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HUMAN RIGHTS IN THE HORN OF AFRICA

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THE CONCEPT OF HUMAN RIGHTS

The framework of constitutional law and international law encompasses the notion of human rights, and human rights advocates strive to defend "human beings against abuses of power committed by the organs of state and at the same time to promote the establishment of human living conditions."[1] The international community applies numerous principles and rules of inter-state cooperation to provide favorable conditions both in peacetime and in wartime.

The following general principles describe human rights as an institute of international humanitarian law (the modern branch of international law):

a) "human rights constitute a judicial notion;"[2]
b) two branches of law pertain to international human rights, municipal and international;[3]
c) "human rights pertain to the citizen and to man;"[4]
d) the notion of human rights protects the fundamental rights and freedoms of citizens and men both in peace and during periods of armed conflict;
e) human rights contain a number of basic principles of which the most important are:
   (i) the principle of promotion of and respect for fundamental human rights and freedoms;
   (ii) the principle of equality and non-discrimination in all forms and manifestations;
f) the concept of human rights has a universal character;
g) human rights stem from the concept of the inalienable rights of man, which derive from natural law.

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1. Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, *in* 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 11 (Karel Vasik ed., 1982).
2. *Id.*
3. *See id.*
4. *Id.*

I. HISTORICAL BACKGROUND OF HUMAN RIGHTS

The concept of human rights dates back to ancient Greece,[5] when the ancient Greek philosophers first considered this issue.[6] In approximately 400 B.C., Sophist Antiphon argued that all people, Ellines and Barbars, the powerful and the ordinary, are equal in nature and thus have a common natural interest. Discrimination among peoples evolved from man-made laws not from nature. In nature, all people are equal in all relations.[7]

Roman law envisioned the concept of natural law from which flowed man's natural rights. One Roman philosopher asserted that "natural law is that which nature teaches to all living beings."[8] Natural law also correlates to *jus gentium*, which has two prongs. First, it describes the rights of non-Romans and "refers to those rights to which men are entitled wherever they go."[9] Second, it includes rights that emanate from international law.

One major facet of human rights is the right to equality "with regard to ownership and the acquisition and enjoyment of property."[10] Scholars and philosophers disagree about whether the right to own property is a natural right that is fundamental and inalienable. For example, Thomas Aquinas believed that the right to property was a fundamental and inalienable right that flowed from natural law.[11] Grotius, on the other hand, argued that the right to property did not derive from natural law but instead was introduced by man-made law.[12] However, Grotius concluded that the right to property correlates with the conception of natural law even if that right falls outside the sphere of natural law.[13]

Human rights law also originates from positive law documents.[14] These documents include charters, bills, petitions, and various declarations.[15] One of the earliest examples is the Magna Carta, also known as the Great Charter of Runnymede (Great Charter), which was acceded to by King John in 1215. The Great Charter guaranteed the freedoms of the church, restricted taxes and fines, and promised justice to all.[16] The Magna Carta declared in article 39: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to

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5. *See id.*
6. *See* 1 THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS II (General Wood Press, UNESCO 1982).
7. *See* HISTORY OF POLITICAL AND LEGAL STUDIES 56 (2d ed. 1988).
8. Szabo, *supra* note 1, at 12.
9. *Id.*
10. *Id.*
11. *See id.* at 13.
12. *See id.*
13. *See id.* at 14.
14. *See id.*
15. *See id.*
16. *See* OXFORD DICTIONARY OF LAW 177 (4th ed. 1997).

prison, excepting by the legal judgment of his peers, or by the laws of the land."[17] Another example is the Habeas Corpus Act of 1679, which delineated a basic component of human rights law. Habeas Corpus is "a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment is not illegal."[18] Persons wrongfully imprisoned may thereby challenge the legality of imprisonment without trial. The Habeas Corpus Act declared that if, upon an application for the writ, the court or the judge is satisfied that the detention is prima facie unlawful, the custodian must appear and justify it, failing to do so would mean that release should be ordered.[19] Finally, the Bill of Rights of 1689 also exemplifies a positive law document that provides a source of human rights; this document limited the power of the monarchy and declared some basic rights and freedoms for English citizens.[20]

The French Revolution and the Declaration of the Rights of Man and of the Citizen provide a starting point for the development of human rights in the modern sense of the term. The French Declaration of the Rights of Man and of the Citizen of 1789 and other similar documents distinguish between the rights of man as an individual and the rights of citizen as a member of society.[21] The rights of the man derive from natural law whereas the rights of the citizen derive from the positive law established by the state.[22] Because man may exist outside of society and because man's inherent rights derive from natural law, these rights are inalienable. The rights of the citizen, however, are positive rights granted by the positive law that the state as an organ of society develops.[23] The natural law rights that pertain to man are therefore superior to the rights given by the state to citizens because they are inalienable and cannot be taken away. The rights of the citizen derive from the state and are therefore dependent upon the state.

Another important document that contributed to the development of human rights law is the U.S. Constitution. The U.S. Constitution prescribes not only the basic elements of human rights expressed in the aforementioned positive law documents but also elaborates upon and advances these basic elements of human rights.[24] The United States prescribed the basic rights and freedoms of it citizens with the U.S. Constitution. Founding father Alexander Hamilton suggested that the Constitution is itself a Bill of Rights.[25] The first ten amendments to the U.S. Constitution are the Bill of Rights, and they protect individuals from the state.[26]

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17. Magna Carta, 1215, *available at* http://magna-carta.net/.
18. BLACK'S LAW DICTIONARY 284 (1998).
19. *See International Acts on Human Rights, in* COLLECTED DOCUMENTS 4 (1998).
20. *See id.* at 14-18.
21. *See* Szabo, *supra* note 1, at 15.
22. *See id.*
23. *See id.*
24. *See* U.S. CONST.
25. *See* THE FEDERALIST NO. 84 (Alexander Hamilton).
26. U.S. CONST. amends. I-X.

Human rights first emerged as an international concern in the aftermath of the atrocities committed against humanity by the Nazis during World War II. These cruel acts finally led to the "official" adoption of measures designed to ensure the international protection of human rights. Before and during World War II numerous proposals and privately sponsored measures were introduced which resulted in the Universal Declaration of Human Rights (UDHR). The U.N. Commission considered a total of eighteen drafts prior to adopting the UDHR in 1947. President Roosevelt's January 26, 1941, declaration on the Four Freedoms – freedom of opinion and expression, freedom of worship, the right to be free of material want, and the guarantee of life without fear – provided the impetus for the Atlantic Charter, drawn up on August 11, 1941, by Roosevelt and Churchill. The Atlantic Charter expanded upon the Four Freedoms and included the need for economic progress and social security. The Atlantic Charter was a precursor to the U.N. Declaration which incorporated the terms of the Atlantic Charter and elevated its stipulations to the level of international duties.[27] Thereafter, the UDHR has become the fundamental guideline for the adoption of regional documents on human rights. The UDHR, proclaimed by the General Assembly on December 10, 1948, recognizes the fundamental rights and freedoms of human beings in its preamble.[28] The preamble to the UDHR states that "the recognition of the inherent dignity and of the equal inalienable right of all members of the human family is the foundation of freedom, justice and peace in the world."[29]

The UDHR provided the guideline for the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention), which was adopted in Rome on November 4, 1950, and entered in to force on September 3, 1953.[30] The European Convention in its preamble directly alludes to the provisions and principles of the UDHR.[31] Similarly, the American Declaration of the Rights and Duties of Man[32] (adopted in Bogotá on May 2, 1948) in its preamble conveys the same idea that is expressed in article 1 of the UDHR. The American Declaration phrases the call for peace and international harmony as follows, "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another."[33]

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27. *See* Szabo, *supra* note 1, at 20-22.

28. G.A. Res. 217, A(III), U.N. Doc. A/810, at 71 (1948).

29. *Id.*

30. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, and 8 *which entered into force* on 21 Sept. 1970, 20 Dec. 1971, and 1 Jan. 1990, respectively.

31. *See id.*

32. American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, *adopted by* the Ninth International Conference of American States, Bogotá (1948): Novena Conferencia Internacional Americana, 6 *Actas y Documentos* 297-302 (1953).

33. *Id.*

The African Charter on Human and People's Rights (African Charter), adopted in Nairobi on June 26, 1981, also follows the lead of the UDHR.[34] The African Charter pledges to "eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights."[35] Other international instruments that follow the guidelines of the UDHR include the International Covenant on Civil and Political Rights (ICCPR),[36] adopted in 1966 and entered into force on March 23, 1976; the International Covenant on Economic, Social and Cultural Rights (ICESCR),[37] adopted in 1966 and entered into force on January 3, 1966; the Optional Protocol to the International Covenant on Civil and Political Rights,[38] adopted in 1966 and entered into force on March 23, 1976; and the Second Optional Protocol to the International Covenant on Civil and Political Rights,[39] aimed at the abolition of the death penalty and adopted in 1989. All of the aforementioned covenants and optional protocols are based on the UDHR.

The importance of the Optional Protocol to the ICCPR is that it recognizes the competence of the committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a state party of any of the rights set forth on the covenant.[40] However, in accordance with article 5 of the Optional Protocol, "[t]he Committee shall not consider any communication from an individual unless it has ascertained that: a) [t]he same matter is not examined under another procedure of international investigation; b) [t]he individual has exhausted all available domestic remedies."[41] Thus, the Optional Protocol provides an appeal to the U.N. for assistance with individual human rights violations only after all avenues of domestic relief have been pursued.

Because it is not easy for an ordinary person whose rights and freedoms are violated by state authorities to be able to submit all arguments necessary

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34. African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/61/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

35. *Id.*

36. G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

37. G.A. Res. 2200A(XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

38. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302, *entered into force* March 23, 1976 [hereinafter Optional Protocol].

39. G.A. Res. 44/128, 44 U.N. GAOR Supp. No. 49, at 207, U.N. Doc. A/44/49, *entered into force* July 11, 1991.

40. *See* Optional Protocol, *supra* note 38, art. 1 (explaining that a party to this agreement "recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant").

41. *Id.* art. 5, § 2(a),(b).

to convince a U.N. committee that he has exhausted all available domestic remedies, the fates of many victims have remained the prerogative of the state authorities. Although there are many other international and regional conventions that pertain to the protection of human rights, the aforementioned instruments (the UDHR and its progeny) are the basic and fundamental instruments for the further development of human rights at the universal and regional level. Other universal and regional conventions or declarations recently adopted are derived from the basic principles espoused in the UDHR.

II. HUMAN RIGHTS DEVELOPMENTS IN ETHIOPIA, ERITREA, SUDAN, AND SOMALIA

Human rights have constantly been violated in African countries, especially so in East African countries irrespective of the existing international and regional instruments dedicated to human rights. Almost no good news is heard concerning human rights in East African countries.

A. Human rights in Ethiopia

In comparison with the prior Ethiopian government the Transitional Government of Ethiopia (TGE) has effectuated significant improvement of the human rights situation in the country since the overthrow of the government of Colonel Mengistu Haile Mariam in May, 1991. The overthrow of the Mariam regime ended seventeen years of rule of the Dergue. In its early days, the TGE adopted a transitional charter (the Charter) which guaranteed basic human rights, and the Government ratified major international human rights instruments and permitted the emergence of more political parties and other associations than ever before in the history of Ethiopia. When the government issued the Basic Freedom of the Press Proclamation,[42] about two hundred licences were issued for independent journals and newspapers. In addition, the TGE took initial steps to support rehabilitation of former refugees returning from neighbouring countries.

The Government also acted effectively through its Relief and Rehabilitation Commission to avert the imminent famine, which threatened a great number of people in 1994. The systematic "disappearances" and massive extra-judicial executions that characterised the Dergue regime were no longer part of the general human rights situation in Ethiopia.

The TGE also adopted the Peaceful Demonstration and Public Political Meeting Proclamation,[43] which guarantees the right to peaceful demonstration and public political meetings.[44] However – unlike the economy which was

42. *See* Proclamation N34/1992.

43. Proclamation N3/1991.

44. *See* HUMAN RIGHTS WATCH, WORLD REPORTS OF 1995 16 (New York, Washington, Los Angeles, Brussels).

doing relatively well and where for the last seven years the average development of gross national product reached more than 7% and 10% in 1996[45] – the political situation in Ethiopia appeared to be deteriorating, and tension was mounting. Hundreds of thousands of former soldiers were left without means of support. Proclamation N3/1991 was largely ignored or misinterpreted depending on the region in which an application was made.

Although the law did not require political parties to obtain permission to hold public meetings, permits were, nevertheless, generally required. Furthermore, permission was often denied or delayed to the extent that parties such as the Ethiopian Democratic Union Party (EDUP), the All Amahara People's Organisation (AAPO), and the Council of Alternative Force for Peace and Democracy in Ethiopia (CAFPDE), did not have the time to organize effectively or to inform the public of their activities.

The harassment of political opponents extended to personal intimidation and harassment of party members and officials. Members of the Sidama Liberation Movement (SLM) and the Ogadeni National Liberation Front (ONLF) were not only arrested and detained with out charge or trial but were also killed. A number of AAPO members were held at *Alem Bekagne* (World's End), the central prison in Addis-Ababa, on different charges and without bail. Many members and supporters of Oromo Liberation Front (OLF), the main organization that helped the Ethiopian People's Revolutionary Democratic Front (EPRDF) form the transitional Government in 1991, were still detained in Hurso, Eastern Ethiopia.[46] Unequal access to the mass media was another major concern in the democratisation process. Pursuant to a council of representative's decision, all of the twenty-five or more political parties that were legally registered in May 1994 were to be given regular access to television and radio air time. However, this decision was not honoured.

On June 5, 1994, when elections were held for the constituent Assembly, the body responsible for debating and enacting the draft constitution, the major opposition political parties boycotted the elections for the Assembly on the grounds that they had been excluded from participation in the drafting of the constitution. Consequently, candidates representing the EPRDF won 464 of the 548 seats (84.7%). It became increasingly difficult to distinguish between the EPRDF as a political party and the EPRDF as the government in power.[47] The government's ongoing suppression of freedom of the press heightened the feeling of anxiety, fear, and confusion in the country. In the first six months of 1994, a number of journalists were either detained or subjected to fines for their writings that criticized the government. The press law (Press

45. *See Federal Democratic Republic of Ethiopia, in* ETHIOPIA TODAY, ETHIOPIAN EMBASSY TO RUSSIAN FEDERATION 3 (1998).

46. *See* HUMAN RIGHTS WATCH, WORLD REPORT, *supra* note 44, at 17.

47. *See id.* at 18.

Proclamation N/1992)[48] contains such vague and ambiguous language regulating the content of what journalists may write that it can easily be abused and manipulated by the government to harass journalists by bringing criminal charges against journalists who are critical of government policies or action and by setting bail too high for them to be discharged awaiting trial.[49]

The 1997 Report of the U.N. Special Rapporteur on Torture documents the ongoing human rights violations and consistent allegations of torture, particularly as perpetrated against persons suspected of involvement with the OLF.[50] Extra-judicial, summary, or arbitrary executions, as well as other human rights violations occurred in secret detention centres,[51] although the Ethiopian government reportedly denies the existence of such centres. Ethiopia is still not a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which was adopted by the General Assembly in 1984 and entered into force on June 26, 1987.[52] Furthermore, Ethiopia is still not a party to the Optional Protocol to the ICCPR,[53] which permits individuals who claim to be victims of violations of the rights set forth in the ICCPR to submit communications containing allegations of these violations to the U.N..

Much concern centers on the violations and abuses of human rights in Ethiopia by a minority that currently holds all political power under the pretext of the current Ethiopian constitution, which grants almost all political power to the Prime Minister who belongs to the leading opposition political party in Ethiopia. Many observers blame the centralized means of government (adopted by both the Imperial and Dergue Regimes) for the persistent human rights abuses. However, the TGE government began implementing a policy of decentralizing authority to regional administrations. The TGE implemented this policy by dividing Ethiopia into nine Subjects of Federation (collectively known as the Federation) and distributing authority accordingly. The foremost challenge in Ethiopia with regard to this redistribution of authority is finding a way to bring about participatory development to ensure not only that the fruits of development are equitably distributed in the country, but that people, especially those at the regional, *woreda* (district), and grass roots levels are given a chance to participate in the determination of their own destiny.

After the formation of the Federation, many local and/or ethnic groups expressed dissatisfaction. However, on May 6, 1998, war broke out between Ethiopia and Eritrea, and the Ethiopian people shifted their attention from

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48. Proclamation N34/1992.

49. *See id.* art. 2.4(C).

50. *See* U.N. ESCOR, 54th Sess., Item 8(a), at 16, U.N. Doc. E/CN.4/1998/38 (1997), *available at* http://www.hri.ca/fortherecord1998/documentation/commission/e-cn4-1998-38.htm.

51. *See id.*

52. G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

53. Optional Protocol, *supra* note 38.

dissatisfaction with the political practices of the government toward the war. The Ethiopian people fought the Eritreans for the protection of their territorial integrity.

The active participation of all Ethiopian people and the contribution of materials and moral support enabled the end of the war after nineteen intense fighting days (from May 12 through May 31, 2000). Since then, some progressive developments have taken place. For example, on June 18, 2000, the Agreement on Cessation of Hostilities between Ethiopia and Eritrea was signed under the oversight of the Current Chairman of the Organization of African Unity (OAU), Abdelaziz Boutefilka.[54] At the request of both parties, the Security Council created the United Nations Mission in Ethiopia and Eritrea (UN MEE)[55] to further the OAU brokered peace process, and the two countries signed a peace agreement in Algiers on December 12, 2000.[56] Since then, the efforts of the Red Cross and the commitment of both governments have made possible the exchange of prisoners of war, and many former prisoners have been reunited with their families and loved ones.

However, a serious problem awaited those prisoners who returned back home – people displaced as a result of war. "[T]he government of Ethiopia and the U.N. Country Team estimated that 349,837 people had been displaced as a result of the conflict in the northern regions of Tigray and Afar" in January, 2000.[57] Moreover, the drought exacerbated the complex emergency situation in Ethiopia, and over ten million people, including over 1.4 million children under the age of five, need emergency food assistance.[58]

In light of the aforementioned problems (the infringement of basic human rights such as freedom of expression, the right to be free from torture, and the right to be free from hunger), the current Ethiopian government must maintain the federalist principle that separates and divides power in order to provide checks and balances on the exercise of authority. Furthermore, the government should strive to minimize human rights violations. If something is not done to address human rights violations in Ethiopia, the current conditions could cause mass strikes and demonstrations which might result in economically, socially, and politically catastrophic consequences. Active Ethiopian political participants should enhance the human rights situation in Ethiopia and try to revise their policies for the well-being of the Ethiopian people.

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54. *See Report of the Secretary-General on Ethiopia and Eritrea*, U.N. SCOR, at 10, U.N. Doc. S/2000/643 (2000).

55. *See* U.N. SCOR, 55th Sess., 4181st mtg., at 10, U.N. Doc. S/RES/1312 (2000).

56. *See* Jos van Buerden, *End in Sight to a Devastating War?*, *at* http://www.oneworld.org/euconflict/sfp/part2/132_.htm (last visited May 26, 2001).

57. *Report of the Secretary-General on Ethiopia and Eritrea*, U.N. SCOR, 55th Sess., S/2000/879.

58. *See id.*

B. Human Rights in Eritrea

As with Ethiopia, violations continue to occur in the recently emerged state of Eritrea. The human rights of the people of Eritrea continue to be violated even worse than in Ethiopia. The people of Northern Ethiopia and those in highland Eritrea are one in the same people, separated only by historical accident. From 1890 to 1941, Eritrea was an Italian colony. In 1941, it became a British territory and was governed by Britain until 1952, when Eritrea was federated with Ethiopia. Emperor Haile Selassie abrogated the Federation in 1962. Some scholars believe that the abrogation of the Federation sparked the 30-years War of Independence. De facto independence was achieved in May, 1991, and was formalized in 1993 following a referendum concluded in Eritrea.[59]

The Eritrean People's Liberation Front (EPLE), also known as the Sha'ebia, evolved from the ranks of the Eritrean Liberation Front (ELF), also known as the Jebha. Although the EPLE was formed as a democratic alternative to the ELF, it never developed a democratic culture. The EPLE was bent on destroying the ELF right from the start, and it was never willing to entertain the existence of other movements in Eritrea. When the referendum was announced, there was a great deal of euphoria and merry-making. But in reality, Eritrea is ruled by a relentless dictator who rules with an iron fist. There is no respect for basic human rights, no freedom of speech, and no freedom of expression and association. The treatment of disabled Eritrean veterans provides a good example. These disabled veterans took to the streets to protest the inhuman conditions in which they were living, and they were mowed down with gunfire without mercy and many were left dead. Many diverse nations and nationalities comprise the population of Eritrea, but freedom is curtailed. There are no political parties, and there is not an elected government.[60] Since it gained its independence, Eritrea has not joined the basic international conventions dedicated to human rights. Eritrea is a party to only two conventions – the Convention on the Rights of the Child[61] and the Convention on the Elimination of All Forms of Discrimination Against Women.[62] Eritrea recently emerged in the world as a newly sovereign state. However, instead of building its statehood internally by securing social guarantees that protect human rights and externally by establishing good political and economic relations with neighbouring countries, Eritrea authorizes itself as a hero of wars against neighbouring countries. The war between Ethiopia and Eritrea resulted in a catastrophic end for Eritrea, and the

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59. *See* 4:2 ETHIOPIAN SCOPE 7 (1998).

60. *See id.* at 10-11.

61. G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49), at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

62. G.A. Res. 34/180, U.N. GAOR Supp. (No. 46), at 193, U.N. Doc. A/34/180, *entered into force* Sept. 3, 1981.

country should focus on its existence as one of the sovereign states of the world rather than the heroism of a bygone war.

C. *Human Rights in Somalia*

Following the collapse of the central government and consequently law and order, wide spread famine crept over Somalia in 1992. The U.N. Commission on Human Rights spotlighted human rights concerns in Somalia. "The resolution created a mandate for an independent expert to report on the human rights situation in Somalia and to study ways and means of best to implements a programme of technical assistance."[63]

Refugees and internally displaced persons are a matter of concern in Somalia as in other East African countries. In November and December, 1997, torrential rains caused flooding in some areas in the South, which was already burdened with an influx of international displaced persons. United Nations agencies noted in December, 1997, that the total number of displaced persons was at least 230,000 and the number of people who remained at risk was approximately 1,000,000.[64] By January 5, 1997, the death toll reportedly reached 1904.[65] Most Somalis are either refugees in countries such as Djibouti, Ethiopia, Kenya, or Yemen or displaced within Somalia due to the mass displacement caused by flooding and famine.[66] International relief agencies asserted that they would enhance relief efforts aimed at assisting internally displaced persons if the donor community would generate greater interest in such programs.[67]

Somalia lacks a centralized government, as it has for several years. In 1997, disturbing attacks against international humanitarian works hampered relief efforts in some parts of Somalia. One particularly disturbing incident, which occurred in Baidoa, involved the assassination of thirty-five year old Dr. Ricardo Marques of Portugal on June 20, 1997. Dr. Marques worked for the international humanitarian agency, Médecins Sans Frontiéres (MSF). Another foreign doctor who accompanied Dr. Marques escaped without harm, and the authorities could not determine the reason for the murder. As a result of this tragic incident, MSF suspended its activities in Bardera, Baidoa, and Tiaglo. The Somalia Aid Coordinating Body (SACB) (made up of donors, U.N. agencies, international nongovernmental organizations (NGOs), and other international organizations) reacted by demanding the government bring the murderers to justice and "recommended the withdrawal of all the aid agencies

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63. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, U.N. ESCOR, 54th Sess., Item 10, U.N. Doc. E/CN4/1998/96 (1998).

64. *Id.*

65. *Id.*

66. *See id.*

67. *See id.*

from the region with immediate effect and the suspension of all activities."[68] Based upon this recommendation, all humanitarian agencies withdrew from Somalia.[69] The absence of an organized and centralized government in Somalia and the constant flow of refugees to the neighboring countries gradually caused the country to lose some of its identity as a state, and the absence of a communication infrastructure contributed to a lack of information about Somalia being dispersed to the international community.

To some extent, the status of women in Somalia has become parallel to the status of men. Because most Somali men were involved in the fighting, many were killed, became refugees, or became internally displaced persons. This led to dissolution of family unity and caused the loss of the traditional male as an economic provider. Somali women stepped in to support their families, and many became heads of households.

The U.N. independent expert, Special Rapporteur Mona Rishmawi, studied the justice system in Somalia and concluded that there were "no uniform rules governing, private, social or economic behaviour in Somalia . . . ."[70] Somali communities do not apply consistent rules; the rules of the various communities are based upon either the traditional Shari'a law or upon Somali law as applied by former President Said Barre's regime, the prior regimes (before the Barre takeover in 1969), or a combination of these laws.[71] Furthermore, Special Rapporteur Rishmawi noted that uniformed forces carry out most regular police functions in Hargeisa, the unrecognised breakaway state of "Somaliland." The regular police force, though quite weak, still exists, and it continues efforts to ensure peace while performing daily law enforcement activities.[72]

Despite the difficult conditions, Somali human rights groups continued their efforts to alleviate the suffering and assist the U.N. Special Rapporteur. The two main Somali human rights groups are located in "Somaliland" and northern Mogadishu. In Somaliland, the Horn of Africa Human Rights Watch Committee and the Guardians for Civil Liberties assisted the U.N. Special Rapporteur. In addition, these groups monitor the human rights situation, provide aid to victims of human rights violations, and intervene with the authorities. In Mogadishu, human rights are advocated by the Dr. Ismail Juma'le Human Rights Organization.[73] According to the independent expert, these groups receive little funding and have limited resources while operating under arduous conditions. The recently established transitional government of Somalia faces a tremendous task in addressing the current human rights abuses in that country.

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68. *Id.*
69. *See id.*
70. *Id.*
71. *See id.*
72. *See id.*
73. *See id.*

In order to normalize the situation and rebuild the nation, the transitional government of Somalia must facilitate the security of the country and permit international agencies, humanitarian organizations, and donor governments to deliver humanitarian assistance to all war-affected civilians. In addition, the government must put forth an effort to proactively attract donors and volunteers who will assist the nation and its people and provide support.

D. Human Rights in Sudan

The human rights situation in Sudan continues to worsen. Sudan is governed by a militaristic group called National Islamic Front (NIF) whose policies have dismantled civil society. It is through force that laws and policies which discriminate against non-Muslim men and women are enforced. Even civil and political rights for Muslim men are not recognized because they were suspended by a Draconian set of emergency rules established when the Juba seized power in 1989. While under the rule of the NIF, the human rights situation in Sudan has continued to worsen. The current laws ban political parties and independent trade unions, and there is no prospect for freedom of association or expression under the present regime. In addition, torture and arbitrary detention pervade the human rights picture in Sudan, and many Sudanese; specifically those who are black Christians living in southern Sudan, are enslaved and abused.[74]

As the largest country in Africa, Sudan is ethnically and religiously diverse. However, the current government seems determined to impose one mold of Arabism and militant Islam on the population. The government's policy is to impose its version of Islamic Shari'a law on both Muslim and non-Muslim segments of the population. The government's strategy is a "calculated plan . . . to make the community expression of the Christian faith extremely difficult, particularly by preventing Christians from having places of worship and by destroying the places they have built."[75]

The government also developed an urban clearance program to remove the large non-Muslim population of war-displaced southern and Nubian peoples from the greater Khartoum area to isolated sites, back to their home areas, or in displaced persons camps.[76] With little or no notice, the displaced, who initially fled for safety and work in the north, were forced home to the south only to find their homes destroyed without compensation as the result

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74. *See Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories, Situation of Human Rights in the Sudan*, U.N. ESCOR, 54th Sess., E/CN.4/1998/66 (1998) [hereinafter *Situation of Human Rights in the Sudan*].

75. *Id.*

76. *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1998 SUDAN 3 (1998), *at* http://www.hrw.org/hrw/worldreport/Africa-12.htm (last visited May 28, 2001).

of this clearance program.[77] The clearance program also forces the displaced southern Sudanese, mainly black Nubian Christians, to live in areas that lack a sufficient water supply and are devoid of employment opportunities.[78] The security forces killed the squatters who protested the government's attempts to destroy their settlements and remove them to primitive sites in the desert far outside Khartoum.

The primary goal of the government is to promote its policies of "Arabization" and "Islamization."[79] Under the pretext of the program, the NIF government flouts child welfare laws and procedures and gives boys Muslim names and religious instruction in Islam regardless of the fact that most boys affected by the laws do not come from Muslim families. The northern political opposition that formerly found expression in political parties remains severely repressed; parties, leaders, and activists who do not belong to the NIF are banned.[80] Many people who have remained in the country, including those who associated with political parties other than the NIF, doctors, lawyers, professors, students, and engineers, are periodically arrested.[81] These arrests often occur without charges, and those who are arrested are frequently mistreated or tortured.[82] The government banned all of the independent press after the 1989 coup.

The government has denied human rights organizations the right to monitor since 1989; both the Sudan Human Rights Organization (SHRO) and the Bar Association were effective Sudanese human rights monitors prior to the 1989 coup. The SHRO since then has been banned, and the Bar Association was taken over by government supporters in 1993. Therefore, the Sudan Bar Association advocates the official government policies and no longer serves as an independent human rights voice.[83]

International communities have tried to stabilize the human rights situation and have criticized the government of Sudan for its frequent violations of human rights. The United States, the U.N., and the European Union (EU) condemned the frequent violations of human rights and expressed

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77. *See id.*

78. *See id.*

79. Interview by Geoff Metcalf with Dr. Peter Hammond, Director of Frontline Fellowship (May 27, 2001), *available at* http://www.worldnetdaily.com/news/article.asp?22976.

80. *See* HUMAN RIGHTS WATCH WORLD REPORT 1998, *supra* note 76, at 1. However, some members of the NIF recently advocated a return to a multi-party system. *See id.*

81. *See Situation of Human Rights in the Sudan, supra* note 74.

82. *Id.* The report detailed torture at the hands of security forces that included:

> beatings, electric shocks, exposure to the sun for hours which, in the given conditions, can result in disfigurement and other lasting skin diseases, pouring of cold water on the naked body, rape in custody and threatening with rape, deprivation of sleep, refusal of food and medical treatment and forcing some detainees to witness the torture of others.

See id.

83. *See* HUMAN RIGHTS WATCH, WORLD REPORTS 1995 55 (1995).

concern over the indiscriminate bombing of civilians and the use of violence by the government to repress the demonstrators. Human Rights Watch/Africa has maintained pressure on the government of Sudan by publishing and widely disseminating a series of reports on human rights abuses in the war zones and in the north and by advocating a program of U.N. human rights monitors to promptly investigate and intervene with the government and the rebels on human rights issues.[84]

Despite the international community's efforts to enhance the human rights condition in Sudan, the violations and abuses of human rights have continued. There were numerous reports of involuntary or enforced disappearances, slavery, extra-judicial killings, summary executions, torture, and detention without due process of law, which took place between July and August 1992 in Juba.[85] These violations and atrocities continue, and the international community has not effectively addressed the situation.[86]

The Sudanese Army battled the Sudanese People's Liberation Front Army (SPLA) in Juba and the surrounding areas in June and July, 1992. Government forces repelled the SPLA attack. Observers noted that security services arrested hundreds of military and civilian personnel after the battle ended; those detained included Sudanese nationals working with international aid agencies as well as international workers.[87] The Special Rapporteur, in his 1994 report to the Commission on Human Rights, documented these incidents. Several employees who worked in Juba for the United States Agency for International Development (US AID), the European Commission, the United Nations Development Programme (UN DP), and the United Nations Children's Fund (UNICEF) were either killed during the fighting or sentenced to death within a few months after the fighting ended.[88]

The institution of slavery continues into the Twenty-first Century and thrives in the Sudan, where the government utilizes this atrocious institution as a means of advancing its policies.[89] The oil fields in northern Sudan provide a financial motivator for the NIF government, which uses the ethnic cleansing policy as a tool for clearing the oil region of the indigenous population.[90] Since the Sudanese government continues to perpetuate

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84. *See id.* at 56-57.

