and the effect of the Economic Community of West African States (ECOWAS) intervention in Sierra Leone. Part IV examines the proposed Special Court, comparing the recommendations of the Secretary-General with the approach taken for the tribunals for Rwanda and the Former Yugoslavia and showing why this Special Court must be carefully designed to prevent political manipulation of the judicial process and to foster a much needed strengthening of the country's judicial and governing institutions.

5. *See id.*

6. *See* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473 (1999).

7. *See* Scheffer, *Foreword*, *supra* note 3, at 6-7.

8. *See generally* Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 *AM. U. INT'L L. REV.* 321 (1998); *Lessons of Sierra Leone Intervention Still Being Debated*, *AFRICA LAW TODAY*, May 19, 1998, available at <http://www.globalpolicy.org/security/issues/sierral.htm>.

9. *See* S.C. Res. 1315, U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000).

10. *See The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, U.N. Doc. S/2000/915 (2000) [hereinafter *Report on Special Court*].

Finally, Part V makes further recommendations for both the Special Court and other aspects of this justice effort.

II. CONFLICT IN SIERRA LEONE: BACKGROUND AND HISTORY

A. *Sierra Leone's Volatile History*

While regional security has been threatened throughout the world, the outbreak of regional conflicts is particularly acute in Africa.¹¹ Since 1970, more than thirty wars have been fought in Africa, the vast majority of them internal.¹² In 1996 alone, fourteen of the fifty-three nations of Africa experienced serious armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than eight million refugees and displaced persons.¹³ These conflicts seriously undermine Africa's efforts to achieve long-term stability, prosperity, and peace for its people.¹⁴ The international community watched in horror as the situation in one of those African nations, Sierra Leone, progressively deteriorated throughout a violent civil war claiming nearly 75,000 lives, displacing more than two million persons,¹⁵ and resulting in human rights violations of untold dimensions.¹⁶

Sierra Leone, on Africa's west coast, received its independence from Britain in 1961.¹⁷ Since its days as a British colony, Sierra Leone has been

11. See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary General*, ¶ 4, U.N. Doc. S/1998/318 (1998) [hereinafter *Africa Report*].

12. See *id.* Internal conflicts are, in general, hostilities occurring within the borders of a nation. The traditional law of nations, in its focus on conflicts *between* nation states rather than *within* a nation state, has failed to develop a generic concept to encompass all internal struggles not rising to the level of international war; therefore, authors do not use a uniform terminology when referring to the various types of internal conflicts. See Arturo Carrillo-Suarez, *Hors De Logique: Contemporary Issues In International Humanitarian Law As Applied To Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1 (1999). "A non-international armed conflict is best described as the range of conflicts that exists between two thresholds in opposition to each other." *Id.* at 69.

13. See *Africa Report*, *supra* note 11, ¶ 4.

14. See *id.*

15. Of this number, an estimated 500,000 are internally displaced, remaining in the country, but separated from their homes and communities. See *Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 41, U.N. Doc. S/2000/1055 (2000).

16. See UNITED STATES DEPARTMENT OF STATE, SIERRA LEONE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (1999) [hereinafter SIERRA LEONE COUNTRY REPORT].

17. See *Sierra Leone Country Profile*, Afr. Rev. World Info., July 1, 1999, available in WESTLAW, 1999 WL 22656741 [hereinafter *Country Profile*]. Sierra Leone, on the Atlantic Ocean in West Africa, lies between Guinea in the north and east, and Liberia in the south. See *id.*; Infoplease.com: Sierra Leone, available at <http://In.infoplease.com/atlas/country/sierraleone.htm> (last visited May 9, 2001). Freetown, the nation's capital, was ceded to English settlers in 1787 as a home for runaway slaves who had found asylum in London and for African soldiers discharged from the British armed forces. See MARY LOUISE CLIFFORD, FROM SLAVERY TO FREETOWN: BLACK LOYALISTS AFTER THE AMERICAN REVOLUTION 3 (1999).

politically unstable,¹⁸ having struggled with an accelerated rate of socio-economic change throughout the nation's de-colonization and with authoritarian and oppressive governance in the form of successive military rulers since its nationhood in 1961.¹⁹ Intermittent internal conflicts in Sierra Leone provided an excuse for continued military rule.²⁰ Years of corruption

18. See generally BANKOLE THOMPSON, *THE CONSTITUTIONAL HISTORY AND LAW OF SIERRA LEONE (1961-1995)* 194-95 (1997). Stevens came to power in 1967, amidst a highly criticized and close election. See *id.* Fearing what he perceived as "tribal voting" by the Sierra Leone electorate, the Governor-General, Sir Henry, proposed that the All People's Congress party (APC—Stevens' party) and the incumbent Sierra Leone People's Party (SLPP) form a coalition party. See *id.* at 27. This proposal, which the Governor-General made before the votes had come in from five districts, was flatly rejected by Stevens, who believed he had already won a majority of seats with 28 seats to SLPP's 31 seats. See *id.* Observing that electoral support was clearly pulling away from the SLPP Prime Minister, the Governor-General took it upon himself to swear Stevens into office as Prime Minister of Sierra Leone before receipt of all the election results. See *id.* Upon learning of the Governor-General's action, the Sierra Leone Army surrounded the State House, put Stevens and three other Ministers under house arrest, and proclaimed a state of marshal law, declaring that under the Sierra Leone Constitution, no Prime Minister would be chosen until all the election results were in. See *id.* at 28.

As a result of this military takeover, the Sierra Leone Constitution of 1961 was suspended and remained so until April 23, 1968, when Siaka Stevens was officially appointed as Prime Minister. See *id.* at 107. The Sierra Leonean Dove-Edwin Commission of Inquiry, mandated to investigate charges of misconduct in the election, subsequently held that the Governor-General, acting pursuant to his powers under the 1961 Constitution, was "manifestly right" to take this action without waiting for the remaining electoral votes. See *id.* at 29. This issue raised the first of many serious challenges to the Constitutionalism of Sierra Leone. See *id.* at 28-29.

In an effort to resolve the political disorder, Stevens began to actively pursue the transformation of Sierra Leone "from a constitutional monopoly to a republican state." *Id.* at 107. Positive response by the electorate to a draft Republican Constitution in 1966 opened the door for Stevens to push an act through Parliament in 1971, which created a republican status for Sierra Leone, thereby making Siaka Stevens the first executive President of the new Republic of Sierra Leone. See *id.* at 107-08.

19. See ELIPHAS G. MUKONOWESHURO, *COLONIALISM, CLASS FORMATION AND UNDERDEVELOPMENT IN SIERRA LEONE* 201-40 (1993). Many of the problems faced by Sierra Leone are common to other post-colonial African States in that the framework of colonial laws and institutions inherited by the States had been designed to exploit local divisions, not overcome them. See *id.* The era of serious conflict over State boundaries in Africa has subsided since the 1963 decision of the Organization of African Unity (OAU) to accept the boundaries that African States had inherited from colonial authorities. *Id.* However, the challenge of building a genuine unified national identity from among disparate and often competing communities within the nation has remained. See *Africa Report*, *supra* note 11, ¶ 8. Attempts at developing national unity were pursued through the extensive centralization of political and economic power and the suppression of political pluralism. See *id.* These political monopolies typically led to corruption, nepotism, and the abuse of power. It is frequently the case that the political victor adopts a "winner-takes-all" stance with respect to wealth and resources, patronage, and the prestige and privileges of office. See *id.* ¶ 12. "Where there is insufficient accountability of leaders, lack of transparency in regimes, inadequate checks and balances, non-adherence to the rule of law, absence of peaceful means to change or replace leadership, or lack of respect for human rights, political control becomes excessively important, and the stakes become dangerously high." *Id.*

20. See Nowrot & Schabacker, *supra* note 8, at 325; *Country Profile*, *supra* note 17, at 107, 235; THOMPSON, *supra* note 18.

followed the nation's independence as a powerful elite ruled from the capital while the rest of the country remained in poverty.²¹

Sierra Leone's abundant resources and its relatively small population could have made it one of the most prosperous nations in Africa, but by the end of the 1980s, it was one of the poorest countries in the world.²² In its early years as an independent nation, Sierra Leone's potentially rich productive activities; including agriculture, fisheries, and diamond and mineral mining, operated mainly for the benefit of the business clients of the All People's Party (APC) regime and its networks.²³ Mismanagement and corruption were rampant, and the state was deeply divided between a growing number of antagonistic political and business rivals.²⁴

21. *See id.*; *see also* MUKONOWESHURO, *supra* note 19, at 201-40 (1993).

22. *See generally* United Nations Economic Commission for Africa (UNECA), ESC Res. 671A (XXV), *Sierra Leone: Prospects for Peace and Stability, Hearing Before the Subcomm. on Int'l Relations*, U.N. SCOR, 104th Cong., 1st Sess. 39, at 21 (1999) [hereinafter *Sierra Leone Hearing*]. The UN's Food and Agriculture Organization states that the country's Gross National Product declined by an average of 4.9% each year from 1992 to 1998, while the population was increasing by about 2.3% annually. David Lord, *Introduction: The Struggle For Power And Peace In Sierra Leone, in Accord: Paying the Price: The Sierra Leone Peace Process* (Sept. 2000), available at <http://www.c-r.org/accord9/index.htm>; and *see Sierra Leone: Hearing*, at 21. At present, 90% of the population is estimated to be living in poverty and Sierra Leone ranked lowest in an analysis of the "well-being" of African nations. Economic Report on Africa 1999: The Challenges of Poverty Reduction and Sustainability, ¶¶ 43-45, available at <http://www.un.org/Depts/eca/divis/espdl/ecrep99.htm> (last visited May 9, 2001). This ranking, called the Borda rank, is determined by taking the sum of the following other rankings: real per capita GDP, life expectancy at birth, infant mortality, and adult illiteracy. *See id.* ¶ 43 and Annex Tables AIII.1-6, AII.5. Of great importance to the economic future of Sierra Leone, is the Institutional Investor Country Risk Rating. In 1998, Sierra Leone ranked among the five lowest in terms of its annual performance trend, with a negative per capita GDP growth score, and the lowest of all nations evaluated for economic sustainability. *See id.* at Annex Tables AIII.15, AIII.16.

23. *See generally* THOMPSON, *supra* note 18, at 194-95. In the competition for oil, diamonds, and other valuable resources in Africa, foreign interests continue to play a large and sometimes decisive role, in either suppressing or sustaining conflict. *See Africa Report, supra* note 11, ¶ 13.

24. *See generally Sierra Leone Hearing, supra* note 22; Joseph Opala, *Sierra Leone: ICG Report to the Japanese Government*, April 1996, available at [wysiwyg://22/http://www.intlcrisis...jects/sierral/reports/slxxback.htm](http://www.intlcrisis...jects/sierral/reports/slxxback.htm). In fact, this had been the state of affairs for decades prior to the nation's independence. In 1935, the colonial authorities concluded an agreement with De Beers, the Sierra Leone Selection Trust (SLST), granting the company exclusive mining and prospecting rights over the entire country for 99 years. *See Ian Smillie et al., The Heart Of The Matter: Sierra Leone, Diamonds & Human Security*, Jan. 2000, available at <http://www.web.net/pac/pacnet-l/msg00009.html>.

By 1956, however, there were an estimated 75,000 illicit miners in Kono District - the heart of the diamond area - leading to smuggling on a vast scale, and causing a general breakdown of law and order. In 1971, Siaka Stevens created the National Diamond Mining Company (NDMC) which effectively nationalized SLST. At that point, all important decisions were made by the Prime Minister and his closest associate, a Lebanese businessman named Jamil Mohammed. From a peak of over 2,000,000 carats in 1970, legitimate diamond exports dropped to 595,000 carats in 1980 and then to only 48,000 in 1988. In 1984, SLST sold its remaining shares to the Precious Metals Mining Company (PMMC), a company controlled by Jamil Mohammed. *Id.*

In early 1991, just prior to the outbreak of its civil war, Sierra Leone was economically and politically on the verge of collapse.²⁵ Years of manipulation and misrule under Siaka Stevens²⁶ and his chosen successor, Joseph Saidu Momoh,²⁷ left the country heavily dependent on foreign aid and loans.²⁸ The rural poor grew increasingly resentful so that when the rebel movement, the Revolutionary United Front (RUF), materialized, there was no shortage of recruits.²⁹

Today, Freetown and many other Sierra Leonean towns are largely destroyed as a result of RUF assaults.³⁰ By 1993, relief organizations estimated that about 1,000,000 Sierra Leoneans, of a total population of 4,500,000, were displaced within the country or forced to take refuge in Guinea and Liberia. Today, the number of displaced persons has risen to more than 2,000,000.³¹ Civilian casualties continue to mount as war crimes of the worst type are routinely and systematically committed against Sierra Leoneans of all ages.³² While all sides to the conflict; including the government, civilian militia groups, and regional peacekeeping forces; are accused of committing human rights violations, the rebel forces of the RUF and the Armed Forces Revolutionary Council (AFRC), led by Johnny Paul Koroma, are responsible for the overwhelming majority of summary killings, rape, enslavement, and the deliberate amputation and mutilation of masses of civilians.³³

25. See THOMPSON, *supra* note 18, at 183-95.

26. See *id.* at 194-95.

27. In 1990, Momoh appointed a 35-member Constitutional Review Commission to review the latest version of the Sierra Leone Constitution (1978) and to recommend changes so as to insure greater accountability on the part of public officials and strengthen the democratic foundation of the nation. See *id.* at 183. This action eventually led to the dismantling of a one-party system of government in Sierra Leone and a proposed new constitution. See *id.* at 184.

Although a new constitution was drafted in 1991, its provisions did not have the opportunity to be tested. Momoh's one-party APC government was overthrown by a military junta, the National Provisional Ruling Council (NPRC) in 1992. See *id.* The NPRC appears to have justified this takeover due to the fact that governmental corruption was still rampant and the 1991 draft Constitution did little to address the need for institutional machinery to enforce accountability on the part of public officials. See *id.* at 188-91.

28. See World Development Indicators Database, The World Bank, July 2000, available at <http://devdata.worldbank.org>.

29. See Abiodun Alao, *Sierra Leone: Tracing The Genesis Of A Controversy*, Briefing Paper No. 50, THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS AT CHATHAM HOUSE, LONDON, June, 1998, available at <http://www.riia.org/briefingpapers/bp50.html>.

30. See Scheffer, *War Crimes*, *supra* note 2, at 321; *Report of the Security Council Mission to Sierra Leone*, U.N. SCOR, U.N. Doc. S/2000/992 (2000) [hereinafter *Mission Report*].