85. *See Situation of Human Rights in Sudan, supra* note 74.

86. *See* Interview, *supra* note 79 (listing atrocities that include systematic rape, killing, torture, mutilation, and ethnic cleansing pursuant to the government sanctioned *jihad*, or holy war, in the Sudan).

87. *See Situation of Human Rights in Sudan, supra* note 74.

88. *See id.*

89. *See* Elizabeth Olson, *Alarm Is Sounded on Slavery Labor Agency Reports Rise in Trafficking of People*, INT'L HERALD TRIB., May 25, 2001, *available at* WL 4855049 (reporting that slavery continues and is openly practiced in the Sudan and Sierra Leone).

90. *See* Eric Reeves, *Rapacious Instincts in Sudan: Oil Companies Are Partners With Khartoum in Waging a Cruel Civil War*, 272:22 THE NATION (2001), *available at* 2001 WL 2132616 (maintaining that the oil companies involved as business partners with NIF forces in Khartoum are accomplices to the travesties in the Sudan).

atrocities against the civilian population, the U.N. vote that resulted in "booting the United States off the Human Rights Commission [HRC] . . ." while at the same time voting the Sudan on to the HRC seems sadly ironic.[91] Allowing the Sudan to participate in presiding over human rights violations is analogous to letting the proverbial fox watch the chicken coop.

The Sudanese government continues its gross violations of human rights and its policies exacerbate rather than alleviate the problem. Rather than promulgating policies that would improve the human rights situation, build public confidence, encourage community cooperation, and attract international volunteers who could aid the Sudanese people, the government turns a blind eye to the suffering that it imposes. These egregious human rights violations require immediate action, both by the Sudanese government and the international community.

The international community has taken some positive steps toward alleviating the human suffering in the Sudan, however more action is urgently needed. The international community should avoid repeating the mistake that it made in Rwanda when it allowed (by not implementing sufficient preventative procedures) the extremely cruel action taken by Hutu extremists on April 6, 1994 against the Tutsi minority in Rwanda. Within fours months of that date, between a half million and a million people, most of whom were Tutsis, were massacred.[92] The human rights violations in Rwanda are beyond the scope of this commentary, however, they bear mention because they illustrate how easily a human rights situation can spiral out of control when the international community delays taking adequate steps to intervene and thereby preclude extreme and monumental loss of human life.

IV. CONCLUSIONS AND RECOMMENDATIONS

Human rights constitute basic rights and freedom to which every human being is entitled. The state should protect against breaches of these rights by enforcing laws that pertain to the protection of human rights. Laws that protect human rights include national constitutions as well as international law, which provides universal protection. Human rights are fundamental rights that derive from natural as well as positive law. One positive law instrument that articulates basic human rights is the UDHR. Other positive law documents that express basic human rights are the French Declaration of the Rights of Man and of the Citizen of 1789 and the U.S. Constitution and Bill of Rights. The Universal Declaration of Human Rights of 1948 is the product of humane minded interpretations by people (including philosophers, theologians, and politicians) who aimed at preventing future atrocities similar to the Holocaust

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91. *The U.S. and the UN: Anti-American Gestures Are Part of a Sustained Ideological Assault*, THE NAT'L POST, May 28, 2001, *available at* 2001 WL 22269980.

92. *See* INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 313 (Newman & Weissbrodt eds., 1996).

from recurring. The UDHR is a proclamation outlining basic human rights; however, it is not binding international law. Though it is not binding, the UDHR has become the precedent and baseline for many international and regional conventions on human rights currently in effect. For example, the rights articulated in the UDHR provided the foundation for the ICCPR and the ICESCR. The UDHR also influenced various regional instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms[93] and the American Convention on Human Rights.[94] The UDHR principles also inspired the African Charter on Human and People's Rights of 1981.[95] The universal human rights principles of the UDHR propelled the regional human rights instruments, and the rights that these instruments delineate stem from the basic rights described in the UDHR. If the UDHR principles are universally accepted by all states as evidenced by the regional human rights documents that reflect the basic rights delineated in the UDHR, then why do egregious human rights violations persist? The principle that man must have recourse from human rights violations and that human rights should be protected by the rule of law remains as true today as it was in 1948.

Without the maintenance of the rule of law, violations of human rights recur and cause rebellion to ferment. Human rights violations impede maintenance of public order and security and exacerbate its deterioration. When the state uses law and order as a pretext for exerting overwhelming force against suspected criminals and employs torture to extract information and violence to stop demonstrations, it leads to abuse and violates human rights. It thereby exacerbates civil unrest, isolating the executive organs from the community, forcing police agencies to be reactive, rather than preventive in their approach, and eliciting international and media criticism and political pressure on the government. These methods create civil unrest.

One factor that fuels human rights violations is the division between citizens and government officials. The government officials retain all power, and the citizens remain subordinate. Therefore, civilians' thoughts naturally turn toward overthrowing the officials and seizing power themselves. This has frequently happened, particularly in developing countries. Under these circumstances, the violation of human rights is inevitable. In order to enhance the protection of human rights, government officials and entities should be seen as a part of the community, not as a separate mechanism or apparatus. Government officials should encourage a dialogue with the citizenry and thereby establish closer ties with the community. The executive bodies should work with the citizens and enlist their input regarding the assistance given by the media, the international community, and from political authorities.

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93. *See supra* note 30.

94. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L./V/II.23 doc. Rev. 2, *entered into force* July 18, 1978.

95. *See supra* note 34.

Another reason for frequent human rights violations is that many ordinary people remain unaware of basic human rights principles. In other words, the concept of human rights, as articulated in international and regional conventions, and to some extent in the internal law of the various states, in most cases is not obvious to the civilian people. Furthermore, authorities frequently misinterpret the provisions of international law that pertain to human rights. Therefore, the international community should continue to contribute human rights assistance, conflict resolution, and peace building, but it must go a step further. In order to achieve its goal of advancing basic human rights, the international community must foster closer ties with the communities where violations occur and introduce the universally and internally recognized human rights concepts to the wide range of civilians. With greater knowledge, the community affected by human rights violations can be free from myth and fully understand the concept of human rights. This greater understanding will generate community confidence and cooperation and the peaceful resolution of conflicts by enabling the public to work with the police force rather than fear it. Thus, fostering human rights protections increases the stability of nations and bolsters the rule of law.

The practical effects of human rights violations in East Africa are multi-faceted. The absence of public confidence in the authorities, the proliferation of civil unrest, and the disconnect of policy from the community are the usual practices. If the governments do not take urgent action, these conditions will lead to the destruction of statehood and barbaric living conditions.

Therefore, in order to improve the human rights situation in East Africa, the international community should establish another agency specifically designed to deal with the human rights violations. This agency should address the common human rights problems in East Africa, including excess border crossing of refugees from one East African country to another, the ongoing wars that force civilians to become refugees in neighboring countries, and civil laws and practices that generate inhumane treatment of refugees by police and other unauthorized (non-police) individuals. Because the abuses of human rights are common problems for all East African countries, there is a persistent need for a concerted action establishing a Central Agency for Protection of Human Rights in East Africa, which would be referred to as "CAPHREA." To facilitate this new agency, the international community should hold conferences that create resolutions and recommendations for the parties to the central agency. These recommendations and resolutions shall be accessible to the broad range of the peoples and individuals of the member countries via the countries' mass media and any other viable means of disseminating information. The results of meetings or conferences should be communicated to the U.N. agencies as well as NGOs that deal with human rights issues.

In East African countries, dispute resolution has principally centered on traditional mediation methods developed from deep-seated traditions and customs. Dispute resolution pursuant to mediation by wise people and elders, who were the traditional leaders, has not only been employed with regard to

disputes between individuals belonging to the same ethnic groups but also with regard to disputes arising between different ethnic groups. Thus, dispute resolution pursuant to international norms and laws became difficult because it was not applied without reference to the traditional forms of mediation (relying on the wise men and elders). The traditional methods of dispute resolution prevailed and impeded effective resolution of disputes pursuant to international law. Thus, the aforementioned central agency should consider the traditional methods of dispute resolution and act accordingly.

SOUTH AFRICA'S SUNDAY LAW: FINDING A COMPROMISE.

Jerry S. Ismail*

Western countries have traditionally prohibited or restricted a variety of activities from occurring on Sundays.[1] This legislation is commonly referred to as "Sunday observance laws." Christians are the majority in such countries and many of them heed the biblical commandment to lay aside their work and observe the Christian Sabbath.[2] Sunday laws, then, correlated with the spiritual convictions of much of the population. Until the beginning of the last century, this practice raised few concerns.[3] Although there was some evidence that these laws were viewed as obstacles to commerce, there was little evidence of general opposition to them on religious grounds.[4]

As the number of nonbelievers and adherents of non-Christian faiths grew in these countries, the practice of Sunday observance laws underwent scrutiny for justification based on principles of religious freedom and neutrality.[5] By then, an additional reason emerged to proscribe Sunday activity: to provide all people, regardless of faith, with a common day of rest.[6] Societal forces largely having nothing to do with religion supported this move. Among the most influential of these forces was the labor movement, which was more concerned with working conditions and the Rights of Man than with religious ideology.[7] Under such influences, the secular idea of the weekend began stealing into the original, religious rationale for the legislation.

As Sunday laws continue in a variety of forms today, the debate is centered not only on the original intent but the continuing purpose of the legislation. Often the State concedes its past association with religion but maintains that the current purpose of the laws provides health, safety, and

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1. *See* DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS 139 (1987).

2. "Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work. But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work." *Exodus* 20:8-10, (King James).

3. *See* WILLIAM ADDISON BLAKELY ed., AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION 259 (4th ed. 1949).

4. *But see id.*

5. *See, e.g.*, Barbara J. Redman, *Sabbatarian Accommodation in the Supreme Court*, 33 J. CHURCH & ST. 495, 496-503 (1991).

6. *See* LABAND & HEINBUCH, *supra* note 1.

7. *See id.*

welfare benefits for the public.[8] Other observers charge that Sunday laws have not abandoned their religious moorings and continue to be an impermissible combination of religious endorsement and infringement on freedom of belief.[9]

While these competing views at times seem irreconcilable, several approaches have been taken to lessen the overt religious impact of the laws. Over time, many of the main proscriptions have been omitted or decriminalized.[10] Others have gone routinely unenforced. In favor of facilitating commerce, several American states have reduced fines imposed on merchants for selling goods on Sundays. Others have passed exemptions that allow non-majoritarian believers to work on Sundays.[11] In many instances, Sunday laws have withered on the vine and died out of their own accord.[12] However, this is by no means representative of other jurisdictions, where the legislation is still alive and well.[13]

In spite of these attempts at reconciliation, the debate continues over the proper place for Sunday legislation. At stake for the majority is the potential loss of something so natural to its identity – a veritable tradition, that its absence would likely bring about a feeling of indignation. On the other side of the debate is the sentiment of those in the minority who view the continuation of Sunday laws as favoring a privileged class to which they do not belong. As a result of such laws, many of these individuals also suffer a loss of earning capacity if they observe Sabbath on another day of the week. To avoid either of these consequences, Sunday-law countries must find a compromise that supports the interests of both sides of the issue.

One country currently dealing with these competing interests is South Africa. This article analyzes the position of the sole remaining Sunday legislation in South Africa and compares and contrasts it with similar laws in the context of well-known American case law.

South Africa makes for a timely discussion for several reasons. Historically, South Africa has been a closed society – one that has not been open to democratic influences for all of its citizens.[14] Consequently, Sunday laws largely represented the values of a political and social elite. Clear religious consideration buttressed the legislation.[15] With the demise of apartheid, however, the veil of religious entanglement has begun to fall away. Courts now have the opportunity to judge the legislation of the old regime under principles of religious tolerance commonly observed in the West.

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8. *See id.*
9. *See* BLAKELY, *supra* note 3, at 379.
10. *See* Redman, *supra* note 5, at 496.
11. *See id.* at 503.
12. *See id.* at 496.
13. *See id.*
14. *See* Johan D. van der Vyver, *Religion, in* THE LAW OF SOUTH AFRICA 198 (W.A. Joubert & T.J. Scott eds., 1976); *see also* Johan D. van der Vyver, *State-Sponsored Proselytization: A South African Experience* 14 EMORY INT'L L. REV. 779, 781 (2000).
15. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 783-85.

South Africa is also a multi-confessional country, where controversies in church-state relations are likely to occur.[16] Additionally, South Africa makes a good case study because its Constitution encourages the use of foreign precedent in controversies where individual liberties are at stake.[17]

The United States, as the comparison country, was chosen for reasons that have much to do with those cited for the case country. Like South Africa, the United States is a predominantly Christian country and has a considerable representation of religious minorities.[18] The United States also has well-established legal precedent on this subject matter.[19]

These similarities aid in understanding the direction Sunday legislation and jurisprudence are taking in South Africa. A word of caution, however, is in order: The two countries are far from unified in their approach to analyzing issues of religious liberties; some of the thinking that underpins one country's opinions may not apply to that of the other. This will be evident in the sections of this paper dealing with the "establishment clause." Consequently, even parallel issues do not always result in precedent applicable to both legal systems.

The central focus of this article is the recent South African case, *State v. Lawrence*.[20] At issue there was the constitutionality of South Africa's Liquor Act, which prohibited the sale of alcohol in grocery stores on Sunday.[21] The discussion of South African Sunday laws commences with a brief overview of the legislation's history. Religious and secular justifications for its existence are offered. A Statement of the Case follows, providing the procedural and factual background of the main case under consideration. The paper then proceeds to explain and comment on the three opinions produced by the case. Finally, the paper closes with a summary of the main legal arguments and a conclusion as to the holdings in the case.

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16. *See The Land and its People, in* SOUTH AFRICA YEARBOOK 1, 3 (Government Communication and Information System, Delien Burger ed., 2000) [hereinafter S.A. YEARBOOK 2000/01], which quotes 1996 census figures of a population of 40.58 million people, 80% of whom identify themselves as Christians, "with large Hindu, Muslim and Jewish minorities." *Id.* at (page number?) *See also,* Amanda Gouws & Lourens M. du Plessis, *The Relationship Between Political Tolerance and Religion: The Case of South Africa,* 14 EMORY INT'L L. REV. 657, 668-75 (2000) for an insightful discussion and survey on the relationship between religion and tolerance for the "other" in South Africa.

17. *See* S. AFR. CONST. ch. 2, §39, "Interpretation of the Bill of Rights."

18. *See* STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 70 (quoting 1990 census figures).

19. *See* Lourens M. du Plessis, *Religious Human Rights in South Africa, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 441, 443 (Johan D. van der Vyver & John Witte, Jr. eds., 1996), where the author states, "South Africa's common-law originated from Roman-Dutch law but has to a large extent been amplified – and in some areas transformed – by English law." *Id.*

20. This controversy is based on three different but related appeals: S v. Lawrence; S v. Negal; and S v. Solberg, 1997 (4) SA 1176, 1997 (10) BCLR 1348 (CC). The Constitutional Court (CC) is uniquely empowered to hear appeals of constitutional questions.

21. *See* Liquor Act 27 of 1989.

This paper concludes that the Liquor Act does not violate the right to freedom of religion contained in the South African Constitution. The legislation is supported by a legitimate secular state interest, it is neutral on its face, and it is generally applied as such, the law is a valid limitation on a citizen's fundamental rights.

There is, however, a more serious question of whether the Act unfairly discriminates against individuals on the basis of religion, in contravention of Section 8 of the interim Constitution.[22] This paper takes the position that the injury complained of need not palpably denigrate, nor exalt, one religion over the other to support a claim of unfair discrimination. It is sufficient that the relevant legislation radiate a clear message of association with believers of one faith over those of others, and that this results in some tangible disadvantage to the protesting party.

As the South African legislation radiates a clear preference for Christianity and unnecessarily places some non-Christians at a financial disadvantage, the Liquor Act is unfairly discriminatory. For reasons that are discussed below, this violation is not redeemed by the State's limitation power. Ultimately, such legislation cannot withstand critical scrutiny under the bedrock notions of the new South African society: An open and democratic society based on human dignity, equality and freedom.

To survive such scrutiny and avoid causing wounds to either side of the debate, the State must rewrite its Sunday legislation in such a way that association with any particular religion is excluded, or significantly reduced. Once this is done, both sides will in a sense prevail.

I. HISTORICAL BACKGROUND OF SOUTH AFRICA'S SUNDAY LAWS

South Africa has been described as a religious nation. Census figures indicate that an overwhelming majority of South Africans identify with a particular religion.[23] Most claim membership in Christian churches, but there are also large Hindu, Muslim, and Jewish communities.[24] To understand the crux of the debate over the purpose underlying Sunday laws today, however, one needs to become familiar with the prevailing religious worldview of the 17th century Europeans who settled in southern Africa.[25] These colonialists brought with them the Roman-Dutch legal system. That system was substantially informed by Catholic and Calvinist dogma,[26] which converged

22. South Africa was ruled by a transitional constitution from 1993-1997, *see* INTER. CONST. (Act 200 of 1993) [hereinafter interim Constitution]. Chapter 3, Section 8 of the interim Constitution prohibited unfair discrimination by the government on the basis of, among other things, religion. *See id.*

23. *See* du Plessis, *Religious Human Rights*, *supra* note 19, at 442.

24. *See* S.A. YEARBOOK 2000/01, *supra* note 16.

25. *See* van der Vyver, *State-Sponsored Proselytization*, *supra* note 14, at 783.

26. *See* van der Vyver, *Religion*, supra note 14, at 177.

in their advocacy that the State, as temporal sovereign, had a divine obligation to rule over its subjects according to principles established in biblical scripture.[27]

This imperative was accomplished by developing positive law that most nearly reflected a belief in divinely inspired law.[28] The State, through the use of its sovereign powers, acted as God's trustee for the benefit of mankind.[29] In this relationship, the line between church and state often became completely blurred. The Articles of Faith of the Calvinist church very clearly illustrate this. The State, in partnership with the church, was

> [T]o watch over sacred Church services, to avert and stamp out all idolatry and false religions, to strike down the kingdom of the Antichrist and to promote the Kingdom of Jesus Christ, to permit the gospel to be preached everywhere in order that all would honor and serve God, as his Word commands us.[30]

In carrying out this mandate, the State historically intervened on behalf of the Church in several significant areas. Among these was its effort to compel the population to keep the Christian Sabbath. From 1652 until late into the twentieth century, the South African legislature drafted a number of proscriptions that made it difficult to do anything else on Sundays except observe the Sabbath. These measures included the prohibition of buying goods, working at one's job, hunting, fishing, gardening, and traveling, except to and from services.[31] Many, if not all of these laws, have been repealed or amended.[32] But as one observer familiar with South Africa stated, "The formative years of South African law included a period when religious forces had a definite influence on legal institutions."[33] Moreover, when the State did side with a religion, it always sided with the Christian religion.[34]

Observance laws were not the only area where the State acted as the handmaiden of Christianity. Without regard to religious belief, witnesses in criminal trials were required to swear out an oath adopted for use solely by

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27. *See id.*

28. *See id.*

29. *See id.* The combined Roman-Dutch worldview proposed a transformation of Mosaic Law and the Decalogue into proscriptions of positive legal affirmations. *See id.*

30. *Id.* at 178.

31. *See id.* at 198-200.

32. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 788-90, for examples of how the white-led apartheid government used security measures to repress certain religious organizations, which also furthered its racial policies well into the late 20th Century.

33. van der Vyver, *Religion, supra* note 14, at 176.

34. *See id.* at 198.

Christians.[35] Witnesses in civil proceedings, on the other hand, were permitted to make the affirmation that most effectively bound their consciences.[36] This approach had the effect of elevating the Christian concept of God over that of others by combining it with the weightier matters of criminal justice and the State.[37]

Another example that illustrates the close association between church and state comes in the form of South Africa's now-defunct[38] blasphemy statute. Under that law, it was a crime to slander only the God of Christianity.[39] Other examples of the comingling of church and state included language used in the preamble of the 1961 Constitution which suggested that God had trinitarian overtones and indicated a special relationship between God and South Africa's European Christians.[40]

Alternative justifications for South Africa's Sunday legislation have been offered. Some commentators have noted that the practice of reserving Sundays for special prohibitions originated with the Emperor Constantine who, at the time, was identified with the pagan religion.[41] Other commentators, recognizing the practice's Christian characteristics, if not origin, have argued that the legislation was never ensconced in a constitutional framework but remained solely statutory in nature.[42] Proponents of this view maintain this distinction relegated the laws to a mundane status, one that never had much support, and generally went unenforced. Over time, it is said, these laws developed a certain civil quality that made them more ceremonial than consequential.[43]

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35. *See id. See also* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 784.

36. *See* van der Vyver, *Religion, supra* note 14, at 198.

37. *See id.*

38. *But see* Nicholas Smith, *The Crime of Blasphemy and the Protection of Fundamental Rights*, 116 S. AFR. L.J. 162, 172-73 (1999), where the author raises the possibility that the offense of blasphemy, which is no longer a crime, could still be punished if a statement containing blasphemous content were held to violate the constitutional prohibition of incitement to hatred or violence based on religion. *See* S. AFR. CONST. ch. 2, §16.

39. *See* van der Vyver, *Religion, supra* note 14, at 199-200; *and see State-Sponsored Proselytization, supra* note 14, at 785.

40. *See* van der Vyver, *Religion, supra* note 14, at 9; *State-Sponsored Proselytization, supra* note 14, at 787, where the author states that when read in the original Afrikaans, the constitutional confession of faith, "die *volk* van . . . Suid-Afrika," has clear ethnic and religious implications. *See id.*

41. *See* van der Vyver, *Religion, supra* note 14.

42. *See id.* at 149. *But see* Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR L.J. 134 (1997), noting that prior to the introduction of a supreme constitution in 1994 that established an independent judiciary, South Africa was ruled by a system that placed supremacy in the power of the legislature and gave only limited powers to the courts to interpret and apply the law within very narrow bounds. There was thus no effective check on legislative power, relegating judges to the status of "mere technicians" in the pursuit of justice. *See id.*

43. *See* van der Vyver, *Religion, supra* note 14.

Additional arguments have been put forth in support of an entirely secular purpose for the laws. The most common justification cited under this class is that of a national day of rest for all.[44] In this age of seemingly endless bustle and commerce, the argument is made, the State has decided to provide one day a week during which everyone, regardless of religious affiliation, can rest, enjoy recreation, spend time with family, or engage in reflection. This national day of rest, it is maintained, is meant to improve both the health of the individual and the welfare of the nation.[45]

Even more particularized health-related purposes for the legislation have been offered. For instance, the State maintains that the reason for Sunday-closing laws is to protect the people from harms resulting from alcohol and alcohol-related mishaps.[46] While this may be a concern of the State, critics argue that it is not likely to be the sole, or even the central justification for the legislation's existence. Detractors from this point of view note that the current South African Sunday law prohibits sales of alcohol only on Sundays and certain Christian holy days.[47] This juxtaposition seems to taint the law's secular credentials, especially as alcohol sales are not prohibited on other public holidays.

In sum, South Africa's Sunday laws have historically been connected to Christianity and the Christian Sabbath. There are also secular reasons for their existence. The critical question today is how much of the original intent of the laws remains in place and, equally, how much of the original effect survives. The case that follows was the first attempt to answer these questions in a post-apartheid legal setting. Above all else, the Constitutional Court engaged these questions against the backdrop of a new South African Society based on "democratic values, social justice and fundamental human rights."[48]

II. STATEMENT OF THE CASE

The factual background of *State v. Lawrence* is relatively simple. Three South African citizens were charged with violating the Liquor Act 27 of 1989 ("the Liquor Act", "the Act"), which in relevant part prohibited the sale of alcoholic beverages by grocers on Sundays.[49] Appellants all worked for a large corporation that operated an international chain of convenience stores. None of the appellants contested the factual charges brought by the State, and

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44. *See id.* at 47.

45. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 53, 95-97.

46. *See id.* ¶¶ 70, 175.

47. *See id.* ¶ 159.

48. *See* S.A. Yearbook 2000/01, *supra* note 16, at 67.

49. *See* Liquor Act 27 of 1989 §§ 88-90. In basic terms, these sections prohibited the sale of alcohol other than table wine by grocers who held wine licenses. *See id.* § 88.1. The law also restricted the hours of the sale of alcohol to 8 p.m. during the week and 5 p.m. on Saturday. *See id.* § 90.1. Most relevant to this discussion is the prohibition of wine sales on Sundays. *See id.*

each was convicted in the magistrate's court. On appeal, appellants argued that the Act violated the Constitution on two grounds. First, they maintained, the Act violated Section 26 of the interim Constitution.[50] That Section guaranteed to all South Africans the right to engage in economic activity.[51] Appellants offered an expansive interpretation of this clause, suggesting that it supported their capacity to engage in any economic enterprise they chose, except "innately criminal" activity without being subject to government regulation.[52] The Court dispatched [word choice?] this part of appellants' argument.[53]

Second, appellants maintained that the Act violated Section 14, which, among other things, guaranteed freedom of religion.[54] Of the appellants, Ms. Solberg's appeal most directly hinged on Section 14, and it is her appeal that is the subject of much of the Court's decision. Section 14 of the interim Constitution states in part: "(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."[55]

In the main, Ms. Solberg argued that the Liquor Act, by constraining the days on which she could sell alcohol, forced her to observe the Christian Sabbath in violation of Section 14.[56] Appellant argued that even indirect official recognition of one religion's Sabbath over others implies State endorsement.[57] Appellant further maintained that the imposition of Sunday closed-days violated her right to freely exercise the faith of her choice.[58] As such, appellant raised both freedom of religion and establishment challenges to the law.

The State responded that the Act was decreed for secular purposes, namely to reduce the destructive consequences of drinking alcohol and to promote health and recreation on the one day of the week when most South Africans were off from work.[59] The State, however, provided no answer to the allegation that the Act was tainted by the choice of other, clearly religious closed-days.[60]

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50. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 7, 83. Except where noted, the substance of the interim Constitution is much the same as the final draft in place today.

51. *See id.* ¶ 7. Section 26(1) of the interim Constitution stated "Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory." *Id.* ¶ 26. Section 26 was omitted from the final draft of the permanent Constitution.

52. *See id.* ¶ 27.

53. *See id.* ¶ 29.

54. *See id.* ¶¶ 7, 83.

55. *Id.* ¶ 84. Section 14 is Section 15 in the current Constitution.

56. *See id.* ¶ 85.

57. *See id.* ¶ 86.

58. *See id.* ¶ 85.

59. *See id.* ¶¶ 53-54, 95-96, 115.

60. *See id.* ¶¶ 86-87.

Ultimately, six of the nine justices hearing the case agreed with the State's position and rejected appellant's arguments, holding that South Africa's Liquor Act does not violate an individual's right to freedom of religion under Section 14. The Justices, however, split into three factions: the plurality, led by the President of the Court, Justice Chaskalson; a concurrence, led by Justice Sachs; and a dissent led by Justice O'Regan.[61] The opinions varied greatly[62] on whether the South African Constitution contained an "establishment clause;" and if it did, whether the Act was violative of that measure.

III. LEGAL ANALYSIS

A. *The Plurality Holding*

1. *Equality and Establishment*

According to the plurality opinion, there is no establishment clause of any kind in the South African Constitution.[63] Appellant argued that if Section 14 did not contain an explicit establishment clause, one was either implied or could be constructed by importing language from other sections of the Constitution. Specifically, appellant argued that when read together, Sections 14(1) and 14(2), created the functional equivalent of an establishment clause.[64] Section 14(2), states: "Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under the rules established by an appropriate authority for that purpose, provided such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."[65]

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61. The judgment of the Court included President of the Court, Chaskalson, Langa D.P., Ackermann, J. and Kriegler, J. (That is, four justices.) The concurring opinion was supported by Sachs and Mokgoro, JJ. The dissent consisted of O'Regan, Goldstone and Madala, JJ. *See generally* S v. Solberg, 1997 (10) BCLR 1348 (CC).

62. *See* A.J.H. Henderson, Note, *Diversity of Opinion in a Diverse Society*, 61 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLANDSE REG 348, 351-54 (1999), where the author states that the splintered Court revealed stark philosophical differences in constitutional interpretation, with Chaskalson, P., adopting a narrow, statute-like reading of the Constitution in order to resolve the controversy without unnecessarily opening up the Constitution to the imprint of foreign jurisprudence; and Justices Sachs and O'Regan, former academics, generously relying on American establishment clause decisions to support their theses. *See id.* According to Henderson, Sachs' and O'Regan's approach reflected a "substantive vision of the law" as a direct reaction to the formal approach that characterized much of Apartheid South African jurisprudence. *See supra* note 42. Henderson maintains, however, that this approach itself is problematic. *See id.*

63. *See infra* note 74, for text of the American "establishment clause." *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 100-01.

64. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 103.

65. *Id.* ¶ 84.

In declining to adopt appellant's view of a synthesized establishment clause, the plurality held that "equitable basis" was not equivalent to lock-step equality or nonpreference in religion. Rather, it is synonymous with the promotion or inhibition of religion in a "fair and appropriate manner."[66] Thus, in situations of prayer in public schools, the Court said, Section 14(2) does not require that accommodation be made for every denomination present at the school.[67] What is required is that school officials give due consideration to the diversity of the demographic population in the institution. Additionally, officials must provide safeguards to protect nonbelievers from being coerced into another's religious observance.[68]

Based on the plurality opinion, it is clear that the South African Constitution envisioned an intertwining relationship between religion and State.[69] According to the holding, the fact that one religion was favored in certain situations did not, in and of itself, support a violation of Section 14(2). To establish such a claim, appellant was required to show that the favoritism took place at a state institution, that the favoritism was inequitable, or that she was in some way coerced into participating.[70]

In support of her claim that the Liquor Act reflected inequitable favoritism, appellant produced evidence showing that the only closed-days chosen in the Liquor Act's legislative history were days of Christian significance: Christmas Day, Good Friday, Ascension Day, and Sunday.[71] In appellant's view, this laid the foundation for the fundamental religious purpose of the Act. However, it was difficult, if not impossible, for appellant to maintain that Sundays were a "state institution" or that she was coerced into taking part in a religious ceremony. Thus, the Court held that Section 14(2) did not provide appellant with relief.[72]

According to the plurality, Section 14 does not envision a high wall separating church and state.[73] This contrasts with the American view where the historical model has been separation of church and state.[74] An example of how the two systems differ is exemplified by looking at how the courts analyze the issue of reading scripture in public schools. In *Abington Township School District v. Schempp*, the United States Supreme Court held that

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66. *Id.* ¶ 103.
67. *See id.*
68. *See id.*
69. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 824.
70. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 104.
71. *See id.* ¶ 86.
72. *See id.* ¶ 105.
73. *See id.* ¶¶ 101-04.
74. *See id.*; U.S. CONST. amend. I states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id. See also*, 8 *Works of Thomas Jefferson* 113, where the Founding Father stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Id.*

religious readings at a public school function were unconstitutional.[75] In its view, the test was that the practice put the power and authority of the State behind an activity associated with a particular religion; in doing so, it created the impression of an officially-endorsed religion.[76]

It is difficult to imagine that such religious readings would violate Section 14 of the South African Constitution. So long as "fair and appropriate" safeguards achieved an "even-handed" approach among different faiths, religious readings would be permitted under South Africa's Constitution.[77]

However, the Court did acknowledge an "equality provision" in Section 8 of the interim Constitution, which provided relief for individuals complaining of unequal treatment in, among other things, religion.[78] Section 8 states in part that "(1)Everyone is equal before the law and has the right to equal protection and benefit of the law. (3)The State may not unfairly discriminate directly or indirectly against anyone on ... [the basis of] religion."[79]

The Plurality held that although Section 8 does not amount to an establishment clause, it does provide similar protections.[80] By its very terms, Section 8 prohibits even "indirect" discrimination. Unfortunately, the Constitutional Court declined to evaluate the case under Section 8, as that section was not briefed by appellant.[81] Moreover, the plurality rejected appellant's approach of incorporating the anti-discrimination provisions of Section 8 into Section 14 which, after Section 26, was the only section relied on by appellant in her appeal. The Court maintained that adopting appellant's approach would give rise to "any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the 'establishment clause' of the United States Constitution."[82]

In analyzing the South African Constitution for evidence of an establishment clause, the plurality correctly concluded that one does not exist.[83] Indeed, it is difficult to reconcile the language of the Constitution,

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75. *See* School District of Abington Township, Pennsylvania, et. al. v. Schempp et. al., 374 U.S. 203, 205 (1963).

76. *See id.* at 223-25.

77. *See* Gouws & du Plessis, *supra* note 16, at 683. The formula provided by the plurality seems to invite the conclusion that any accommodation of religion in public life will be permissible so long as the relationship passes the very subjective criteria embodied in S. 14(2).

78. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 102. The other factors include race, gender, pregnancy, ethnic or social origin, color, sexual orientation, age, disability, culture, language and birth. *See id.*

79. S. AFR. CONST. ch. 2, § 9. Section 8 of the interim Constitution is Section 9 in the final draft.

80. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 100.

81. *See id.* ¶ 102.

82. *Id.*

83. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 823-24.

especially Section 14(2), with the American notion of non-establishment. As Section 14(2) expressly allows for religious observances at state institutions so long as they are free, voluntary, and conducted on an equitable basis. Official support of religion is undoubtedly permissible so long as such a relationship meets that criteria.

The plurality, however, having gone so far toward admitting Section 8 as the proper grounds for evaluating allegations of unequal treatment allowed an oversight in the pleadings to forestall a firm resolution of this issue. This is a tough approach, and one certainly open to criticism. However, the Court has signaled to litigants that Section 8 is to be considered in future controversies involving religious discrimination.

2. *Freedom of Religion*

Appellant argued that prohibiting her from selling alcohol on a Sunday violated her constitutional right to pursue the faith of her choice, as the law interfered with her ability to take another day off from work to worship without suffering a monetary loss. To demonstrate the impact of Sunday legislation on non-Christian sabbatarians, appellant argued that the South African law was similar to the law implicated in the Canadian case, *Regina v. Big M Drug Mart, Ltd.*[84] In that case, the Canadian High Court pronounced the Lord's Day Act unconstitutional.[85] The Act prohibited a wide range of common activity from occurring on Sundays, including all labor and commerce, fee-based recreation, and the sale and distribution of foreign newspapers.[86] The High Court, in striking down the law, held that the legislation had no neutral purpose and was solely meant to "compel observance of the Christian Sabbath."[87]

The South African Court agreed that the Canadian Act plainly violated freedom of religion and transgressed establishment principles, as well.[88] However, the plurality opinion drew a sharp distinction between the two Acts. While the Canadian Act prohibited engaging in any activities on Sunday other than observing the Christian Sabbath, the South African Act solely restricted the day, time, and type of alcohol that a grocer could sell.[89] It did not prohibit grocers generally from selling products on Sundays. It did not require anyone to open or close his store on Sundays. It did not entirely prohibit the sale of

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84. Regina v. Big M Drug Mart, Ltd. (1985) 13 CRR 64.

85. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 87-90 (*quoting* Regina v. Big M Drug Mart, Ltd. [1985] 13 CRR at 93).

86. *See id.* ¶ 88.

87. *Id.* ¶ 92.

88. *See id.* ¶ 90. Regarding establishment principles, the plurality was reflecting on the Canadian situation.

89. *See id.*

alcohol on Sundays.[90] Moreover, according to the plurality, the Act did not prevent grocers in any way from exercising their religious convictions. They were free to observe the Sabbath on Friday, Saturday, Sunday, or any other day of the week. In essence, what was lacking from the South African Act was coercion. Short of a Canadian-styled Act, "the selection of a Sunday for purposes which are not purely religious in nature and do not constrain the practice of other religions would [not] be unlawful simply because Sunday is the Christian Sabbath."[91]

In so holding, the Court adopted reasoning similar to that announced by the United States Supreme Court in *Braunfeld v. Brown*.[92] In that case, Orthodox Jewish merchants from Philadelphia challenged Pennsylvania's legislation, that closed shops on Sunday on the grounds that the law violated their right to freely follow the faith of their choice as guaranteed in the First Amendment.[93] Appellants argued that the law penalized them solely because they practiced a faith other than Christianity.[94] Appellant maintained that closing for an additional day cost the merchants a considerable amount of business solely, in their view, because they were Jewish. This amounted to an involuntary choice between a central tenet of appellants' faith and their livelihoods.[95]

In upholding the constitutional validity of the law, the plurality centered its ruling on the distinction between beliefs and opinions on the one side, and action on the other.[96] The right to hold the former is absolute; the latter, it held, is susceptible to restriction when it is "in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."[97]

The conduct in question was not demanded by appellants' religion; it was one step removed. That is, it was activity incidental to appellants' religion. The law simply made it more difficult for appellants to practice their faith; it did not prohibit them from doing so, and in no way enjoined them from following the tenets of their faith.[98] The law, thus, imposed only an indirect burden on appellants.

As the number of indirect burdens is nearly limitless, the Court was persuaded to adopt the view that these burdens were presumptively valid because holding otherwise would "radically restrict the operating latitude of

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90. *See id.* ¶¶ 90, 94. Restaurant establishments, for instance, were permitted to sell alcohol under the law, so long as it was consumed on premises. *See id.* ¶ 90.

91. *Id.* ¶ 89.

92. *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

93. *See id.* at 602.

94. *See id.* at 601.

95. *See id.* at 602.

96. *See id.* at 603-04.

97. *Id.*

98. *See id.* at 605-06.

the legislature."[99] The plurality held, however, that not all indirect burdens would be overlooked, even under a rational basis review. Where the purpose or effect of the legislation is to impede or discriminate against religion, the law is invalid even if the burden is slight.[100] Where, however, the law is neutral on its face, is generally applied, and has a secular purpose, then the legislature will not be bound.[101]

Similarly, the plurality held that the Liquor Act did not violate the Constitution, as the law was neutral on its face, generally applied, and had a legitimate secular purpose. The fact that the law may have once had religious foundations, it held, was not fatal to this outcome.[102] So long as the religious origins of the statute in question existed alongside economic and social justifications for the law, its origins were not dispositive.[103]

Further, the plurality opined that had the Act demonstrated an interference with appellant's freedom of religion, such interference might be permissible under the State's constitutionally-provided limitation powers.[104] The Court avoided making this decision, however, thereby leaving open the possibility that something more than a "reasonable limitation" but less than an all-out prohibition on Sunday activity, as envisioned by the Canadian Act, could tip the scale toward an impermissible violation of the right to freedom of religion.[105] The plurality simply did not find that the facts in this case warranted such an examination.

Appellant's case suffered from two major defects. First, it is clear that appellant was not a religious victim of the Act. She — and more to the point, her employer — were adversely affected economically by the law.[106] The law made it somewhat harder for them to make a profit on Sundays. On this point, it is important to note that appellant's religious convictions are completely absent in the judicial record. Although the Court readily admitted appellant's right to bring a claim challenging a statute under religious liberty, the language

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99. *Id.* at 606.

100. *See id.* at 607.

101. *See id.*

102. *See* S v. Solberg, 1997(10) BCLR 1348 (CC), ¶¶ 89, 156. *See also* McGowan v. Maryland, 366 U.S. 420, 426, 434 (1961).

103. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 89, 156.

104. *See id.* ¶ 98. Under § 33, the legislature could limit fundamental individual rights so long as the limitation is "reasonable, justifiable, and necessary." "Necessary" was removed from the final draft.

105. *See id.* ¶ 93, where the President of the Court remarked that he is not "unmindful of the fact that constraints on the exercise of freedom of religion can be imposed in subtle ways." *Id.*

106. *See id.* ¶ 97. *See also* Michele Havenga, *Corporations and the Right to Equality*, 62 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLANDSE REG 495, 497 n. 10 (1999), where the author makes the argument that had the corporation been charged instead of its employees, it should have been able to avail itself of the same defenses used by appellants, namely that the Act violated its "Freedom of Religion." *Id.*

of the decision suggests that her economic motives had much to do with the outcome of the case.[107]

The Court dealt with this case in a near-total religious vacuum.[108] There were no briefs filed with the Court by religious organizations, and there was a dearth of evidence in the record on the financial impact to non-majoritarian believers subject to the Act. In the absence of an establishment clause, it proved very problematic for a non-religious defendant to prevail against a general law by utilizing mostly free exercise arguments.

The second deficiency in appellant's case is based on her reliance on the Canadian case. In arguing that the two Acts were similar, appellant's case was weakened from the inside. The effect of the South African law paled in comparison to the sheer coercion present in the Canadian Act. As such, appellant's choice gave the Court a radical benchmark against which to judge the South African law. The result was that the Liquor Act appeared less harmful to religious sensitivities than otherwise might have been the case. This outcome might have been avoided had appellant focused on a stronger choice of cases or a passionate appeal to the disparate impact on nonbelievers occasioned solely by their convictions.

B. The Concurring Opinion

In a separate opinion, two justices concurred with the plurality. Their opinion dealt solely with the *Solberg* appeal. The justices posed the question: Does the prohibition of wine sales by grocers on Sundays violate appellant's religious rights?[109] They found two instances where the Act might do so under Section 14: a disparate impact on non-Christians solely occasioned by their choice of belief systems; and the appearance of a favored religion.[110] Essentially, the first instance is a question of freedom of religion; the second is a question of establishment.

1. Freedom of Religion

The notion of disparate impact was difficult for the concurring justices to escape, especially when they considered the realities of the grocer's trade. In competing with one another, shopkeepers seek as many advantages over their competitors as they can in order to gain the public's business. A law that

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107. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 140; *see also id.* ¶ 8, where the Court notes that the only group that entered an appearance on behalf of appellant as an amicus curiae was the South African Liquor Store Association! *See id.*

108. *See* Gouws & du Plessis, *supra* note 16, at 681, where it is noted that the absence of legal briefs from faith-based organizations helped ensure that this case was evaluated as one of commercial and not religious importance.

109. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 138.

110. *See id.* ¶¶ 137-38.

mandates closed days may amount to such an advantage.[111] In its barest form, the issue faced by the concurrence was reduced to this: If a non-Christian grocer observes sabbath on any other day than Sunday, all other things being equal, he is at twice the disadvantage of his Christian competitor, at least in terms of business resulting from the sale of alcohol. While the Christian grocer has the potential to sell alcohol six out of seven days, the non-Christian has the potential for only five.[112] In the words of the concurring Justices, the Sabbatarian shopkeeper is "subjected to an invidious choice between following her religion or pursuing her trade."[113]

However, given the lack of evidence in the record supporting the Act's impact on appellant's religious freedom, the concurrence concluded that appellant did not suffer anything more than a slight economic disadvantage as a result of the Act.[114] As in *Braunfeld*, the law had a legitimate purpose, was neutral on its face, and was generally applied to all concerned. Therefore, while recognizing the law's unequal effect on appellant, as compared to professed Christians, the effect amounted to no more than an "incidental burden."

The concurring Justices avoided viewing the constitutionality of Section 14 in a wider context. Although often stating that appellant had the right to challenge the Act whatever her motives, the concurrence seemed singularly focused on appellant's lack of religious credentials. This focus made it difficult for it to conclude that the purpose or effect of the Act was to inhibit non-Christian belief.[115] That the Act might have adversely affected many other individuals who were subject to the impact of the law in all its manifestations was only considered as an afterthought.

In essence, the concurrence maintained that appellant's case was built not so much on a religious liberty foundation but on an economic freedom model. As the Court unanimously disagreed with that part of appellant's case, she was left to make religious arguments for why her conviction should be overturned. The concurring opinion reflected and, in some ways, exacerbated this imperfect approach.

2. *Establishment*

The concurring justices took for granted that which occupied much of the plurality's evaluation of the Constitution, namely, that Section 14 contains

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111. *See id.* ¶ 155.

112. *See id.* ¶ 154.

113. *Id.*

114. *See id.* ¶¶ 154-55. *But see id.* ¶ 158, where it appears that Justice Sachs would not have reached a different conclusion had appellant been a true religious casualty of the Act.

115. In support of this position, the concurrence pointed out that South Africa's Sunday law regime has been eradicated, leaving the Liquor Act as the sole Sunday prohibition law in the country. *See id.* ¶¶ 149-51. However, the concurrence did not venture a reason why this Act, which had clear religious motivations, should have survived in its present form.

an establishment clause.[116] In the concurrence's view, it was not necessary to show that there was coercion at State-funded religious observances or official imposition of the Christian Sabbath to make out an establishment violation. Rather, what was required was a showing that there was an intertwining relationship between church and State, and that the comingling was impermissible under the State's limitation power.[117] The justices concluded that such an entanglement existed because religious symbolism was inherent in all the Liquor Act's closed-days:

> "[A]lthough part of the objective might have been purely secular, the means used, namely the selection of religiously-based days as closed days, was intended to acknowledge and comply with the sentiments of those Christians who regarded these days as days requiring special observance."[118]

The Act, the concurrence opined, would not have been suspect on this basis had the list of closed-days included other, non-religious days, such as public holidays, which would have neutralized the religious effect of the Act.[119] The plurality stated that evidence of the close relationship between religious holidays and closed-days showed that Christians were still viewed with favor.[120] Accordingly, the appellant established that there was a facially inappropriate endorsement of religion.[121]

With this established the concurrence had to evaluate the endorsement under the State's Section 33 limitation powers.[122] To be permissible, the limitation was required to be slight, "reasonable, justifiable and necessary."[123] In applying this formula, the concurrence accepted that when the State adopts the habits of a particular religion, even for non-religious reasons, it gives the impression to the public that it prefers that religion.[124]

However, the concurrence maintained, this favoritism must be weighed against the State's objectives. In doing so, the justices contrasted the Liquor Act with Canada's Lord's Day Act. The Canadian law, it stated, was clearly

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116. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 141-48. While offering a multitude of textual references to support this point of view, it is a conclusion lacking in substance and analysis. *See id.*; *see also* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 827.

117. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 158-60.

118. *Id.* ¶ 159.

119. *See id.*

120. *See id.* ¶¶ 160, 163.

121. *See id.* ¶ 164.

122. *See id.* ¶ 165.

123. *Id.* The concurring justices interpret "necessary" as "not [being] made the subject of rigid definition, but rather regarded as implying a series of interrelated elements in which central place [is] given to... the means used to achieve a pressing and legitimate public purpose." *Id.* at n.152. The term was removed from the final draft.

124. *See id.* ¶ 170.

intended to compel Sunday observance and no legitimate state interest could be found to support the Act. Conversely, the concurrence held, the Liquor Act was part of a health, safety, and welfare regime that did not seek to generally control what people did on Sundays.[125] The effect of the law simply limited the sale of alcohol to the public on Sunday. At worst, the concurrence maintained, the Act led to a case of indifferent favoritism.[126] Furthermore, the justices were of the opinion that the religious closed-days were not purely religious anymore.[127]

Applying a rational basis review, the justices concluded that the State's objectives were legitimate.[128] The law was drafted, in their opinion, to prohibit the sale of alcohol on Sundays at grocery stores – not to close down shops or ban alcohol consumption entirely. As such, it was restricted in scope, the intrusion on appellant's religious rights was slight, and the means were reasonably related to that end. The remaining question was whether the means used to achieve the end were "necessary."

The final draft of the South African Constitution deleted "necessary" from the limitation clause, in part because of the difficulty in defining the term.[129] However, since the prosecutions in this case occurred when the interim Constitution was in force, the Act must satisfy that requirement among others. Assuming "necessary" means "required," in the sense that no less restrictive means were available to bring about the stated ends, the terms of the Act arguably were not necessary.

At the time of appellant's violation, South Africa had twelve public holidays, only two of which were designated closed-days: Christmas Day and Good Friday. These days were the only patently religious days of the twelve.[130] Their inclusion called into question the motivation behind the Act and made the addition of Sunday appear dubious. When Sundays are counted, the total number of closed-days amounts to, at most, fifty-four days per year. The concurring justices concluded that the inclusion of these days were "necessary" to bring about the State's objective, namely, tranquility and a reduction in alcohol abuse by the public.[131]

Two other approaches, however, appear to be as effective as that approved by the concurrence, while at the same time significantly reducing the suggestion of an endorsement of Christianity. The first restricts alcohol sales to Sundays only; it would remove Christmas Day and Good Friday from the

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125. *See id.* ¶¶ 174-77.
126. *See id.* ¶ 172.
127. *See id.* ¶ 173.
128. *See id.* ¶ 175. The concurrence pronounced the State's health and welfare argument to be "powerful and legitimate." *Id.*
129. *See id.*
130. *See id.* ¶ 125.
131. *See id.*

list of closed-days.[132] Since the Court upheld as legitimate the need for the State to set aside a day of rest for the benefit of all its citizens, Sunday arguably makes the most sense based on prevailing social structure, current practice, and tradition. Removing the holy days would leave a statute in effect that has far less religious association and more secular purpose, without tangibly diminishing the effectiveness of the Act.

The second approach would add to the current closed-days all other South African public holidays, such as New Year's Day, Human Rights Day, and Family Day.[133] While this actually increases the number of closed-days by about ten per year, it also strengthens the health, safety, and welfare thrust of the Act. These additions would also make the Act appear more secular by reducing the transparent associations with religion presently in the law.

The concurrence stated that it could not engage in speculation about the efficacy of the means used by the State to implement its laws.[134] While this is true in cases of a *prima facie* review of a statute, that was not the situation presented to the Court. Once the Court determined that there was an infringement, it was obligated to inquire into the merits of the means used by the legislation.[135] Based on the concurrence's own findings that a constitutional infringement had occurred, it was required to determine if less restrictive means were available. As the two examples above illustrate, there are less restrictive means available for use that would accomplish the State's goal while reducing or eliminating the infringement on religious liberty. Adopting either of these approaches would signal to nonmajoritarian believers that the government sees them as equal citizens.

C. *The Dissent*

Three justices dissented from the Court's decision. They agreed with the plurality that there is no establishment clause in the Constitution, yet the dissent ultimately found establishment clause protections implicit in the language of Section 14. [136] Like the approach used by the concurrence, this was accomplished by incorporating provisions from other constitutional sections into a "contextual reading" of Section 14. In the dissent's view, since official participation in religious observances is permitted under the Constitution, there must exist some limited establishment clause inherent in Section 14 to ensure fairness in this process.[137]

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132. *See id.* ¶ 164. The other patently religious closed-days were omitted from the interim and final Constitutions.

133. *See* SOUTH AFRICA YEARBOOK 2000/01, *supra* note 16.

134. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 164, 176.

135. *See id.* ¶ 133 (O'Regan, dissenting), citing § 98(5) of the interim Constitution.

136. *See id.* ¶ 116.

137. *See id.* ¶¶ 120-21.

Foremost among the dissenters' concerns was the ability of the State to pressure religious minorities into observing officially sanctioned religious activity: "When the power, prestige and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [138] Specifically, the dissent was bothered by the possibility that government power was being used to promote one religion over others and, in so doing, coerce religious minorities into conforming to the prevailing norms promoted by the State. By taking this approach the dissent, in effect, merged together its freedom of exercise and establishment analyses.

The dissent also noted that Sundays were chosen as closed days alongside other plainly religious holidays. Justice O'Regan argued that there was a strong likelihood, then, that religious favoritism informed this choice, giving a "legislative endorsement to Christianity, but not to other religions."[139] The religious purpose of the statute seemed even stronger when the dissent recalled that ten other secular holidays were not included as closed-days.[140]

The dissent was also troubled by the law's existence after the fall of the old regime. This was especially true, in its view, given the preamble's proclamation that democracy, freedom, and human dignity would govern the new South Africa with a view toward rectifying past social injustices.[141] In the dissent's opinion, legislation associated with the most objectionable practices of the old order would, per se, violate this proclamation. Accordingly, the Liquor Act constituted an infringement on appellant's Section 14 rights.

Having established that an initial infringement had occurred, the dissent applied a limitations analysis under Section 33 to determine if this infringement was dispositive.[142] Section 33 permitted government limitation of fundamental rights only if such restrictions were reasonable, justifiable, and, most importantly, necessary. In defining the boundaries of that inquiry, the dissent adopted the approach used in *S. v. Makwanyane,*[143] in which the Court held that legislation limiting fundamental rights was necessary if and only if it was accomplished by the least restrictive means available.[144]

In applying this standard, the dissent was troubled by the lack of evidence regarding the exact purpose the State hoped to achieve by enforcing

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138. *Id.* ¶ 120, quoting Engel v. Vitale, 370 U.S. 421 (1962); *see supra* note 62, for a discussion of how Justice O'Regan's efforts to read "establishment protections" into Section 14 allowed her access to American Supreme Court establishment decisions that seem somewhat out of place in the South African context.

139. S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 125.

140. *See id.*

141. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 825.

142. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130.

143. *See* S v. Makwanyane, 1995 (6) BCLR 665 (CC).

144. *See id.* The *Makwanyane* Court stated, "it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights." S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130.

the legislation.[145] This vacuum caused the dissent to engage in speculation as to the purpose of the law, which it ultimately accepted as being a restriction on the sale of alcohol to curb public consumption.[146] However, given the holes that existed in such an approach to curbing consumption – namely, that consumption itself was not prohibited and that alcohol was still sold on other public holidays – the dissent was not impressed with the necessity or effectiveness of the means used by the State to achieve its desired end.[147] When considered against the backdrop of the religious importance of the selected closed-days, the legitimacy of the State's means became slighter still.[148]

Having failed the dissent's balancing test, the Liquor Act was declared unconstitutional to the extent that it prohibited sale of alcohol on closed-days associated only with Christianity.[149]

While the dissent correctly concluded that the State was unjustified in limiting appellant's fundamental right to freedom of religion, its conclusion is flawed because it conducted its evaluation on the basis of Section 14. Section 14 prohibits religious observances only when the observances are conducted on an inequitable basis, or there is coercion, and the activity takes place at a state institution.[150] While it is likely that the Act benefited and paid tribute to Christianity, this was not a case involving violations that occurred at a state institution. Nor was there any evidence of coercion. As such, the dissent's reliance on Section 14's inequity analysis is misplaced.

Section 8 provided a much better platform on which to view this law. Under Section 8, all citizens are to be treated equally and "unfair discrimination" by the State based on religion is grounds for striking down a statute, irrespective of the involvement of a state institution. Section 8 also provided for a lower threshold for proving a violation of unequal treatment than does Section 14, as it permitted a case to be built on indirect discrimination.[151]

While the appellant did not demonstrate a strong case of direct State discrimination against her, there was enough evidence in the record to permit the Justices to decide that the law, in an indirect way, placed non-Christians

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145. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130. Justice O'Regan stated that the lack of such evidence on the part of the state inevitably makes it much more difficult to justify the infringement. *See id.* Note how this comment demonstrates a view of legislative interpretation that is diametrically opposed to the solicitous view afforded the State's reasoning by Justice Sachs.

146. *See id.* ¶ 132. The dissent did not adopt the view that the Act intended to create a common day of rest for all South Africans, as it did not require shops to shut down on that day. *See id.* ¶131.

147. *See id.* ¶ 132.

148. *See id.*

149. *See id.* ¶ 133.

150. *See* Inter. Const. § 8.

151. *See id.*

at an unfair disadvantage. Under a Section 8 analysis, the infringement caused by the law would only be permissible if it satisfied Section 33's limitation requirements.[152] Under Section 33, the law in question must be "reasonable, justifiable and necessary."[153] As previously noted, there are less restrictive means available to accomplish the State's secular aims.[154] Therefore, the legislation, as written, is not "necessary."[155] However, for all the dissent's efforts to incorporate American establishment jurisprudence into its *ratio decidendi*, it failed to avail itself of the one section that offered the most natural and indigenous resolution to the problem under consideration.[156]

IV. SUMMARY AND CONCLUSION

State v. Lawrence unfortunately did not produce a clear precedent. Partially as a result of appellant's use of religious defenses as a last resort to her criminal conviction the Court was forced into a middling set of opinions. Often the factions split along philosophical lines, using constitutional provisions as shorthand for their own policy beliefs.

The plurality held that there was no establishment clause in the South African Constitution but that appellant's correct avenue of challenging the law lay in Section 8's Unfair Discrimination clause. The plurality chose not to conduct this review. However, the plurality remained faithful to the idea that South Africa was the product of a unique historical experience that mandated an approach to constitutional jurisprudence that differed in significant ways from other well-known legal traditions.[157]

The concurrence held that there was an establishment clause in the Constitution and that it was violated by the Act. However, it held the violation was permissible since the State's secular interest in keeping the law was reasonable and "necessary." This conclusion resulted from a balancing test where the secular purposes proffered for the legislation were weighed against the harm done to appellant's religious rights without regard to the efficacy of the State's means in achieving the desired aim. In coming to this conclusion, the concurrence meandered along a tortured analysis of Section 14.

The dissent stated that there was no establishment clause in the Constitution, then proceded to find one.[158] Moreover, the dissenters seemed

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152. *See supra* note 123.

153. S. AFR. CONST. ch. 2, § 33.

154. *See supra* note 135 and accompanying text.

155. *See id.*

156. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 129, where O'Regan J states, "It is not necessary, in view of my conclusion, to consider whether section 90 would constitute a breach of that constitutional provision [§ 8] as well; *see also supra* note 63, at 353-54.

157. *See* Christof Heyns & Danie Brand, *The Constitutional Protection of Religious Human Rights in Southern Africa*, 14 EMORY INT'L L. REV. 699, 759 n.147 (2000).

158. *See* Gouws & du Plessis, *supra* note 16, at 681, where the authors indicate that although there was a majority of justices (6/9) voting to dismiss appellant's claim, another

intent on making public policy fit inside a constitutional box that would not warmly receive it. More than the concurrence, the dissent sweepingly incorporated American establishment clause theory into its holding, even when such an approach strained the credible meaning of the sections under consideration. At the same time, an adequate section existed in the South African Constitution that could have accomplished the same result. Outside of this anomaly, however, the dissent adhered more loyally to the spirit of the new Constitution than did the other factions.

The religious interpretation of the Liquor Act is uncertain after this decision. Looking at the holdings, it is apparent that those factions that agreed with each other on the outcome of the case fundamentally disagreed on how to get there. Conversely, those factions that disagreed most strongly on the outcome of the holding substantially agreed on the means to reach it. In fact, there was no outright majority of the Court on any one, single, legal issue.[159]

Perhaps the Court, presented with an unattractive set of facts, decided to defer making clear precedent until a stronger case came along. But the Court had the right to refuse this case which, on reflection, it might better have done.[160] The fractionalized outcome of the Court portends mediocre justice in similar future controversies. Part of this confusion originates in the language of the Constitution itself. In its attempt to be precise, the legislature created a situation where the overarching meaning of its constitutional provisions was buried in a haze of details. As the Court tried to separate what was principle from what served as example, larger issues of public policy became obscured by minutiae.

Instead of further clouding the issues in future cases, the Court should defer all rulings until the legislature clarifies its stance on such critical issues as establishment, the scope of equality, and the application of the preambular language that, remarkably enough, seems to be the clearest language of all.

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majority (5/9) held that there was an establishment clause in Section 14. *See also supra* note 113, at 755; *but see infra* note 159.

159. *See* Christof Heyns, Proselytism in Southern Africa (April 1997) (unpublished manuscript on file with Johan van der Vyver at Emory University School of Law). The author argues that since no majority was reached on any single legal issue, the case itself serves as but shaky precedential value. *See id.*

160. *See* Gouws & du Plessis, *supra* note 16, at 681.

THE LAND CRISIS IN ZIMBABWE: GETTING BEYOND THE MYOPIC FOCUS UPON BLACK & WHITE

Thomas W. Mitchell*

I. INTRODUCTION

Throughout Zimbabwe, people from all walks of life still dream of obtaining land. One recent survey has indicated that no less than 67% of the population would like to become farmers.[1] However, from independence in 1980,[2] until the present, the government has only made small inroads into providing land to landless Zimbabweans or those living on marginal land. More than twenty years after independence, 4500 white-owned commercial farms are located upon approximately one-third of the country's agricultural land and are situated upon the best farming land in the country. The current distribution of land is one of the most obvious enduring legacies of the colonial period.[3] The lopsided distribution of land is a frustrating reality for many rural peasants who supported the freedom fighters during the war of

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1. R.W. Johnson, The Helen Suzman Foundation, Political Opinion and the Crisis of Zimbabwe 43 (2000). Bill Kinsey, Senior Research Fellow, Free University Amsterdam, has commented that the Helen Suzman Foundation survey appears to overstate significantly the percentage of Zimbabweans who aspire to be farmers in light of other surveys—including ones he has conducted—that have concluded that only a small percentage of Zimbabweans would like to be farmers. *See* Email correspondence between Thomas Mitchell and Bill H. Kinsey, Senior Research Fellow, Free University Amsterdam (June 24, 2001) (on file with author).

2. Carolyn Jenkins, *The Politics of Economic Policy-Making in Zimbabwe*, 35 J. Mod. Afr. Stud. 575 n.1 (1997).

3. In 1890, a small army of "pioneers," hired by Cecil Rhodes' British South Africa Company, laid claim to Mashonaland which is located in present day Zimbabwe. *See* ANTONY THOMAS, RHODES: THE RACE FOR AFRICA 220 (1996). Rhodes paid his soldiers by granting land and mining claims to them. *See id.* at 220-21. Several years later, the British South Africa Company set aside the most productive lands for European settlement. *See* Michael R. Roth & John W. Bruce, Land Tenure, Agrarian Structure, and Comparative Land Use Efficiency in Zimbabwe: Options for Land Tenure Reform and Land Redistribution 1 (1994) (unpublished LTC Research Paper 117)(on file with author). Eight years after Rhodesia obtained self-government in 1923, enactment of the Land Apportionment Act of 1931 formalized the segregation of land between whites and blacks. Under the Act, 19.7 million hectares of land, including the overwhelming percentage of the best agricultural land were designated as "European" lands; 11.6 million hectares were set aside as African reserves. *Id.*

independence because they were promised that the land would be theirs upon obtaining independence. Ever since Zimbabwe won its independence in 1980, the unresolved—some would say neglected—land question has tended to re-emerge on the political scene shortly before parliamentary or presidential elections.[4] At the end of February 2000, Zimbabwe suddenly became the focus of international media attention after hundreds of Zimbabweans, claiming to be veterans of Zimbabwe's war of independence, began occupying parts of white-owned commercial farms.[5] In the past year, war veterans and others have occupied as many as 1700 white commercial farms.[6] Currently, approximately 900 white-owned farms remain occupied.[7] Overall, forty people were killed in the wake of the farm invasions, thirty-four black Zimbabweans and six white farmers.[8]

Despite the attention these murders have received, violence on white-owned farms is not limited to Zimbabwe. Since 1995, almost 500 white

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4. *See* ISAAC MAPOSA, LAND REFORM IN ZIMBABWE: AN INQUIRY INTO THE LAND ACQUISITION ACT (1992) COMBINED WITH A CASE STUDY ANALYSIS OF THE RESETTLEMENT PROGRAMME 20 (1995). *See also* Bill H. Kinsey, *Land Reform, Growth and Equity: Emerging Evidence from Zimbabwe's Resettlement Programme*, 25 J. S. AFR. STUD. 173, 174 (1999). The events leading up to last year's parliamentary election proved to be exceptional mostly in the degree to which the land issue took center stage.