31. United States Central Intelligence Agency, World Factbook: Sierra Leone, 2000, available at <http://www.odci.gov/cia/publications/factbook/geos/sl.html#Intro> (last visited May 9, 2001).

32. See World Development Indicators, *supra* note 28; Scheffer, *War Crimes*, *supra* note 2, at 321-22; *Sierra Leone Hearing*, *supra* note 22.

33. See *Sierra Leone: Africa Review*, Afr. Rev. World Info. 225, March 1, 1998, available at 1998 WL 11217747. During the infamous January 1999 offensive launched by the RUF against the government in Freetown, widespread atrocities were committed against the civilian

B. Most Recent Events in the Civil War

The current conflict in Sierra Leone dates from March 1991 when fighters of the RUF, led by Foday Sankoh,³⁴ launched a war to overthrow the government.³⁵ With the support of the Military Observer Group (ECOMOG)

population. See *Sierra Leone Human Rights Developments*, Human Rights Watch, available at <http://www.hrw.org/wr2k/Africa-09.htm> (last visited May 9, 2001) [hereinafter *Human Rights Developments*]. This three-week occupation of the capital by the rebels marked the most intensive and concentrated period of human rights violations of the civil war. See *id.* During this time, the rebels were said to have murdered at least 2000 citizens, committed sexual violence against girls and women, and cut off the limbs of an estimated 100 civilians, including 26 double arm amputations. See *id.* This horrific practice began early in the RUF offensive, but gained increased attention during the 1996 democratic elections when ink marks were placed on the hands of people who had voted and RUF leader Foday Sankoh ordered that the hands of these people be cut off in an attempt to discourage voting by other civilians. See David Pratt, *Sierra Leone: The Forgotten Crisis*, Report to the Minister of Foreign Affairs, The Honourable Lloyd Axworthy, P.C., M.P. from David Pratt, M.P., Nepean-Carleton, Special Envoy to Sierra Leone (April 23, 1999), at 26, available at <http://www.sierra-leone.org/pratt042399.html> [hereinafter *Pratt Report*]. When this tactic proved unsuccessful in discouraging voting by Sierra Leoneans who were willing to take great personal risks in the name of freedom, the RUF resorted to random and arbitrary amputations. See *id.*

Although the majority of the victims were chosen at random, the rebels directly targeted a few groups or individuals; including journalists, unarmed police officers, clergymen, and other pro-democracy and human rights activists. See *Sierra Leone: Getting Away With Murder, Mutilation, Rape—New testimony from Sierra Leone*, Human Rights Watch, July 1999, available at <http://www.hrw.org/hrw/reports/1999/sierra/> [hereinafter *Getting Away With Murder*]. Although these atrocities were typically planned and premeditated, they served no apparent purpose other than to spread terror and destruction. See *id.* §§ I. Summary, IV. *Human Rights Abuses Committed by RUF Rebels*. Many of the victims were gunned down without a single word by the rebels or were told that they were being punished for supporting the Sierra Leone government. See *id.* § IV at 1, 23-25. Several victims who survived the amputations testify that the rebels told them to take a message to the government or to President Kabbah. See *id.*

According to Human Rights Watch, many of the victims died before medical attention could be given, including numerous young girls under the age of twelve who died as a result of the violent rape they endured. See *Human Rights Developments*. Well over one hundred girls became pregnant. More than 3000 children and 570 adults were reported missing following the January offensive. *Id.* In spite of the overwhelming evidence and testimony from civilian witnesses and survivors of these brutal and sadistic acts, the RUF formally denied that it had committed any of the atrocities. See *Getting Away With Murder*, § IV at 2-3. The Sierra Leone government and ECOMOG forces were also alleged to have committed serious violations of humanitarian law, but the overwhelming majority of the violence against citizens came at the hands of the RUF. See *id.* Abuses by AFRC took place during Koroma's rein when the AFRC and RUF forces united to oust President Kabbah. See *id.*

34. Sankoh is credited with recruiting poor, young, uneducated, and displaced Sierra Leoneans into the RUF by promising future rewards, instilling in them "the belief that those with guns can eat" and offering a "bush education" in survival skills. EARL CONTEH-MORGAN & MAC DIXON-FYLE, *SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY: HISTORY, POLITICS AND SOCIETY* 134 (Yakuba Saaka ed., 8th ed., 1999). As the rebel faction grew, new members, including children, were forced into the ranks by use of indoctrination and drugging. See *id.*

35. See Barton, *supra* note 1, at 80; *Country Profile*, *supra* note 17. The RUF failed to offer any specific reasons for its attacks against the government or citizenry and never expressed

of the Economic Community of West African States (ECOWAS), Sierra Leone's army tried at first to defend the government but, the following year, a group of young army officers overthrew its own government and established a National Provisional Ruling Council (NPRC).³⁶ Despite the change of power, the RUF continued its attacks.³⁷

In February 1995, the United Nations Secretary-General appointed a Special Envoy, Mr. Berhanu Dinka, who worked with the Organization of African Unity (OAU) and ECOWAS, to try to negotiate a settlement to the conflict and return the country to civilian rule.³⁸ However, settlement negotiations failed and the conflict continued until March, 1996, when Ahmed Tejan Kabbah was elected President of Sierra Leone in the country's first free, democratic election.³⁹

The new government and the rebel soldiers of the RUF, at that time led by Foday Sankoh, entered into the Abidjan Accord on November 30, 1996, which declared an immediate end to the armed conflict, provided for the demobilization of RUF forces, and set forth political provisions whereby the RUF was to register and function as a political party.⁴⁰ The Abidjan Accord, however, failed to include a schedule for implementation of its provisions and the RUF, not willing to relinquish its militant control, subsequently accused

any definite political objectives. See CONTEH-MORGAN & DIXON-FYLE, *supra* note 34, at 135. Although Foday Sankoh asked that the government to recognize the RUF as a political party, the RUF made no attempts to achieve this "objective" during the 1996 Sierra Leone elections. *See id.*

36. *See* Alao, *supra* note 29, at 2. Before this event; the Sierra Leonean army had been undermined by the interference of politicians, was underpaid and under-trained, and weakened due to the large number of troops dispatched to Liberia as part of the ECOMOG peacekeeping force; leaving massive numbers of unemployed youths from across the country to replace the absent troops. As a means of subsistence, these soldiers turned to the rebels' strategy of intimidation and looting from civilians. Many soldiers were believed to have exchanged their weapons for diamonds from the rebels. Valentine Strasser, who headed the NPRC, was uncertain as to what policy he should pursue towards the RUF, but ultimately decided to follow public opinion and continue the war with the rebels. In January 1996, Strasser was overthrown by his deputy, Julius Maada Bio, who immediately began negotiating with the RUF. *See id.* The citizenry of Sierra Leone, disillusioned with the army's ability to end the war, began to pressure Bio to step aside and allow an elected civilian negotiate a peace process. Bio resisted, but was ultimately forced to concede that an election should be allowed. *See id.*

37. *See id.*

38. *See* Nowrot & Schabacker, *supra* note 8, at 325-26; *Sierra Leone Hearing*, *supra* note 22.

39. *See generally* Nowrot & Schabacker, *supra* note 8, at 325-26; Alao, *supra* note 29, at 3. President Kabbah, a former lawyer, won the election against formidable odds. Unlike Bio and many others who stood against him in the election and who had been prominent in Sierra Leone's controversial political and economic arenas, Kabbah was an outsider whose primary experience had been from his position as an official at the United Nations Headquarters. *See id.*; *Key Events in Sierra Leone's History*, (Sept. 11, 2000), available at <http://www.cnn.com/2000/WORLD/Europe/08/29/sleone.timeline/> [hereinafter *Key Events*].

40. *See* Nowrot & Schabacker, *supra* note 8, at 325-28.

the government of not taking the necessary action to implement the Accord, affording it an excuse to continue its violent assaults.⁴¹

On May 25, 1997, a military coup led by Major General Johnny Paul Koroma unseated President Kabbah, suspending the constitution, banning demonstrations, and abolishing political parties.⁴² Kabbah fled to Guinea, where he worked to mobilize regional and international support.⁴³ In February of 1998, ECOMOG forces regained control of Freetown and restored President Kabbah to power on March 10, 1998.⁴⁴

Since that time, the rebel activities have escalated, despite numerous attempts at peace, leaving destruction and death in their wake.⁴⁵ Continued attempts toward a peaceful resolution of the civil war led to the signing of the Lome Peace Accord in July 1999.⁴⁶ The Accord gave amnesty to the rebels, who committed widespread atrocities against civilians, in exchange for peace.⁴⁷ The Lome Peace Accord recognized RUF as a legal political party and gave its leader, Foday Sankoh, a key government post as Chairman of the Strategic Minerals Commission, overseeing the exploitation of the country's diamond wealth.⁴⁸ The Accord provided for UN oversight of the RUF disarmament, but thousands of rebel gunmen remain at large, and the RUF still

41. See *id.*; see also Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 343 (1998).

42. See Barton, *supra* note 1, at 99.

43. See *id.*; see also *Sierra Leone: Africa Review 1998*, *supra* note 33; Sierra Leone Timeline, Aug. 31, 2000, available at http://news1.thdo.bbc.co.uk/hi/english/world/africa/newsid_741000/741070.stm.

44. See *Country Profile*, *supra* note 17; *Key Events*, *supra* note 39.

45. See generally *Country Report: Sierra Leone*, United States Committee for Refugees, Worldwide Refugee Information, available at http://www.refugees.org/world/countryrpt/africa/sierra_leone.htm (last visited May 9, 2001). Following the expulsion of the RUF/AFRC forces from power, the rebels have engaged in a campaign of terror against civilians, coined "Operation No Living Thing" by the rebels. See *Pratt Report*, *supra* note 33, at 11 (citing an Amnesty International November 1998 report).

46. *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, July 7, 1999, reprinted in *Letter Dated 12 July 1999 from the Charge d'Affaires ad interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. 2/1999/777, annex (1999) [hereinafter *Lome Agreement*]. The Accord was brokered by the UN, Organization of African Unity (OAU), and ECOWAS. See *Human Rights Developments*, *supra* note 33, at 1. President Clinton appointed Jesse Jackson as "Special Envoy For The President And Secretary Of State For The Promotion Of Democracy In Africa," who flew to Lome with President Kabbah, and together with the U.S. Ambassador to Sierra Leone, Joseph Melrose, urged a peaceful agreement with the RUF. See Cynthia Long, *Peace Talks Begin in War-Torn Sierra Leone*, available at <http://www.disasterrelief.org/Disasters/990524sierra/> (last visited Feb. 1, 2001); Michael Kelly, *A Forced 'Peace' in Sierra Leone*, SAN DIEGO UNION-TRIB., July 20, 2000, at B10, available at 2000 WL 13976457. Many contend that, in effect, Jackson actually brokered the accord. See *id.*

47. See *Human Rights Developments*, *supra* note 33, at 1; *Lome Agreement*, *supra* note 46, at 1.

48. See *Lome Agreement*, *supra* note 46, at 1.

controls much of the country.⁴⁹ Although cease-fire negotiations are underway, the RUF has yet to demonstrate a genuine willingness to relinquish its militant control.⁵⁰ Human rights organizations criticized both the Lome Accord's provision of amnesty for rebel leaders and its inclusion of the RUF in government, arguing that the rebels should not be allowed to use nine years of killings, rapes, and mutilations to gain a place at the negotiating table.⁵¹

It is now estimated that as many as 20,000 civilians either joined or were forced into the RUF throughout the conflict, performing both combat and non-combat roles; such as diamond miners, porters, or sexual slaves of fighters.⁵² Most alarming is that many of the rebels are children, most of whom were abducted from their homes and forced to get high on drugs and perform these atrocities.⁵³ The typical pattern is that the rebels burn down entire communities, line up men, women, and children and, one-by-one, chop off their arms or feet, sometimes both.⁵⁴ When child soldiers are the butchers, they are typically so weak that the "choppings" are often not completed, leaving limbs dangling and requiring the victim to finish the job on himself or herself.⁵⁵

Throughout this desperate struggle, the citizens of Sierra Leone actively sought peace and reconciliation. Numerous civic leaders, women's groups, community organizations, and religious associations from all areas of the nation have instituted various actions; initiating peace negotiations between the parties to the conflict, mobilizing public opinion in favor of peace and democratization, and attempting to encourage cooperation in pursuit of long-term peace and reconstruction.⁵⁶

49. See *Mission Report*, *supra* note 30; see also *Sierra Leone; Review 2000*, 8/30/00 Afr. Rev. World Info. 1, Aug. 30, 2000, available at WESTLAW, 2000 WL 26487079.

50. See *Mission Report*, *supra* note 30; Transcript of UNAMSIL Press Briefing held November 13, 2000, available at <http://www.un.org/Depts/dpko/unamsil/UnamsilD.htm>.

51. See Lord, *supra* note 22; see also Kenneth Roth, *International Injustice: The Tragedy of Sierra Leone*, WALL STREET J. EUROPE, August 2, 2000, available at <http://www.hrw.org/editorials/2000/ken-sl-aug.htm>.

52. Scheffer, *War Crimes*, *supra* note 2, at 322. Actual estimates of the number of fighters are unreliable, although demobilization and disarmament plans have used a figure of 15,000 current RUF combatants. See SIERRA LEONE COUNTRY REPORT, *supra* note 16.

53. See *Human Rights Developments*, *supra* note 33, at 1; Scheffer, *War Crimes*, *supra* note 2, at 322.

54. See Scheffer, *War Crimes*, *supra* note 2, at 322.

55. See *id.*

56. See Lord, *supra* note 22; *Mission Report*, *supra* note 30.

III. ECOWAS INTERVENTION AND UNITED NATIONS SECURITY COUNCIL INVOLVEMENT

Despite missteps and reports of occurrences of abuse on the part of ECOWAS,⁵⁷ its involvement in Sierra Leone and the entire region has proven indispensable and is actively supported by the Security Council.⁵⁸ ECOWAS was originally created to promote economic union and broad-based cooperation among West African states, with an eye toward contributing to the progress and development of the African continent.⁵⁹ However, as conflicts and civil wars continued to erupt throughout the region, threatening economic and social instability in Western Africa, ECOWAS began to gradually transform itself into a regional security organization.⁶⁰

The relationship between ECOWAS and the United Nations is also evolving and there are still issues to be resolved regarding its future role in collective security.⁶¹ The ultimate success of ECOWAS regional security policy hinges on its legitimacy and legality.⁶² The organization has faced numerous obstacles in making this transformation and continues to face criticism in its struggle to develop a viable security policy; however, this criticism must be weighed against the organization's significant success in providing for the regional security needs of West Africa.⁶³

Although the future relationship between ECOWAS and the United Nations is uncertain, without ECOWAS intervention in Sierra Leone, it is certain the human rights abuses would have been far worse.⁶⁴ Furthermore, without ECOWAS intervention, it is difficult to predict whether there would have been any progress toward disarmament and peace. Long before the U.N. intervened in Sierra Leone, ECOWAS responded to the nation's request for security assistance.⁶⁵ Throughout this century, regional conflicts have led to

57. The Sierra Leone government, Civil Defense Forces (CDF), and ECOMOG forces were also alleged to have committed serious violations of humanitarian law, including allegations of over 180 summary executions of rebels and suspected collaborators. See Scheffer, *War Crimes*, *supra* note 2, at 322. ECOMOG officials asserted that they are investigating these allegations and assured they would not happen again. See *id.*

58. See generally S.C. Res. 1270, U.N. SCOR, Sess., 4054th mtg., U.N. Doc. S/RES/1270 (1999); *Second Report of the Secretary-General, Covering Developments Since the Issuance of the First Report*, U.N. SCOR, U.N. Doc. S/1997/958 (1997); *Third Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 53rd Sess. U.N. Doc. S/1998/103 (1998); S.C. Res. 1315, *supra* note 9; *Report on Special Court*, *supra* note 10.