5. *See, e.g.*, Basildon Peta, *The New Enemies of the State: Reporters, As Foreign Journalists Face Expulsion from Zimbabwe, Basildon Peta Reports from Harare on the Dangers Confronting the Press*, THE INDEPENDENT (London), Feb. 20, 2001, at 8.

6. Ann M. Simmons, *White Farmers Protest Forced Land Transfer*, L.A. TIMES, Mar. 17, 2001, at A1. Although this round of farm invasions has received a great deal of attention, there have been other periods since independence in which Zimbabwean peasants have invaded farms. In the past, the government has responded somewhat ambivalently to such land invasions. In the initial years after independence, the government tolerated peasant invasions of land that had been abandoned or purchased by the state. However, the government did not tolerate invasions that threatened the white, commercial farming sector. *See* LAWRENCE TSHUMA, A MATTER OF (IN)JUSTICE: LAW, STATE AND THE AGRARIAN QUESTION IN ZIMBABWE 62 (1997). By December of 1982, the government had declared a zero tolerance policy toward land invaders and ordered squatters to vacate the land by early 1983. Rachael Knight, *"We are Tired of Promises, Tired of Waiting": People's Power, Local Politics and the Fight for Land in Zimbabwe* 99 (1999) (unpublished thesis, Brown University 1999)(on file with author). As recently as 1998, a new round of commercial farm invasions erupted, which began with an invasion of a commercial farm located in the Mashonaland East Province by a group of peasants from an area called Svosve. *Id.* at 25. In November 1998, 600 rural villagers and war veterans invaded five commercial farms in a area called Juru, which is located one hour west of Harare. *Id.* at 99. By the end of the month, the national chairman of the ruling party ordered the invaders off of the farms. *Id.* at 44. Police in riot gear forcibly evicted the squatters and arrested 12 of the invaders. *Id.*

7. David Blair, *Mugabe's Mobs Storm Firms With "White Link"*, THE DAILY TELEGRAPH (London), Apr. 7, 2001, at 15.

8. *Farmers Vow to Stay Put*, AFRICA NEWS, Mar. 7, 2001, *at* Documents & Commentary; R.W. Johnson, *Mugabe, Mbeki, and Mandela's Shadow*, THE NATIONAL INTEREST, Spring 2001.

farmers have been killed in South Africa.[9] Hundreds of black farm laborers and other rural black South Africans, "in turn, have been beaten, raped and murdered by white farm owners, managers, and private security personnel."[10]

Although fewer murders occurred on farms in Zimbabwe in the past year than on farms in South Africa, a large number of Zimbabweans have been victimized by crude acts of political violence, and many continue to live in fear.[11] Supporters of the ruling party, the Zimbabwe African National Union - Patriotic Front ("ZANU-PF"), have been accused of conducting mass beatings, burning houses, and issuing death threats in an effort to intimidate the fledgling opposition.[12] The leading independent newspaper in Zimbabwe, a newspaper that has frequently criticized the government, was bombed on January 28, 2001.[13] Reports have shown that supporters of the opposition party have also acted violently to intimidate voters.[14] Nevertheless, these acts of violence by supporters of the opposition have occurred on a much smaller scale than the violence attributed to the supporters of the ruling party.

In contrast to South Africa's problem with farm violence and implementation of its land reform program, Zimbabwe's land crisis has received more international attention due to the fact that President Mugabe and ZANU-PF have openly supported the farm invasions.[15] Critics of the government claim that government support for the farm invasions demonstrates that it has abandoned any commitment to the rule of law. There is no question that after the Movement for Democratic Change ("MDC") nearly won in the June 2000 elections, despite the fact that it had been formed only months before, leaders within ZANU-PF moved swiftly to consolidate their party's hold on power. In February, Chief Justice Anthony Gubbay was forced to resign after the government, dissatisfied with several Supreme Court rulings, indicated that

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9. *See Angry White South Africans Bury Another Victim*, N.Y. TIMES, Apr. 3, 2001, at A4.

10. *Violence on South African Farms*, N.Y. TIMES, Mar. 31, 2001, at A14. Though not widely reported in the international media, many white farmers in Zimbabwe have also had a record of treating their farm employees in a brutal manner. *See* Ann M. Simmons, *Hostages of Hostilities in Their Homeland; Zimbabwe: Whites Decry Farm Seizures*, L.A. TIMES, Apr. 28, 2000, at A1.

11. *See* JOHNSON, *supra* note 1, at 35 (noting survey results that indicate 74% of the population believe that they must be careful about expressing negative views about the government due to fear that the government might seek to retaliate by harming them).

12. *See* R.W. JOHNSON, THE HELEN SUZMAN FOUNDATION, ZIMBABWE: THE HARD ROAD TO DEMOCRACY 5 (2000).

13. *See* R.W. Johnson, *Mugabe, Mbeki, and Mandela's Shadow*, THE NATIONAL INTEREST, Spring 2001.

14. *See* Rosie DiManno, *In Zimbabwe Change Is Just a Word . . .*, THE TORONTO STAR, Mar. 26, 2001.

15. *See* JOHNSON, *supra* note12, at 5. Reports indicated that the government paid the people invading the white-owned farms and transported them in government vehicles from farm to farm. *See* Kurt Shillinger, *New Crackdown Starts in Zimbabwe*, THE BOSTON GLOBE, Feb. 18, 2001, at A7.

it would not guarantee his personal safety.[16] In April, the government passed a law making it illegal for political parties in Zimbabwe to receive financial contributions from foreign sources.[17]

Notwithstanding the real difficulties that a few thousand white farmers in Zimbabwe have endured over the past year, the more fundamental and enduring land problem in Zimbabwe still remains - more than twenty years after independence - the question of providing access to land to the hundreds of thousands of Zimbabweans who are landless or who have been confined to living on overcrowded marginal-land in the communal areas. The more compelling and enduring story of hundreds of thousands of poor, black Zimbabweans with insufficient land has not garnered nearly as much media attention as the farm invasions. As even government officials in Zimbabwe will acknowledge, the government's efforts since independence to provide land to landless and poor Zimbabweans have fallen well short of the governmental targets.[18]

Nevertheless, a recent study has demonstrated that the government's resettlement program has significant potential for alleviating poverty in the overcrowded and impoverished areas. However, the limited number of families resettled in Zimbabwe since independence represent a very small percentage of Zimbabweans who need access to good land. Addressing the critical land needs of these hundreds of thousands of Zimbabweans in a manner that respects the rule of law will require a great deal of financial resources, technical support, and patience.[19]

This Article is written with the limited objective of providing readers with some background into the current land and political crisis in Zimbabwe. Although there is certainly a racial component to the issue, the land question in Zimbabwe is more complicated than a struggle between an oppressed black majority and a privileged white minority. The manner in which the international media has covered the land crisis in Zimbabwe has shed more heat than light. First, this Article will provide a brief profile of the agrarian sector within Zimbabwe. Second, this Article will review the main land resettlement initiatives that have been undertaken by the government of Zimbabwe from independence in 1980 until the present. Third, this Article will discuss the land use efficiency and agricultural productivity in the communal areas and largescale commercial sectors. In conclusion, this Article discusses some of

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16. *See 2 More Judges Face Ire of Government*, TELEGRAPH HERALD (Dubuque, IA), Feb. 11, 2001, at A12. The government has asked two more Supreme Court justices to resign and plans to ask the remaining two justices on the five-member court to resign as well. *See id.*

17. *See Biking the Samizdat*, THE ECONOMIST (U.S. Edition), Apr. 7, 2001, Int'l.

18. *See* Kinsey, *supra* note 4, at 174; *see also* Robin Palmer, *Land Reform in Zimbabwe, 1980-1990*, 89 AFR. AFF. 163, 173 (1990).

19. Vincent Kahiya, *UNDP Report on Land Heading for Rejection*, ZIMBABWE INDEPENDENT, May 25, 2001 (estimating that a proper resettlement program that would adequately reduce poverty will require 1 billion dollars).

the challenges that lie ahead for Zimbabwe as it struggles to address the land question in a political environment in which many other issues are competing for attention.

II. ZIMBABWE: A PROFILE OF THE AGRARIAN SECTOR

Zimbabwe is a land locked country in Southern Africa. The country has a population of more than twelve million people;[20] and at least 97% of the population is black consisting mostly of the Shona and Ndebele people. The white population makes up less than 2% of the population, a figure that appears to be declining as many whites have been leaving the country over the past year.[21] Zimbabwe, one of the smaller countries in southern Africa, has a total land area of thirty-nine million hectares (approximately 96 million acres).[22] In this mostly rural country, a little more than thirty-two million hectares are devoted to the agricultural sector.[23] Nearly 75% of the population earns their livelihood from agriculture.[24] Overall, the agricultural sector generates about 15% of the gross domestic product, and agricultural exports constitute 50% of export earnings for the country.[25]

As is the case with almost every aspect of life in Zimbabwe, the agrarian sector is highly dualistic, with land distributed unevenly between blacks and whites.[26] There are approximately 4800 large-scale commercial farms that are located on almost eleven million hectares of land.[27] Of the total number of large-scale commercial farms, nearly 4500 are white-owned. As recently as 1989, these large-scale farms employed nearly 250,000 permanent and seasonal employees.[28] Many of the remaining large-scale farms have been acquired by members of the new or emerging black elite, including politicians and government officials, even though many of these farms were acquired for the stated purpose of resettling the poor.[29]

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20. *See* MARTIN WHITESIDE, ENCOURAGING SUSTAINABLE SMALLHOLDER AGRICULTURE IN SOUTHERN ZIMBABWE 10 (1998).

21. *See* Rachel L. Swarns, *As Zimbabwe Falters, Doubts About Who is Really to Blame*, N.Y. TIMES, Apr. 8, 2000, at A1. The number of whites is shrinking daily as many whites, and some black Zimbabweans with means, have decided to move out of the country in the past year.

22. *See* Roth & Bruce, *supra* note 3, at 112, n.27. There are approximately 2.47 acres to a hectare. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 733 (10th ed. 1999).

23. *See* WHITESIDE, *supra* note 20, at 15.

24. *See id.* at 12.

25. *See id.*; Roth & Bruce, *supra* note 3, at 2.

26. WHITESIDE, *supra* note 20, at 10. Other sectors of the economy such as the mining, tourism, manufacturing, and financial services sectors exhibit similar imbalances, highlighting the fact that more than twenty years after independence the colonial legacy survives. *See* MAPOSA, *supra* note 4, at 24.

27. WHITESIDE, *supra* note 20, at 15.

28. *See* Roth & Bruce, *supra* note 3, at 169.

29. *See* WHITESIDE, *supra* note 20, at 14; *Mugabe Defends Farm Allocations to Ministers*, XINHUA GENERAL NEWS SERVICE, Apr. 5, 2000, World News.

In contrast, one million Shona and Ndbele families live on sixteen million hectares in the exclusively black communal areas. Recent statistics indicate that large-scale farms averages 2223 hectares;[30] as of 1981, the large-scale commercial farms owned by corporations or multinationals averaged 3835 hectares, as compared to the commercial farms owned by individuals or families that averaged 1402 hectares.[31] In contrast, the farms in the communal areas average eighteen hectares, with each farm averaging only three to five hectares of arable land.[32] The population density in the communal areas is thirty-eight people per one hundred hectares, which is three times the population density on the large-scale commercial farms that have an overall density of thirteen people per one hundred hectares.[33]

In addition to the much higher population density in the communal areas as opposed to the large-scale commercial sector, there are many other qualitative differences between the two sectors. Due to the fact that the initial European settlers took the best land for themselves, there are marked differences between the quality of land that most black Zimbabweans farm and the land owned by large-scale commercial farmers. Overall, the country is divided into five "Natural Regions" that have different degrees of soil quality, rainfall,[34] and other climatic features that significantly impact a farmer's ability to grow crops productively.[35] In Natural Regions One and Two, the regions that have the most rainfall and the best farming land, 74% of the land used for farming is owned by large-scale commercial farmers.[36] Representing the mirror opposite, 74% of the land that is located in Natural Regions Four and Five, the areas with the poorest rainfall, is communal area land.[37] Not only are there great differences in the amount of arable land the commercial farmers own as opposed to communal area residents, soil erosion occurs at a far higher rate in the communal areas as opposed to the commercial farming areas, due to the overcrowding in the communal areas.[38]

Further, there are tremendous differences in the poverty rates found within the different farming sectors. A 1995 study reported that 62% of the

30. *See* WHITESIDE, *supra* note 20, at 15.

31. SAM MOYO, THE LAND QUESTION IN ZIMBABWE 84 (1995).

32. *See* WHITESIDE, *supra* note 20, at 15.

33. *Id.*

34. Rainfall is the most important determinant of whether land is arable in Zimbabwe. *See* M.W. MURPHREE & D.H.M. CUMMING, SAVANNA LAND USE: POLICY AND PRACTICE IN ZIMBABWE, CENTRE FOR APPLIED SOCIAL SCIENCE, 1 WORLD WILDLIFE FUND PAPER 6 (1991). There is a single rainy season in Zimbabwe that lasts from November to March and about 65% of the country receives less that 750 millimeters of rain per year. *Id.*

35. *See* Roth & Bruce, *supra* note 3, at 8-9.

36. *See* WHITESIDE, *supra* note 20, at 12-13.

37. *See id.* at 15; Roth & Bruce, *supra* note 3, at 19.

38. *See* MURPHREE & CUMMING, *supra* note 34, at 7.

population nationwide was living below the poverty line.[39] However, in the communal areas, 81% of the people lived below the poverty line as compared to 51% of the people residing in the large-scale commercial farming areas.[40]

In addition to the large-scale commercial sector and the communal area sector, which together account for nearly 85% of Zimbabwe's farming area, there is a resettlement area sector and a small-scale commercial farming sector, reserved for black small holders.[41] The resettlement area consists mostly of former large-scale commercial farmland that the government acquired after independence for the stated purpose of resettling poor Zimbabweans living in communal areas.[42] Pre-independence, the small-scale commercial farming areas were referred to as the native purchase areas and subsequently the African purchase areas.[43] These areas were established to give black Zimbabweans some limited ability to purchase land in a black sector because under the Land Apportionment Act of 1930, blacks were barred from buying land in the newly established white purchase areas. Only in the native purchase areas were blacks permitted to purchase land, in 30 to 300 acre parcels, and hold such land under freehold title.[44]

The dualistic structure of the agrarian sector extends to the land tenure systems found within the different sectors. Ironically, the central government has maintained at least as much control over land administration as did the colonial government just prior to independence.[45] Individual black Zimbabweans appear to own no more land under freehold title today than blacks held during the colonial era. Freehold title has typically been used as collateral for loans due to the fact that freehold has the characteristic of unrestricted alienation.[46] The fact that institutions making agricultural loans require the borrower to possess collateral partially explains the reasons why large-scale farms have received two-thirds of the country's agricultural

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39. *See* WHITESIDE, *supra* note 20, at 11. The percentage of people living in poverty has increased by almost one-third over the last decade as 40% of Zimbabweans lived in poverty at the beginning of the 1990s. Swarns, *supra* note 21.

40. *See* WHITESIDE, supra note 20, at 11.

41. Small holders are landowners who own relatively small parcels of land as compared with the other landowners in a given region or country. There are 3.29 million hectares of land found in the resettlement sector and 1.38 million hectares that lie in the small scale commercial areas. *Id.* at 15.

42. *See* 1 COMMISSION OF INQUIRY INTO APPROPRIATE AGRICULTURAL LAND TENURE SYSTEMS, REPORT OF THE COMMISSION OF INQUIRY INTO APPROPRIATE AGRICULTURAL LAND TENURE SYSTEMS, at 55 (1994) (commission chaired by Professor Mandivamba Rukuni) [hereinafter the Rukuni Report].

43. *See id.* at 73.

44. *See* Roth & Bruce, *supra* note 3, at 14.

45. *See* ZERO-REGIONAL ENVIRONMENT ORGANISATION, ENHANCING LAND REFORMS IN SOUTHERN AFRICA; CASE STUDIES ON LAND REFORM STRATEGIES AND COMMUNITY BASED NATURAL RESOURCES MANAGEMENT 63 (1998).

46. Roth & Bruce, *supra* note 3, at 31.

credit.[47] Nevertheless, government officials in Zimbabwe remain skeptical about the benefits of freehold tenure.[48]

Such skepticism may explain the government's resistence to providing those established in the resettlement areas with the ability to own land under freehold title. Instead, under the various resettlement schemes, including the one that has been used most extensively, known as the Model A scheme, title to the resettlement land vests in the state.[49] In the first ten years or so of the resettlement efforts, the government issued three types of permits to those resettled under the Model A scheme: a permit to reside, a permit to cultivate, and a permit to depasture livestock.[50] On paper at least, the permits gave the government extraordinary power over those resettled who in turn possessed relatively few rights. Kinsey indicates that the government stopped issuing physical, paper permits in 1992 or so.[51]

Although the government no longer appears to be issuing paper permits, title to land in the resettlement areas still vests in the state. The precise conditions under which those resettled since 1992 have access to the land is somewhat murky. One thing, however, is more certain. Any farm invaders or other Zimbabweans who are resettled on any of the farms the government may acquire that are now being occupied, will likely receive access to the land under some tenure system under which title vests in the state as opposed to under freehold title.

The government also has significant control over land administration in the communal areas. Under the Communal Lands Act of 1982 ("CLA"), land allocation and administration was taken away from traditional leaders and given to district councils, known currently as the Rural District Councils, who report to the central government.[52] Under the CLA, the President holds title over communal areas in trust for the people.[53] In its allocation of power with respect to land administration, the Communal Lands Act of 1982 resembles the Native Land Husbandry Act of 1951 ("NLHA").[54] The NLHA represented a radical attempt by the Rhodesian government to replace traditional Shona and Ndebele tenure systems with a system based upon Western concepts of freehold tenure.[55] Furthermore, the NLHA stripped traditional leaders of the

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47. *See id.* at 31-32.

48. *See id.*

49. *See* Rukuni Report, *supra* note 42, at 56.

50. *See* Roth & Bruce, *supra* note 3, at 51.

51. *See* Email correspondence between Thomas Mitchell and Bill H. Kinsey, Senior Research Fellow, Free University Amsterdam (June 24, 2001) (on file with author).

52. *See id.* at 41.

53. *See* Rukuni Report, *supra* note 42, at 22.

54. *See* Roth & Bruce, *supra* note 3, at 38, 41.

55. *See* Rukuni Report, *supra* note 42, at 22. The NLHA was similar in important respects to the General Allotment Act of 1887 (or "Dawes Act") that the United States Congress adopted in the late nineteenth century in order to fundamentally alter the land tenure systems on Native American reservations. *See* General Allotment Act of 1887, ch. 119, 24 Stat. 388,

power to allocate and administer land and placed authority into the hands of government officials.[56] Under the Tribal Trust Land Act of 1965, traditional leaders were given back the authority to allocate and administer land in the reserves or tribal trust lands.[57] Under the CLA, that authority has once again been removed.

III. THE GOVERNMENT'S RESETTLEMENT PROGRAMS

A. *Review of the Government's Programs Since Independence*

Over the past twenty years, the Zimbabwean government has launched a series of land reform initiatives. However, as compared to South Africa which undertook a broad range of land reform initiatives after the transition to majority rule in 1994—including programs aimed at restitution, redistribution and improving land tenure security[58]—Zimbabwe's land reform program has been more one-dimensional.[59] From independence until last year, the primary focus of the Zimbabwean government's land reform program had been on resettlement of black families onto land sold by whites on a "willing seller, willing buyer" basis.[60] The policy decision to focus efforts on resettling a few hundred thousand Zimbabweans has not responded adequately to the land problems faced by millions of black Zimbabweans who live in the overcrowded communal areas. Plans to rehabilitate the communal areas or to reform the pattern of land tenure within the communal areas to provide the people living there with more autonomy from government technocrats have "not turned into reality on the ground" for the most part.[61]

(1887). Under the Dawes Act, Congress sought to break up Indian reservations by allocating part of the reservation land to individual Indians and families and declaring the remainder as "surplus land". Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995). Not only did Native American tribes lose millions of acres of land that was declared as "surplus land" under the Dawes Act, but also a majority of the individual Indians who were given fee simple ownership of land under the Act lost their land within a few years after they were preyed upon by land speculators. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 542-43 (2001). Just as the Dawes Act ended up being considered a failure with respect to its goal of creating Native American yeoman farmers committed to a system of individualized, freehold tenure, implementation of the Native Land Husbandry collapsed under fierce opposition from those living in the targeted areas. *Cf.* Roth and Bruce, *supra* note 3, at 41.

56. *See* Roth & Bruce, *supra* note 3, at 38.

57. *See* Rukuni Report, *supra* note 42, at 22.

58. *See* South Afr. Dep't of Land Affairs, White Paper on South African Land Policy 9 (1997).

59. *See* Kinsey, *supra* note 4, at 174 n. 5. *See also* Palmer, *supra* note 18, at 167-78.

60. *See* Palmer, *supra* note 18, at 167-68.

61. *Id.* at 168.

Under the Land Reform and Resettlement Program ("LRRP - 1"), implemented between 1980 and 1997, the government resettled 71,000 households on approximately 3,500,000 hectares of land.[62] This land consisted mostly of land acquired from the commercial farming sector, with some additional State-owned land.[63] The number of households resettled represents less than10% of the communal area farmers and resettlement has not kept pace with population growth.[64] Further, despite the resettlement of these families, the government had set a goal in 1982 under its Transitional National Development Plan of resettling 162,000 families on 9,000,000 hectares by the end of 1985.[65] Not only was the government unable to meet this goal, but recent reports indicate that 524,890 families have registered for resettlement throughout the country.[66] Moreover, the government has not provided all of the needed infrastructure to the LRRP-1 resettled families or improved the "settlers" access to research, extension, and markets."[67]

In 1997, the government announced that it would launch a second Land Reform and Resettlement Program ("LRRP-2") with the goal of acquiring five million hectares of land from the large-scale commercial farming sector and resettling 150,000 families.[68] This land acquisition and resettlement were to be accomplished within a five-year period.[69] However, political events overtook implementation of the LRRP-2.

Prior to the June parliamentary elections, at a time in which ZANU-PF held 147 out of the 150 seats, the parliament amended the constitution in a manner that allowed the government to expropriate land without paying compensation.[70] On May 23, 2000, the government amended the Land

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62. *Inception Phase Framework Plan, 1999 to 2000: An Implementation Plan of the Land Reform and Resettlement Programme, Phase 2*/Technical Committee of the Inter-Ministerial Committee on Resettlement and Rural Development National Economic Consultative Forum Land Reform Task Force (Zimbabwe), 2nd draft (undated)(on file with author).

63. *See* Roth & Bruce, *supra* note 3, at 21.

64. *See* WHITESIDE, *supra* note 20, at 54.

65. *See* TSHUMA, *supra* note 6, at 60.

66. *See Brief for Negotiations on the Land Reform and Resettlement Programme Between the Zimbabwean and the British Governments*, http://www.gta.gov.zw/Land%20Issues/workingbrief.htm (last visited May 31, 2001).

67. Roth & Bruce, *supra* note 3, at 124. This is not surprising in light of the fact that the percentage of national spending the government devoted to agriculture dropped from a high of 9.2% in the 1984/85 fiscal year to 1.9% in 1997/98 fiscal year. *See* WHITESIDE, *supra* note 20, at App. III.

68. *See Inception Phase*, *supra* note 63. In addition to resettling families, the government intended to allocate land to a number of black commercial farmers in an effort to increase agricultural productivity. *Id.*

69. *See id.*

70. *See Zimbabwe: Market Land Acquisition Experience*, AFRICA NEWS, Nov. 27, 2000, at Documents & Commentary. Under the amendment, the government is required to pay for improvements; however, the government is allowed to offset previous subsidies the government provided to the landowners. *Id.*

Acquisition Act of 1992 ("LAA-1992")[71] to make it consistent with the constitutional amendment. The amended LAA-1992 provides for compensation for the acquisition of agricultural land as follows: "In respect of the acquisition of agricultural land required for resettlement purposes, compensation shall only be payable for any improvements on or to the land . . . ." [72]

On July 15, 2000, Vice President Joseph Msika announced the commencement of the government's "Accelerated Land Reform and Resettlement Implementation Plan" or the "fast-track" resettlement plan as it has been commonly designated.[73] Under the fast-track plan, the government now seeks to acquire five million hectares of land by December 2001.[74] Compensation for land will be paid in accordance with the recent amendments to the LAA-1992.[75] The government has identified more than 3000 farms located on slightly more than five million hectares of land that it intends to acquire.[76] Under the fast-track plan, the government has stated that its first priority is to resettle poor landless people from congested communal areas and then indigenous black Zimbabweans who wish to participate in the large-scale commercial farming sector.[77] Even the government has acknowledged that the fast-track approach is flawed because the people resettled will be provided with only the most basic infrastructure needed to use the land (presumably beneficiaries will receive less support than beneficiaries received under LRRP-1).[78]

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71. *See* Land Issues in Zimbabwe, *New Land Acquisition Act*, http://www.gta.gov.zw/Land%20Issues/LAND.htm (last visited May 31, 2001) [hereinafter "Land 1"].

72. *Id.*

73. *See* Land Issues in Zimbabwe, *Statement made by Vice President Joseph Msika on Announcing the Accelerated Land Reform and Resettlement Programme "Fast Track" Approach, July 15, 2000*, http://www.gta.gov.zw/Land%20Issues/LAND.htm (last visited May 31, 2001) [hereinafter "Land 2"].

74. *See* Ministerial Pronouncements, *Minister Mudenge Honours the UNDP Administrator and Special Envoy of the United Nations Secretary-General, Mr. Mark Malloch Brown, Nov. 30, 2000*, http://www.gta.gov.zw/Ministerial%20Speeches/ministerial_speeches_main.htm.

75. *See* Land 1, *supra* note 71.

76. *See* Land Issues in Zimbabwe, *Chairman of the National Land Acquisition Committee: Hon. Vice President J.W. Msika Announces the Identification of Additional Farms for the Resettlement Programme, July 31, 2000*, http://www.gta.gov.zw/Land%20Issues/LAND.htm (last visited May 31, 2001) [hereinafter "Land 3"].

77. *See* Land 2, *supra* note 73.

78. *See* Ministerial Pronouncements, *supra* note 74. "We shall not hide the fact that the Fast Track Programme has room for improvement. For example, the settlers require access roads, water supplies, schools, clinics, dip tanks, draught power, initial seeds and fertilisers, extension services, training and many more which the Government is unable to provide at present." *Id.* at 15.

B. *Analysis of the Effectiveness of the Resettlement Efforts*

An assessment of the government's resettlement program since independence cannot be written in black and white or labeled a complete success or failure. Although the program has not come close to fulfilling its goals, thousands of poor and landless Zimbabweans have benefitted from the resettlement program. At the same time, a number of well connected Zimbabweans have been allocated land under the resettlement program that the government claimed it had acquired in order to resettle the poor and landless.

Despite the more limited focus of the land reform initiatives in Zimbabwe, the Zimbabwean resettlement program overshadows any other voluntary resettlement program that has been undertaken in sub-Saharan Africa.[79] For example, the government has allocated significantly more land to those resettled than the Kenyan government allocated to resettled families under its resettlement program.[80] Not only has the Zimbabwean resettlement program been relatively impressive in terms of its scope as compared to other such efforts, but it has also been somewhat successful in achieving some of the early goals of the program with respect to improving the life chances of those resettled.[81]

One of the leading research scientists who has tracked the beneficiaries of the resettlement program in Zimbabwe has emphasized that the impact of resettlement can only be measured over a fairly long time horizon.[82] Further, when measured against some of the programs initial poverty-alleviation goals instead of against the productivity of the large-scale farming sector, the resettlement program benefits become clearer.[83] The more appropriate comparison is between households in the communal areas and households in the resettlement areas because most of those resettled have come from the communal areas. Analysis of the data from the 1996 crop harvest revealed that the value of the agricultural crops of the average resettled family was worth over four and a half times the value of the crops produced by the

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79. *See* Kinsey, *supra* note 4, at 177.

80. *See* Palmer, *supra* note 18, at 169.

81. The main objectives of the resettlement program at its inception were as follows: (1) to alleviate population pressure in the communal areas; (2) to extend and improve the base for productive agriculture in the peasant farming sector; (3) to improve the level of living of the largest and poorest sector of the population; (4) to provide, at the lower end of the scale, opportunities for people who have no land and who are without employment and may therefore be classed as destitute; (5) to bring abandoned or under-utilised land into full production as one facet of implementing an equitable programme of land redistribution; (6) to expand or improve the infrastructure of economic production; and (7) to achieve national stability and progress in a country that has only recently emerged from the turmoil of war. Kinsey, *supra* note 4, at 176.

82. *Id.* at 175.

83. *See id.* at 176.

average communal area household.[84] Further analysis of the data also revealed that resettled households earned almost seven times as much income from the sale of their crops as the communal area households.[85]

Despite these markers of success of the resettlement program—indicators that must be tempered by the small percentage of the poor and landless who have benefitted from the program—there has also been a recurrent pattern of large farms being allocated to members of the black elite despite the fact that the government has mostly justified its resettlement program as designed to acquire land for the teeming masses of the poor and landless.[86] In March 2000, the Zimbabwean parliament revealed that the government had acquired and distributed 270 white-owned farms, presumably acquired for redistribution to the poor, to 400 relatively privileged Zimbabweans, some of whom served in the government.[87] Unfortunately, the allocation of these farms to well-heeled or connected Zimbabweans is not an isolated event. In 1998, twenty-four farms that had been acquired from white farmers were divided amongst forty-seven government officials.[88] In 1994, twenty farms acquired by the government were disbtibuted to high-ranking government officials.[89]

IV. THE EFFICIENCY OF THE LARGE-SCALE COMMERCIAL FARMING SECTOR

The wisdom of redistributing significant amounts of land from white farmers to poor native Zimbabweans has been questioned consistently by many white farmers since independence.[90] Typically, those opposing the government acqusition of white-owned farms claim that the large-scale commercial farming sector, which is dominated by white farmers, is significantly more efficient than the other farming sectors. Thus, it is believed that redistributing commercial farmland to resettled blacks drawn from the overcrowded communal areas will negatively impact agricultural productivity, lowering foreign exchange earnings.[91] Further, given the high percentage of

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84. *See id.* at 183.

85. *Id.* Resettled households, however, did not make much progress as compared to communal area households with respect to child nutritional levels. *Id.* at 189-92.

86. *See* Jenkins, *supra* note 2, *at* 594-95.

87. *See* George Ayittey, *What is Koigo Doing in the Company of Despots?*, AFRICA NEWS, May 11, 2000, *at* Documents & Commentary.

88. *Id.*

89. *Id.*

90. *See* Brian J. Nickerson, *The Environmental Laws of Zimbabwe: A Unique Approach to Management of the Environment*, 14 B.C. THIRD WORLD L.J. 189, 225 (1994).

91. *See* Roth & Bruce, *supra* note 3, at 1. Until recently at least, the most successful organization that has lobbied against extensive land reform that would redistribute white-owned farmland to poor black Zimbabweans has been the Commercial Farmers' Union. Palmer, *supra* note 18, at 163, 170-71.

persons employed in Zimbabwe who work as farm laborers on large-scale commercial farms, there are serious and legitimate concerns that acqusition of large numbers of white-owned farms may further exacerbate the country's high unemployment rate.[92] Nevertheless, the perception that large-scale white farms have been highly efficient is a common misconception.