59. See Barton, *supra* note 1, at 91-93. This transformation has attracted criticism from some due to the fact that the Nigerian government, ECOWAS greatest supporter and provider of troops, is notorious for its own repressive governance and military regimes; therefore, its significant role in a group who's aim is to defend democracy is suspect. See *id.*

60. See *id.*

61. See generally Nowrot & Schabacker, *supra* note 8.

62. See *id.*

63. See Barton, *supra* note 1, at 108-13.

64. See Levitt, *supra* note 41, at 369.

65. See Nowrot & Schabacker, *supra* note 8, at 327-28.

unmitigated devastation in terms of the breakdown of law and order and the abuse, massacre, or displacement of hundreds of thousands of civilians.⁶⁶ Although the United Nations is free to exercise its full authority under its Chapter VII mandate to "maintain or restore international peace and security,"⁶⁷ it has found the security demands of the post-Cold War world to be overwhelming—since 1990, the United Nations has engaged in more peace-keeping activities than at any other time in the organization's history.⁶⁸ As a result of this proliferation of security crises, the United Nations in recent years has repeatedly utilized the ECOWAS forces in West African conflicts⁶⁹ and authorized, retroactively, its presence in Sierra Leone under its Chapter VIII powers.⁷⁰

The Security Council established UNAMSIL with Resolution 1270, under Chapter VII of the United Nations UN Charter,⁷¹ to insure the security and freedom of movement of its peacekeeping personnel and protect civilians under imminent threat of physical violence, "taking into account the responsibilities of the Government of Sierra Leone and ECOMOG."⁷² The United Nations, therefore, has welcomed ECOWAS intervention and has relied on its presence to help secure the situation in Sierra Leone.⁷³

In addition to its security response to the crisis in Sierra Leone, on August 14, 2000, the UN Security Council adopted Resolution 1315, which proposed the establishment of an international criminal tribunal for Sierra Leone.⁷⁴ The purpose of this Special Court is "to prosecute persons who bear

66. *See id.*

67. U.N. Charter art. 39.

68. *See Levitt, supra* note 41, at 351. In the past 10 years, the United Nations engaged in substantial "peace-enforcement" activities in Iraq, Somalia, Yugoslavia, Rwanda, Haiti, Liberia, and Sierra Leone. *See id.* at n. 97.

69. *See Barton, supra* note 1, at 89-91.

70. *See Nowrot & Schabacker, supra* note 8, at 357. In the case of Sierra Leone, ECOWAS has been present in the area throughout the conflict, ultimately gaining international approval for intervention under Security Council Resolution 1132, in which the Security Council declared that the situation there constituted a threat to international peace and security, thus opening the door for the imposition of economic and military sanctions. *See* U.N. Doc. S/Res/1132 (1997). On this basis, the Security Council next invoked Chapter VIII of the U.N. Charter to authorize ECOWAS, in cooperation with the legitimate government of Sierra Leone, to enforce these sanctions, stating, The Security Council . . . (3) Expresses its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourages it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations; (4) Encourages the Secretary-General, through his Special Envoy, in cooperation with the ECOWAS Committee, to assist the search for a peaceful resolution of the crisis and, to that end, to work for a resumption of discussions with all parties to the crisis.

Id. ¶¶ 3-4.

71. *See* S.C. Res. 1270, *supra* note 58.

72. *Id.*

73. *See id.*; Barton, *supra* note 1, at 98-101.

74. *See* S.C. Res. 1315, *supra* note 9.

the greatest responsibility”⁷⁵ for “crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law, committed within the territory of Sierra Leone.”⁷⁶ This resolution requested that the Secretary-General, after consultation and negotiation with the Government of Sierra Leone and with guidance from a team of experts sent there to evaluate the situation, submit a report within thirty days to the Security Council with recommendations for the implementation of the proposed Court.⁷⁷ The capacity by which the Security Council may establish this Special Court flows from either of two bases of authority under the United Nations Charter—its treaty power or its Chapter VII power.⁷⁸

IV. EVOLUTION OF CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW

Since the turn of the century, the international community has made many attempts to form an effective body of international criminal law to eradicate aggressive war and to secure humane treatment for persons during both war and peacetime.⁷⁹ Of primary significance are the Hague Conventions, the Treaty of Versailles, the Charter of the League of Nations, the Nuremberg Charter, the Charter of the United Nations, and the Genocide Convention.⁸⁰ While these agreements have been largely theoretical and have not achieved a solid, effectual body of international criminal law, they represent an evolution toward clearly defined offenses; including the elements of these offenses, resulting penalties or sanctions, and a greater stability and legitimacy in international law and criminal adjudication.⁸¹

75. *Id.* ¶ 3.

76. *Id.* ¶ 2.

77. *See id.*

78. *See generally* J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 536 (1989).

79. *See generally* M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980)[hereinafter BASSIOUNI, CODE].

80. *See* Sandra L. Jamison, Note, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 *DENV. J. INT'L L. & POL'Y* 419, 424-28 (1995); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992)[hereinafter BASSIOUNI, CRIMES].

81. *See* Jamison, *supra* note 80.

A. *The Nuremberg Charter*

Article 6 (c) of the 1945 Charter of the International Military Tribunal⁸² (commonly referred to as the "Nuremberg Charter") for the Prosecution and Punishment of Major War Criminals of the European Axis⁸³ was the first instance in positive international criminal law in which the term "crimes against humanity" was used.⁸⁴ However, the concept of protecting civilians in times of armed conflict was well established prior to the 1945 Charter in the international regulation of armed conflicts.⁸⁵ The drafters of the Charter recognized this international crime on the basis of conventional international law, customary international law, and "general principles" of international law.⁸⁶

Article 6(c) contemplates crimes against civilians by prohibiting murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.⁸⁷ Furthermore, Article 6(b) prohibits "plunder of public or private property, and wanton destruction of cities, towns

82. Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945 [hereinafter "Nuremberg Charter"] *reprinted in* BASSIONI, *CRIMES*, *supra* note 80, at 582. For a thorough treatment of the historical development of crimes against humanity in international law and a comprehensive compilation of relevant historical documents, including outcomes and dispositions of the Nuremberg Trials, *see id.*

83. Also referred to as the "London Agreement," *reprinted in* BASSIOUNI, *CRIMES*, *supra* note 80, at 579.

84. Article 6(c) of the Charter states: Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

reprinted in BASSIONI, *CRIMES*, *supra* note 80, at 583-84.

85. *See* BASSIONI *CRIMES*, *supra* note 80, at 147. Subsequent constructions defining the term were used in Article 5(c) of the Tokyo Charter and Article II(c) of the Allied Control Council Law No. 10. *See id.* at 1.

86. *See id.* at 534.

87. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, ¶ c., 59 Stat. 1544, 82 U.N.T.S. 279.

and villages.”⁸⁸ The Nuremberg Charter represented a desire by the international community to strengthen international humanitarian law and hold accountable any who would violate the principles which affirmed “the legal right of every human being to live in peace and dignity.”⁸⁹

The Nuremberg Charter was the beginning of a process.⁹⁰ Unanimous affirmation of the Nuremberg principles by the United Nations in 1947 implied a promise that these principles would be upheld and that the international community would build on its precedents.⁹¹ Subsequently, the concept of crimes against humanity under international law was expanded by the Genocide Convention to include acts of genocide and prohibiting all crimes against humanity irrespective of whether they are committed in the time of war.⁹²

The Geneva Conventions, first drafted in 1864 and 1906 and later amended in 1949, 1961, and 1977,⁹³ were founded on the idea of respect for the individual and his dignity.⁹⁴ The Geneva Conventions prohibit, under all circumstances; murder, torture, corporal punishment, mutilation, outrages upon personal dignity, the taking of hostages, collective punishments, execution without regular trial, and all cruel and degrading treatment.⁹⁵ A central principle of the Geneva Conventions is the protection of children from any form of indecent assault.⁹⁶

Although it appeared that the process begun at Nuremberg would become wholly ineffectual in the realm of international criminal adjudication and deterrence, events of the last decades, particularly since the end of the Cold War, have demanded a revival of the principles set forth at Nuremberg, leading to the establishment of numerous international organizations, ad hoc criminal tribunals, and efforts to create the permanent International Criminal Court (ICC).⁹⁷ As M. Cherif Bassiouni eloquently articulated, “Law is part of history, [and] like a river, . . . [t]he Law of the [Nuremberg] Charter was a deep and forceful thrust cutting across legal hurdles and creating a new course for history. It opened a new channel for international criminal law and

88. *Id.* ¶ b.

89. Benjamin B. Ferencz, *Can Aggression Be Deterred by Law?*, 11 PACE INT’L L. REV. 341 (1999).

90. *See id.* at 341.

91. *See* BASSIOUNI, CRIMES, *supra* note 80, at 543.

92. *See* BRYAN F. MACPHERSON, AN INTERNATIONAL CRIMINAL COURT: APPLYING WORLD LAW TO INDIVIDUALS 5 (1992). The Genocide Convention was adopted by the U.N. in 1948. *See id.*

93. *See* Geneva Conventions, (I) 6 U.S.T. 3114, 75 U.N.T.S. 31; (II) 6 U.S.T. 3217, 75 U.N.T.S. 85; (III) 6 U.S.T. 3316, 75 U.N.T.S. 135; (IV) 6 U.S.T. 3516, 75 U.N.T.S. 287.

94. *See id.* (I) art. 46, (II) art. 47, (III) art. 13, (IV) art. 33.

95. *See id.* (IV), art. 3.

96. *See id.* art. 24.

97. *See* Patricia A. McKeon, Note, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN’S J. LEGAL COMMENT. 535, 544-45 (1997).

provided a means to strengthen the international legal process and the 'Rule of Law.'⁹⁸ Bassiouni, in 1992, lamented that the force of the Charter had become stagnant from neglect.⁹⁹ However, by 1993, the Charter was to be revisited and revived with the establishment of two important ad hoc criminal tribunals.

B. *Chapter VII Tribunals: The Contemporary Pioneers*

The United Nations Security Council, acting under Chapter VII of the U.N. Charter, established the tribunal for the Former Yugoslavia (the Yugoslavian Tribunal) in 1993 and the tribunal for Rwanda (the Rwandan Tribunal) in 1994.¹⁰⁰ As with the Nuremberg Trials, both of these tribunals were established for the purpose of prosecuting individuals accused of committing crimes against humanity.¹⁰¹ However, the context in which these contemporary criminal tribunals were established is fundamentally different from the tribunal established by the Nuremberg Charter. Most importantly, the Nuremberg Tribunal was initiated by the victorious states after World War II had ended.¹⁰² The ad hoc criminal tribunals for the Former Yugoslavia and Rwanda, on the other hand, were commenced while the adversaries were still confronting each other.¹⁰³ By establishing these tribunals in the midst of the conflict, the Security Council employed them as instruments in the peace process and thus conferred upon them a significant political attribute.¹⁰⁴

98. See BASSIOUNI, *CRIMES*, *supra* note 80, at 543. Mr. Bassiouni, President of the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, is currently the Chairman of the Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court. See U.N. Press Release BIO/3169 L/2874 (June 1998). Bassiouni holds a J.D. degree from Indiana University, an LL.M. from John Marshall Law School and a S.J.D. degree from George Washington University. See *id.* He also studied at Dijon University in France, the University of Geneva, Switzerland, and the University of Cairo, Egypt. See *id.*

99. See BASSIOUNI, *CRIMES*, *supra* note 80, at 543.

100. The Yugoslavian Tribunal was established by Security Council Resolution 827, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993). The Rwandan Tribunal was established by Security Council Resolution 955. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

101. See JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 3 (1998). The establishment of the Yugoslavian Tribunal may be seen as "a modern form of collective humanitarian intervention by the Security Council to deal with the massive human rights violations committed in the Former Yugoslavia." *Id.* Its operative paragraph (¶ 2) states that its sole purpose is to prosecute "persons responsible for serious violations of international humanitarian law . . ." *Id.* The Rwandan Tribunal was established in like manner. See *id.* at 4.

102. See KARINE LESCURE & FLORENCE TRINTIGNAC, *INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE* 3 (1996). See also BASSIOUNI, *CRIMES*, *supra* note 80.