One reason some believe that white-owned commercial farms are highly efficient stems from the fact that large farms are assumed to be operated in a way that takes advantage of economies of scale.[93] However, a number of empirical studies demonstrate that there is often an inverse relationship between the scale of a farming operation and the productivity of the farm per hectare for most crops.[94] In Zimbabwe, the large-scale commercial farming "sector's substantial contribution to agricultural production and export earnings mask a number of inefficiencies."[95] For example, "[o]ne multinational alone held 25 farms amounting to 500,000 hectares which were mostly not cropped."[96] Overall, at least 40 to 50% of the arable land in Natural Regions One and Two has been unutilized for crop production.[97] The land in the third best Natural Region in terms of rainfall, Natural Region III, "remains grossly underutilized at 15 percent."[98] Roth and Bruce have indicated that within these three regions, 3.5 million hectares "could be acquired for resettlement without sacrificing commercial crop output and/or exports."[99] Kinsey, however, points out that the land to be acquired would have to be carefully selected and that a feasible land subdivision or "land

92. Roth & Bruce, *supra* note 3, at 111.

93. In terms of the historical development of the dominant large-scale commercial sector, it should be noted that between 1894-1980, the agricultural policy objectives were geared towards building up white commercial farmers. Policymakers realized this objective by: (1) providing land to white farmers either for free or below market value; (2) facilitating easy access to credit for white farmers; (3) devoting resources to research and agricultural extension programs that set up to benefit white farmers; and (4) regulating the agricultural sector through controlling prices and providing subsidies. *See* MAPOSA, *supra* note 4, at 34-35. *See also* TSHUMA, *supra* note 6, at 56-57. "[White commercial farms] have reached their present levels of productivity and efficiency on the basis of lavish state support and protection from competition. Moreover, their efficiency continues to be based on indirect subsidies of cheap labour as evidenced by the poor conditions of employment for farm workers and the high levels of malnutrition among their children." *Id.*

94. *See* Roth & Bruce, *supra* note 3, at 57-58. *See also* R. ALBERT BERRY AND WILLIAM R. CLINE, AGRARIAN STRUCTURE AND PRODUCTIVITY IN DEVELOPING COUNTRIES: A STUDY PREPARED FOR THE INTERNATIONAL LABOUR OFFICE WITHIN THE FRAMEWORK OF THE WORLD EMPLOYMENT PROGRAMME 131, 134-35 (1979).

95. Roth & Bruce, *supra* note 3, at 101.

96. *Market Land Acquisition, supra* note 70.

97. Roth & Bruce, *supra* note 3, at 108.

98. *Id.* at 106.

99. *Id.* at 109.

sharing" scheme would have to be established.[100] He notes that neither precondition has been satisfied to date.[101]

Further, the large-scale commercial sector's dominance does not extend to all agricultural crops. After it achieved independence in 1980, the Zimbabwean government "increased investment in rural infrastructure - in input and marketing services and in extension - in the communal areas . . . ."[102] With these improvements and increased market access, communal area farmers now hold a comparative advantage over large-scale commercial farmers in the production of maize and sunflowers; and farmers in the two sectors produce cotton on nearly equal terms.[103] These developments demonstrate that Zimbabwe's mostly poor black farmers can be as productive as the large-scale commercial farmers if given the same level of support.

V. CONCLUSION

Given all of the media attention devoted to the farm invasions and the overheated rhetoric about the land question, those unfamiliar with day-to-day life in Zimbabwe may think that the land question is the biggest concern for most Zimbabweans. However, Zimbabweans face many issues they consider significantly more important than the land question. Twenty five percent of the population is H.I.V. positive.[104] At least 30% of the population is now unemployed.[105] In fact, the results of a poll conducted, by the South African-based Helen Suzman Foundation in September to October 2000, indicate that only 6% of Zimbabweans rate the land question as the country's most important issue.[106] This is just ahead of the 5% who believe government corruption to be the country's leading problem.[107] Given the fact that between 250,000 and 300,000 people are employed in the large-scale commercial sector[108] and that many of these people do not believe the farm invasions will lead to genuine land reform,[109] it is not surprising that these farm employees

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100. *See* Email correspondence between Thomas Mitchell and Bill H. Kinsey, Senior Research Fellow, Free University Amsterdam (June 24, 2001) (on file with author).

101. *Id.*

102. *Id.* at 82.

103. *See id.* at 99.

104. *South Africa's Aid to Zimbabwe Must be Conditional*, FINANCIAL MAIL (South Africa), Mar. 23, 2001, at 14.

105. *See* WHITESIDE, *supra* note 20, at 97-98.

106. *See* JOHNSON, *supra* note 1, at 18.

107. *See id.* at 18. The land question ranked sixth amongst the concerns people expressed. The following issues ranked ahead of the land question: rising prices (32%); unemployment (19%); the drop in value of the Zimbabwe dollar (14%); poverty (8%); and HIV/AIDS (8%). *Id.*

108. Roth & Bruce, *supra* note 3, at 169; MOYO, *supra* note 31, at 98.

109. *See* JOHNSON, *supra* note 1, at 40. (in this survey, 64% of the respondents indicated that the farm invasions were a mere political ploy that had nothing to do with genuine land reform).

fear that the farm invasions may lead to greater unemployment with no corresponding benefit of effective land reform.

Further, those who have been following the land crisis in Zimbabwe from afar should not assume that the majority of Zimbabweans support the farm invasions. This may appear surprising given the degree to which the issue of land distribution has become politicized in Zimbabwe. In a survey conducted towards the end of 2000, 68% of the respondents believed that the self proclaimed war veterans should leave the farms they invaded immediately.[110] With respect to the role that white farmers should play, 69% of the respondents indicated that they did not favor radical redistribution initiatives that would drive white farmers off their land.[111] Even amongst the ZANU-PF respondents to the survey, 47% did not favor radical redistribution that would take away farms from whites.[112]

Any lasting solution to the land question in Zimbabwe can only occur in a less politically charged environment. Before the government implemented its "fast-track" program, even many white farmers in Zimbabwe acknowledged that a substantial number of white-owned commercial farms would need to be acquired in order to decrease the highly skewed land distribution patterns.[113] However, it is questionable whether the current approach will deliver the benefits the government has promised.

Even if the government is able to relocate a significant number of the more than 500,000 poor families who registered for resettlement onto formerly white-owned commercial farms, those resettled probably will not benefit as much as those who have already been resettled under earlier resettlement initiatives. This is likely to be the case because the government acknowledges that it will be able to provide those to be resettled with only the barest amount of infrastructure and support.[114] Moreover, Zimbabwe's troubled economy will likely suffer further downturns under the present conditions; and economic declines will negatively impact people throughout the country, including those resettled on farms acquired under the "fast-track" program.

The government of Zimbabwe must expand its land reform strategies and programs to better meet the needs of its population. In terms of resettlement, the government must adopt a process that requires government officials

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110. *See id.* at 41. *See also* Swarns, *supra* note 21.

111. *See* JOHNSON, *supra* note 1, at 35.

112. *See id.*

113. *See* Andrew Meldrum, *African Leaders Criticise Mugabe for Farm Seizures*, THE GUARDIAN, Dec. 1, 2000 ("Virtually everyone, including international donors and Zimbabwe's white farmers, agree that thorough land reform is needed to redress the historic injustices in which white British settlers seized vast tracts of African land without paying compensation.") *Id. See also*, Rupert Cornwell, *Zimbabwe: Land and Freedom: Only Both Will Do*, THE INDEPENDENT, Apr. 9, 2000.

114. *See supra* note 78 and accompanying text. *See also* John Dludlu, *New Look, Old Problems for Mugabe*, BUSINESS DAY (South Africa), Dec. 19, 2000.

to consult with those to be resettled from the beginning of the resettlement process instead of using the top-down approach that has often characterized the resettlement program up to this point.[115] Beyond, the resettlement program, the government must also consider making changes to the land tenure laws that allocate rights and responsibilities between individuals, groups and the government with respect to landownership and land use.

As in many other post-colonial countries, the Zimbabwean government has maintained a dualistic land tenure system resembling tenure systems found in colonial states.[116] Whether extending freehold title throughout post-colonial countries, such as Zimbabwe, would do much to give people more secure property rights, referred to as improving security of tenure, is a hotly contested issue.[117] The government of Zimbabwe, however, should consider relinquishing some of its grip over those in the resettlement areas by providing resettled individuals, groups and communities with more autonomy and ownership rights.

Given that the current land reform crisis flared up months before a hotly contested election, many Zimbabweans doubt whether the government's initiatives will have much staying power beyond the presidential elections in 2002. Further, now that the leader of the war veterans - Chenjerai Hunzui - has died, no one knows whether those who have participated in the farm occupations will maintain their resolve.[118] The farm invasions in the past year have unquestionably changed the parameters of the land debate both within Zimbabwe and in countries such as South Africa. Whether or not the "fast-track" program will help garner political support for President Mugabe and ZANU-PF over the course of the next year, the effectiveness of the new program — in the end — must be measured by the degree to which the lives of poor and landless Zimbabweans are improved or not. Time will surely tell.

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115. *See* Kinsey, *supra* note 4, at 173, 181.

116. Jane Borges, *Land Reform Not Only Mugabe's Problem*, AFRICA TODAY, Feb. 23, 1998 ("Namibia, Zimbabwe and South Africa have similar colonial-inspired dual-agrarian systems – export orientated, large-scale farms and smallholder peasant farmers in communal areas producing for local markets").

117. SEARCHING FOR LAND TENURE SECURITY IN AFRICA 24-27, 137-39, 260-64 (John W. Bruce & Shem E. Migot-Adholla eds. 1994). *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000) (arguing that developing countries should adopt Western-style property systems in order to unlock the economic potential of the poor).

118. *Chenjerai Hunzvi, 51, Leader of Farm Take Overs in Zimbabwe*, N.Y. TIMES, June 5, 2001, A25 (Obituaries).

STATE PRACTICE EVIDENCE OF THE HUMANITARIAN INTERVENTION DOCTRINE: THE ECOWAS INTERVENTION IN SIERRA LEONE

I. INTRODUCTION

The world is replete with humanitarian disasters, often perpetrated by governments upon their own citizens. Today, civilians in Afghanistan, Burundi, Columbia, Democratic Republic of Congo, Indonesia, Iraq, Sudan, and many other countries suffer murder, rape, and torture at the hands of government or paramilitary forces.[1] Unfortunately, with few exceptions,[2] the United Nations (U.N.) Security Council is unwilling or unable to act due to institutional and political barriers to worldwide collective action.[3] Despite the failure of the U.N., states still have a moral imperative to stop governments from committing large-scale atrocities against their own people. In a number of recent cases, states have engaged in unilateral[4] humanitarian interventions[5] to solve these crises. While such humanitarian interventions are good policy, are they in accordance with international law?

Treaties are a central component of international law,[6] and the U.N. Charter, with 189 state signatories,[7] is the paramount multilateral treaty.

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1. *See generally* AMNESTY INTERNATIONAL, REPORT 2000 (2000) (documenting humanitarian disasters and atrocities worldwide).

2. *See, e.g.*, Res. 688, U.N. SCOR, 2982d mtg., U.N. Doc. S/RES/688 (1991) (calling for humanitarian assistance for Kurds in Iraq); Res. 794, U.N. SCOR, 3145th mtg., U.N. Doc. S/RES/794 (1991) (authorizing large and far-reaching humanitarian mission in Somalia).

3. Even in those instances where the U.N. Security Council purportedly authorized a use of force to intervene in a humanitarian crisis, it did so reluctantly. *See* Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205, 221-22 (Lori Fisler Damrosch ed. 1993); Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, *in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS, *supra* at 77, 79.

4. Unless otherwise noted, the use of the word "unilateral" in this note indicates actions taken by a state alone or a group of states through a regional organization, as opposed to a United Nations sponsored "collective action." For similar treatment, *see* David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 264 (1992). "Joint action" refers to an intervention conducted by more than one nation, but without U.N. approval.

5. "Humanitarian intervention has been defined as: '[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.'" Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203-04, n.3 (1974), *quoting* E. STONWELL, INTERNATIONAL LAW 348 (1931).

6. *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, at Pmbl.

7. *See* Information Technology Section, Department of Public Information, United

Literally interpreted,[8] Article 2(4) of the U.N. Charter explicitly prohibits a state from using force against another state,[9] except in self-defense.[10] However, customary international law, the common law of interstate relations, is equal in status to treaties as a source of international law.[11] When a treaty and customary international law conflict, the "last in time" rule applies, which states that the law that came into existence last generally prevails.[12] Assuming the U.N. Charter prohibits states from intervening with force in another state,[13] any lawful humanitarian intervention must be founded on overriding, more recently formed customary international law. Thus, for a humanitarian intervention not approved by the U.N. Security Council to be legal, customary international law allowing humanitarian interventions must have formed since the original signing of the U.N. Charter in 1945.

To prove the existence of customary international law, one must establish both historical state practice and *opinio juris*.[14] First, the consistent, reoccurring acts and policies of states must reflect the customary international law.[15] State practice, either unilateral or joint action, includes uses of force and other state policies, diplomatic acts and official statements, and even instances of state inaction.[16] Second, to have *opinio juris*, "it must appear that the states follow the practice from a sense of legal obligation."[17] To demonstrate the existence of customary law, a state must provide evidence that the act completed was due to the compulsion of, or the belief that their actions were consistent with, international law.[18] Evidence of *opinio juris* may include official pronouncements of states, statements of international and national judicial tribunals, and writings of scholars.[19] With extensive evidence of state practice and *opinio juris*, jurists can pronounce the existence of a rule of

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Nations, *Growth in United Nations Membership, 1945-2000, available at* http://www.un.org/Overview/growth.htm (2000).

8. *See* Vienna Convention on Law of Treaties, *supra* note 6, at art. 31 (interpreting treaties using the plain meaning of their texts).

9. U.N. CHARTER art. 2, para. 4.

10. *Id.* art. 51. Some jurists argue that unilateral humanitarian intervention is legal directly under the U.N. Charter, including Article 2(4). *See, e.g.*, Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 337-38 (2000). *See also* text accompanying *infra* notes 47-48.

11. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (1986); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38, § 1, 59 Stat. 1055, 1060.

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (1986).

13. Many scholars do not accept the assumption that the U.N. Charter prohibits humanitarian interventions. *See infra* text accompanying notes 46-50.

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986); *see also* J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984), *reprinted in* INTERNATIONAL LAW 134-36, 136 (Barry Carter & Phillip Trimble, eds., 3rd ed. 1999).

15. STARKE, *supra* note 14, at 136.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b (1986).

17. *Id.* § 102 cmt. c.

18. STARKE, *supra* note 14, at 136-37.

19. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103(2) (1986).

customary international law and states can safely act in accordance with that law.

Today, many scholars support the humanitarian intervention doctrine, a rule of customary international law providing an exception to the general prohibition on the use of force for humanitarian interventions. Unfortunately, these proponents have so far failed to accumulate enough evidence to establish the substantiality necessary to prove customary international law, due to the quantity and quality of their state practice analyses. First, while there is no fixed quantity of state practice examples required to prove customary international law, a majority of jurists are unconvinced of the existence of the humanitarian intervention doctrine because of an insufficient number of concrete cases. Recently, however, the world has seen a number of unilateral humanitarian interventions, most notably in Kosovo,[20] nearly overcome that lack of evidence. The doctrine will become commandingly persuasive with the addition of a few future interventions. This article will add to that quantity of state practice evidence by examining the 1998 intervention in Sierra Leone by the Economic Community of Western African States (ECOWAS), an economic union and regional security organization that includes Sierra Leone and most other nations of Western Africa.[21]

Second, jurists on both sides of the debate have been too quick to judge the existence of the humanitarian intervention doctrine. Proponents of the doctrine, like Jean-Pierre Fonteyne,[22] Michael Bazyler,[23] and Ved Nanda,[24] arrive at the realization of the doctrine in a few pages after abbreviated

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20. *See* Geissler, *supra* note 10, at 344-45 (arguing that Kosovo provided state practice evidence of the humanitarian intervention doctrine); *but see* Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 36 (2000) (claiming that NATO's action "in Kosovo cannot be viewed as groping toward a new international law doctrine of humanitarian intervention"); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1787 (2000) (concluding that humanitarian intervention in Kosovo was legal under international law).

21. *See generally* Economic Community of West African States: Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter *ECOWAS Treaty*]. Signatory nations are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. *See id.* preamble, 35 I.L.M. at 664. ECOWAS was formed in 1975.

22. *See* Fonteyne, *supra* note 5 (developing the humanitarian intervention doctrine and defending it against challenges of invalidity considering article 2(4) of the U.N. Charter).

23. *See* Michael Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STANFORD J. INT'L L. 547 (1987) (expounding and establishing criteria for the humanitarian intervention doctrine).

24. *See* Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention Under International Law – Part I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992) (examining the humanitarian intervention doctrine in light of contemporary interventions) [hereinafter *Tragedies I*]; Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention Under International Law – Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998) (updating his previous article with short case studies of recent state practice) [hereinafter *Tragedies II*].

examinations of former state practice and *opinio juris*. In a similar manner, opponents of the doctrine, such as Ian Brownlie,[25] Oscar Schachter,[26] and Jost Delbruck,[27] summarily deny its existence without thoroughly examining each example of state practice or *opinio juris*. While these scholars support their assertions with skillful analysis, because they discuss so many supporting examples, they truncate each analysis to fit concisely into a single article. Jurists cannot, however, curtail the laborious process of proving the existence of customary international law: scholars must methodically examine each piece of *opinio juris* or state practice evidence to determine its relevance, weight and true meaning. Only after a truly thorough analysis can a jurist point to the required mountain of evidence and declare the existence of the humanitarian intervention doctrine. Thus, to prove the humanitarian intervention doctrine, one must examine separately and exhaustively each piece of evidence that supports the doctrine. This article aims to examine one piece of state practice evidence with sufficient particularity.

For a state practice to give support to the existence of the humanitarian intervention doctrine, it must comply with the criteria formulated in Conditionalist theory. Conditionalists recognize the legality of humanitarian interventions, but to curb abuse "would allow the unilateral use of force for humanitarian purposes when certain objective criteria are met."[28] While numerous other scholars have proposed theories on the legality of humanitarian intervention,[29] only true Conditionalists, such as Fonteyne, Bazyler, and

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25. *See* Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217, 219 (John Norton Moore ed., 1974) (arguing self-help by states is illegal except in self-defense after enactment of article 2(4) of the U.N. Charter).

26. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) (concluding that unilateral intervention is only allowed in self-defense and possibly the rescuing of hostages); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) (rejecting unilateral intervention on humanitarian grounds); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986) (arguing that law limits unilateral uses of force to self-defense).

27. *See* Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992) (promoting an expanded role for U.N. humanitarian interventions while simultaneously denying the legality of any humanitarian intervention without U.N. authority).

28. Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 279 (1994).

29. *See* Geissler, *supra* note 10, at 333-35 (surveying modern scholars supporting humanitarian intervention); *see also, e.g.*, Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 374 (1995) (arguing that there is a right to humanitarian intervention, for preventing atrocities and restoring democracy); Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 RECUEIL DES COURS [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9, 256-57 (1993) (permitting humanitarian intervention when there is a "genuine, immediate and dire emergency which could not be redressed" without intervention, and requiring an exhaustion of U.N. remedies); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts:*

Nanda,[30] present the humanitarian intervention doctrine in a useful and understandable way by employing normative criteria. Part II of this note discusses the Conditionalist theory in detail. Part III depicts the human rights disaster that enveloped Sierra Leone directly after the 1997 coup and the ECOWAS intervention that ended the crisis nine months later.[31] Part IV briefly reviews other theories on the legality of the ECOWAS intervention. Part V demonstrates how the ECOWAS intervention conformed to the humanitarian intervention doctrine by applying Conditionalist criteria, therefore providing evidence of state practice for the humanitarian intervention doctrine. In the words of Justice Horace Gray, this note is not a statement of "the speculations of [the author] concerning what the law ought to be, but ... trustworthy evidence of what the law really is."[32]

II. CONDITIONALIST THEORY ON AN EXCEPTION TO THE PROHIBITION AGAINST USE OF FORCE FOR HUMANITARIAN INTERVENTIONS

A. *Development of Conditionalist Theory*

Over the past thirty years, Conditionalists have described customary international law as permitting unilateral humanitarian intervention.[33] By relying on historical state practice and *opinio juris*, the Conditionalists argued that a right of humanitarian intervention exists and defined its scope with five criteria.[34] State practice and *opinio juris* from both before and after the formation of the U.N. in 1945 supported the Conditionalist theory.[35] Before

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The Cases of ECOWAS in Liberia and Sierra Leone, 12 TEMP. INT'L & COMP. L.J. 333, 336-38 (1998) (postulating three criteria so general as to be inutile).

30. *See supra* notes 22-24.

31. This note does not seek to explore the legality of ECOWAS interventions in Sierra Leone after the deposal of the coup leaders. While later humanitarian crises featured even more horrific and widespread atrocities than recounted in this note, those interventions were legal because Kabbah, firmly established by ECOWAS forces and a newly revitalized Sierra Leonean national army as the legitimate head of state, had invited ECOWAS troops to enter, thus excepting them from the prohibition on use of force and forgoing necessary reliance on the humanitarian intervention doctrine. For a discussion of intervention by invitations, *see* text accompanying *infra* notes 142-44.

32. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

33. *See, e.g.*, Bazyler, *supra* note 23; Fonteyne, *supra* note 5; *Tragedies I*, *supra* note 24.

34. Not all Conditionalists used the same criteria; however, the five basic criteria presented in this article generally reflect most authors' standards. *Compare* Bazyler, *supra* note 23, at 598-607, *with* Burmester, *supra* note 28, at 279-83, *with* Fonteyne, *supra* note 5, at 258-68, *with Tragedies I*, *supra* note 24, at 330.

35. While examining evidence prior to the signing of the U.N. Charter may seem to rely on evidence that would violate the last in time rule for conflict of international law, the point of formation of customary international law is when both state practice and *opinio juris* are totally satisfied, while relying on evidence through history. *See* STARKE, *supra* note 14, at 134-36 (discussing when a usage becomes customary international law). Therefore, the last in time rule would still give precedence to the customary international law because it formed after the 1945 signing of the U.N. Charter.

1945, state practice and *opinio juris* hinted at the existence of the humanitarian intervention doctrine. Examples of state practice evidencing the humanitarian intervention doctrine include numerous European interventions in the Muslim Ottoman Empire to protect repressed Christians and the 1898 United States intervention in Cuba, which President William McKinley justified partly on humanitarian grounds.[36] Pre-World War II *opinio juris*, manifested in the writings of scholars such as St. Thomas Aquinas, Grotius, Vattel, Borchard, and Oppenheim, and Antoine Rougier, the first Conditionalist, writing in 1910, upheld this doctrine.[37] In the decades surrounding the turn of the twentieth century, most publicists supported some form of the humanitarian intervention doctrine.[38] The roots of the humanitarian doctrine were securely in place before the signing of the U.N. Charter.

After the 1945 establishment of the United Nations, state practice and *opinio juris* advanced the humanitarian intervention doctrine to the cusp of customary international law. Conditionalists cite numerous modern humanitarian interventions to lend state practice evidence to their theory. For example, in 1964, Belgium and the U.S. acted with purely humanitarian intent when deploying troops to the Congo to rescue over two thousand alien hostages.[39] Later, in 1971, India intervened in the Pakistani civil war to support the independence of Bangladesh. While regional geopolitics influenced India's decision to invade, the "documented facts that the West Pakistani army was engaging in mass slaughter, rape and pillage in East Bengal [Bangladesh]" was also a primary motive.[40] Humanitarian concern substantially motivated Tanzania's 1979 invasion of Uganda, in which Tanzanian forces ousted the brutal Amin regime responsible for the execution of 300,000 Ugandan citizens and the rape and displacement of many thousands

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36. Fonteyne, *supra* note 5, 205-13; *see also* Bazyler, *supra* note 23, at 582-83; *but see* Brownlie, *supra* note 25, at 220-21 (criticizing reliance on this state practice evidence as "ex post factoism" because it only infers the intervenors' dependence on the humanitarian intervention doctrine). European states often undertook these interventions through the Concert of Europe. *See* Bazyler, *supra* note 23, at 582.

37. Bazyler, *supra* note 23, at 571-73; Fonteyne, *supra* note 5, at 214-26.

38. *Tragedies I*, *supra* note 24.

39. Bazyler, *supra* note 23, at 587-88; *see also* Fonteyne, *supra* note 5, at 233.

40. Bazyler, *supra* note 23, at 588-89; *see also* Fonteyne, *supra* note 5, at 233-34; *Tragedies I*, *supra* note 24, at 315-19; *but see*, Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 193 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) (arguing that the fact that India did not explicitly rely on the humanitarian intervention doctrine in its invasion of Bangladesh detracts from the intervention's persuasiveness as evidence of state practice). Farer seems to overlook many statement made by Indian representatives in the United Nations that indicated a humanitarian motive. *Compare* Thomas M. Franck & Nigel S.Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 276, 302-03 (1973) (arguing that the these statements were a historical anomaly and therefore does not support the humanitarian intervention doctrine), *with Tragedies I*, *supra* note 24, 317-18 (citing the Bangladesh intervention and India's accompanying statements as strong support for the humanitarian intervention doctrine).

more.[41] After the Gulf War, the United States and Britain established safe havens to allow brutally oppressed Kurds safety from their Iraqi oppressors.[42] Finally, the North Atlantic Treaty Organization (NATO) conducted a bombing campaign in Kosovo to end the Yugoslavian government's campaign of ethnic cleansing against ethnic Albanians.[43] State practice after 1945 evidences nations' accordance to the humanitarian intervention doctrine.

The greatest weakness in the recognition of the humanitarian intervention doctrine is modern *opinio juris*. While numerous jurists recognize the doctrine,[44] there is a general dearth of explicit acknowledgement of the doctrine as customary international law by governments. However, such acknowledgement is impossible due to the self-defeating legalistic hypersensitivity of modern states. No state wants to risk accusations that their actions have violated international law. Therefore, even if they act pursuant to a rule of customary international law condoning unilateral humanitarian intervention, the state will never admit to doing so, because the very existence of the rule is in dispute. The failure of each state to admit recognition of the humanitarian intervention doctrine prevents all other states from acknowl-edging it. Therefore, heavy reliance on government statements to prove *opinio juris* for any emerging rule of customary international law is inherently self-defeating. Instead, to confirm the humanitarian intervention doctrine, jurists must rely on other forms of *opinio juris*, including legal scholarship,[45] and especially state practice.

B. Critique of the Humanitarian Intervention Doctrine

In addition to maintaining that insufficient evidence exists to support the humanitarian intervention doctrine, some scholars believe that international

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41. Bazyler, *supra* note 23, at 590-92; *Tragedies I*, *supra* note 24, at 319-21; *but see* Farer, *supra* note 40, at 193 (arguing that Tanzania did not rely on the humanitarian intervention doctrine in its invasion of Uganda, detracting from its persuasiveness as evidence of state practice).

42. *Tragedies I*, *supra* note 24, at 331-34.

43. *See* authorities cited in *supra* note 20.

44. *See* Bazyler, *supra* note 23, at 576-80 (detailing numerous scholarly declarations and articles supporting the humanitarian intervention doctrine); Burmester, *supra* note 28, at 278-85 (citing numerous modern proponents of the humanitarian intervention doctrine); *see also, e.g.*, *Report of the World Conference on Human Rights*, U.N. GAOR, at 35, U.N. Doc. A/CONF.157/24 (Part I) (1993) ("The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end."); authorities cited *supra* notes 22-24, 29; *but see, e.g.*, Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, 202, 208-09 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that only the U.N. Security Council can legally intervene for humanitarian purposes); authorities cited *supra* notes 25-27.

45. *See* Fonteyne, *supra* note 5, at 233 ("The opinions of the leading scholars, especially in an essentially non-institutionalized structure such as that of international law, have a significant impact upon the development of the legal norm ....").

law outright forbids humanitarian interventions. Most opponents claim that Article 2(4) of the U.N. Charter prohibits all unilateral uses of force, including humanitarian interventions, except in self-defense.[46] However, this interpretation is needlessly broad. First, the text of the Charter only prohibits the use of force when it is inconsistent with the principles of the U.N., such as infringement upon the territorial integrity or political independence of another state.[47] A truly lawful humanitarian intervention, complying with the criteria examined below, does not violate these principles; instead, it supports the principles of human rights extolled in the U.N. Charter.[48] Second, even if the plain meaning of the text excludes humanitarian interventions, states should not interpret the Charter to prohibit such actions because of changing circumstances. The framers of the Charter originally intended that the U.N. conduct collective interventions in appropriate cases of extreme atrocities; yet, the U.N.'s involvement in this area, due to geopolitical and economic restraints, has been virtually nonexistent.[49] Until the U.N. can realistically perform its intended duties, its limiting features cannot bind the signatories. Finally, the "last in time" rule gives precedence to customary international law formed after the signing of the U.N. Charter in 1945.[50] Regardless of whether the humanitarian intervention doctrine has formed in the recent past or will form in the near future, because it came into existence after 1945, it overrides contrary language in the U.N. Charter.

Critics of the humanitarian intervention doctrine further claim it is nonfunctional because it is fraught with abuse, as disingenuous states use the cover of a legal humanitarian intervention to justify malevolent uses of force.[51] However, the possibility of abuse does not preclude the existence of customary international law; customary international law permitting the use of force in self-defense is undisputed, despite innumerable acts of aggression mendaciously claiming that right.[52] Additionally, Conditionalists differentiate

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46. *See, e.g.*, Brownlie, *supra* note 25, at 219; Franck & Rodley, *supra* note 40, at 299.

47. *Tragedies II*, *supra* note 24, at 864.

48. U.N. CHARTER art. 1.

49. *See* Fonteyne, *supra* note 5, at 257.

50. *See supra* text accompanying notes 12-13.

51. *See* Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, 213, 215-21 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that powerful nations can manipulate regional and collective organizations to purport humanitarian interventions while possessing "less than purely humanitarian motiv[es]"); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, *surpa* note 40, at 305; Lobel, *supra* note 20, at 28.

52. Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9, 316 (1991); *cf.* Fonteyne, *supra* note 5, at 269 ("'It is a big mistake, in general, to stop short of recognition of an inherently just principle, [merely] because of the possibility of non-genuine invocation.'" (*quoting Lettre de M. Arniz*, in Rolin-Jacquemyns, *Note sur la Théorie du Droit d'Intervention*, 8 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE [REV. DR. INT'L & LEGISL. COMP.] 675, 679 (1876))).

genuine humanitarian interventions from inauthentic claims by utilizing definitive and substantial criteria. Detractors retort that unless criteria are so general as to be useless, narrow and inflexible criteria make legality under the humanitarian doctrine too difficult to achieve, leaving many of the worst humanitarian crises unremedied.[53] Answering these critiques, Conditionalists accurately state the emerging rule of customary international law of humanitarian intervention by carefully balancing the definitive with the flexible, arriving at criteria that specify when a unilateral use of force for humanitarian objectives is legitimate. The criteria are useful for analyzing legitimacy after an intervention, while also serving as an expedient standard for when a nation may and should unilaterally intervene.[54]

C. *Criteria for a Legitimate Humanitarian Intervention*

To assess the legitimacy of a humanitarian intervention, Conditionalists generally apply five criteria. First, large-scale atrocities must occur or be imminent.[55] This criterion raises the question "who decides [which] human rights violations are so gross and massive as to warrant armed intervention."[56] Certainly, the threshold is met by violations of *jus cogens* norms of international law,[57] which include genocide, slavery, systematic murder or causing the disappearance of individuals, and torture or other cruel, inhuman, or degrading treatment.[58]

Second, the intervening state must have an overriding – but not necessarily pure – humanitarian motive.[59] To fulfill this criterion, there must be evidence supporting a benign humanitarian motive without any more substantial ulterior motive, such as territorial gain.[60] This criterion may often

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53. *See* Lobel, *supra* note 20, at 32.

54. *See* Bazyler, *supra* note 23, at 598.

55. *Id.* at 598-601; Fonteyne, *supra* note 5, at 258-60; *Tragedies I*, *supra* note 24, at 330; *see also* Franck, *supra* note 29, at 257.