103. See LESCURE & TRINTIGNAC, *supra* note 102, at 3.

104. See *id.* at 4. The Yugoslavian Tribunal was established to prosecute persons responsible for violations of international humanitarian law committed in the Former Yugoslavia; primarily for mass killings, the systematic detention and rape of women, and

Chapter VII of the U.N. Charter declares that the Security Council's main responsibility is to maintain and re-establish international peace and security.¹⁰⁵ The Security Council has interpreted Article 39 to provide itself with authority to re-establish international peace and security by creating ad hoc criminal tribunals as a method "not involving the use of armed force . . . to give effect to its decisions."¹⁰⁶ Thus, the Yugoslavian and Rwandan Tribunals were established, not by treaty, but as organs of the U.N. under its Chapter VII powers.¹⁰⁷

The tribunals are nonbinding on one another, but each has referred to the other as persuasive authority.¹⁰⁸ A primary difference between the tribunals is the scope of their subject matter jurisdiction in that the Statute of the Rwandan Tribunal does not require that the crimes be connected with armed conflict.¹⁰⁹ The tribunals have not been without problems; however, as they have overcome obstacles and unforeseen difficulties; such as shortages of funding and personnel, organizational shortcomings, and interpretive and enforcement challenges; they have gained credibility and effectiveness.¹¹⁰ Furthermore, by establishing a strong body of case law through the trials and convictions of key Yugoslavian and Rwandan leaders responsible for serious human rights violations, they have strengthened the enforcement of international humanitarian law.¹¹¹ David J. Scheffer commends the tribunals, pronouncing "[a]s instruments of deterrence, the tribunals are formidable partners that cannot be lightly ignored in the future."¹¹²

Because of the important precedents set by the tribunals, the Secretary-General's recommendations for the establishment of the Special Criminal Court for Sierra Leone will next be considered in light of the expertise gained by the two tribunals. A thorough discussion of every proposed provision of

ethnic cleansing. See JONES, *supra* note 101, at 3. The Rwandan Tribunal was established to prosecute individuals, primarily elements of the Hutu ethnic group, responsible for acts of genocide against the Tutsi ethnic group. See Payam Akhavan, *The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 505 (1996). The genocidal acts were committed between April 6, 1994, after the crash of an aircraft carrying the Presidents of Rwanda and Burundi, and December 31, 1994. See *id.* at 505. This event is considered to be the event that triggered the civil war and acts of genocide. See *id.*

105. See U.N. Charter, art. 39.

106. U.N. Charter, art. 41; See also LESCURE & TRINTIGNAC, *supra* note 102, at 6. For further information regarding various interpretations of the U.N. Charter, see LOUIS B. SOHN, *RIGHTS IN CONFLICT: THE UNITED NATIONS AND SOUTH AFRICA* 42 (1994).

107. See JONES, *supra* note 101, at 3-4. See also *Report on Special Court*, *supra* note 10, ¶ 9.

108. See JONES, *supra* note 101, at 7.

109. See U.N. Doc. IT-94-1-AR72, ¶ 141 (1995), reprinted in *International Criminal Tribunal For The Former Yugoslavia: Decision In Prosecutor v. Dusko Tadic. (Establishment Of The International Tribunal)*, 35 ILM 32, 155 (1996).

110. See Ferencz, *supra* note 89 at 348-49. See also LESCURE & TRINTIGNAC, *supra* note 102, at 6; Scheffer, *War Crimes*, *supra* note 2, at 328.

111. See Scheffer, *War Crimes*, *supra* note 2, at 328.

112. See *id.*

the Sierra Leone Court is beyond the scope of this Note; however, several recommendations are evaluated, while others are briefly mentioned for comparison with the Rwandan and Yugoslavian Tribunals or for the purpose of placing in context other provisions.

II. SECRETARY-GENERAL'S REPORT ON THE ESTABLISHMENT OF THE SPECIAL COURT FOR SIERRA LEONE

Pursuant to Resolution 1315, negotiations between the United Nations and the government of Sierra Leone were held at the U.N. headquarters from September 12-14, 2000, and focused on the legal framework of the Special Court, the Agreement between the U.N. and Sierra Leone, and the Statute of the Special Court.¹¹³ Next, a small U.N. team of experts visited Sierra Leone from September 18-20, 2000, and concluded negotiations on the remaining legal issues, met with Sierra Leoneans of all segments of society, and assessed the adequacy of potential premises for the seat of the Special Court.¹¹⁴ On October 4, 2000, the Secretary-General submitted his Report on the Establishment of a Special Court for Sierra Leone (Report) to the Security Council.¹¹⁵ As of the writing of this Note, the Security Council had not yet taken any action toward establishing the Special Court.

A. *Nature and specificity of the Special Court*

Unlike either of the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and created as subsidiary organs of the United Nations, the Special Court is proposed to be established by an agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based *sui generis*¹¹⁶ court of mixed jurisdiction and composition.¹¹⁷ The Secretary-General proposed that the Special Court have concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it would have the power to request, at any stage of the proceedings, that any national Sierra Leonean court defer to its jurisdiction.¹¹⁸

The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third party States.¹¹⁹

113. See *Report on Special Court*, *supra* note 10, ¶ 5.

114. See *id.* ¶ 6; *Mission Report*, *supra* note 30.

115. See *Report on Special Court*, *supra* note 10.

116. Meaning, "of its own kind or class" or "peculiar." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

117. See *Report on Special Court*, *supra* note 10.

118. See art. 8, ¶ 2 of the Statute of the Special Court for Sierra Leone, annexed to *Report on Special Court*, *supra* note 10, at 21.

119. See *Report on Special Court*, *supra* note 10.

In examining measures to enhance the deterrent powers of the Special Court, the Secretary-General noted that "the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court."¹²⁰

While it is understandable that the Special Court, being treaty-based, would have primacy over Sierra Leone national courts only, it is critical to the success of the Court that it possess Chapter VII powers. The tribunals for the Former Yugoslavia and Rwanda have withstood challenges to their primacy over States in regard to requests relative to the criminal proceedings, irrespective of whether there is a treaty agreement or whether the State has specifically consented.¹²¹ The Rwandan Tribunal, in rejecting a pretrial motion challenging the jurisdiction of the tribunal by indictee Joseph Kanyabashi, held that the Security Council's establishment of the Rwandan Tribunal had not violated the sovereignty of Rwanda, which had requested its establishment, *or that of the other member states of the United Nations*, which had accepted certain limitations on their sovereignty by virtue of the United Nations Charter and had agreed to accept and carry out Security Council decisions under its Article 25.¹²²

Without Chapter VII powers, the Special Court will have little authority to insist that a country surrender an indictee who has fled to that country.¹²³ Since it is highly unlikely that all of the accused will remain in Sierra Leone so they can be captured and detained, the Special Court would be severely limited in its ability to bring those individuals to trial. As with the Yugoslavian Tribunal, many of the accused individuals are not at this time in custody.¹²⁴ The Security Council, by endowing the Court with Chapter VII

120. *Id.*

121. Membership in the United Nations itself implicitly constitutes agreement to be bound by the U.N. Charter. See U.N. Charter art. 2, ¶ 3.

122. Virginia Morris, *International Criminal Tribunal For Rwanda—Jurisdiction—Waiver of Deadlines for Motions—Security Council Competence Under Chapter VII of UN Charter—Jus de Non Evocando—Effect of Prior Decisions of Appeals Chamber of International Criminal Tribunal for the Former Yugoslavia*, 92 AM. J. INT'L L. 66, 67 (1998)(emphasis added).

123. See *Report on Special Court*, *supra* note 10, ¶ 10.

124. See *Mission Report*, *supra* note 30, ¶¶ 23, 30. In fact, many are still in military or political power. See *id.* For example, Charles Taylor, President of Liberia, has been accused by many as playing a key role in supporting and providing arms and supplies to the RUF to maintain control of illegal diamond smuggling out of Sierra Leone. See *id.* U.S. sources said the evidence and intelligence on Taylor's involvement includes aerial photography of convoys of trucks carrying weapons and medical supplies to Sierra Leone, as well as electronic intercepts showing Taylor and some of his senior military commanders meeting regularly with senior RUF commanders to coordinate activities. See Douglas Farah & Steven Mufson, *U.S. Warns Liberian Leader Not to Aid Sierra Leone Rebels*, WASH. POST FOREIGN SERVICE, July 30, 2000, at A27. "The evidence," said one Pentagon official, "is overwhelming." *Id.* U.S. officials asserted that if Taylor's aid continued, he, too, could be tried in that court. See *id.* President Taylor denies the allegations. See *Mission Report*, *supra* note 30, ¶ 43. However, if the prosecutor finds sufficient cause to indict him, Taylor would most assuredly refuse to submit to arrest. In the case of the Yugoslavian Tribunal, the Yugoslavian government initially indicated that it would

powers, will enable it "to issue directly binding international legal orders and requests to States, irrespective of their consent" because the States have agreed to accept and carry out Security Council decisions when the Court is acting under its Chapter VII powers.¹²⁵

According to the rules of the Yugoslavian Tribunal, once an arrest warrant has been issued for an indictee, the warrant is forwarded to the country where the indictee is residing, along with a request that the individual be surrendered to the tribunal.¹²⁶ Since the tribunal has been established under Chapter VII of the U.N. Charter, there is an obligation on all member states to comply.¹²⁷ In the case of noncompliance, the Rules under the Charter allow for further action. First, the prosecutor will present, in public, the evidence upon which the indictment is based.¹²⁸ Having presented that evidence, the trial chamber may then reconfirm the indictment, issue an international arrest warrant, and inform the Security Council of the non-cooperation of the country refusing to surrender the indictee.¹²⁹ The Security Council can then impose sanctions on the noncompliant country.¹³⁰

Furthermore, the mere fact that the evidence has been made public brands the indictee as an international fugitive. The existence of an international arrest warrant will likely confine the individual to the country where he is residing and, in the case where the indictee is a political or military leader, he will not be able to participate in international discussions. In all probability, the indictee will not be able to maintain the confidence of his electorate—quite possibly resulting in the surrender of the indictee to the tribunal, particularly by a political opponent who has come to power as a result of the indictee's waning popularity.¹³¹ While many Yugoslavian Tribunal indictees are still at large, the Tribunal has these strategies available to use at

not surrender individuals to the jurisdiction of the court. See Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 23 (1995). Without Chapter VII powers, the tribunal may have been wholly ineffectual in bringing indictees to trial. See *id.*

125. See *Report of the Secretary-General Pursuant to para. 2 of Security Council Res. 808*, ¶ 23, U.N. Doc. S/25704 (1993); U.N. Charter art. 41.

126. See JONES, *supra* note 101, at 202-09.

127. See JONES, *supra* note 101, at 116-17. Paragraphs 1 and 2 of Article 29 of the Statute of the International Tribunal for the Former Yugoslavia is set forth in mandatory terms: "(1) States shall cooperate with the International Tribunal . . ." and "(2) States shall comply without undue delay . . ." *Id.* The Statute of the Yugoslavian Tribunal and the Secretary-General's Commentaries are also contained in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, U.N. Doc. S/25704, ¶¶ 23 & 125, May 3 1993, reprinted in 32 I.L.M. 1163, 1192 (1993).

128. See JONES, *supra* note 101, at 209-11.

129. See *id.*

130. See Steven Engelberg, *War Crimes Panel Orders Suspect Released*, N.Y. TIMES, Dec. 11, 1995, at A10.

131. See Graham Blewitt, *Panel III: Identifying and Prosecuting War Crimes: Two Case Studies—The Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 638-39 (1996).

its discretion and may rely on the Security Council for the imposition of sanctions or other means to induce compliance.¹³² If the Sierra Leone Court is not armed with Chapter VII powers, it will not be sufficiently equipped to effectuate the surrender of an indictee by states not a party to the treaty.

B. Competence of the Sierra Leonean Special Court

1. Subject-matter Jurisdiction

a. Crimes Under International Law

The subject-matter jurisdiction of the Special Court is to encompass crimes under international humanitarian law as well as Sierra Leonean law.¹³³ It would cover

the most egregious practices of mass killing, extrajudicial executions, and widespread mutilation, in particular, amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labor and forced recruitment into armed groups, and looting and setting fire to large urban dwellings and villages.¹³⁴

The Secretary-General recommends that the list of crimes against humanity follow the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on Article 6 of the Nuremberg Charter.¹³⁵ In this manner, the Special Court will build upon the established body of law and expertise gained by the current tribunals in applying this law.

132. See JONES, *supra* note 101.

133. See *Report on Special Court*, *supra* note 10, ¶ 12.

134. *Id.* There is no evidence that the killing in Sierra Leone was at any time aimed at an identified national, ethnic, racial or religious group with an intent to annihilate the group. Therefore, the Security Council did not include the crime of genocide in its recommendation, nor did the Secretary-General include genocide as an "international crime falling within the jurisdiction of the Court." *Id.*

135. See *id.* ¶ 14. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

- (a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;
- (b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and
- (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Id. ¶ 15.

It should be noted that the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda do not sufficiently address the crime of abductions and forced recruitment of children under the age of fifteen years into armed conflict.¹³⁶ Furthermore, owing to the doubtful customary nature of the ICC statutory crime of conscription or enlistment of children under the age of fifteen, Article 4 (c) of the proposed Statute of the Special Court has been drafted specifically to address the crimes committed in Sierra Leone.¹³⁷ The elements of the crime under the draft Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was a crime under Sierra Leonean law and is also a crime under common article 3 of the Geneva Conventions; (b) forced recruitment—regardless of administrative formalities;¹³⁸ and (c) transformation of the child into a “child-combatant” and subjecting the child to other degrading forms of exploitation.¹³⁹

b. Crimes Under Sierra Leonean Law

The Report states that recourse to Sierra Leonean law may be deemed appropriate in cases where a specific situation or an aspect of a crime is either not addressed or inadequately regulated under international law.¹⁴⁰ The crimes considered relevant for this purpose are included in the proposed Statute of the Special Court¹⁴¹ and include offenses relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offenses relating to the wanton destruction of property, in particular arson, under the 1861 Malicious Damage Act.¹⁴²

c. Rules of Procedure and Evidence

As stated in the Report, the applicability of two systems of law implies that the elements of the crimes are governed by the respective international or

136. See *id.* ¶¶ 17-18; See JONES, *supra* note 101, at 48, 116-17.

137. See generally Amy Beth Abbott, *Child Soldiers—The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499 (2000). While the Rome Statute of the ICC does designate the recruitment and use of child soldiers under the age of 15 as a war crime, a small number of states continue to stand in strong opposition to these efforts. See *id.* At this point, the international community has failed to ameliorate the problem of the use of child soldiers and rehabilitative jurisprudence solutions many times run counter to a more retributive domestic sentiment. See Alison Dundes Renteln, Ph.D., J.D., *The Child Soldier: The Challenge of Enforcing International Standards*, 21 WHITTIER L. REV. 191 (1999).

138. See *Report on Special Court*, *supra* note 10, ¶¶ 33-34; Abbott, *supra* note 137, at 499.

139. See *Report on Special Court*, *supra* note 10, ¶¶ 18, 33-34. The issues surrounding the manner in which the court will deal with child combatants who have committed crimes against humanity are addressed in section (3)(b) of this Note.

140. See *id.*

141. See *Report on Special Court*, *supra* note 10, at art. 5 of the Statute of the Special Court for Sierra Leone, annexed to the *Report on Special Court*.