56. Lobel, *supra* note 20, at 30.

57. *See* Levitt, *supra* note 29, at 341 ("[H]umanitarian intervention should only be justified when responding to human rights abuses that are so grave that they violate the *jus cogens* norms of international law (to persecute, oppress, exterminate, enslave or deport civilian populations.)"). *Jus cogens* are "preemptory norm[s] of general international law ... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ..." Vienna Convention on the Law of Treaties, *supra* note 6, art. 53.

58. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986); *see also* Bazyler, *supra* note 23, at 600; *see generally* Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989) (surveying development of *jus cogens*). Rape is generally considered a form of torture banned by international law. *See*, HUMAN RIGHTS 372-79 (Louis Henkin, et. al., eds., 1999).

59. Bazyler, *supra* note 23, at 601-02; Fonteyne, *supra* note 5, at 261; *see also Tragedies I*, *supra* note 24, at 330.

60. *See, e.g.*, Bazyler, *supra* note 23, at 608-09, 613-16, *Tragedies I*, *supra* note 24, at 320-21, 322.

be problematic, because nations usually equivocate concerning their numerous motives for an intervention.

Third, there is a preference for joint action.[61] Nations should first try to intervene collectively through the United Nations;[62] if this proves impracticable, states should act jointly with other states, preferably through a regional organization.[63] Regional organizations often face the problem of hegemonic domination, making their actions seem truly effectuated by a single state.[64] However, most regional organizations have some diversity of control, providing at least a partial check on the use of the organization for the pugnacity of a hegemon.

Fourth, the intervention should be limited in duration and magnitude to that necessary to cease the atrocities.[65] If required to end the human rights violations, the intervenor may remove illegitimate or pernicious leaders.[66] This criterion reflects closely the requirement for all allowable uses of force of necessity and proportionality.[67] Due to the often protracted nature of humanitarian missions, the limit on duration of the intervention includes the corollary: "whenever feasible, U.N. multilateral troops should be substituted as soon as possible for the intervening forces."[68]

Finally, an intervenor must exhaust all peaceful remedies before resorting to a use of force, including diplomatic appeals, international condemnation, and economic sanctions.[69] This criterion recognizes that in some instances the humanitarian need is so urgent or the peaceful options so

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61. *See* Bazyler, *supra* note 23, at 602-04; Fonteyne, *supra* note 5, at 266-67; *see also Tragedies I*, *supra* note 24, at 330.

62. *See* Fonteyne, *supra* note 5, at 264-65.

63. *See* Bazyler, *supra* note 23, at 602-03; *see also* Fielding, *supra* note 29, at 374-76 (arguing that customary international law permits states to intervene in a humanitarian crisis unilaterally if the U.N. Security Council fails to act).

64. *See* Lobel, *supra* note 20, at 30-31.

65. Bazyler, *supra* note 23, at 604-06; Fonteyne, *supra* note 5, at 262-64; *Tragedies I*, *supra* note 24, at 330; *see also* Geissler, *supra* note 10, at 335 (citing Nanda's concentration on the limit on purpose, duration, and force used in a humanitarian intervention); *Tragedies II*, *supra* note 24, at 864 ("For humanitarian intervention to be considered valid it is usually undertaken for a limited purpose and duration ....").

66. *See* Bazyler, *supra* note 23, at 604; *but see* Fonteyne, *supra* note 5, at 262-63 (disallowing suspect humanitarian interventions that feature the removal of abusive leaders).

67. Bazyler, *supra* note 23, at 604; Fonteyne, *supra* note 5, at 262. Well-established customary international law provides that any use of force in reprisal for the violation of international law must be related to the law violated and reasonably proportionate in intensity to the magnitude of the violation. *See* Sir Claud Humphrey Meredith Wadlock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 460 (1952).

68. Bazyler, *supra* note 23, at 605; *see also Tragedies I*, *supra* note 24, at 332 (supporting the U.S./British intervention in Iraq to save the Kurds by citing U.S./British efforts to replace American and British troops with U.N. peacekeepers).

69. Bazyler, *supra* note 23, at 606; Fonteyne, *supra* note 5, at 264; *see also Tragedies I*, *supra* note 24, at 334 (recommending that humanitarian intervenors use force only "as a last resort").

futile that alternatives must be forgone.[70] In total, failure in one criterion does not preclude legitimacy, but does require a strong showing in other areas.[71] Conditionalists believe that with the filter of these five criteria, jurists can determine the legitimacy of a unilateral humanitarian intervention in accordance with customary international law. By applying these criteria to the ECOWAS intervention in Sierra Leone, the evidence will demonstrate that ECOWAS complied with the humanitarian intervention doctrine, thus providing state practice evidence for the doctrine.

III. FACTUAL BACKGROUND: THE 1998 ECOWAS INTERVENTION IN SIERRA LEONE

A. *Pre-1997 History*

Sierra Leone, a nation of 5.2 million people, sits on the western coast of Africa.[72] British philanthropists established Sierra Leone as a colony for former slaves discharged from the British military at the close of the American Revolutionary War.[73] Since attaining independence from Britain in 1961, Sierra Leoneans have been ruled by military dictators through successive coups d'état.[74] The United Nations ranks Sierra Leone as the second least developed nation in the world, with per capita income at US$160 a year and a life expectancy at 43 years.[75] One out of every four children dies before the age of five.[76]

On March 23, 1991, a civil war erupted in Sierra Leone when the Revolutionary United Front (RUF), an unknown group of one hundred fighters led by former army sergeant and professional photographer Foday Sankoh, attacked in the south and east of the country.[77] Amid the chaos that followed, including heavy losses sustained by Sierra Leone's army, Captain Valentine Strasser, a youthful army paymaster, took power in Freetown on a wave of

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70. *See* Bazyler, *supra* note 23, at 606-07.

71. *See Tragedies I*, *supra* note 24, at 330 (balancing the factors and alternatives to maximize the outcome); *see also* Bazyler, *supra* note 23, at 591 (forbidding weak evidence of humanitarian motive to disqualify the Tanzanian intervention in Uganda, which "on balance...can be justified on humanitarian grounds.").

72. THE WORLD ALMANAC AND BOOK OF FACTS 857 (Robert Famighetti ed., 2000).

73. Sheldon H. Harris, *An American's Impressions of Sierra Leone in 1811*, 47 J. NEGRO HIST. 35, 35 (Jan. 1962).

74. James Rupert, *Tenuous Peace In Brutal War; Sierra Leone Sides Sign Accord*, WASH. POST, July 8, 1999, at A17 tbl.

75. *Interim Report of the Inter-Agency Mission to Sierra Leone*, U.N. SCOR, Annex ¶ 3, U.N. Doc. S/1998/155 (Feb. 25, 1998) [hereinafter *Interim Report*].

76. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 309 (1998).

77. *Special Reports: Chronology of Sierra Leone: How Diamonds Fuelled the Conflict*, AFRICA CONFIDENTIAL, *at* http://www.africa-confidential.com/special.htm (last visited Jan. 6, 2001) [hereinafter *Chronology*].

popular enthusiasm in 1992.[78] While the conflict raged on for many years, the government had severely damaged the RUF with the help of the South African mercenary security firm Executive Outcomes, forcing the rebels to sign a cease-fire agreement in January 1996, returning the country to civilian rule with free democratic elections.[79] Ahmad Kabbah, a former U.N. diplomat who had been absent from Sierra Leone while working in New York, became president in March 1996 as a result of these elections.[80] By the end of the year, Kabbah and Sankoh signed the Abidjan Accords. This peace agreement between the Sierra Leone government and the RUF included the disarmament of combatants, the integration of the RUF into the government's army, and the inclusion of the RUF in the government as a political entity.[81] Unfortunately, the Abidjan Accords failed to bring peace to the ravaged nation. The RUF did not disarm[82] and instead continued its attacks,[83] while Kabbah scarcely fended off numerous coup attempts from his own army.[84]

B. *The Armed Forces Revolutionary Council and the Human Rights Crisis*

On May 27, 1997, a group of low-ranking military officers headed by Major Johnny Paul Koroma, frustrated by unpaid wages and alleged ethnic favoritism,[85] succeeded in overthrowing the democratically elected government.[86] Kabbah fled the country,[87] while Nigerian ECOWAS forces, already present in Freetown and reinforced by additional soldiers and naval bombardments, clashed with, but ultimately failed to defend against Koroma's rebel fighters.[88] Within days, the victorious Koroma suspended the

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78. David Pratt, Sierra Leone: The Forgotten Crisis 11, Sessional Paper No. 8530-361-35 (Apr. 23, 1999) (unpublished report to the Can. Minister of Foreign Affairs, on file with Can. Dept. of Foreign Affairs and Int'l Trade), *available at* http://www.infoexport.gc.ca/docs/view-e.asp?did=1287.

79. *See* Jim Hooper, *Peace in Sierra Leone: A Temporary Outcome?*, JANE'S INTELLIGENCE REV., Feb. 2, 1997, at 91-93.

80. *See* David Hecht, *Sierra Leone Changes Power Without Coup, Despite Ongoing War*, CHRISTIAN SCI. MONITOR, Apr. 1, 1996, at 6, *available at* 1996 WL 5040520.

81. *See* Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), U.N. SCOR, at art. III, V, IX, U.N. Doc. S/1996/1034 (1996).

82. 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, 326 (1998).

83. *See* Pratt, *supra* note 78, at 14.

84. *See* Adeline Iziren, *"Give Kabbah Democracy a Chance": Sierra Leone Defuses Third Coup Plot in 4 Months*, THE VOICE, Jan. 20, 1997, at 15.

85. Nowrot & Schabacker, *supra* note 82, at 327.

86. *See* AMNESTY INTERNATIONAL, AI INDEX AFR 51/05/97, SIERRA LEONE: A DISASTROUS SET-BACK FOR HUMAN RIGHTS 3 (1997) [hereinafter DISASTROUS SET-BACK].

87. *See* Pratt, *supra* note 78, at 14.

88. *See* Nowrot & Schabacker, *supra* note 82, at 327. ECOWAS forces were present in Freetown as a base of operations for an independent intervention in Liberia. *See id.* There is

constitution[89] and outlawed all political parties and public demonstrations and meetings,[90] despite ongoing resistance from large civilian groups such as labor unions.[91] He then identified Sankoh as his ideological leader[92] and invited the rebel RUF fighters to join his junta,[93] forming the Armed Forces Revolutionary Council (AFRC) to rule Sierra Leone.[94] The U.N., Organization of African Unity (OAU), ECOWAS, the Commonwealth, and European Union swiftly condemned the AFRC coup d'état, while the OAU General Secretary denounced the coup as "unacceptable to the continent." However, the U.N. Security Council failed to take immediate action.[95]

1. Atrocities Committed Directly Against Civilians

The price for such inaction was substantial: under the AFRC kakistocracy,[96] junta henchmen exercised "a total disregard for the rule of law.... The rule of law completely collapsed and violence engulfed the country."[97] By choosing to bring the RUF into the fold, Koroma linked the AFRC to a rebel group notorious for random murder and mutilation of civilians, especially the crude amputation of hands, feet, ears, and genitals.[98] Immediately after the coup, banks, businesses, and government offices shut down, "while rape and looting became the order of the day."[99] John Ernest Leigh, Sierra Leonean ambassador to the U.S., narrated the crimes committed by the AFRC during testimony before the House of Representatives Subcommittee on Africa:

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disagreement over whether ECOWAS or the coup forces attacked the other first. *Compare id.* (claiming that ECOWAS forces initiated hostilities), *with* Levitt, *supra* note 29, at 365 (noting that Koroma's forces attacked ECOWAS first).

89. *Restructuring Sierra Leone: Hearing Before the Subcomm. on Afr. of the House Comm. on Int'l Relations*, 105th Cong. 38 (June 11, 1998) (statement of John Ernest Leigh, Sierra Leone's Ambassador to the U.S.) [hereinafter *Restructuring Sierra Leone*]; U.S. DEP'T OF STATE, *supra* note 76, at 298.

90. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, *supra* note 76, at 298.

91. *See* Africa Research Bulletin, June 1997, at 12735A.

92. *See Chronology*, *supra* note 77.

93. *Restructuring Sierra Leone*, *supra* note 89, at 38 (statement of John Ernest Leigh). Many believe the RUF had complete control over AFRC, with Koroma merely serving only as a figurehead. *See id.* at 1 (statement of Rep. Edward R. Royce, Chairman of the Subcommittee).

94. *See* DISASTROUS SET-BACK, *supra* note 86, at 1.

95. *Id.* at 8-9; *see also* Nowrot & Schabacker, *supra* note 82, at 328.

96. *See All Things Considered* (National Public Radio radio broadcast, Feb. 13, 1998), *available at* 1998 WL 3643801 ("[T]he junta...really are poorly educated, renegades, [and] criminals....").

97. AMNESTY INTERNATIONAL, AI INDEX AFR 51/22/98, SIERRA LEONE: 1998 - A YEAR OF ATROCITIES AGAINST CIVILIANS 16 (1998) [hereinafter A YEAR OF ATROCITIES].

98. Pratt, *supra* note 78, at 12.

99. *Id.* at 14.

> Thus began the Reign of Terror ... of gang-rape, looting, beatings, jailing, killings, maiming, wounding, kidnappings, abuse of children, and starvation of civilians; the plunder of public funds and natural resources; gun-running; arson; lying; destruction of public records; destruction of private property, intimidation, sanction-busting, illicit mining, and nation-wrecking. The people of Sierra Leone never supported the Koroma coup despite their deprivations and the repeated, gross violations of their civil rights.[100]

During the AFRC rule, government agents committed innumerable acts violating international human rights standards.[101] AFRC soldiers arbitrarily detained and held incommunicado hundreds of political activists, journalists, and university students.[102] The junta used rape systematically as an instrument of control, raping women as punishment for their opposition to the regime.[103] There were countless reports of extrajudicial torture and executions, often featuring unaccountable AFRC soldiers capriciously raping, mutilating, and murdering innocent civilians.[104] In Kenema, an eastern province under RUF control, "terror reigned":

> As in Freetown and other parts of the country, rape of girls and women was systematic and at least a hundred civilians were reported to have been deliberately and arbitrarily killed.... Every house in the town was looted. The homes of those perceived to have been supporters of [Kabbah] were destroyed.... [S]everal prominent members of the community ... were stripped and repeatedly beaten with sticks, electric cable and strips of tyres and were threatened with death. Their arms were tied tightly behind them. One of those detained sustained a serious head wound and injury to his eye after being beaten on his head with a gun. At least one of these detained died as a result of beatings.[105]

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100. *Restructuring Sierra Leone*, *supra* note 89, at 38.

101. U.S. DEP'T OF STATE, *supra* note 76, at 303.

102. A YEAR OF ATROCITIES, *supra* note 97, at 17-18.

103. U.S. DEP'T OF STATE, *supra* note 76, at 299, 301. Koroma also decreed that women could be subjected to female genital mutilation without hindrance. *See id.* at 309.

104. A YEAR OF ATROCITIES, *supra* note 97, at 18-20; *see also* DISASTROUS SET-BACK, *supra* note 86, at 18-23; U.S. DEP'T OF STATE, *supra* note 76, at 299-301 (listing hundreds of documented murders during the first months of AFRC rule alone).

105. A YEAR OF ATROCITIES, *supra* note 97, 20-21.

Additionally, the AFRC tortured children, especially child-combatants, and impressed many civilians into forced labor.[106] Finally, the AFRC allegedly planned to carry out genocide against civilians opposed to its rule.[107]

2. *Criminal Government Negligence*

Almost as heinous as the violence the AFRC junta perpetrated against the citizenry was the government's gross negligence in providing or permitting care to its people. The U.N. Secretary General reported the dire humanitarian crisis in Sierra Leone as follows:

> The number of displaced persons registered with humanitarian organizations during the months of July and August stands at around 100,000. However, the actual number of new internally displaced persons is thought to be much higher. A polluted water supply and deteriorating sanitary conditions in one camp for internally displaced persons in Kenema district led to an outbreak of bloody diarrhoea which began in late September. Nutrition surveys have identified pockets of severe malnutrition in the rural areas and an increase in child malnutrition generally.... Health systems are near collapse. Consequently, a measles epidemic is accounting for a 30 per cent case mortality rate among children. In one district alone (Koinadugu), 3,000 cases were reported during the third week of September. The number of Sierra Leoneans who have registered as refugees in neighbouring countries has risen to over 60,000. A much larger number of people have moved temporarily to neighbouring countries, but they have not as yet sought refugee status.[108]

Instead of helping alleviate the crisis, government forces often prevented the delivery of relief supplies from international agencies to the sick and starving

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106. *Fifth Report of the Secretary-General on the Situation in Sierra Leone*, at 37, U.N. Doc. S/1998/486 (June 9, 1998) [hereinafter *Fifth Report*].

107. *See* Press Briefing by James O. C. Jonah, U.N. Ambassador from Sierra Leone, in New York, N.Y. *at* http://www.sierra-leone.org/jonah021798.html (last updated Feb. 17, 1998). Mr. Jonah also claimed he had evidence of lethal gas shipments to the junta for use against civilians. *See UN Press Conference by Sierra Leone*, M2 PRESSWIRE, September 15, 1997, *available in* 1997 WL 13655162. *See also* Levitt, *supra* note 29, at 369 (claiming that the civilian population, "because of their active opposition to the coup were threatened with death and suffering on a grand scale").

108. *Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, U.N. Doc. S/1997/811 (Oct. 21, 1997); *see also* DISASTROUS SET-BACK, *supra* note 86, at 23-24 (discussing problems of renewed refugee flows considering Sierra Leone had not yet finished resettling over 100,000 refugees from prior unrest).

population, usually commandeering the supplies for themselves.[109] Despite the impending famine, the AFRC even exacted a "food tax" on civilians, leaving farmers to hoard what little food they harvested instead of sending it to market.[110] In total, the AFRC refused to do anything to end the suffering of Sierra Leoneans and actively prevented help from reaching those in need.

C. *ECOWAS Reacts to the Humanitarian Crisis*

1. *Diplomatic Efforts*

After its initial attempt to dislodge the AFRC during the coup, ECOWAS took many measures to end the crisis peacefully. ECOWAS first tried to end the AFRC's atrocities through diplomatic efforts. ECOWAS's most laudable effort was the Conakry Accord, a six-month peace plan for Sierra Leone negotiated between members of ECOWAS and a representative of the AFRC.[111] This peace treaty featured an immediate end to all combat, disarmament and demobilization of all combatants within two months, guarantee of the flow of humanitarian assistance coupled with an international appeal for relief supplies, the return of refugees, restoration of Kabbah and the constitution, and amnesty for AFRC combatants and coup leaders.[112] Despite Koroma's initial acceptance of the Conakry Accord,[113] by the end of 1997 the AFRC continued to resist disarmament and attack rural dissidents.[114] Regardless of ECOWAS's intense diplomatic efforts, the AFRC refused to adhere to the terms of the Conakry Accord four months after signing the same.[115] Even from the outset of diplomatic negotiations, it seemed that Koroma was unwilling or unable to implement any negotiated end to the humanitarian crisis.[116] Therefore, despite ECOWAS's best endeavors, a strictly diplomatic solution to the humanitarian crisis in Sierra Leone appeared unlikely.

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109. *See Statement by the President of the Security Council*, U.N. SCOR, 3809th mtg., U.N. Doc. S/PRST/1997/42 (Aug. 6, 1997). Additionally, some food assistance may have been inadvertently detained by the United Nations/ECOWAS imposed economic embargo due to inefficiency in the ECOWAS monitoring system. *See Interim Report*, *supra* note 75, Annex ¶ 5.

110. *Third Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 52d Sess., ¶ 27, U.N. Doc. S/1998/103 (1998) [hereinafter *Third Report*].

111. *Second Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 53d Sess., ¶ 2, U.N. Doc. S/1997/958 (1997) [hereinafter *Second Report*].

112. *Economic Community of West African States Six-Month Peace Plan for Sierra Leone (23 October 1997-22 April 1998)*, U.N. SCOR, Annex 2, U.N. Doc. S/1997/824, at 5-6 (1997).

113. *Second Report*, *supra* note 111, ¶¶ 4, 5.

114. *See* Nowrot & Schabacker, *supra* note 82, at 329.

115. *See Fourth Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, ¶¶ 4-5, U.N. Doc. S/1998/249 (1998) [hereinafter *Fourth Report*]; *see also Restructuring Sierra Leone*, *supra* note 89, at 38 (statement of John Ernest Leigh) ("[T]he junta refused to cooperate, using various foolish ruses.").

116. *Second Report*, *supra* note 111, ¶ 15.

2. *Economic Embargo*

ECOWAS also attempted to implement economic sanctions to compel the AFRC to end the crisis in Sierra Leone. At its August 29, 1997 summit meeting, ECOWAS imposed a total embargo on Sierra Leone, stopping the flow of all commodities, including petroleum products, arms, and military equipment, prohibiting all international business transactions, and freezing all AFRC financial accounts.[117] On August 1, 1997, the OAU had authorized ECOWAS to take all "appropriate measures" to return the rule of law to Sierra Leone,[118] a mandate that was reaffirmed by the OAU's Secretary General at ECOWAS's August 29 summit.[119] Five weeks after the summit, citing the "continued violence and loss of life ... [and] the deteriorating humanitarian conditions" in Sierra Leone,[120] the U.N. Security Council imposed a similar embargo, supporting the ECOWAS effort by obligating all U.N. member-states to participate in the embargo.[121] The U.N. Security Council, however, put primary responsibility for enforcement of the embargo back on ECOWAS.[122] Unfortunately, the economic embargo was fraught with violations, especially concerning arms importation by the AFRC, as well as AFRC leaders and their families traveling abroad.[123] More than five months after its inception, it seemed that the embargo only exacerbated the suffering of civilians[124] instead of forcing the junta to stop atrocities or abdicate power. Like ECOWAS's diplomatic attempts, efforts to secure a peaceful resolution to the humanitarian crisis in Sierra Leone through economic sanctions failed.

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117. *Decision on Sanctions Against the Junta in Sierra Leone*, Econ. Community of W. Afr. States, Authority of Heads of St. and Gov't, 20th Sess., arts. 3-5 (Aug. 29, 1997), *available at* http://www.sierra-leone.org/ecowas082999.html. ECOWAS member-states surround Sierra Leone on all land borders and ECOWAS naval units patrolled Sierra Leonean territorial waters, making total enforcement of the embargo possible.

118. *Africa Highlights - August 1997*, AFR. NEWS SERVICE, Dec. 31, 1997, *available in* 1997 WL 17419813; *see also* U.S. DEP'T OF STATE, *supra* note 76, at 298 ("The Organization of African Unity (OAU) designated the Economic Organization [sic] of West African States (ECOWAS) to bring about [full] restoration of the constitutional government.").

119. *See* DISASTROUS SET-BACK, *supra* note 86, at 7.

120. U.N. SCOR Res. 1132, U.N. SCOR, 3822d mtg. at pmbl., U.N. Doc. S/RES/1132 (1997).

121. *See id.* ¶¶ 3, 6, 8, 11.

122. *See id.* ¶¶ 8, 18.

123. *See Third Report*, *supra* note 110, ¶ 20; *Communiqué*, Econ. Community of W. Afr. States, Ministers of Foreign Aff. of the Community of Five on Sierra Leone, ¶ 9 (Dec. 19, 1997), *at* http://www.sierra-leone.org/ecowas121997.html; *Final Communiqué*, Econ. Cmty. of W. Afr. States, Ministers of Foreign Aff. of the Community of Five on Sierra Leone, ¶ 10 (Feb. 6, 1998), *at* http://www.sierra-leone.org/ecowas020698.html [hereinafter *Final Communiqué*].

124. *See Interim Report*, *supra* note 75, Annex ¶ 26.

3. Direct Intervention

On February 6, 1998, ECOWAS finally decided to use force to oust the AFRC[125] after the failure of all other measures and repeated requests from Kabbah to intervene[126] and to "put an end to [Sierra Leoneans'] nightmare and to enable them to recover their fundamental human rights."[127] Within a week of the invasion by the ECOWAS Monitoring Group (ECOMOG) forces, the AFRC government had collapsed and ECOMOG was in control of Freetown.[128] Even as the junta forces withdrew, AFRC combatants tortured and killed any civilian suspected of opposing them.[129] ECOWAS soldiers and officials entered Freetown to find government buildings looted and neglected and an enthusiastic crowd celebrating their arrival.[130] Kabbah returned to Sierra Leone and resumed his presidential post on March 10, 1998.[131]

ECOWAS received numerous commendations from the international community for its intervention in Sierra Leone. In Resolution 1162, the U.N. Security Council commended ECOWAS and ECOMOG for "the important role they are playing in support of the objectives related to the restoration of peace and security" in Sierra Leone.[132] Additionally, the U.N. Secretary General commended ECOWAS' intervention as "laudable" and urged U.N. member- states to contribute to its efforts.[133] Similarly, the OAU approved of the intervention,[134] while numerous individual states, through their diplomats or actions, also granted their approval.[135]

Today, the RUF continues its struggle against the democratically elected government, exacting a heavy humanitarian toll as it commits ever-more horrifying atrocities against civilians,[136] including attacking refugee camps in

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125. *Final Communiqué*, *supra* note 123, ¶ 6(iii).

126. *See* Levitt, *supra* note 29, at 365; Nowrot & Schabacker, *supra* note 82, at 327.

127. President Ahmad Tejan Kabbah, Address at the ECOWAS Summit, ¶ 5 (Aug. 27, 1997), *available at* http://www.sierra-leone.org/kabbah082797.html.

128. *Fourth Report*, *supra* note 115, ¶ 6.

129. *See* Press Release, *Amnesty International, Sierra Leone: Civilians Deliberately Killed as Fighting Engulfs Freetown and Provinces*, AFR 51/006/1998 (Feb. 11, 1998), *at* http://web.amnesty.org/ai.nsf/Print/AFR510061998.

130. *Fourth Report*, *supra* note 115, ¶ 7.

131. *Id.* ¶ 10.

132. U.N. SCOR Res. 1162, U.N. SCOR, 3872d mtg. ¶ 2, U.N. Doc. S/RES/1162 (1998).

133. *Fourth Report*, *supra* note 115, ¶¶ 38, 48-49.

134. *See Sierra Leone: Putting a Country Together Again*, ECONOMIST, Feb. 21, 1998, at 44.

135. *See, e.g.*, *Chronology*, *supra* note 77 (documenting British Minister of State for Africa Tony Lloyd stating support for the ECOWAS intervention); *Fifth Report*, *supra* note 106, ¶ 28 (evidencing U.S. contribution of US$3.9 million to ECOWAS for military support in Sierra Leone, an action indicating U.S. approval of the ECOWAS intervention).

136. *See Government, Rebels to Discuss Ending Conflict*, SEATTLE POST-INTELLIGENCER, Nov. 4, 2000, at A4; AMNESTY INTERNATIONAL, *supra* note 1, at 209-10 (documenting incessant atrocities committed by the RUF).

neighboring Guinea[137] and taking hostage hundreds of peacekeepers.[138] Recently, the U.N. has cracked down on foreign support for the RUF.[139] The U.N. Security Council has imposed a travel ban and a military and diamond trade embargo on Liberia for its sheltering and support of RUF members.[140]

IV. OTHER THEORIES OF THE LEGALITY OF THE ECOWAS INTERVENTION

Often more than one legal theory will support a state action. Besides the humanitarian intervention doctrine, some scholars claim the ECOWAS use of force is lawful under two other theories: the invitation of the ECOMOG forces by Sierra Leone's head of state, and international treaties between Sierra Leone and ECOWAS members. While legality under another theory does not preclude legitimacy under the humanitarian intervention doctrine, it does mitigate its persuasiveness as evidence of state practice to support a norm of customary international law. In this case, however, neither alternative legal theory is tenable.

A. *Intervention at Kabbah's Invitation*

Some analysts claim that the ECOWAS intervention was legal because ECOMOG entered Sierra Leone at Kabbah's behest.[141] There is no violation of international law if a legitimate head of state with clear control over his nation requests military assistance from a foreign nation.[142] However, in most situations, a state cannot legally honor a head-of-state's request for foreign military assistance to suppress an efficacious rebellion.[143] A "government's authority to seek external assistance ... comes into question when the government faces internal armed opposition sufficient to cast serious doubt on the government's ability to maintain itself in power without foreign assistance."[144] This rule of international law reflects an inherent right of self-

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137. *See* Douglas Farah, *For Refugees, Hazardous Haven in Guinea; As Fighting Spills Into Camps, Aid Becomes Unreliable*, WASH. POST, Nov. 6, 2000, at A24.

138. *See* Douglas Farah, *Liberian Pledges to Cut Sierra Leone Rebel Ties; Facing Sanctions, Taylor Agrees to U.N. Demands*, WASH. POST, Jan. 20, 2001, at A21.

139. *See id.* at A21.

140. *See* U.S. SCOR Res. 1343, U.N. SCOR, 4287th mtg. Para. 2, 3-7, U.N. Doc. S/RES/1343 (2001).

141. *See* Nowrot & Schabacker, *supra* note 82, at 378-402. Note that Nowrot and Schabacker's reliance on Kabbah's authority is framed in terms of their theory of a right of humanitarian intervention for the restoration of democracy. For a discussion of this theory, *see infra* text accompanying notes 167-73.

142. *See* Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189 (1985).

143. *See id.* at 251.

144. David Wippman, *Change And Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 446 (1996); *see also* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 306 (2d ed. 1979) ("Military intervention in civil war was not acceptable under traditional international law...."); Doswald-

determination through revolution; in situations of a closely contested civil war, foreign nations cannot guarantee which regime reflects the will of the people.[145] If Kabbah made his request for ECOWAS's assistance before fleeing the country,[146] ECOWAS could not have legally fulfilled the request because Kabbah's government was unable to maintain itself without foreign assistance. A look at the brief pre-coup history of Kabbah's unfledged government, plagued with coup attempts and fighting a protracted civil war against the RUF while losing support of its own military,[147] shows a government perpetually on the verge of collapse. Without Kabbah clearly in control, ECOWAS cannot legally intervene at his request. Similarly, Kabbah had no control over Sierra Leone's government after the AFRC gained control of the capital and subjected the entire nation to its rule. ECOWAS could not honor Kabbah's post-flight request for assistance because he did not maintain his government without foreign assistance. Therefore, because Kabbah requested military assistance without having clear control over Sierra Leone, any reliance by ECOWAS on Kabbah's invitation would have been illegal.

B. Intervention by Right of Treaty

The treaties signed with Sierra Leone did not grant ECOWAS the right to intervene in this situation. Neither the Status of Force Agreement (SOFA) between Nigeria and Sierra Leone nor the ECOWAS Charter granted ECOWAS the right to intervene in Sierra Leone's internal problems. First, ECOWAS had no right to intervene under the SOFA, a bilateral defense pact, which gave Nigeria "the right to apply force in the sustenance of the sovereignty and territorial integrity of the Republic of Sierra Leone."[148] While subversive forces may have imperiled Sierra Leone's democratic government, they did not threaten the state's sovereignty and territorial integrity, and therefore ECOWAS had no right under this treaty. In addition, only Nigeria was party to the SOFA, not ECOWAS. While Nigeria's influence in ECOWAS was substantial, it was not sufficient to transfer Nigeria's treaty

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Beck, *supra* note 142, at 251 (explaining doubt concerning legality of invitation for military assistance if a "rebellion is widespread and seriously aimed at the overthrow of the incumbent regime").

145. *See* Ruth Wedgwood, *Commentary on Intervention by Invitation, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, 135, 138 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

146. There is some factual uncertainty as to whether Kabbah first requested ECOWAS's assistance immediately before or after fleeing from power. *Compare* Levitt, *supra* note 29, at 365 (citing Kabbah as making the request before fleeing from power), *with* Nowrot & Schabacker, *supra* note 82, at 327 (claiming Kabbah requested ECOWAS intervention after fleeing the country).

147. *See supra* text accompanying notes 80-85.

148. Levitt, *supra* note 29, at 368.

rights to ECOWAS.[149] Therefore, ECOWAS could not rely on the SOFA for legal authority to intervene.

Second, ECOWAS could not have legitimately relied on its own charter to allow the intervention. Article 58(2) of the ECOWAS Charter, to which Sierra Leone is a signatory, states that

> Member States [shall] undertake to co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts, paying particular regard to the need to ... establish a regional peace and security observation system and peace-keeping forces where appropriate.[150]

Jeremy Levitt argues that this language gave ECOWAS the authority to intervene, as member-states were "obligated to send peace-keeping forces to Sierra Leone to restore law and order."[151] However, Levitt overlooks Article 58(3), which states "provisions governing ... regional peace and stability shall be defined in the relevant Protocols."[152] At the time of ECOWAS's intervention in Sierra Leone, member-states had not signed a protocol relevant to Article 58, thus leaving the security mechanisms without substance.[153] ECOWAS could not fill this gap with the pre-Article 58 Protocol Relating to Mutual Defense, because that Protocol prohibited ECOWAS from intervening into purely internal conflicts.[154] While Article 58(2) arguably permits ECOW0AS to establish a peacekeeping force, it does not authorize use of that force without mechanisms defined in relevant Article 58(3) Protocols. Without a pertinent protocol, ECOWAS could not use Article 58(2) to justify its intervention into Sierra Leone. Therefore, ECOWAS could rely on neither Kabbah's invitation nor any treaty language to lawfully warrant its invasion of Sierra Leone.

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149. *See infra* text accompanying notes 181-83 (discussing Nigeria's influence in the truly multilateral ECOWAS).

150. *ECOWAS Treaty*, *supra* note 21, art. LVIII, § 2, 35 I.L.M. at 687-88.

151. Levitt, *supra* note 29, at 368.

152. *ECOWAS Treaty*, *supra* note 21, at art. LVIII, § 3, 35 I.L.M. at 688.

153. The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, which created extensive mechanisms for resolving regional conflicts and humanitarian crisis within the preexisting ECOWAS structure, did not come into force until after the 1998 intervention. *See* The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, *available at* http://www.ecowas.int/sitecedeao/english/ap101299.htm (last visited Jan. 8, 2000), *also available at* http://www.alliancesforafrica.org/RegionalMechanisms/ ECOWAS%20 protocol.doc (last visited Jan. 6, 2000).

154. *See* Protocol Relating to Mutual Assistance on Defence, May 29, 1981, art. XVIII, § 2, 1690 U.N.T.S. 51, 59.

V. APPLYING CONDITIONALIST CRITERIA TO THE ECOWAS INTERVENTION

The ECOWAS military intervention in Sierra Leone serves as evidence of state practice supporting the humanitarian intervention doctrine, because it fulfills the Conditionalists' five criteria for a lawful humanitarian intervention. First, the AFRC government inflicted large-scale atrocities on Sierra Leonean civilians. Second, ECOWAS had an overriding humanitarian motive to intervene in Sierra Leone because ECOWAS's primary concern was to stop the humanitarian crisis. Third, the intervention was a joint action conducted through ECOWAS, a regional security organization, including troops and command from numerous countries. Fourth, the intervention was limited in scope and duration to that necessary to stop the atrocities. Fifth, ECOWAS had reasonably exhausted other peaceful remedies including diplomatic negotiations and economic sanctions. Therefore, because all the Conditionalist criteria are met, the ECOWAS intervention provides state practice evidence supporting the humanitarian intervention doctrine.

A. *The AFRC Committed Large-Scale Atrocities*

The AFRC committed gross human rights violations. As documented in *supra* Part III.B, the AFRC perpetrated innumerable and systematic atrocities against Sierra Leonean civilians, including murder, rape, mutilation, torture, forced labor, and intentional and neglectful acts leading to mass starvation and disease. Many of these cruelties violated the *jus cogens* norms of international law prohibiting a state from committing enslavement, murder, and torture of its own citizens.[155] Some authors, without examining this evidence or providing any explanation, claim that all of these gruesome acts did not constitute sufficient evidence of the AFRC committing mass atrocities.[156] Even accepting these authors' unsupported assertion, the AFRC's alleged imminent genocide against the large civilian population actively opposing the coup is adequate to warrant a humanitarian intervention.[157] Therefore, the ECOWAS invasion meets the first criterion for a humanitarian intervention, because the AFRC committed mass atrocities, while further gross violations of human rights were imminent.

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155. *See supra* notes 57-58 and accompanying text.

156. *See* Nowrot & Schabacker, *supra* note 82, at 376 (arguing that the AFRC created crisis was not a situation "where fundamental human rights are at stake" because the "dwindling food supplies ... [were] largely the creation of ECOWAS and United Nations imposed sanctions"). Nowrot and Schabacker notably fail to discuss any of the documented murder, rape, torture, mutilation, etc., discussed in *supra* Part III.B, when rejecting the notion that fundamental human rights were at stake during the AFRC rule. *See id.* at 376; *see also* Levitt, *supra* note 29, at 369 (claiming that "it cannot be said that... there were mass violations of human rights warranting humanitarian intervention," without citing evidence of the humanitarian situation or justifying this position).

157. *Supra* note 107 and accompanying text.

B. ECOWAS had an Overriding Humanitarian Motive

ECOWAS had an overriding humanitarian motive when it intervened in Sierra Leone. In considering this criterion, note that while humanitarian concern must be a primary motive, the humanitarian intervention doctrine does not require it to be the exclusive motive.[158] To discover the state's subjective intent, official statements and the state's record can be informative.[159] A number of statements by ECOWAS officials and others indicated a humanitarian motive for the intervention in Sierra Leone. For example, ECOWAS's stated objectives for the intervention were the attainment of peace, restraint of the national army, disarmament and demobilization of combatants, and the provision of humanitarian assistance.[160] Note that all of these objectives in some way seek to avert humanitarian disaster, either by stopping the fighting that led to civilian suffering, disempowering the forces that committed the atrocities, or directly addressing the humanitarian problem. Furthermore, in the same statement that disclosed the ECOWAS intention to use force in Sierra Leone, ECOWAS ministers expressed their concern for the humanitarian crisis.[161] ECOMOG's commander lamented publicly about the human rights abuses, saying that the AFRC had "carried out a lot of atrocities[;] ... they have killed so many people, they have looted so many people's houses. All they were doing was terror."[162] Additionally, the U.S. State Department had commented that ECOWAS's involvement in Sierra Leone "underscored the universality of human rights."[163] These statements shed light on ECOWAS's motive for the intervention, of which ECOWAS generally has been silent. This silence may be due to appearance of inauthenticity of the humanitarian intent, given ECOWAS Chairman Nigeria's own poor human rights record.[164] Critics cannot claim that ECOWAS was ignorant of the AFRC's atrocities against Sierra Leoneans because Kabbah and other exiled officials repeatedly informed ECOWAS of these human rights violations.[165] Unfortunately, without a decisive statement by ECOWAS on its primary motive, any determination of intent is ultimately conjecture. Yet, in the aggregate, the statements by ECOWAS and its representatives and the assessment by the

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158. *See supra* note 59 and accompanying text.

159. Without listing them explicitly, Conditionalists use these factors in their analyses of humanitarian intent. *See, e.g.*, Bazyler, *supra* note 23, at 608-09, 613-14; *Tragedies I*, *supra* note 24, at 312, 317, 322.

160. *See Fifth Report*, *supra* note 106, ¶ 17.

161. *See Final Communiqué*, *supra* note 123, ¶ 12.

162. Anthony Morland, *Junta Leaders Flee as ECOMOG Takes Freetown*, AGENCE FR.-PRESSE, Feb. 12, 1998, *available at* 1998 WL 2221007.

163. U.S. DEP'T OF STATE, *supra* note 76, at xv.

164. For a discussion of such criticism, *see infra* notes 175-176 and accompanying text.

165. *See, e.g., Ousted President Demands End to Violence in Sierra Leone*, AGENCE FR.-PRESSE, July 18, 1997, *available at* 1997 WL 2160982.

United States, strongly suggest that stopping the humanitarian crisis was the primary motive for the ECOWAS intervention.

Critics contend that humanitarian concern was not ECOWAS's overriding motive in this intervention. For example, a motivation for ECOWAS member Nigeria was the protection of its nationals legitimately stationed in Sierra Leone.[166] While this was certainly a partial motivation, the intervention undertaken far exceeded that necessary and proportional to the protection of the small Nigerian contingent present in Sierra Leone at the time, suggesting the existence of a more influential motive. There was no evidence that territorial ambition motivated ECOWAS or any of its member-states to intervene in Sierra Leone. Karsten Nowrot and Emily Schabacker emphasize that ECOWAS's most often stated goal was not stopping the AFRC's atrocities, but to restore the civilian, democratically elected government to Sierra Leone.[167] Nowrot and Schabacker then argue that the goal to restore the civilian government reveals that ECOWAS's intent was "pro-democratic"[168] and subsequently conclude that this intervention was taken under a proposed rule of customary international law permitting military interventions for the restoration of democracy.[169] They base their conclusion on Nigeria's "self appointed role as regional defender of democracy."[170] However, ECOWAS's limited stated goal is insufficient to support Nowrot and Schabacker's broad claims. It does not necessarily follow that ECOWAS's objective of restoring the civilian government to power is based on the intent to support democracy. Instead, ECOWAS could want to restore Kabbah because he is friendlier to ECOWAS's policies, or as this article argues, because the restoration of the civilian government would end the humanitarian crisis. The restoration of democracy is an unlikely motive, since the majority of heads-of-state that sat on the ECOWAS Committee of Five, the ECOWAS subgroup in charge of the Sierra Leone intervention, were current or former military dictators, including ECOWAS's Nigerian chairman.[171] Critics retort that these same states, especially Nigeria, are regular abusers of human rights, excluding the possibility of humanitarian intent.[172] While this criticism does carry some

166. *See* Levitt, *supra* note 29, at 368.

167. Nowrot & Schabacker, *supra* note 82, at 376, 378.

168. *Id.* at 378 ("This attempt to justify the use of force raises questions concerning the existence of a general right of pro-democratic intervention under international law....").

169. *See id.* at 412.

170. *Id.*

171. In February 1998, the time of the intervention, three of the five heads of state of the Committee of Five were current or former dictators. *See* James Rupert, *Nigerian Ruler Dies After Brutal Reign*, WASH. POST, June 9, 1998, at A1 (Nigeria, current dictator); THE WORLD ALMANAC AND BOOK OF FACTS 802 (Robert Famighetti et al. eds., 2000) (Ghana, former dictator); *id.* at 803 (Guinea, former dictator); *id.* at 834 (Liberia, elected president); *id.* at 789 (Cote d'Ivoire, appointed president).

172. Lobel, *supra* note 20, at 31; *A Double Standard in Nigeria*, CHI. TRIB., Mar. 21, 1998, at 24; *Leaders: Nigeria Does It Again*, THE ECONOMIST, Feb. 21, 1998, at 16-17; *This Madness in Africa*, GHANAIAN INDEPENDENT, Oct. 31, 1997, *available at* 1997 WL 15136107.

weight, it is important to focus on the magnitude of the human rights violations. Nigeria's record of unfair trials and imprisonment of many hundreds of political dissenters, and especially its murder of approximately sixty unarmed civilians is unjust,[173] but the relative magnitude of these crimes pale in comparison to the hundreds of thousands of Sierra Leoneans that suffered horrendous atrocities under AFRC subjection.[174] One commentator accused Nigeria, as the most powerful member of ECOWAS, of engineering the intervention to improve its standing in international opinion.[175] Allegedly, Nigeria hoped that conducting a humanitarian intervention "might help ease the international condemnation and isolation [Nigeria] faces."[176] However unintentionally, arguing that Nigeria conducted this humanitarian mission to improve its international reputation reinforces the claim that ECOWAS's motive was humanitarian. While the reason Nigeria had a humanitarian motive may have included gaining respect through an act of compassion, the basic motivation was still humanitarian in nature. Thus, despite Nigeria and its partners' unclean humanitarian records, the ECOWAS intervention still had a legitimate humanitarian motive. In total, other theories of ECOWAS's intent do not stand-up to scrutiny, leaving humanitarian intent as the most likely motive.

C. *The ECOWAS Intervention was a Regional Joint Action*

The intervention fulfilled the preference for joint action criterion because the West African nations acted through a regional organization after the U.N. failed to take decisive action.[177] By February 1998, it had become increasingly obvious that the U.N. Security Council had reached the limits of its interest in Sierra Leone, unwilling to intervene in Sierra Leone beyond the economic embargo.[178] In lieu of collective intervention, ECOWAS took responsibility to stop the atrocities. Though the nations of West Africa originally formed ECOWAS to promote economic and monetary union, ECOWAS gradually

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173. *See* AMNESTY INT'L, AI INDEX NO. AFR 44/003/1996; NIGERIA: A SUMMARY OF HUMAN RIGHTS CONCERNS 1, 3, 6 (1996).

174. Sierra Leoneans are especially forgiving of Abacha's domestic humanitarian failures. "[T]hey consider [Abacha] their savior and protector from brutal savages. The United States may not have approved of President Abacha's role in Nigeria, but in Sierra Leone, General Abacha will forever remain their hero." *Restructuring Sierra Leone*, *supra* note 89, at 14 (statement of John Ernest Leigh).

175. *See* Atasu Evero, *Abacha Restore Nigeria's Democracy Before Sierra Leone*, N.Y. BEACON, June 25, 1997, at 32, *available at* 1997 WL 11707386.

176. *Id.*

177. *See supra* text accompanying notes 61-64.

178. Press Briefing by James O. C. Jonah, *supra* note 107. Despite the ongoing and worsening humanitarian crisis in Sierra Leone, the U.N. Security Council took no other action concerning the crisis beyond its October 8, 1997 reinforcement of the ECOWAS embargo until well after the ECOWAS intervention.

transformed into a regional security organization.[179] ECOWAS has sixteen member nations, with five of those members sitting on the committee directing the intervention in Sierra Leone.[180] Though Nigeria is the most powerful member of ECOWAS, it is inaccurate to say that this intervention was merely "hegemonic interest masquerading under humanitarian goals."[181] While Nigerians represent a majority of the 20,000 ECOMOG troops, soldiers from Gambia, Ghana, Guinea, Mali, Senegal, Sierra Leone, and Tanzania also serve in ECOMOG.[182] Furthermore, only the collective decision-making bodies of ECOWAS, not Nigeria alone, exercised control over ECOMOG.[183] Even assuming that Nigeria did dominate ECOWAS, this does not disqualify its actions as truly multilateral. U.S. interests often dominate NATO, yet actions taken by NATO are certainly multilateral and have the legitimacy of a proper regional action. Therefore, because ECOWAS is a true regional organization and the United Nations was unwilling or unable to stop the atrocities in Sierra Leone, the ECOWAS intervention fulfilled the third criterion of preference for joint action.

D. The ECOWAS Intervention was Limited in Magnitude and Duration

The ECOWAS invasion was a limited intervention because it was restricted in both magnitude and duration to that necessary to end the atrocities.[184] The intervention was limited in magnitude because ECOWAS forces did not exceed their mandate of removing the abusive AFRC and returning the civilian government to power.[185] As was shown by the failure of peaceful attempts to stop the humanitarian crisis,[186] the only way to make the junta end its murderous practices was to remove it from power. In this concern, ECOWAS's mission was limited to four objectives: attainment of peace, provision of humanitarian assistance, assimilation of combatants into society, and retraining of a civilian-led Sierra Leonean military.[187] Similarly, the duration of the intervention was limited to that necessary to depose the AFRC. While ECOWAS troops did remain after Kabbah's return to power, they did so only at the request of the Sierra Leone government and therefore

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179. *See* Matthew S. Barton, *ECOWAS and West African Security: The New Regionalism*, 4 DEPAUL INT'L L.J. 79, 91-92 (2000).

180. *See supra* note 171 and accompanying text.

181. Lobel, *supra* note 20, at 30-31.

182. *ECOMOG: A Nigerian-Led West African Military Force*, AGENCE FR.-PRESSE, Feb. 10, 1998, *available at* 1998 WL 2219175.

183. *See* Francois-Xavier Harispe, *ADDS Reax from ECOMOG Chief*, AGENCE FR.-PRESSE, Nov. 5, 1997, *available at* 1997 WL 13427939.

184. *See supra* text accompanying notes 65-68.

185. *See Final Communiqué*, *supra* note 123, ¶¶ 6, 8.

186. *See infra* Part V.E.

187. *See Fifth Report*, *supra* note 106, ¶ 17.

were no longer intervening.[188] Furthermore, after ECOWAS reinstated Kabbah, U.N. peacekeepers joined the ECOMOG soldiers, adding legitimacy to their stay.[189] Therefore, the ECOWAS intervention was limited in magnitude and duration, satisfying the fourth criterion for humanitarian intervention.

E. ECOWAS Exhausted All Peaceful Remedies

By exhausting all peaceful remedies before using force, ECOWAS fulfilled the fifth criterion.[190] Despite intense efforts, ECOWAS was unable to stop the AFRC's atrocities through diplomacy or economic sanctions, while prospects of a peaceful resolution to the crisis were grim.[191] Quick action was imperative because of the continued economic suffering by civilians and threat of even worse atrocities, making further attempts at diplomacy and economic solutions extremely hazardous. Therefore, ECOWAS reasonably exhausted all peaceful remedies before invading Sierra Leone, satisfying the fifth criterion for a legitimate humanitarian intervention.

The ECOWAS invasion fulfilled all five criteria under the humanitarian intervention doctrine. The AFRC committed massive atrocities against the Sierra Leoneans, and these atrocities motivated ECOWAS to intervene. ECOWAS, a regional security organization, conducted the intervention in a limited manner and only after reasonably exhausting all peaceful means of resolving the humanitarian crisis. While evidence may not be absolutely solid concerning a clear motive, evidence suggesting humanitarian intent and strong evidence in all other criteria buoy the totality of the intervention to meet the Conditionalists' requirements. By fulfilling this test, the ECOWAS intervention in Sierra Leone serves as evidence of state practice supporting a humanitarian intervention exception to the prohibition against the use of force in international law.

VI. CONCLUSION

A single example of state practice is insufficient to conclusively prove the existence of the humanitarian intervention doctrine. However, when coupled with other recent and future examples of humanitarian interventions that conform to the Conditionalist criteria, the case for the existence of the

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188. *See* President Ahmad Tejan Kabbah, Address to the Nation on the Restoration of Democracy in Sierra Leone (Feb. 13, 1998), *available at* http://www.sierra-leone.org/kabbah021398.html; *see also* Press Briefing by James O. C. Jonah, *supra* note 107.

189. *See* U.N. SCOR Res. 1181, U.N. SCOR, 3902d mtg. at 6, U.N. Doc. S/RES/1181 (1998). U.N. peacekeepers eventually replaced all ECOMOG forces in Sierra Leone. *See* ECOWAS Executive Secretariat, *25th Anniversary Report: Regional Peace and Security*, ¶ 5, *available at* http://www.ecowas.int/sitecedeao/english/peace.htm (last modified Dec. 14, 2000).

190. *Supra* text accompanying notes 69-70.

191. *See supra* parts III.C.1-III.C.2.

humanitarian intervention doctrine becomes strong. With further applications of the Conditionalist theory to past and future interventions indicating state practice support, the humanitarian intervention doctrine will become a cornerstone of customary international law.

Though laudable and lawful according to the humanitarian intervention doctrine, the ECOWAS intervention was too late to prevent the needless deaths of thousands and suffering of millions. Had the U.N. Security Council acted quickly and decisively immediately after the coup, ECOWAS would not have had to rely on the humanitarian intervention doctrine to invade because there would have been no humanitarian crisis to end. Instead, the U.N. Security Council has demonstrated a general disinterest in or disability concerning humanitarian interventions, especially in Africa.[192] With the development and clarification of the humanitarian intervention doctrine, regional organizations should now rely on the doctrine and intervene to prevent and resolve true humanitarian crises.

*Lee F. Berger**

192. *See* Press Briefing by James O. C. Jonah, *supra* note 107. Also, consider U.N. Security Council inaction concerning Rwanda, Burundi, Kosovo (until after unilateral NATO action), and Burma.

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SIERRA LEONE AND CONFLICT DIAMONDS: ESTABLISHING A LEGAL DIAMOND TRADE AND ENDING REBEL CONTROL OVER THE COUNTRY'S DIAMOND RESOURCES

"Control of resources has greater weight than uniform administrative control over one's entire corner of the world, especially in places such as Sierra Leone where valuable resources are concentrated and portable."[1]

I. INTRODUCTION

Sierra Leone[2] is in the midst of a civil war that began in 1991, when the Revolutionary United Front (RUF) invaded the country from neighboring Liberia.[3] RUF rebels immediately sought control over one of the country's richest resources--diamonds.[4] Since gaining control over the most productive diamond fields, the rebels have at their fingertips an endless supply of wealth with which to fund their insurgencies against the Government of Sierra Leone.[5] The RUF rebels illicitly trade diamonds for arms in open smuggling operations.[6] Diamonds sold by the RUF, in order to fund the rebel group's military action in opposition to Sierra Leone's legitimate and internationally recognized government, are called "conflict diamonds."[7]

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1. WILLIAM RENO, WARLORD POLITICS AND AFRICAN STATES 140 (1998).

2. Sierra Leone is located on the west coast of Africa north of Liberia and south of Guinea. The country has 4,900,000 residents, almost all of whom belong to one of 13 native African tribes. *Country: Sierra Leone*, Sept. 3, 2000, *available at* LEXIS, Kaleidoscope File. One of the primary economic activities in Sierra Leone is mining of its large diamond deposits that are a major source of hard currency. Countries that predominantly import goods from Sierra Leone include Belgium, the United States, and India. Sierra Leone is also a member of the Economic Community of West African States (ECOWAS). *See id.*

3. *See* Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone, in* AFRICAN GUERRILLAS 172, 178 (Christopher Clapham ed., 1998).

4. Mineral wealth is the core foundation of economies throughout African states. *See* JOHN READER, AFRICA: A BIOGRAPHY OF THE CONTINENT 16-17 (1997). Since gaining independence from the British, Sierra Leone's economic development has been dependent upon the output of its diamond mines. *See id.*

5. *See Conflict Diamonds: Sanctions and War, at* http://www.un.org/peace/africa /Diamond.html. (last visited Oct. 14, 2000).

6. *See* READER, *supra* note 4, at 576 (explaining that smuggling is a continent-wide activity of great proportions and accounts for a large share of diamonds mined in Sierra Leone and nearby countries). *See also* NIC CONFERENCE REPORT, AFRICA: THE ECONOMICS OF INSURGENCY IN ANGOLA, THE DEMOCRATIC REPUBLIC OF THE CONGO, AND SIERRA LEONE 6 (1999) (statement of a diamond industry expert explaining that smuggling diamonds in Sierra Leone and other African countries is a low-risk, high-return venture because diamonds are small, easily concealed, and extremely valuable).

7. *See Conflict Diamonds: Sanctions and War, supra* note 5.

Today, the rebels control nine-tenths of Sierra Leone's diamond mines.[8] The Government of Sierra Leone urgently needs to regain control of these mines and develop a system by which it will be able to legitimately exploit the country's diamond resources.[9] At stake is not only Sierra Leone's fragile democracy, which is continually threatened by RUF attacks, but also the lives of thousands of civilians who are repeatedly subjected to gross human rights abuses committed by the rebels.[10]

This Note analyzes the efforts taken thus far by the international community to develop a sustainable and well-regulated diamond industry in Sierra Leone. Part II explores the political landscape in Sierra Leone from the late eighteenth century to present. Part III outlines the history and current state of Sierra Leone's diamond trade. Part IV examines various international responses to Sierra Leone's illicit diamond trade, including an in-depth analysis of pertinent United Nations resolutions and pending United States legislation on the matter. Part V outlines influential members of the global diamond industry and the steps taken by them and by the industry in general to stop trading in conflict diamonds. Part VI provides specific recommendations for establishing a legitimate diamond industry in Sierra Leone.

II. POLITICAL LANDSCAPE IN SIERRA LEONE

A. *Leadership and History*

In the late eighteenth century, 1200 freed slaves founded Freetown,[11] Sierra Leone's capital.[12] The African country gained legal status, through a

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8. *Hearings on Ending the Trade in Conflict Diamonds* (Testimony of Holly Burkhalter, Physicians for Human Rights), *Before the House Ways and Means Subcomm. on Trade (2000)*, Sept. 13, 2000, *available at* http://www.phrusa.org/research/sierra_leone/sierra_diamd_091400.html. [hereinafter *Holly Burkhalter*]

9. *See Prepared Testimony of Chairman Gooch, Director of Global Witness, Before the Subcomm. on Africa of the House Comm. on Int'l Relations Subcomm. on Africa*, FEDERAL NEWS SERVICE, May 9, 2000, *available at* LEXIS, Federal News Service File [hereinafter *Chairman Gooch*].

10. *See* HUMAN RIGHTS WATCH, GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, Vol. 11, No. 3 (A), 9-42, June 1999 (noting that during a three week occupation of Sierra Leone's capital by the RUF rebels in January 1999, 7335 corpses were registered in a single day by the senior government pathologist as a result of the incursion. *Id.* at 9. The report goes on to cite the various types of human rights abuses for which RUF rebels are infamous including burning civilians alive, using civilians as human shields, mass mutilation, and amputations, rape, and abduction). *See id.* at 15, 23-25, 27-40.

11. READER, *supra* note 4, at 379, 426. "Freetown is so named because it was the port at which slaves were set ashore as free men by the English fleet which patrolled the shipping lanes off West Africa and seized slaving vessels after England and America abolished the slave trade in 1807 and 1808 respectively." *Id.* at 379. Sierra Leone abolished slavery in 1896. *Id.* at 426.

12. *See* Ian Smillie et al., *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*. This study was produced in January 2000 by a non-governmental agency in Canada, known as Partnership Africa Canada, which has been at the forefront in examining the

Royal Charter, as a British colony in 1799.[13] British departure in 1961[14] marked the start of Sierra Leone's independence, as well as the beginning of a "checkered political experience."[15] Politically ambitious military personnel in the 1967 general elections soon overtook the pluralistic political system that Sierra Leoneans established after gaining independence in 1961.[16]

In 1967, the Sierra Leonean Army took power under the title "National Reform Council,"[17] and handed power to Siaka Stevens[18] who was the presumed winner of the general elections.[19] By the end of the 1970s, Stevens declared Sierra Leone a one-party state which he ruled as its dictator until his retirement in 1985, at which time he seeded power to his former army chief Joseph Mamoh.[20] Mamoh, characterized as politically weak,[21] fled the country in 1992 due to a military coup instigated by young officers revolting against poor work conditions, a lackluster economy, and the country's desire to restore multi-party democracy.[22] Twenty-seven year old army captain Valentine Strasser led the military coup that succeeded in ousting President Mamoh's government.[23]

In 1996, another military coup, this time led by Strasser's second in command, Julius Maada Bio, expelled Strasser from power.[24] Bio's reign was even more short-lived than his predecessor's however; as within three months, democratically elected Ahmed Tejan Kabbah, head of the same Sierra Leone People's Party that led the country to independence in 1961, replaced Bio.[25]

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relationship between diamonds and guns in Sierra Leone. *See id.* at 1. The study includes excellent background information on Sierra Leone's development as a country in relation to its diamond resources. *See id.* at 4-7. The section entitled "Key Events in Sierra Leone's History," provides a chronology of important historical events from 1787 to 1999. *See id.* at 14-16.

13. *See id.*

14. *See* RENO, *supra* note 1, at 69.

15. Alahji Bah, *Exploring the Dynamics of the Sierra Leone Conflict*, PEACE KEEPING AND INTERNATIONAL RELATIONS, Jan.-Apr. 2000, at 1.

16. *See id.*

17. *See* Smillie et al., *supra* note 12, at 14.

18. After becoming Prime Minister in 1968, Siaka Stevens immediately turned diamonds into a political issue. *See id.* at 5. He encouraged illegal mining, at times involving himself in criminal activities. Three years into his reign of power, Stevens nationalized the Sierra Leone Selection Trust (SLST) through his creation of the National Diamond Mining Company (NDMC). *See id.*

19. *See* Bah, *supra* note 15, at 1.

20. *See* Smillie et al., *supra* note 12, at 15.

21. *See* RENO, *supra* note 1, at 116.

22. *See* Abdullah & Muana, *supra* note 3, at 181. The revolting military officers took the name "National Provisional Ruling Council" (NPRC). The young officers soon became seduced by their positions of power in the government and started neglecting their duties as soldiers. *See id.* Some officers abandoned important posts outside Freetown, which allowed the RUF to strengthen its recruits and to capture from the government the main town in Sierra Leone's rich diamond district, Kono. *See id.* at 182.

23. *See* RENO, *supra* note 1, at 174.

24. *See* Smillie et al., *supra* note 12, at 15. *See also* RENO, supra note 1, at 221 (noting that Bio was, ironically, Strasser's "anti-insurgency military commander").

25. RENO, *supra* note 1, at 134. *See also* Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12

In May 1997, a group of military officers known as the Armed Forces Revolutionary Council (AFRC) overthrew President Kabbah's fourteen-month old civilian government.[26] Shortly thereafter, the AFRC allied itself with the country's dominant rebel forces, the RUF, in an alliance that is commonly referred to as the junta.[27] Both the Foreign Ministers of the Economic Community of West African States (ECOWAS)[28] and the United Nations Security Council condemned the coup, which resulted in the imposition of embargoes[29] on arms and oil entering Sierra Leone.[30] In February 1998, the ECOWAS monitoring group ECOMOG launched a military offensive that expelled the RUF from Freetown.[31] President Kabbah finally regained power in March 1998, when he signed a cease-fire agreement with the AFRC and the RUF.[32] Despite their expulsion from Freetown, the RUF rebels were able to maintain control over Sierra Leone's diamond rich Kono District.[33]

B. The Revolutionary United Front

Rebel forces wield as much, and often times more, political power in Sierra Leone than the official government. The RUF is the dominant rebel group in Sierra Leone and is responsible for waging an almost decade-long civil war that is regarded as one of the most violent[34] conflicts in African

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TEMP. INT'L & COMP. L.J. 333, 364-65 (1998). President Kabbah was elected in the midst of civil war. The election was the first of its kind in 30 years. Sierra Leone also held parliamentary elections during this tumultuous time. The RUF contested President Kabbah's election and continued fighting the government. *See id.*

26. *See* 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, 325 (1998).

27. *See* Sheryl Dickey, Note, *Sierra Leone: Diamonds for Arms*, 7 HUM. RTS. BRIEF 9 (2000).

28. *See* ERIC G. BERMAN & KATIE E. SAMS, PEARSON PAPERS: AFRICAN PEACEKEEPERS: PARTNERS OR PROXIES? (3rd ed. 1998). ECOWAS was established in 1975, and is comprised of 16 member states: Benin, Burkina Faso, Cape Verde, Côte d' Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Senegal, Sierra Leone, and Togo. *See id.* at 11 n. 41. ECOWAS also has a Cease-fire Monitoring Group known as ECOMOG, which deployed in Sierra Leone, following the 1997 coup in support of that country's democratically elected government led by President Kabbah. *See id.* at 11.

29. *See id. See also* S.C. Res. 1132, U.N. SCOR, U.N. Doc. S/RES/1132 (1997). The prohibitions imposed by paragraphs 5 and 6 of Resolution 1132 (1997) were later repealed by Resolution 1171 (1998).

30. *See* Dickey, *supra* note 27, at 9.

31. *See* BERMAN & SAMS, *supra* note 28, at 11.

32. *See* Dickey, *supra* note 27, at 10.