142. *Report on Special Court*, *supra* note 10, Annex. Article 5 of the Statute of the Special Court lays out these two Sierra Leonean laws. See *id.*

national law, and that the Rules of Evidence will differ according to the nature of the crime as a common or international crime. In that connection, Article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable *mutatis mutandis*¹⁴³ to proceedings before the Special Court,¹⁴⁴ and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for in the current rules. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.¹⁴⁵

2. *Temporal Jurisdiction of the Special Court*

The Secretary-General considered three options for the beginning date of the temporal jurisdiction of the Court and recommended that the date of November 30, 1996, would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court.¹⁴⁶ Beginning with this date would also insure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction.¹⁴⁷ Since the armed conflict in Sierra Leone is still ongoing, the report recommended that the temporal jurisdiction of the Special Court should be left open-ended, but that the lifespan of the Special Court, as distinguished from its temporal jurisdiction, should be determined by a subsequent agreement between the parties upon the completion of its judicial activities.¹⁴⁸ The capacity acquired by the local courts to assume the prosecution of the remaining cases, in addition to the availability of resources, will determine when the Special Court will be concluded.¹⁴⁹

The Rwandan Government at first actively sought and supported the establishment of the Rwandan Tribunal, but when the Security Council

143. Meaning, the rules would be generally the same, but with necessary alterations in points of detail. BLACK'S LAW DICTIONARY 1019 (6th ed. 1990).

144. Article 14 of the Statute of the International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, is somewhat different from Article 15 of the Statute of the Yugoslavian Tribunal in that it also applies the rules of the Yugoslavian Tribunal *mutatis mutandis*. See JONES, *supra* note 101, at 87-87. Article 14 provides The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia *with such changes as they deem necessary*. (emphasis added). *Id.* For a discussion of the rules of procedure and evidence in the Yugoslavian and Rwandan tribunals, see *id.* at 129-50.

145. See *Report on Special Court*, *supra* note 10, ¶ 20.

146. See *id.* ¶ 27.

147. See *id.*

148. See *id.* ¶ 28.

149. See *id.*

submitted the Statute of the Tribunal, the Rwandan Government protested.¹⁵⁰ The government was dissatisfied with several aspects of the Tribunal, including the temporal jurisdiction of the Court.¹⁵¹ The government felt the Tribunal's temporal jurisdiction was too restrictive in that it covered only the period during which the majority of the genocidal massacres were actually committed, and not the planning stages for the genocide.¹⁵² The Security Council based its determination of the tribunal's temporal jurisdiction on its understanding that, under Chapter VII, it was only authorized to establish a tribunal for the purpose of maintaining or restoring peace.¹⁵³ The Security Council determined that actions occurring during the planning phase of the genocide were crimes occurring prior to the disruption of peace and, therefore, outside of its authority to punish.¹⁵⁴

The Security Council, in attempting to show a good faith effort to compromise, ultimately determined that it should set the beginning of the Rwandan Tribunal's temporal jurisdiction at January 1, 1994, "in order to capture the planning stage of the crimes."¹⁵⁵ In the case of the proposed Sierra Leonean Court, the Secretary-General appears to have attempted to avoid this contention by setting a date which would balance the competing considerations to arrive at a beginning date early enough to encompass the majority of the crimes, while keeping in line with the Security Council's mandate to only prosecute crimes in the context of maintaining or restoring the peace.

3. *Personal Jurisdiction*

a. *Persons "Most Responsible"*

The Report recommended that while those "most responsible" obviously includes individuals in political or military leadership, others with less authority in the chain of command may also be regarded most responsible if merited by the severity or magnitude of the individual's crime.¹⁵⁶ As with the Rwandan and Yugoslavian Tribunals, the Special Court's jurisdiction is over natural persons only, thus, the Court will not prosecute groups or members of groups as such, but each person will be held accountable for his own actions.¹⁵⁷

150. *See Akhavan, supra* note 104, at 505.

151. *See id.*

152. *See id.* The Government argued that the massacres actually witnessed by the world were the result of a long period of planning for the genocide, during which "pilot projects for extermination were successfully tested." *Id.* (quoting portion of the Rwandan Government statement in U.N. Doc. S/PV.3453, at 14 (1994)).

153. *See id.*

154. *See id.*

155. *Id.* at 506.

156. *See Report on Special Court, supra* note 10, ¶¶ 29-30.

157. *See JONES, supra* note 101, at 60-65; *Report on Special Court, supra* note 10, ¶¶ 29-30.

In this respect, the Special Court is expected to prosecute only a small number of persons.¹⁵⁸ If the Court prosecutes even a fraction of the persons who took part in the atrocities, the symbolic effect of prosecuting the leaders who planned and instigated the crimes against humanity would nevertheless have a considerable impact on national reconciliation, and will hopefully deter such crimes in the future.¹⁵⁹ Furthermore, as was the case in Rwanda, the national courts in Sierra Leone are not presently capable of prosecuting these individuals.¹⁶⁰

b. Individual Criminal Responsibility at 15 Years of Age

The Secretary-General reported that the situation in Sierra Leone is different from other conflicts where children have been used as combatants because of the number of cases where the children were forcibly abducted, sexually abused and reduced to slavery of all kinds, then trained as rebel recruits, often under the influence of drugs, to kill, maim and burn.¹⁶¹ The Report acknowledged that although they committed brutal acts, most, if not all of these children, were subjected to a process of psychological and physical abuse and duress, which transformed them from victims into perpetrators.¹⁶²

However, in view of the horrific conduct of child soldiers in Sierra Leone, some of whom acted as commanders, not merely foot soldiers, during executions and mutilations, the Secretary-General felt that they could not automatically be excluded from the Special Court's jurisdiction.¹⁶³ The Government of Sierra Leone has also urged that child combatants be held accountable for their crimes.¹⁶⁴

The Secretary-General proposed that any defendants between the ages of fifteen and eighteen would be held and tried separately from adults and, if

158. See *Report on Special Court*, *supra* note 10.

159. See Akhavan, *supra* note 104, at 509.

160. See *id.*; *Pratt Report*, *supra* note 33. In Rwanda, prior to April 1994, there was a total of approximately 300 judges and lawyers in appellate courts and 500 in provincial courts; of that total, only 40 magistrates survived and remained in Rwanda by 1996. See Akhavan, *supra* note 104, at 509.

161. See *Report on Special Court*, *supra* note 10, ¶ 32.

162. See *id.*

163. See *id.* ¶¶ 31-38.

164. See *id.* ¶ 35; Colum Lynch, *Prosecution of Minors For War Crimes Urged: U.N. Chief Backs Sierra Leone's Stand*, WASH. POST, Oct. 6, 2000, at A28, available at <http://www.washingtonpost.com/wp-dyn/world/africa/A21406-2000Oct6.html>. In considering the position taken by the people of Sierra Leone regarding the prosecution of child combatants, attention must also be given to cultural differences in the conceptualization of child soldiers and childhood in general. The distinction between childhood and adulthood is not clear cut in many societies. See Renteln, *supra* note 137, at 203. In many countries individuals marry much younger and are expected to work to contribute to the survival of the family from early ages. See *id.* In those nations, the notion that it is inexcusable to let young persons fight might be considered culturally imperialistic. See *id.* Moreover, if these young people are considered by their society as capable of working, marrying, and fighting in war, they are likely deemed capable to form the requisite intent to commit crimes as well. See *id.*

found guilty, they should be sentenced to counseling and rehabilitation rather than imprisonment.¹⁶⁵ Still, the issue of prosecuting minors has divided African and Western officials and the proposal is strenuously opposed by the U.N. Children's Fund, Human Rights Watch, and other advocacy groups, which argue that trying minors would set a dangerous legal precedent and could undermine efforts to rehabilitate child combatants in Sierra Leone.¹⁶⁶

Several options were identified in the Report as a possible solution to this critical dilemma faced by the Special Court:

- (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.¹⁶⁷

The Secretary-General stated that if the Council, after considering the moral and educational message to both the present and next generation of children in Sierra Leone, comes to the conclusion that children under the age of eighteen should be eligible for prosecution, statutory provisions were drafted in an effort to strike an appropriate balance between the conflicting interests¹⁶⁸ and to provide the necessary guarantees of juvenile justice.¹⁶⁹ The

165. See *Report on Special Court*, *supra* note 10, ¶¶ 33-37.

166. See *id.*

167. *Id.* ¶ 33. The merits of a Truth and Reconciliation Commission for Sierra Leone is further discussed in Section V of this Note.

168. The Secretary-General was informed that the people of Sierra Leone would not be in support of a court which failed to bring to justice children who committed these crimes against humanity. See *id.* ¶ 35. The international non-governmental organizations responsible for child-care and rehabilitation programs and some of their national counterparts, however, "were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved." *Id.* The Report stated that this debate underscored the importance of ensuring that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered. See *id.*

169. See *Report on Special Court*, *supra* note 10, Annex. The Statute of the Special Court, in Article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. See *id.* For example, Article 13, ¶ 1 of the Statute states that the overall composition of the judges should reflect their experiences in a variety of fields, including juvenile justice; Article 15, ¶ 4 requires that the Office of the Prosecutor be staffed with persons experienced in gender-related crimes and juvenile justice; Article 15, ¶ 5 requires that the Prosecutor insure that the child-rehabilitation program is not placed at risk, and that, where appropriate, alternative truth and reconciliation mechanisms should be utilized. See *Report on Special Court*, *supra* note 10,

report stressed that, ultimately, it will be for the Prosecutor to decide if action should be taken against a juvenile offender in any individual case.¹⁷⁰

In making its decision on this important issue, the Security Council must bear in mind that most of the children involved in the violence were psychologically abused and high on drugs; they were traumatized and were generally unable to make the moral choices required to show intent and culpability.¹⁷¹ However, if intervention does not occur in the lives of these children, they are likely to return to the survival tactics they developed during the conflict; they will "turn their anger on civil society, looting them for survival and killing them if necessary since death does not mean anything to them."¹⁷² Children's participation in warfare violates their innocence. Most of the children involved in the violence in Sierra Leone have learned how to survive harsh conditions by looting and killing, they have become callused by the carnage and destruction, many have turned to drugs, most have no home or community to which they will be welcomed, they lack education and their prospects for the future are unpromising.¹⁷³ Their increased propensity to violence coupled with the breakdown of community support systems traumatizes childhood development, threatening to destroy their future and, therefore, the future of their society.¹⁷⁴ Therefore, it is imperative that these children receive some form of intensive and ongoing rehabilitation.¹⁷⁵

c. Organizational Structure of the Special Court

Organizationally, the Secretary-General recommends that the Special Court be a self-contained entity, consisting of three organs: the Chambers, comprised of two Trial Chambers and an Appeals Chamber, the Prosecutor's Office, and the Registry.¹⁷⁶ In the establishment of ad hoc international tribunals or special courts operating as separate institutions and independent

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annexed to The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone.

170. In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber," order the separation of the trial of a juvenile from that of an adult, provide all legal and other assistance, and order protective measures to insure the privacy of the juvenile. *Report on Special Court, supra* note 10. The penalty of imprisonment is excluded in the case of a juvenile offender, and alternative options of a correctional or educational nature are provided for instead. *See id.*

171. *See generally* Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 653 (1997).

172. *See id.* at 654 (quoting a Liberian teacher predicting the future of the child soldiers who fought in that country's civil war).

173. *See generally* Scheffer, *War Crimes, supra* note 2; Abbott, *Child Soldiers, supra* note 137.

174. *See* Abbott, *Child Soldiers, supra* note 137.

175. *See infra* text of Section V for further recommendations.

176. *See Report on Special Court, supra* note 10, ¶ 39.

of the relevant national legal system, the Report stated that it has proved necessary to include all three organs within one entity.¹⁷⁷ As with the two other International Tribunals, the Secretary-General recommended that the Special Court be established outside the national court system; therefore, the inclusion of the Appeals Chamber within the same Special Court was considered the obvious choice.¹⁷⁸

1. *The Chambers*

The Secretary-General believes that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound, not practically feasible, and would result in unacceptably high administrative and financial costs.¹⁷⁹ Instead, he proposes that a coherent body of law may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on a shared Appeals Chamber the financial and administrative constraints of a formal institutional link.¹⁸⁰

The Tribunals for the Former Yugoslavia and Rwanda, although separate tribunals, were established with certain organizational and institutional links in an effort to achieve a cohesive legal approach, as well as an efficient and economic use of resources.¹⁸¹ The two tribunals share the same Prosecutor and the same members of the appeals chamber.¹⁸² The Rwandan Government disagreed with the proposed composition and structure of the Rwandan Tribunal, pronouncing it inappropriate and ineffective because of the enormity of the task of the Tribunal and the need for prompt and effective action by the Tribunal.¹⁸³ Rwanda charged that the Tribunal would not be an effective response to the crimes committed against the Rwandan people, but would only serve to appease the conscience of the international community.¹⁸⁴ The Security Council addressed the concerns of Rwanda by stating that it would consider increasing the number of judges and chambers if it became necessary.¹⁸⁵

177. *See id.*

178. *See id.*

179. *See id.* ¶ 40.

180. *See id.* ¶ 41. Article 20, paragraph 3 of the proposed Statute provides that the judges of the Appeals Chamber of the Special Court are to be guided by the decisions of the Appeals Chamber of the Yugoslavian and the Rwanda Tribunals; Article 14, paragraph 1 of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable *mutatis mutandis* to the proceedings before the Special Court. *See id.*

181. *See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, U.N. Doc. S/1995/134, ¶ 7.

182. *See JONES, supra note 101*, at 82-85, 88.

183. *See Akhavan, supra note 104*, at 506.

184. *See id.*

185. *See id.* at 507.

2. *The Prosecutor*

As proposed, the Secretary-General will appoint an international prosecutor to lead the investigations and prosecutions, and a Sierra Leonean deputy prosecutor will be appointed to assist with such actions.¹⁸⁶ The Report states that "the appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial."¹⁸⁷

While a fair and impartial Prosecutor is always a requirement of any justice effort, this is especially important in the case of Sierra Leone, where public officials have been characterized by greed, corruption, and impunity, leaving the citizenry disillusioned and distressed.¹⁸⁸

The Secretary-General stressed that the Security Council has recognized that a credible system of justice and accountability for the very serious crimes committed in Sierra Leone

would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.¹⁸⁹

The people of Sierra Leone have suffered immensely during not only this civil war, but throughout the country's history.¹⁹⁰ The Report of the Security Council Mission to Sierra Leone further appealed to the Security Council by stating, "Sierra Leone is a challenge that the United Nations and the international community as a whole should gather the collective will to meet. . . . [I]ts resilient and hopeful people . . . have been let down too many times by their own leaders and by influences and circumstances beyond their control."¹⁹¹ The long-term stability of Sierra Leone depends not only on humanitarian aid, a successful disarmament and reintegration program, and assistance in reestablishing peace, but also hinges on whether the government and judicial system is firmly reestablished and the confidence of the people in justice and fairness is restored. To that effect, the prosecutor and the judges must not only be fair and impartial, but must also *appear* to be so for the sake of the people in whom the future of Sierra Leone lies.

186. See *Report on Special Court*, *supra* note 10, ¶ 47.

187. *Id.*

188. See generally THOMPSON, *supra* note 18; Scheffer, *War Crimes*, *supra* note 2.

189. See generally Scheffer, *War Crimes*, *supra* note 2.

190. See generally CLIFFORD, *supra* note 17; THOMPSON, *supra* note 18; MUKONOWESHURO, *supra* note 19; Scheffer, *War Crimes*, *supra* note 2.

191. See *Mission Report*, *supra* note 30, ¶ 56.

3. *Enforcement of Sentences*

According to the Report, while imprisonment should normally be served in Sierra Leone, under particular circumstances, such as the security risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, relocation to a third State may be required.¹⁹² This relocation is provided for in Article 22 of the Statute.¹⁹³ Although the agreement for the enforcement of sentences is to be between the Special Court and the State of enforcement, the Report recommends that the wishes of the Government of Sierra Leone, in which it expressed preference for relocation to an East African State, be respected.¹⁹⁴

It should also be noted that capital punishment will not be imposed by the Special Court and that this has been met with some dissatisfaction by the people of Sierra Leone. As the Secretary-General explained, [f]or a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an 'acquittal' of the accused, but an imposition of a more humane punishment.¹⁹⁵

4. *An Alternative Host Country*

Another important reason for endowing the Special Court with Chapter VII powers is how it will come into play if the need arises to transfer the Court to another country.¹⁹⁶ If the Court is endowed with Chapter VII powers, a binding obligation is created on all member States to the United Nations to cooperate with the Tribunal and assist it in all stages of the proceedings.¹⁹⁷ In principle, however, an agreement would be reached between the Government of Sierra Leone, for the transfer of the Special Court to the State of the alternative seat, and the authorities of the latter, for the relocation of the seat to its territory.¹⁹⁸

The agreement would stipulate the type of circumstances that would require the transfer of the seat, facilitate an emergency transfer if needed, and lay out the course of action for finalizing a separate "Headquarters Agreement" if such a transfer is warranted.¹⁹⁹ This agreement would "facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters

192. See *Report on Special Court*, *supra* note 10, ¶ 49.

193. See *Report on Special Court*, *supra* note 10, Annex.

194. See *id.* ¶ 50.

195. *Report on Special Court*, *supra* note 10, ¶ 7.

196. See *id.* ¶ 51.

197. See Draft Report of the International Law Commission on the Work of its Forty-Sixth Session, Ch. II, Draft Code of Crimes Against the Peace & Security of Mankind, 11 (May 2-July 24, 1994), U.N. Doc. A/CN.4/L.496, 13, 17 (1994).

198. See *Report on Special Court*, *supra* note 10, ¶ 52.

199. *Id.* ¶ 53.

Agreement soon thereafter.”²⁰⁰ The Sierra Leone government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.²⁰¹

D. Expertise and Advice from the Two International Tribunals

The Report stated that the kind of advice and expertise the Special Court could expect from the Yugoslavian and Rwandan Tribunals could include any or all of the following: consultations among judges of both jurisdictions on matters of common concern; prosecutor training, training of investigators and administrative support staff for the Special Court—to be conducted in The Hague, Kigali, and Arusha, as well as training of personnel at the location of the Sierra Leone Court by a team of prosecutors, investigators, and administrators from both Tribunals; advice on establishment of a Court library and assistance in its creation; as well as the sharing of information, documents, judgments and other relevant legal material on a continuous basis.²⁰²

According to the Report, both the Yugoslavian and Rwandan Tribunals have expressed a willingness to share their experience in all of these respects with the Special Court.²⁰³ In addition, the Secretary-General recommended that the support and technical assistance of UNAMSIL; in providing security, logistics, administrative support, and even temporary accommodation; be provided in the first operational phase of the Special Court.²⁰⁴ In the current unstable security situation in Sierra Leone and the weakened state of its national security forces, the Secretary-General asserts that UNAMSIL is the only credible force with the capacity to adequately provide such assistance.²⁰⁵

It is interesting to note that the security-related recommendations of the Secretary-General make no mention of ECOWAS or other groups that have been providing a regular and indispensable security presence in Sierra Leone.²⁰⁶ In nearly every report issued by UNAMSIL, the Secretary-General, and the Mission group to Sierra Leone, the importance of ECOWAS presence is discussed.²⁰⁷ Although the group is conspicuous by its absence in the Secretary-General's report, it is highly unlikely that the Security Council will discontinue its dependence on ECOWAS and other non-U.N. groups in Sierra Leone, at least through the first operational phase of the Court.

200. *Id.*

201. *See id.* ¶ 54.

202. *See id.* ¶ 64.

203. *See id.* ¶ 65.

204. *See id.* ¶ 66.

205. *See id.*

206. *See id.*

207. *See Mission Report, supra note 30; S.C. Res. 1315, supra note 9; S.C. Res. 1270, supra note 71; Statement by the President of the Security Council, 4126 th meeting, U.N. Doc. S/PRST/2000/31 (2000).*

E. *Financial Support and Stability*

According to the Secretary-General, "the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they must depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations."²⁰⁸ The Report stressed that because of its current condition, "the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court."²⁰⁹ The government desires to provide a building in which to house the Court and detention facility; however, any building utilized in Sierra Leone will require extensive restoration to be functional.²¹⁰ The Secretary-General, therefore, reiterated that the requirements would have to be met through contributions from sources other than the Government of Sierra Leone.²¹¹ The Report notes that implicit in Security Council Resolution 1315 is the notion that this Court would be funded by voluntary contributions by United Nations Member States, but concludes that such an arrangement is insufficient.²¹² Notwithstanding this judgment, the Secretary-General laid out the following options for funding the Court.

Option One, Voluntary Contributions by Member States.

The report quite correctly states that financing based entirely on voluntary contributions would not provide the continuous and adequate funding required to compensate the judges, Prosecutor, and Registrar, to contract the services of administrative and support staff, and to purchase the necessary equipment.²¹³ This, the Report concluded, is based on the experience gained in the operation of the two ad hoc International Tribunals regarding the scope, costs, and long-term duration of the judicial activities of an international jurisdiction of this kind.²¹⁴ Specifically, the report stated, "[t]he risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of the continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability."²¹⁵ Therefore, the Secretary-General advised that a special Court based entirely on voluntary contributions "would be neither viable nor sustainable."²¹⁶

208. *See Mission Report*, supra note 30, ¶ 55.

209. *Id.* ¶ 56.

210. *See id.*

211. *See id.*

212. *See id.* ¶ 70.

213. *See id.*

214. *See id.* ¶ 69.

215. *Id.* ¶ 70.

216. *Id.*

Option Two, Assessed Contributions.

In the view of the Secretary-General, the only realistic solution is financing the Court through assessed contributions by Member States to the United Nations.²¹⁷ This would be a practical and sustainable means of securing continuous funding.²¹⁸ The Secretary-General cautions, however, that the financing of the Special Court through assessed contributions “would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by United Nations financial and staff regulations and rules.”²¹⁹

Option Three: National jurisdiction with international assistance—Relying on the existing Sierra Leonean Court system.

The Report notes the existence of this alternative, but declines to elaborate further.²²⁰ For all practical purposes, this alternative is dismissed as wholly inadequate and inconsistent with the mandate of Resolution 1315.²²¹

The financing of the Court is a decision the Security Council cannot make lightly. The expenses of the Yugoslavian and Rwandan Tribunals were to be born by the regular UN budget under Article 17 of the U.N. Charter.²²² However, while this arrangement might appear to solve any problems concerning the task of achieving sufficient and sustainable funding, it must be recognized that the Rwandan Tribunal, although funded out of the regular U.N. budget, experienced severe financial and administrative difficulties in its early days.²²³ An investigation conducted by the UN reported that the Tribunal

217. *See id.* ¶ 71.

218. *See id.*

219. *Id.*

220. *See id.* ¶ 72.

221. *See id.*

222. *See JONES, supra* note 101, at 124. Article 17 of the U.N. Charter provides for consideration and approval of a budget by the General Assembly for each organization. *See id.* In the case of the Tribunals, spending plans, including personnel and other structural requirements, are worked into a budget, prepared by the Registrar of the Tribunal and then submitted by Secretary-General to the Advisory Committee on Administration and Budgetary Questions (ACABQ), a panel of 18 experts elected by the General Assembly. *See id.*; *see also* Jeffrey Laurenti, *Considerations on the Financing of an International Criminal Court*, UNA-USA Policy Studies Analysis, United Nations Association of the United States, Rome, 1 (June 19, 1998), available at <http://www.unausa.org/issues/icc/iccfinance.htm>. This Committee then advises the Fifth Committee of the General Assembly which, in turn, considers the proposal and passes its budget recommendations to the General Assembly for vote. *See id.* A budget is approved by resolution of the General Assembly. *See id.*

223. *See Financing of the 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 Neighboring States Between January 1 and December 31 1994*, United Nations, Report of the Secretary General on the Activities of the Office of Internal Oversight Services, 51st Sess., Agenda items 139, 141, at 1, U.N. Doc.

was dysfunctional in virtually all areas.²²⁴ The tribunal had no accounting system; incomplete and unreliable financial records; unqualified or insufficient numbers of staff, lawyers and investigators; a shortage of cells and courtrooms; and a lack of logistical, transport, and office equipment.²²⁵ Furthermore, it was determined that the Tribunal disregarded UN regulations and was neglected by UN headquarters. The report recommended that the UN provide the Tribunal with more administrative and financial support and oversight, better trained and experienced personnel, and that additional guidance and cooperation with the Yugoslavian Tribunal be forged to improve its performance.²²⁶

In a Press Release on March 12, 1998, the Fifth Committee of the General Assembly reported that substantial improvements had been made since the investigation, stating that most of the recommendations made following the Office's 1996 investigation had been at least partially implemented, but that the Rwandan Tribunal still had much to do in the areas of procurement, recruitment and asset management, as well as in the security of Tribunal personnel, witnesses, and documents.²²⁷ With the problems found in the Rwandan Tribunal and its manifest difficulties in overcoming these problems, the Security Council must insure that this Court be assured adequate and sustainable funding, experienced personnel, and sufficient oversight in order to avoid the pitfalls experienced by the Rwandan Tribunal.

F. *Structural Needs of the Court*

1. *Personnel*

Personnel requirements and the corresponding equipment and vehicle requirements are estimated on a preliminary basis to total US\$22,000,000 per year.²²⁸ This would include eight Trial Chamber judges²²⁹ and six Appeals Chamber judges,²³⁰ one law clerk and two support staff for each Chamber, and one security guard detailed to each judge; a Prosecutor and a Deputy Prosecutor, twenty investigators, twenty prosecutors, and twenty-six support staff; a Registrar and Deputy Registrar, twenty-seven administrative support staff, and forty security officers; four staff in the Victims and Witnesses Unit; and one correction officer and twelve security officers in the detention facilities.²³¹

A/51/789 (1997) [hereinafter Rwanda Tribunal Report].

224. *See id.*; see also John Goshko, *UN Probe Finds Mismanagement, Waste in Rwanda War Crimes Tribunal*, WASH. POST, Feb. 13, 1997, at A20.

225. *See* Rwanda Tribunal Report, *supra* note 223, ¶¶ 70-74.

226. *See id.* ¶¶ 75-100.

227. *See* Press Release GA/AB/3215, 50th Meeting, March 12, 1998.

228. *See Report on Special Court*, *supra* note 10, ¶ 58.

229. Three sitting judges and one alternate judge in each Chamber. *See id.* ¶ 57.

230. Five sitting judges and one alternate judge. *See id.*

231. *See id.* ¶ 57.

In the Report, the Secretary-General urged the Security Council to seek out qualified people from the Commonwealth²³² in Africa who share the same language and common-law legal system to serve as judges, prosecutors, Registrar, investigators or administrative staff.²³³ The U.N. Office of Legal Affairs has already approached the Commonwealth with this request and plans to approach ECOWAS with the same request.²³⁴

2. Premises

Based on the information provided by the team of experts that visited Sierra Leone to evaluate potential sites for the Court, the Secretary-General considered several alternatives for premises for the Court Chambers. The first option was to use the existing High Court of Sierra Leone.²³⁵ This would incur the least expenditure at an estimated US\$1,500,000.²³⁶ However, in the estimation of the Secretary-General, using this facility posed the danger of significantly disrupting the ordinary schedule of the Special Court and might eventually bring it to a halt.²³⁷ Use of this facility also poses serious security risks because it is located in central Freetown, the likely focus of potential assaults by rebel forces.²³⁸ The second option would use the existing Conference Centre, the site deemed most secure by the team out of the sites visited, at an estimated expenditure of \$5,800,000 for the large-scale renovation required.²³⁹

The third option would be to construct a new prefabricated, self-contained compound on government land.²⁴⁰ The estimated cost of this option is US\$2,900,000.²⁴¹ Advantages of this option are that it would afford easy expansion if needed, a salvage value at the completion of the activities of the Special Court, the prospect of a donation in kind, and no rental costs.²⁴²

232. The African Commonwealth nations are Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. See The Commonwealth, *Members & Membership: Africa*, at <http://www.thecommonwealth.org/html/commonwealth/about/members/memberlist/africa.htm> (last visited May 9, 2001). The Commonwealth consists of 54 developed and developing nations around the world, which, except for Mozambique, have experienced some form of British rule or share administration with another Commonwealth country. Each member is expected to comply with Commonwealth values, principles, and accept Commonwealth norms and conventions. See The Commonwealth, *What the Commonwealth is*, at <http://www.thecommonwealth.org/html/commonwealth/about/info/whatis.htm> (last visited May 9, 2001).

233. See *Report on Special Court*, *supra* note 10, ¶ 59.

234. See *id.*

235. See *id.* ¶ 60.

236. See *id.*

237. See *id.*

238. See *id.*

239. See *id.*

240. See *id.* ¶ 61.

241. See *id.*

242. See *id.*

In evaluating the proposed premises for the Detention Facilities, the Secretary-General also considered the renovation of the New England Prison at an estimated cost of US\$600,000.²⁴³ No other options were identified or discussed for this facility.

II. FURTHER RECOMMENDATIONS

A. *Achieving Peace and Stability for Sierra Leone*

First and foremost, the people of Sierra Leone need peace—an end to the fighting, a new beginning, and the opportunity to rebuild. Peace cannot be accomplished if it cannot be enforced. Therefore, the consequences of a failure by the international community to adequately support ECOMOG at this critical time could be disastrous, not only for the people of Sierra Leone, but for the region as a whole.²⁴⁴ While the Sierra Leone crisis is no longer at the forefront of media attention, it remains locked in violence, with the legitimate government controlling only half of the nation's territory and rebel forces continuing to control the diamond-producing regions.²⁴⁵ The continuing human rights atrocities must be stopped. Furthermore, the effectiveness of the Special Court will be determined not only by its retributive impact, but also by its ability to deter future atrocities. Continued support of ECOMOG and other legitimate regional peacekeeping groups will further this objective by controlling the rebels and preventing their abuse of innocent civilians.²⁴⁶

It should be noted, however, that the recommended use of regional peacekeeping organizations, such as ECOMOG, must be distinguished from a widespread use of private security companies, the latter of which should be approached with great caution.²⁴⁷ The use of these private security companies has grown dramatically in recent years and the reasons for this growth are many.²⁴⁸ These security companies fill a military void for both Western and

243. See *id.* ¶ 62.

244. See generally U.N. Doc. S/Res/1132 (1997).

245. See Rosa Ehrenreich, *Save Sierra Leone*, WASH. POST, March 4, 2001, at B07, available at www.washingtonpost.com/wp-dyn/articles/A17212-2001Mar3.html.

246. See Scheffer *Foreword*, *supra* note 3, at 3.

247. See Herbert M. Howe, *Global Order and the Privatization of Security*, 22 FLETCHER F. WORLD AFF. 1 (1998) (stating, "Private Security" is a broad grouping") *Id.* at 2. Many in this group are comprised of highly disciplined military units. See *id.* One company that has gained widespread attention is Executive Outcomes, a South Africa-based company composed of ex-commandos from South Africa's apartheid-era security forces that has been directly and effectively involved in the Angolan and Sierra Leonean civil wars. See *id.* at 3; see also Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998). While most commentators characterize these companies as sophisticated mercenaries, they also agree that they are more likely to furnish specialists in logistics, communications, procurement, intelligence, advising, and training. See *id.*

248. See Howe, *supra* note 247, at 1-3.

recipient governments, they are relatively inexpensive, and they may offer several military and political advantages.²⁴⁹ Private security forces can enter situations where Western governments may fear to intervene or they can perform functions that these governments approve of, but are reluctant to carry out themselves because of the high political, military, or financial costs.²⁵⁰

However, these companies are often labeled as a threat to global security.²⁵¹ Most often, the threat arises because the security companies act only in their pecuniary interests and are not subject to regulation, resulting in frequent and easily changed alliances.²⁵² Furthermore, when a nation recommends or exports private security companies, the government can disavow any connection to the companies' activities, thus creating the potential for exporting governments to use them as pawns in order to intervene in foreign conflicts while maintaining the appearance of neutrality.²⁵³ Finally, aside from the customary international laws banning the use of mercenaries, which in practice have been largely ignored by states, there are no specific regulations designed to temper the potential disruptive effects of these security companies.²⁵⁴

A relevant example is the South African-based "Executive Outcomes," a private security company hired by the government of Sierra Leone to aid in its defense during the civil war.²⁵⁵ The United Nations has labeled this company a mercenary operation.²⁵⁶ After investigating its activity in Sierra Leone, the U.N. found that Executive Outcomes is involved with training officers and other military ranks in the use of new military equipment, conducting reconnaissance, advising on arms purchases, devising psychological campaigns aimed at creating panic among the civilian population, and discrediting the leaders of the RUF.²⁵⁷ The Report concluded "[t]his would appear to be yet another instance of an internal armed conflict in which the involvement of mercenaries prolongs and adds to the cruelty of

249. *See id.* at 5.

250. *See id.*

251. *See id.* at 3.

252. *See id.* at 3, 7. While these companies have sometimes performed valuable services for governments and for worthwhile causes, they are also likely to lay aside moral and ethical concerns in order to go to battle for the highest bidder. *See id.* at 7; Zarate, *supra* note 247, at 78.

253. *See Zarate, supra* note 247, at 77-78.

254. *See id.* at 79-80. *See also* Mercenary Report, *infra* note 255.

255. *See* The Right Of Peoples To Self-Determination And Its Application To Peoples Under Colonial Or Alien Domination Or Foreign Occupation: Report On The Question Of The Use Of Mercenaries As A Means Of Violating Human Rights And Impeding The Exercise Of The Right Of Peoples To Self-Determination, Submitted By Mr. Enrique Bernales Ballesteros, Special Rapporteur, Pursuant To Commission Resolution 1995/5 and Economic and Council resolution 1995/254, U.N. Doc. E/CN.4/1996/27, Commission On Human Rights 52nd Sess. January 17, 1996, ¶¶ 62-66 [hereinafter *Mercenary Report*]; Howe, *supra* note 247, at 3.

256. *See* Mercenary Report, *supra* note 255, ¶ 65.

257. *See id.*

that conflict, while at the same time undermining the exercise of the right to self-determination of the people of the country involved."²⁵⁸

Executive Outcomes is reported to have exceptionally close links to the Branch Minerals and Heritage Oil and Gas organizations operating in Sierra Leone.²⁵⁹ This illustrates the potential abuse of power in an unstable nation. Once inside a country and incorporated into its defense structure, a private firm could exert powerful leverage upon the state to achieve its own private interests.²⁶⁰ Furthermore, this coupling of the private security firm with powerful multinational companies dramatically increases the power of these foreign companies within the destabilized nation.²⁶¹ Until international norms and regulations are developed and means of enforcement are in place, private security companies should be used as a last resort, and preference should be given to regional peacekeeping groups such as ECOMOG.

In addition to strengthening ECOMOG, the rebels must be weakened and means taken to impede their financing in the future. There is overwhelming evidence that in the recent stages of the war, RUF's staying power is largely attributed to its control over major diamond fields in the east of the country and its ability to traffic gems through Liberia in exchange for weapons and supplies.²⁶² To incapacitate the rebel forces, it will be important to concentrate on both the arms supply and the diamond smuggling. It is imperative that private arms merchants are impeded from providing weapons to any areas of conflict in Africa.²⁶³ The prevalence of diamonds for arms trading is due in large part to the fact that it has been conducted under a cloak of secrecy.²⁶⁴ Therefore, identifying the sources of these illicit weapons is critical,²⁶⁵ as well as the channels of diamond smuggling out of the nation. Most Sierra Leonean diamonds are reported to reach the world market via Liberia because of its proximity to the main Sierra Leonean diamond fields and the absence of border controls.²⁶⁶ It is essential that the international community assist the United Nations in this task because of the elusive nature of this type of underground trading and the resources required to strengthen border controls.²⁶⁷

The international community must also strongly support efforts to impede funding of the rebels by foreign governments and must sharply

258. *Id.* ¶ 66.

259. *See* Howe, *supra* note 247, at 3.

260. *See id.*

261. *See id.*

262. *See* Farah & Mufson, *supra* note 124; *Mission Report*, *supra* note 30, ¶ 56.

263. *See Africa Report*, *supra* note 11, ¶ 28.

264. *See id.*

265. *See id.*

266. *See generally* *Mission Report*, *supra* note 30, ¶ 56; Farah & Mufson, *supra* note 124; Ian Smillie et al., *The Heart of The Matter: Sierra Leone, Diamonds & Human Security*, available at <http://www.web.net/pac/pacnet-1/msg00009.html> (last visited May 9, 2001).

267. *See Africa Report*, *supra* note 11, ¶ 28.

condemn those governments as collaborators in the atrocities.²⁶⁸ Further, the international community must aid the government of Sierra Leone in regulating and monitoring its diamond mining operations, as well as its other mining and agricultural activities. With its abundance of natural resources, not the least of which are its people, Sierra Leone can rebuild itself with guidance and security assistance throughout the initial stages of restoration.²⁶⁹ ECOWAS and the United Nations, as well as humanitarian and non-governmental organizations, will be essential to this effort.²⁷⁰

B. *Looking to the Future*

1. *The Children*

The Security Council is grappling with the issue of whether to prosecute child combatants accused of committing crimes against humanity.²⁷¹ If these children are tried merely to appease the government's or victims' desire for revenge, and without regard to their actual culpability in the commission of these crimes, the prosecution of these children would be acutely unjust and would neither serve the goals of strengthening of the rule of law nor the ends of reconciliation. On the other hand, a general amnesty for all children involved in the conflict would also be unjust—unjust to their victims and unjust to the children themselves. For their own emotional and psychological well-being, the children must be made to come to terms with what they have done—even if they felt they had no choice at the time or were incapable of distinguishing right from wrong due to the effect of drugs or forced “asocialization.”²⁷²

The prosecutor should thoroughly investigate every child soldier alleged to have committed crimes against humanity and the threshold for indictment for prosecution should be very high. Only in rare cases, if at all, should the prosecutor find that a child possessed the requisite culpability to be tried for war crimes.²⁷³ While the prosecutor must take into account the child's rank in the chain of command and whether the child gave orders for the killings or mutilations, the fact that a child held a position of authority must not be

268. See *Mission Report*, *supra* note 30, ¶¶ 23, 30, 42-43 (discussing the need to curb the contribution of illegally mined diamonds to the influx of weapons and instability in the region and indicating there is compelling evidence that President Charles Taylor of Liberia exercises strong control over the illegal trading and RUF forces).

269. See *id.* ¶ 38.

270. See *id.* The Security Council Mission to Sierra Leone concluded that one of the three primary objectives for Sierra Leone is to get the international community to “assist in improving the capacity of ECOWAS to address subregional and regional issues, such as the proposed regional investigation into the illegal trade in Sierra Leonean diamonds. . . .” *Id.*

271. See *Report on Special Court*, *supra* note 10.

272. See Reis, *supra* note 171, at 644 (citing MARGARET MCCALLIN, THE REINTEGRATION OF YOUNG EX-COMBATANTS INTO CIVILIAN LIFE: A REPORT FOR THE INTERNATIONAL LABOUR OFFICE 8 (1995)).

273. See Reis, *supra* note 171, at 654.

determinative. Only in the rare case that the prosecutor has overwhelming evidence that the child possessed the requisite culpability—that he made those moral choices without coercion and of his own volition²⁷⁴—should an indictment be handed down. If an indictment is issued, the child should go through the judicial process for the purpose of accountability, without an imposition of imprisonment, in a court of law providing all internationally recognized guarantees of juvenile justice²⁷⁵ as proposed by the Secretary-General.

While the sentencing should not result in imprisonment, the Court should place the child into a secured and intensive counseling program. In requiring accountability to society and to his victims, the child should take part in the proposed Truth and Reconciliation Commission or similar procedure.²⁷⁶ He might be sentenced to a term of community service as a part of a rehabilitation process. Finally, the child should be reintegrated into society with the provision of an ongoing support and accountability network.²⁷⁷ Much work is required if these children are to recover from this tragedy. Non-governmental organizations have set up camps in several regions in Sierra Leone to receive ex-child combatants and abductees and to provide both medical and trauma care.²⁷⁸ Furthermore, the Security Council's determination of this matter will not only affect the Sierra Leonean child combatants and their victims, but will be instructive to the continuing development of international criminal law itself.

2. *Need For a Quicker Response to Conflict*

It is striking to realize how long and to what depths this civil war progressed before the world seemingly noticed.²⁷⁹ Although the United

274. Most of these children were victims of severe trauma and coercion before they became victimizers themselves and the primary responsibility for crimes committed by these child soldiers should be placed squarely on the adults who placed the children into the conflict. *See id.*

275. *See* Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. Doc. A/44/736, art. 45(c) (1989). Article 39; *see also Report on Special Court, supra* note 10.

276. *See Report on Special Court, supra* note 10, ¶ 33.

277. *See* Lansana Fofana, *Sierra Leone-Children: Young, Armed and Dangerous*, World News Inter Press Service (July 1, 1997), at <http://www.oneworld.org/ips2/jul/sierraleone.html> (because ex-child combatants were provided no support structure, many were easily re-recruited by rebel forces when the conflict flared again after the 1996 Abidjan Accord peace process broke down); Paul Sterk, *Children Associated with War and Ex-Child Soldiers: Childcombattants or Child Soldiers in Sierra-Leone*, (1997), at http://www.euronet.nl/~p_sterk/sl-1997.htm (last updated July 9, 2000).

278. *See* Sterk, *supra* note 277.

279. *See* Long, *supra*, note 46. Jesse Jackson, in his role as the U.S. Special Envoy for the Promotion of Democracy in Africa, accused the U.S. government and the international media of substantially ignoring the crisis since the beginning of the conflict in 1991. *See id.* Jackson blamed the lack of news coverage on the fact that the world's attention was focused on the crisis in Kosovo. *See id.* Furthermore, the U.N. waited until 1999 to establish its official peace-keeping operation, UNAMSIL, in Sierra Leone. *See* U.N. Doc. S/Res/1270, *supra* note 71.

Nations received regular reports on the situation, countless lives were lost, homes were destroyed, and human beings were tortured, raped, and maimed while the U.N. and the international community either declined to act or delayed taking action.²⁸⁰

Both the United States and the U.N. have promised to act more quickly in responding to crimes against humanity. In his March 25, 1998, statement to Rwandan and U.S. officials and relief workers at the Kigali Airport in Rwanda, President Clinton acknowledged that the international community did not act quickly enough after the killing in Rwanda began.²⁸¹ He pledged to "increase our vigilance and strengthen our stand against those who would commit such atrocities in the future," and he called for "our best efforts to organize ourselves so that we can maximize the chances of preventing these events. And where they cannot be prevented, we can move more quickly to minimize the horror."²⁸²

The United Nations has repeatedly promised to move "from a culture of reaction to a culture of prevention."²⁸³ In its 4072nd meeting, the Security Council acknowledged that "[d]elayed action means delayed peace and prolonged suffering" and that timely action is critical if conflicts are to be addressed before they explode into violence.²⁸⁴ In an April 2000 Security Council meeting, it was stated that "the genocide in Rwanda happened before the eyes of the international community and a United Nations peacekeeping force."²⁸⁵ At that meeting, the Foreign Minister of Canada proclaimed that the best way to honor the victims of the Rwanda genocide was to make a firm commitment to never again turn away from civilian victims of armed conflict.²⁸⁶ However, the Namibian representative noted that, despite the experience with Rwanda, some of the United Nations processes that contributed to the inaction in Rwanda were still being employed when the U.N. considered taking action on various conflict situations.²⁸⁷ In the 4081st meeting of the Security Council, the question was asked, "why did it take six months to get the United Nations moving in Sierra Leone?"²⁸⁸ So, the question remains, how will this prevention and quicker response be accomplished?

According to the Secretary-General, the United Nations early warning capabilities have been significantly improved in recent years.²⁸⁹ Therefore, the

280. See Wendy Lubetkin, *UNHCR Warns Of Looming Humanitarian Disaster In Freetown*, The United Nations High Commissioner for Refugees (UNHCR), January 12, 1999, available at http://www.eucom.mil/africa/sierra_leone/usis/99jan12.htm.

281. See USIS Washington File, *Transcript: Clinton Meets With Rwandan Genocide Survivors*, March 25, 1998, available at <http://www.usinfo.state.gov/regional/af/prestrip/lw980325a.htm>.

282. *Id.*

283. Press Release SC/6759, 4072d mtg, November 29, 1999.

284. *See id.*

285. Press Release SC/6843, 4127d mtg, April 14, 2000.

286. *See id.*

287. *See id.*

288. Press Release SC/6771, 4081st mtg, December 15, 1999.

289. *See Africa Report*, *supra* note 11, ¶ 16.

critical concern today is not so much the need for early warning, but rather the need to follow up early warning with early and effective action on impending crises.²⁹⁰

3. *A Suggested Multi-level Strategy for Early Intervention*

The Security Council and other U.N. organs must first facilitate an efficient and effective system of conflict prevention via better communication and coordination within and among all United Nations departments and organs, as well as local and regional peacekeeping organizations. Equally important, however, is the establishment of a system, beginning at the local level, to facilitate early warning and prevention of conflicts. Furthermore, since the majority of conflicts, particularly in Africa, have economic and social causes, post-conflict reconciliation, peace-building, and reconstruction programs are vital.²⁹¹

The strategy begins at the base level, which should include the local enforcement in each country working along side international agencies committed to human rights and peace. In the midst of claims of mismanagement and waste in both the United Nations and other International Humanitarian groups, there are a number of groups that are well-managed and effective in their efforts.²⁹² These groups should gather information on their own, as well as collect and funnel information and resources to a committee designated for the collection and investigation of allegations of human rights violations or corruption from government or business entities. The groups working together in the base level would include domestic citizen groups, business groups, and regional and international institutions such as various non-governmental organizations and United Nations organizations. Each of these groups would watch for the signs of instability and threats to peace in a different way and with different results. These groups would also facilitate the rebuilding and strengthening of domestic economic and political policy and practices.

The committee would become an information center to consolidate the efforts and centralize the process, receiving and responding to information from the various groups and funneling that information to the next level of the hierarchy: an international administrative agency. This administrative agency would hear disputes concerning possible corrupt practices, human rights violations, or claims of the threat of a violent political uprising. The agency should be well publicized and should also allow individual citizens to bring

290. *See id.*

291. *See* Press Release SC/6759, *supra* note 283.

292. *See* Keith B. Richburg, *In Africa, Lost Lives, Lost Dollars: Incompetence, Negligence, Maladministration Among U.N. Woes Series: The U.N. EMPIRE: FAILING THE NEEDIEST*, WASH. POST, September 21, 1992, at A01, available at WL 2165892. Two groups notable for their effective service in areas of crisis are Save the Children and the United Nations organization, UNICEF. *See id.*

credible claims. The agency would then be authorized to conduct investigations, broker negotiations, or request assistance from the next level: The U.N. Security Council, the International Court of Justice, or if established, the permanent International Criminal Court.

Facilitating an expedited and organized channel for obtaining information from the people who can first detect the beginnings of these hostilities would not only alert the organizations that have the power to intervene and prevent the human rights abuses in the first place, but may result in earlier intervention to prevent the needless devastation that occurred in the Former Yugoslavia, Rwanda, and Sierra Leone, as well as the atrocities that have occurred in other nations.²⁹³ Ad hoc international courts can play a vital role in bringing justice and, ultimately, peace to these arenas of destruction. Whenever possible, national courts should prosecute persons within their boundaries who violate international criminal law. However, there is an increase in situations where national courts are not capable of trying these individuals, as in the situation in Sierra Leone where the judicial system has been largely decimated as a result of the civil war.²⁹⁴ There are also nations who refuse to prosecute persons in their jurisdiction accused of committing war crimes or crimes against humanity. In both these situations, a justice effort utilizing either an ad hoc or permanent international criminal court is needed.

4. *The Special Court for Sierra Leone*

The Special Court should be utilized as a vital part of an integrated whole—a part of everything the United Nations and local, regional, and international organizations are doing in Sierra Leone.²⁹⁵ While this has been acknowledged by the United Nations,²⁹⁶ those words of acknowledgement must be turned into action. It is imperative that these efforts be coordinated and supported with funding from the international community, with the enforcement of security by international and regional peacekeeping groups, with international condemnation of foreign support of illegal diamond smuggling and rebel activity, and with adequate support and oversight of the justice effort by the United Nations.

It is also of utmost importance that the Court for Sierra Leone be established in a way that will insure efficiency and neutrality. Historically, successes realized by international tribunals often occurred in spite of, not

293. See Press Release SC/6759, *supra* note 283.

294. See generally *Mission Report*, *supra* note 30. The same was true for Rwandan national courts where, following the conflict, “only about 20 per cent of the judiciary survived, and courts lacked the most basic resources.” See Reis, *supra* note 171, at 649. Of the Rwandan attorneys surviving the conflict, most refused to represent genocide suspects. See *id.*

295. See generally *Mission Report*, *supra* note 30; *Report on Special Court*, *supra* note 10.

296. See generally *Report on Special Court*, *supra* note 10.

because of, the influence of the international community—by nations acting independently, in concert, or through U.N. channels.²⁹⁷ M. Cherif Bassiouni states that “even when tribunals and investigative commissions were established, their professed goal—the pursuit of justice by independent, effective and fair methods and procedures—was seldom upheld. Instead, the establishment and administration of these bodies were . . . , in varying degrees, controlled or influenced by political considerations”²⁹⁸ He further states that bureaucratic and financial methods have often been used “to direct, curtail, check, and ultimately terminate these bodies for political reasons.”²⁹⁹

Most frequently in these earlier tribunals, politics was favored over justice.³⁰⁰ Politicians often intentionally allowed time to pass so that international public interest and pressure eroded, thereby freeing them from the obligation to insure the success of the justice effort.³⁰¹ In order to learn from the past and avoid its mistakes, the Security Council must not only take measures to consistently uphold its mandate to operate Sierra Leone Court efficiently and neutrally, but it must appear to do so to the people of Sierra Leone. If this can be achieved, it may be possible to restore faith in the rule of law and in orderly and accountable governance to the citizenry of Sierra Leone.

If successful, this Court, as well as the Tribunals of the Former Yugoslavia and Rwanda, will continue to play a vital role in the evolution of international law itself. The body of international criminal law is already being significantly advanced through the Yugoslavian and Rwandan Tribunals, and will be further developed by the Sierra Leone Special Court. The focus of any effective justice effort, however, will move beyond the adjudication of international crime to the strengthening of individual nations as well as the world community.

The success of this Special Court will be a significant step in stabilizing Sierra Leone, but this Court, and any future international criminal court, will be far more effective if combined with and utilized as a part of a comprehensive domestic and international process of accountability, reconstruction, and reconciliation. The international community should seek to not only hold accountable those individuals most responsible for human

297. See M. Cherif Bassiouni, *From Versailles To Rwanda In Seventy-Five Years: The Need To Establish A Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 43-44 (1997). Bassiouni blames much of the financial and administrative woes of the Yugoslavian and Rwandan Tribunals on the fact that the Security Council chose to fund them through the General Assembly regular budget. See *id.* If the Security Council had funded the tribunals through its peacekeeping budget, they could have avoided going through the various stages of the General Assembly's budget procedures, which opens the door to political influence. See *id.* Furthermore, the subordination of the tribunals to U.N. headquarter's personnel has often hampered and frustrated the investigatory and prosecutorial efforts of the tribunals. See *id.* at 44, 48.

298. *Id.* at 12.

299. *Id.*

300. See *id.* at 41.

301. See *id.* at 12.

rights atrocities, but to also identify and confront the foundational problems that led to the instability and hostilities in the first place.³⁰²

An important project that can be utilized as a precursor or alternative to the Special Court is the Truth and Reconciliation Commission provided for in the Lome Peace Agreement.³⁰³ The Truth and Reconciliation Commission Act was enacted in February 2000, establishing the Commission and laying out its functions and administrative provisions.³⁰⁴ A commission workshop was held in Freetown during November 2000, during which participants declared their commitment to the truth and reconciliation process, laid out the goals of the Commission, the resources required, and made recommendations regarding the steps to be taken in order to get the Commission operational.³⁰⁵

5. *Moving Forward: Sierra Leone's Role—Africa's Role*

All nations in Africa, including Sierra Leone, must summon the will to take good governance seriously, assuring respect for human rights and the rule of law, strengthening democratization, and promoting transparency and

302. See Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997).

303. See *Lome Agreement*, *supra* note 46. This alternative was adopted as the means of bringing the human rights criminals of the South Africa apartheid era to accountability. See DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 19-32 (2000). Tutu described how the Truth and Reconciliation Commission compared the situation in South Africa to the situation during the Nuremberg trials, stating “[w]hile the Allies could pack up and go home after Nuremberg, we in South Africa had to live with one another.” *Id.* at 21. Further elaborating on the differences between the Nuremberg trial prosecutions and South Africa’s situation, Judge Ismail Mahomed, in ruling on a challenge to the constitutional validity of the South African law’s amnesty provision, quoted Judge Marvin Frankel:

The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode—trials of war criminals of a defeated nation—was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators. A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else. . . .

Id. at 21 (quoting MARVIN FRANKEL & ELLEN SAIDEMAN, *OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS* (1989)). South Africa embraced the Truth and Reconciliation Commission as a restorative justice, where the central concern was not retribution or punishment, but accountability, the redressing of imbalances, and the rehabilitation of both the victim and the perpetrator. See *id.* at 54-55. This was a high price to ask of the victims, but it has promoted a “relatively peaceful transition from repression to democracy” and resulted in stability and peace in that country. See *id.* at 55. Likewise, a Truth and Reconciliation Commission is a viable option for Sierra Leone, whether used as an alternative or as a counterpart to the Special Court.

304. The Truth and Reconciliation Commission Act 2000, Being an Act to Establish the Truth and Reconciliation Commission in Line With Article XXVI of the Lome Peace Agreement and to Provide for Related Matters, (2000).

305. See *Final Communique, Truth and Reconciliation Commission Workshop, Freetown, November 2000*, available at <http://www.sierra-leone.org/trc1100.html>.

capability in public administration.³⁰⁶ Sierra Leoneans must seek healing and stability as they press forward from the nightmare they have endured. That Sierra Leone has experienced little success to date in its stated commitment to the restoration of constitutionalism is understandable, given the corruption in its governance and the negation of democracy resulting from successive military rulers.³⁰⁷ However, Sierra Leone must learn from its past and not allow the same mistakes to be repeated in the future. It must establish sound guidelines and institutional mechanisms to insure against the abuse of power by public officials.³⁰⁸ It must elect persons to govern who will put away notions of sovereign, limitless power and accept the checks and balances that are necessary to an effective and stable democracy.³⁰⁹

Unless good governance is respected and disputes are responded to with political rather than military measures, neither Sierra Leone nor Africa as a whole will break free of the threat and reality of conflict that pervades the continent today.³¹⁰ "Respect for the institution of legality is a major function of any civilized and enlightened society."³¹¹ Furthermore, Africa must utilize the various reforms required for the promotion of economic growth until a solid economic foundation has been established.³¹²

CONCLUSION

The goals of this justice effort must be clear: to redress crimes against the innocent civilians of Sierra Leone, to restore peace and stability in the nation, and to initiate mechanisms designed to prevent the recurrence, anywhere in the world, of this type of senseless and unprecedented violence against humanity. The achievement of these goals requires a comprehensive and multi-layered regional and international strategy that will not only provide for a quicker response to already-escalating hostilities, but to foresee, on the basis of past experiences, the indicative signs and symptoms of social and political unrest in order to intervene and prevent such atrocities altogether.

The Special Court for Sierra Leone will play a central role in the effort to bring justice to the victims of the conflict and activate reconstruction in the nation. If it is successful, however, the Court will perform a function significantly beyond its stated purpose because as it builds upon the body of law developed through the Nuremberg and Tokyo trials and the tribunals for the Former Yugoslavia and Rwanda, it will add its own attributes to the tableau. Together, the errors, the missteps, and the insights gained will be instructive to the future.

306. See *Africa Report*, *supra* note 11, ¶ 105.

307. See Thompson, *supra* note 18, at 252.

308. See *id.*

309. See *id.*

310. See *Africa Report*, *supra* note 11, ¶ 105.

311. THOMPSON, *supra* note 18, at 251.

312. See *Africa Report*, *supra* note 11, ¶ 105.

Professor Wright described the evolving nature of international law as revealed in the concepts set forth in the Nuremberg Charter:

Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources . . . , there can be little doubt that international law had designated as [crimes against humanity] the acts so specified in the Charter long before the acts charged against the defendants were committed.³¹³

There can also be little doubt that the practices and body of law developed by these current International Criminal Tribunals will evolve, both substantively and procedurally, and will contribute to the mosaic of conventional and customary international law, which may one day be unified into a cohesive whole in a permanent international criminal court.

As M. Cherif Bassiouni has asserted, "Justice is no longer in contradiction to peace. . . ; now it is both justice and peace, because you cannot have one without the other."³¹⁴ The question remains, how will justice and peace be achieved for Sierra Leone? Although it will play a crucial role, the establishment of a Special Court to prosecute those most responsible for crimes against humanity is only a beginning. It will take many years of strong commitment, sensitivity, and labor on the part of the Sierra Leonean people and their chosen leaders to correct the societal imbalances, to demand and achieve accountability and transparency in governance, and to find healing through reconciliation. "Without adequate reparation and rehabilitation measures, there can be no healing and reconciliation, either at an individual or a community level. . ."³¹⁵

Sierra Leone lacks the resources to fully redress these massive wrongs against its citizenry. Therefore, the international community must support the establishment of the Special Court and the Truth and Reconciliation Commission, as well as programs making effective use of both international and Sierra Leone resources to facilitate the reconstruction process.

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313. BASSIOUNI, *CRIMES*, *supra* note 80, at 532-33 (quoting Professor Quincy Wright, *The Law of the Nuremberg Trial*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* at 623, 641).

314. M. Cherif Bassiouni, Transcript of *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 *AM. U. INT'L L. REV.* 1383 (1998).

315. TUTU, *supra* note 303, at 58.

* J.D. Candidate, 2001, Indiana University School of Law-Indianapolis. I would like to thank my family, especially my husband, Larry, and my son, Nick, for their patience and support throughout this process. I would also like to thank Professor George Edwards, who gave me the idea to look into this timely issue and the *II&CLR* editorial staff for their exceptional assistance.