33. *See id.*

34. *See* BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., U.S. DEPT. OF STATE, SIERRA LEONE: 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000). [hereinafter BUREAU OF DEMOCRACY]. According to this report:

> The rebels [have] continued the particularly vicious practice of cutting off the ears, noses, hands, arms, and legs of noncombatants as a deliberate terror tactic and to punish those unwilling to cooperate with the insurgents. The victims

history.[35] To date, 2,400,000[36] people in Sierra Leone have been displaced, and 75,000 [37] people have been killed since the RUF invaded the country in 1991.[38]

At the time the RUF invaded Sierra Leone in March 1991, a motley crew of 100-150 fighters comprised the rebel group.[39] While there was no official leadership of the RUF at its inception in the late 1980's, Foday Sankoh eventually emerged as the rebel group's leader.[40] In 1988, Sankoh aligned himself with Charles Taylor, who is the current president of Liberia and leader of the National Patriotic Front of Liberia (NPFL), that country's predominant rebel group.[41] When the RUF invaded Sierra Leone in 1991, it entered from Liberia with offensive support from members of President Taylor's NPFL.[42]

The civil population was not supportive of the RUF invasion or revolution as the rebels would refer to it.[43] Instead, the civilian response to the RUF's initial offensive was wholly unsympathetic. Such a reaction was understandable given that the rebels initially kidnapped scores of village children for the purpose of guerilla training to support the RUF.[44] In one year alone, families in Sierra Leone registered more than 3,800 children as missing

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> [range] from small children to elderly women; in some cases, one limb was cut off, in others two limbs, typically two hands or arms. Many died from their wounds before they could obtain any form of medical treatment. Rebel forces abducted civilians, missionaries, aid workers from nongovernmental agencies, U.N. personnel, and journalists; ambushed humanitarian relief convoys; raided refugee sites; and extorted and stole food. Junta forces continued the longstanding practice of abducting villagers (including women and children) and using them as forced laborers, as sex slaves, and as human shields during skirmishes with government and ECOMOG forces. Boys were forced to become child soldiers. Rebel forces used rape as a terror tactic against women. Rebel atrocities prompted the internal displacement of hundreds of thousands of civilians. . . .

Id.

35. *See* Bah, *supra* note 15, at 1.

36. *Id.*

37. Dickey, *supra* note 27, at 9.

38. *See id.*

39. Abdullah & Muana, *supra* note 3, at 178.

40. *See id.* at 177.

41. *See id.*

42. *See id.* at 178. Liberians comprised the majority of the RUF's "special forces" unit, which was an integral part of the initial 1991 invasion. *See id.* at 180, 188.

43. *See id.* at 178-79. Here was a reserve army of fighting men who were attracted by the simplistic 'emancipatory' rhetoric of the RUF's ill-defined ideas, and motivated by the acquisition of wealth through looting, and of authority by wresting control from both the local and the national political authorities whom they blamed for their predicament and the agony of the nation as a whole. . . . On the other hand, the apprehension of a settled civil population was reinforced by testimonies of brutality from the Liberian crisis, [referring to violent acts committed against civilians in Liberia by the NPFL] and flight from RUF fighters became the ultimate security option for self-preservation.

Id.

44. *See id.* at 179.

or abducted.[45] Thus far, according to United Nations estimates, there are approximately 20,000 persons recorded as kidnapped in Sierra Leone from 1991-1999.[46]

The Government of Sierra Leone attempted to defend itself against the rebel soldiers in a variety of ways. In 1995, the military government under Strasser hired a private military company called Executive Outcomes (EO).[47] In addition to government efforts, a mass civil defense movement, known as Kamajo forces, began to chip away at rebel power.[48] So devastating was the Kamajo offensive that the RUF admitted that at one point its enemy was the Kamajo, not the Sierra Leone Army.[49] The combined efforts of the Kamajo forces and the EO mercenaries forced the RUF to the negotiating table by the latter half of 1996, resulting in a peace agreement[50] in November of that year.[51]

The RUF rebuilt its forces after signing the 1996 peace accord.[52] In 1997, less than a year after agreeing with the Government of Sierra Leone to end the civil war, the RUF resumed its offensive.[53] The RUF formed an alliance with the AFRC and succeeded in ousting President Kabbah from power.[54] President Kabbah was not restored to power until March 1998.[55] Ten months later in January 1999, the RUF launched another military campaign to take control of Sierra Leone's capital city.[56] The RUF rebels retreated after

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45. BUREAU OF DEMOCRACY, *supra* note 34.

46. *Id.*

47. *See* Bah, *supra* note 15, at 4. Bah provides a detailed overview of the role mercenary groups, like EO, played in Sierra Leone as a means of protecting civilians from the rebels. *See also* RENO, *supra* note 1, at 138 (explaining that following his election in 1996, President Kabbah refused to renew EO's contract past January 1997). Shortly after the hired soldiers left Sierra Leone, the country's security worsened significantly culminating in the May 1997 coup by the AFRC that forced Kabbah from power. *See id.*

48. *See* Abdullah & Muana, *supra* note 3, at 185.

49. *See id.* at 186.

50. *See* Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF/SL), Nov. 30, 1996 [hereinafter Abidjan Accord]. Article 1 provides that "[t]he armed conflict between the Government of Sierra Leone and the RUF/SL is hereby ended with immediate effect. Accordingly, the two foes will ensure that a total cessation of hostilities is observed forthwith." *Id.*

51. *See* Abdullah & Muana, *supra* note 3, at 187.

52. *See* 146 CONG. REC. E633 (May 4, 2000). (Representative Tony Hall of Ohio discusses the RUF's influence in Sierra Leone). The once rag-tag rebel group that counted 100-150 among its ranks at the start of the civil war in 1991, has grown into a formidable guerrilla force 25,000 members strong. *Id.*

53. *See* Dickey, *supra* note 27, at 9.

54. *See id.*

55. *Id.* at 10.

56. *See id.*

three weeks of inflicting gross human rights abuses and causing mass destruction throughout Freetown and nearby villages.[57]

On July 7, 1999, Jesse Jackson[58] helped broker the Lome Peace Accord,[59] which the Government of Sierra Leone and the RUF leader signed. The Accord made the RUF leader at the time, Foday Sankoh, vice president, placed him in charge of a new commission to oversee the country's diamonds, and granted complete amnesty for any crime committed by Sankoh and his fellow rebels during their eight year insurgency.[60]

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57. *See World Report 1999: Sierra Leone, at* http://www.hrw.org/wr2k/Africa-09.htm (last visited Oct. 12, 2000). According to this report:

> More than 3,000 children and 570 adults were reported missing following the January offensive. Hundreds more were abducted as they moved through the villages around Masiaka. The abductees were often subjected to hard labor, forcibly recruited into the military, and compelled to become sexual partners to male combatants.
>
> ...
>
> The RUF also systematically set urban dwellings and entire villages on fire as they withdrew. In Freetown, entire city blocks, embassies, government buildings, factories, churches, mosques, and historical landmarks were set alight: housing authorities registered the destruction of 5,788 homes and residential buildings.

Id.

58. *See* 146 CONG. REC. H6399, H6420 (July 18, 2000). Jesse Jackson was appointed "Special Envoy for the President and the Secretary of State for the Promotion of Democracy in Africa" in October 1997. *See id.*

59. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), July 7, 1999 [hereinafter Lome Accord].

60. *See id.* art. V ¶ 2, art. IX ¶¶ 1-3. Article V ¶ 2 mandates:

> The Chairmanship of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD) as provided for in Article VII of the present Agreement shall be offered to the leader of the RUF/SL, Corporal Foday Sankoh. For this purpose he shall enjoy the status of Vice President and shall therefore be answerable only to the President of Sierra Leone.

Id.

Article IX mandates:

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ... in respect of anything done by them in pursuit of their objectives as members of those organisations [sic], since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall

The violence initially subsided after signing the Lome Accord.[61] However, recent reports indicate violations of the peace agreement on behalf of the rebels.[62] While President Kabbah's government remains intact, the rebels continue to control much of the Sierra Leonean countryside, including the wealthy diamond district Kono.[63]

From the start of the RUF's initial invasion in 1991, the rebels sought to conquer the country's economically valuable areas, which necessitated gaining control over rich mining areas.[64] "In 1992, the RUF gained control of the diamond-rich Kono District in the eastern part of the country, near the Guinean and Liberian borders."[65] The RUF continues to maintain control of the Kono District, and uses profits from the illicit trade of diamonds from that area to purchase sophisticated guns to further its stronghold over the country.[66]

The RUF's continued control over Sierra Leone's diamond mines threatens the country's democratically elected government by providing the rebels the means with which to purchase more guns to enhance their military capability.[67] The stronger the RUF's military capability, the greater the threat that the group will keep Sierra Leone hostage, both economically and politically, as it has throughout the almost decade-long civil war.[68] The rebel group will continue to thrive in the absence of law and order that would otherwise reclaim the wealth of Sierra Leone's resources for the benefit of the many, not just the rebel few.[69]

III. OVERVIEW OF SIERRA LEONE'S DIAMOND TRADE

Diamonds were first discovered in Sierra Leone in 1930.[70] Diamond fields in Sierra Leone cover a 7700 square mile radius in the southeastern part of the country.[71] The most important fields in that area are located at Kono, Tongo, and the Sierra Valley.[72] Sierra Leone has a high proportion of exceptionally high quality diamonds.[73] Almost all of the country's diamonds

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be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

Id.

61. *See* Dickey, *supra* note 27, at 10.
62. *See id.*
63. *See id.*
64. *See* RENO, *supra* note 1, at 123.
65. Dickey, *supra* note 27, at 9.
66. *See* 146 CONG. REC. H6654, H6657 (July 20, 2000).
67. *See* Dickey, *supra* note 27, at 9.
68. *Id.* at 10.
69. *See infra* notes 211-13 and accompanying text.
70. Smillie et al., *supra* note 12, at 4.
71. PETER GREENHALG, WEST AFRICAN DIAMONDS 1919-1983: AN ECONOMIC HISTORY 16 (1985).
72. *See id.*
73. *See* Dickey, *supra* note 27, at 9.

are octahedral,[74] which accounts for their high value.[75] According to a recent study, Sierra Leone officially mined 55,000,000 carats[76] of diamonds from 1930-1998.[77] In 1996, the average price per carat was US$270.[78]

In 1956, legislation was enacted to implement a way to legally market diamond production in Sierra Leone.[79] The legislation became necessary due to widespread smuggling of diamonds through neighboring Liberia, which challenged not only the Government of Sierra Leone's ability to govern, but also resulted in substantial revenue losses.[80] In an effort to gain greater control over the country's diamond resources, the Government of Sierra Leone granted a monopoly to De Beers' marketing arm, which is referred to as the Central Selling Organization (CSO).[81]

Affiliation with a CSO is supposed to provide stability for a diamond market by curbing smuggling and illicit diamond mining, however the opposite has proved true for the diamond market in Sierra Leone.[82] "From a high of over two million carats in 1970, legitimate diamond exports dropped to 595,000 carats in 1980 and then to only 48,000 in 1988."[83] The Bank of Sierra Leone recently reported that revenue from diamond exports totaling US$20,600,000 in 1991, fell to US$800,000 by 1995.[84]

Illegal diamond traders, namely members of the RUF, are responsible for the country's decreased official diamond exports.[85] The RUF smuggles diamonds out of Sierra Leone and sells them in order to buy arms from other African states.[86] Sierra Leone's neighboring country on its southeastern border, Liberia, is notorious for acting as a partner to the RUF rebels in their smuggling pursuits.[87] "Liberia has been the principal route for the smuggling

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74. Octahedral describes a diamond that has eight plane faces. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 817 (1991).

75. *See* Dickey *supra* note 27, at 9.

76. A carat is defined as a unit of diamond measurement; one carat is equivalent to 0.2 gram (200 milligrammes). *Conflict Diamonds, infra* note 167, at 52.

77. Smillie et al., *supra* note 12, at 4.

78. *Id.*

79. *See* GREENHALGH, *supra* note 71, at 246.

80. *See id.*

81. *See id.* A CSO, like De Beers' which is currently based in London, offers greater stability, guaranteed purchases, larger financial resources, and expert knowledge of diamonds. *See id.* De Beers' CSO continues to dominate Sierra Leone's diamond marketing. *See id.* at 268.

82. *See* Smillie et al., *supra* note 12, at 5.

83. *Id.*

84. RENO, *supra* note 1, at 127.

85. *See* Dickey, *supra* note 27, at 9.

86. *See id.*

87. *See* Smillie et al., *supra* note 12, at 11. According to this study:

> Liberia has become a major criminal entrepot for diamonds, guns, money laundering, terror and other forms of organized crime. The astoundingly high levels of its diamond exports bear no relationship to its own limited resource base. By accepting Liberian exports as legitimate, the international diamond

of Sierra Leonean diamonds on to the world markets,[88] a refuge for RUF fighters, a diplomatic supporter of the RUF, and an alleged transit point for arms shipments."[89]

The heart of the world's diamond market is located in Antwerp, Belgium.[90] Approximately 90% of the world's rough diamonds are traded there.[91] De Beers is the most influential international diamond industry, mining 50% and controlling 70-80% of world diamond sales.[92] The United States purchases 65% of the world's gem-quality diamonds traded in Antwerp.[93]

The Hoge Raad voor Diamant (HRD)-the Diamond High Council, which is located in Belgium, is another pivotal actor in the international diamond industry.[94] The HRD is an industry umbrella group responsible for structuring the formal trading of diamonds, which monitors diamond imports and exports for the Belgian government.[95] Significantly, upon import the HRD records a diamond's origin as that of the country from which the diamond was last exported.[96] Therefore, Sierra Leonean diamonds can be officially imported and designated as originating from any country that smuggles them in, and then exports them.[97] Liberia, the primary smuggling route for Sierra Leonean diamonds, is the most infamous benefactor of the HRD's loose tracking policy.[98] Ultimately, knowing the true origin of a diamond is precluded by the

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> industry actively colludes in crimes committed or permitted by the Liberian government.

Id.

88. *See Holly Burkhalter, supra* note 8, (noting that while Sierra Leonean diamonds illegally enter the world market from several different countries, Liberia is by far the greatest offender).

89. *Sierra Leone One Year After the Peace Accord: the Search for Peace, Justice and Sustainable Development,* Ottawa: Partnership Africa Canada, August 8, 2000 (summary report of policy symposium held on June 21-23, 2000).

90. *See* Dickey, *supra* note 27, at 9.

91. *Id.*

92. *Id.*

93. *Id. See also Conflict Diamonds, infra* note 167, at 53 (defining a gem-quality diamond as the highest quality of diamond that commands top prices and is usually in high demand).

94. *See* Dickey, *supra* note 27, at 9.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* Smillie et al., *supra* note 12, at 4. Partnership Africa Canada outlines the basic discrepancies between Sierra Leonean diamond exports with respect to the HRD's import records, and Liberia's role in the matter as follows:

> -While the Government of Sierra Leone recorded exports of only 8,500 carats in 1998, the HRD records imports of 770,000 carats;
>
> -annual Liberian diamond mining capacity is between 100,000 and 150,000 carats, but the HRD records Liberian imports into Belgium of over 31 million carats between 1994 and 1998- an average of over six million carats a year.... .

Id.

HRD's recordation method, which facilitates opaqueness in the diamond industry and mass smuggling from weak African states like Sierra Leone.[99]

IV. INTERNATIONAL RESPONSE

A. *The United Nations*

The international community is increasing its efforts to help demobilize and disarm the RUF rebels who continue to hold Sierra Leone economically hostage through their control over the country's diamond mines.[100] The United Nations maintains peacekeeping forces in the war torn country and recently enacted a global embargo on the import of conflict diamonds from the rebels.[101] With respect to peacekeeping forces, in Resolution 1270 of October 1999, the Security Council established the United Nations Mission in Sierra Leone (UNAMSIL)[102] to facilitate conditions by which the Lome Accord[103] could be implemented. Approximately seven months after the creation of

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99. *See id.* There have been several judicial inquiries into the HRD's system in recent years. *See id.* The way in which the HRD monitors diamond imports and exports on behalf of the Belgian Government has been criticized as violating "almost any definition of neutrality, and is an invitation to corruption. Cases of fraud in the Antwerp diamond trade are legendary and Antwerp has become one of the primary world centres for Russian organized crime." *Id.*

100. *See infra* notes 107-10 and accompanying text.

101. *See infra* notes 111-12 and accompanying text.

102. S.C. Res. 1270, U.N. Doc. S/RES/1270 (1999), ¶ 8:

> The Security Council, 8. Decides to establish the United Nations Mission in Sierra Leone (UNAMSIL) with immediate effect for an initial period of six months and with the following mandate:
>
> 1. To cooperate with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement;
> 2. To assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan;
> 3. To that end, to establish a presence at key locations throughout the territory of Sierra Leone, including at disarmament/reception centres and demobilization centres;
> 4. To ensure the security and freedom of movement of United Nations personnel;
> 5. To monitor adherence to the ceasefire in accordance with the ceasefire agreement of 18 May 1999...through the structures provided for therein;
> 6. To encourage the parties to create confidence-building mechanisms and support their functioning;
> 7. To facilitate the delivery of humanitarian assistance;
> 8. To support the operations of United Nations civilian officials, including the Special Representative of the Secretary-General and his staff, human rights officers and civil affairs officers;
> 9. To provide support, as requested, to the elections, which are to be held in accordance with the present constitution of Sierra Leone; ....

Id. See also S.C. Res. 1321, U.N. Doc. S/RES/1321 (2000). Resolution 1321 is UNAMSIL's current mandate, which extends until December 31, 2000.

103. *See generally* Lome Accord, *supra* note 59.

UNAMSIL, international peacekeepers began deploying in Sierra Leone.[104] Within a matter of days however, RUF rebels disarmed and took hostage nearly 500 of those peacekeepers deployed in RUF-controlled areas.[105] The rebels held the hostages for several weeks, eventually releasing them by July 18, 2000.[106]

The weaknesses exposed in the UNAMSIL hostage crisis spurred UN Secretary General Kofi Annan to request an increase in the size and mandate of the peacekeeping forces.[107] As a result, the military component of UNAMSIL originally not intended to exceed 6000[108] ballooned to 13,000, with Mr. Annan recently requesting an additional increase to 20,500 military personnel.[109] UNAMSIL is currently the largest peacekeeping force deployed by the United Nations.[110]

In addition to military intervention by UN peacekeepers to reclaim Sierra Leone's rebel-controlled areas, especially the diamond mines, the UN has also imposed a worldwide ban on the purchase of rough diamonds from Sierra Leone.[111] The United Nations Security Council adopted Resolution 1306 on July 5, 2000.[112] Key provisions of Resolution 1306 include paragraphs one through six, which establish the framework for the ban.[113] The embargo,

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104. *See* Michael Fleshman, *Sierra Leone: Peacekeeping Under Fire*, AFRICA RECOVERY ONLINE, *at* http://www.un.org/ecosocdev/geninfo/afrec/vol14no2/sierral.htm (last visited Oct. 21, 2000).

105. *Id.*

106. *See* 146 CONG. REC. H6399, H6421 (July 18, 2000).

107. *See Sierra Leone: After African Trip, Security Council Team Urges Stronger UN Mission in Sierra Leone*, AFRICA NEWS, Oct. 19, 2000, *available at* LEXIS, Africa News File.

108. S.C. Res. 1270, *supra* note 102. Paragraph 9 provides that "the military component of UNAMSIL shall comprise a maximum of 6,000 military personnel...." *Id.* However, this provision goes on to explain that the determination of the number of UNAMSIL military personnel, along with other military observers, would be subject to review in light of conditions on the ground and any success made in the peace process. *See id.*

109. *Sierra Leone*, *supra* note 107.

110. *See Conflict Diamonds: Sanctions and War*, *supra* note 5.

111. *See* S.C. Res. 1306, U.N. Doc. S/RES/1306 (2000).

112. *Id.*

113. See *id.* ¶¶ 1-6. These provisions are as follows:

The Security Council,

1. Decides that all States shall take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory;
2. Requests the Government of Sierra Leone to ensure, as a matter of urgency, that an effective Certificate of Origin regime for trade in diamonds is in operation in Sierra Leone;
3. Also requests States, relevant international organizations and other bodies in a position to do so to offer assistance to the Government of Sierra Leone to facilitate the full operation of an effective Certificate of Origin regime for Sierra Leone rough diamonds;
4. Further requests the Government of Sierra Leone to notify the Committee established by resolution 1132 (1997) ('the Committee') of the details of such a Certificate of Origin regime when it is fully in operation;

designed to last for at least eighteen months, makes it illegal to buy Sierra Leonean diamonds whose origin is not officially certified by the Government of Sierra Leone.[114] The Resolution also calls on the Government of Sierra Leone to develop an effective certificate of origin scheme in order to track the country's rough diamond exports.[115] Resolution 1306 also provides for the establishment of a panel of experts to investigate the link between diamonds and arms.[116]

Notably, the resolution calls upon influential members of the diamond industry and relevant international organizations to assist the Government of Sierra Leone in establishing a well-regulated diamond industry.[117] The resolution does not however, provide for sanctions against those individuals, companies, or groups that refuse to assist the Government of Sierra Leone in developing a sustainable diamond trade.[118]

Resolution 1306 is a critical step towards ensuring that the exploitation of diamonds benefits the people of Sierra Leone and the country's

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5. Decides that rough diamonds controlled by the Government of Sierra Leone through the Certificate of Origin regime shall be exempt form the measures imposed in paragraph 1 above when the Committee has reported to the Council, taking into account expert advice obtained at the request of the Committee through the Secretary-General, that an effective regime is fully in operation;
6. Decides that the measures referred to in paragraph 1 above are established for an initial period of 18 months and affirms that, at the end of this period, it will review the situation in Sierra Leone, including the extent of the Government's authority over the diamond-producing areas, in order to decide whether to extend these measures for a further period and, if necessary, to modify them or adopt further measures; ....

Id.

114. *See id.* ¶¶ 1, 5-6.

115. *See id.*

116. S.C. Res. 1306, *supra* note 111, ¶ 19. The Chairman of the Sierra Leone Sanctions Committee, Anwarul Chowdhury, announced the names of the five-member panel in a press briefing on August 1, 2000. The five experts are: Chairman, Martin Chungong Ayafor (Cameroon); Diamond Expert, Ian Smillie (Canada); Expert on Arms and Transportation, Johan Peleman (Belgium); Expert from Interpol, Harjit Singh Sandu; and Expert from the International Civil Aviation Organization (ICAO), Atabou Bodian (Senegal). *See id.*

117. *See id.* ¶¶ 10-11. These provisions are as follows:

10. [The Security Council] Encourages the International Diamond Manufactures Association, the World Federation of Diamond Bourses, the Diamond High Council and all other representatives of the diamond industry to work with the Government of Sierra Leone and the Committee to develop methods and working practices to facilitate the effective implementation of this resolution;
11. Invites States, international organizations, members of the diamond industry and other relevant entities in a position to do so to offer assistance to the Government of Sierra Leone to contribute to the further development of a well-structured and well-regulated diamond industry that provides for the identification of the provenance of rough diamonds; ....

Id.

118. *See id.*

development as a democratic state, rather than the coffers of RUF rebels.[119] Following the Security Council's adoption of Resolution 1306, Sierra Leone's ambassador, Ibrahim M. Kamara, praised the Council's action.[120] He noted that for the first time the Council went to the root of the conflict in Sierra Leone, which in his opinion was and remains diamonds.[121] The United Kingdom's ambassador, Sir Jeremy Greenstock,[122] noted the diamond industry's crucial role in the success or failure of Resolution 1306.[123] Sir Jeremy made similar remarks with respect to the importance of Sierra Leone's neighboring countries' adherence to the terms of the Resolution.[124]

In addition to praising the Security Council's action in adopting Resolution 1306, the United States ambassador voiced sharp criticism for the Resolution's eighteen-month time limit.[125] U.S. ambassador Nancy Soderberg declared:

> The use of time limits in the resolution or any other undermined the incentive for sanctioned States or entities to comply with the demands of the Security Council, encouraging them to believe that if they could simply outlast the patience of the Council or somehow divide its members, sanctions would be lifted without compliance or would just simply expire.[126]

Despite criticisms however, Resolution 1306 has already begun to have an impact on the development of a legitimate diamond trade in Sierra Leone.[127] Pursuant to paragraph two of the resolution, the Government of Sierra Leone implemented a diamond certification system.[128] The United Nations sanctions committee approved the government's certification regime September 29, 2000.[129] Sierra Leone subsequently resumed legal diamond exports October 12, 2000, three months after imposition of the embargo by the United Nations.[130]

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119. *See* S.C. Res. 1306, Doc. SC/6886 (July 5, 2000). (statement of Nancy Soderberg).

120. *See id.* (statement of Ibrahim M. Kamara).

121. *See id.*

122. *See* Richard Beeston, *UN Delays British Call to Ban Rebel Diamond Sales*, THE TIMES (London), July 1, 2000, *available at* LEXIS, The Times File (explaining Britain's role in the adoption of Resolution 1306, in that Sir Jeremy drafted the Resolution).

123. *See* U.N. Doc. SC/6886, *supra* note 119. (statement of Sir Jeremy Greenstock).

124. *See id.*

125. *See* S.C. Res. 1306, *supra* note 111, ¶ 6.

126. U.N. Doc. SC/6886, *supra* note 119. (statement of Nancy Soderberg).

127. Carola Hoyas, *UN Backs Diamond Scheme*, FINANCIAL TIMES (London), Sept. 30, 2000, at 7, *available at* LEXIS, The Financial Times File.

128. *See id.*

129. *Id.*

130. *See Sierra Leone Expected to Resume "Legal" Diamond Exports on 12th October*, BBC WORLDWIDE MONITORING, Oct. 13, 2000, *available at* LEXIS, BBC Monitoring Africa-Political File.

The government's plan provides for the control of diamond exports by both the use of certificates of origin and electronic monitoring of tamper-proof containers.[131] The certificate of origin provides the weight of the diamond in carats and its dollar value, it also verifies the legality of the exports, and it states the name of the purchaser -- who would have to belong to the World Diamond Council.[132] The government's new system also mandates the sale of diamonds seized for noncompliance, with the proceeds going to the government.[133]

Shortly after the Security Council adopted Resolution 1306, the Council started work on another resolution intended to hold accountable those who violated international humanitarian law in Sierra Leone.[134] On August 14, 2000, the Security Council adopted Resolution 1315, which calls for the Secretary General to negotiate with the Government of Sierra Leone to create an independent special court.[135]

Overall, the United Nations has gone to great lengths to facilitate the return of law and order to Sierra Leone in general, and to the diamond industry in particular.[136] From providing peacekeeping troops under UNAMSIL, to adopting Resolutions 1306 and 1315, the UN continues to demonstrate its steadfastness in facilitating the development of a peaceable democracy in Sierra Leone, in which the country's resources are used to achieve that end.[137]

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131. *See id.*

132. *See id.*

133. *See id.*

134. GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, *supra* note 10, at 4. In this report, Human Rights Watch workers assert that the rebels have "grossly and systematically" violated fundamental guarantees of the laws of war under the 1949 Geneva Conventions and their Protocols. *See id.* The following acts, prohibited by the laws of war, are what RUF rebels have been accused of committing:

a) violence to the life, health, and physical or mental well-being of persons, particularly murder, torture of all kinds, whether physical or mental, corporal punishment, and mutilation;
b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution, rape, and any form of indecent assault;
c) the taking of hostages;
d) collective punishments;
e) threats to commit any of the foregoing acts.

Id.

135. *See* S.C. Res. 1315, U.N. Doc. SC/6910 (Aug. 14, 2000). (providing that "persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law"... .) *See also* Minh T. Vo, *War-Torn Sierra Leone Gets Help from the West*, CHRISTIAN SCI. MONITOR, Aug. 10, 2000, at 7. (noting that the issue of the court's jurisdiction is a point of controversy between Sierra Leone's government and the UN. In particular, the Government of Sierra Leone wants to limit jurisdiction to crimes committed after the Lome Accord, while the UN insists that jurisdiction should be broader.)

136. *See generally* S.C. Res. 1306, *supra* note 111.

137. *See id. See generally* S.C. Res. 1315, *supra* note 135; S.C. Res. 1270, *supra* note 102.

B. The United States

In conjunction with the United Nations, the Unites States is taking steps to end the RUF's illegal diamond trade in Sierra Leone. Various members of Congress have sponsored legislation designed to use the leverage the United States has as consumer of over sixty-five percent of the world's diamonds in preventing the diamond industry from dealing in conflict diamonds.[138] Representative Tony Hall (D-Ohio) is the leading proponent of legislation that calls for the disclosure of a diamond's country of origin so that American consumers will know whether or not they are purchasing diamonds from conflict areas like Sierra Leone.[139]

On November 1, 1999, Representative Hall introduced the Consumer Access to a Responsible Accounting of Trade (CARAT) Act of 2000.[140] As introduced in 1999, the CARAT Act did not block the import of diamonds from conflict zones; rather, it focused on changing traditional diamond industry practice by requiring that a certificate stating the country where such diamonds were mined accompany all diamond imports into the United States.[141] Following the adoption of UN Security Council Resolution 1306, Representative Hall revamped the CARAT Act to incorporate the resolution's explicit embargo on all diamonds from Sierra Leone not certified by the government.[142]

Representative Hall's revised CARAT Act went even further than Resolution 1306 by requiring certificates of origin from a range of diamond importing countries in Africa other than Sierra Leone, including Liberia, the notorious conduit for illicit Sierra Leonean diamonds reaching the world market.[143] The September 2000 CARAT Act also provided for stricter civil penalties than were set out in the Act's original 1999 form. The revised act increased the penalty for a first time offense from a possible US$5,000 fine to US$50,000.[144] Moreover, the September 2000 CARAT Act calls for the

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138. Dickey, *supra* note 27, at 9.

139. *See* H.R. 3188, 106th Cong. (1999).

140. *Id.*

141. *Id.* § 3(a)(1) and (2). *See also* 146 CONG. REC. H6654, H6658 (July 20, 2000) (explaining that under current United States law, no certification at all is required).

142. H.R. 5147, 106th Cong. (2000). Rep. Hall introduced this bill on September 12, 2000. *See id.* The prohibition on Sierra Leonean diamonds is found in § 101, which provides:No diamonds that have been mined in or exported from the Republic of Sierra Leone, the Republic of Liberia, Burkina Faso, the Republic of Cote d'Ivoire, the Republic of Angola, Guinea, Togo, or Ukraine may be imported into the United States, except for diamonds—

> (1) the country of origin of which has been certified as the Republic of Sierra Leone by the internationally recognized government of that country, in accordance with United Nations Security Council Resolution 1306 July 5, 2000;
>
> ....

Id.

143. *See id.*

144. *Compare* H.R. 3188, *supra* note 139, § 4 (a), *with* H.R. 5147, *supra* note 142, § 202 (a).

appointment of a Special Representative on Conflict Diamonds.[145] A final distinction between the November 1999 and the September 2000 version of the Act is that the latter does not restrict itself to gem-quality[146] diamonds; instead, it prohibits the import of all diamonds lacking required country-of-origin certification.[147]

The CARAT Act provides a way in which American consumers may exercise their purchasing power wisely, by refusing to accept a diamond whose country of origin is not declared at the time of purchase.[148] The fact that Americans buy over 65 % of gem-quality diamonds worldwide affords them a powerful voice in the global diamond market.[149] Representative Hall urges that enacting legislation informing consumers of the original source of the diamond they buy will "encourage countries and businesses in Africa to use their influence to end the wars that wreak so much havoc on that continent before those wars give diamonds a bad name."[150] He further added "[a]nd it will help protect the democratic nations that are using their diamond revenues for the good of their people."[151]

Representative Hall has also proposed non-legislative solutions for restoring legitimacy to Sierra Leone's diamond trade.[152] Speaking before the

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145. H.R. 5147, *supra* note 142, § 401. § 401. Special Representative on Conflict Diamonds.

(a) Appointment. The president shall...appoint a Special Representative on Conflict Diamonds. The Special Representatives [sic] on Conflict Diamonds shall hold office at the pleasure of the President and shall have the rank of Ambassador.

(b) Functions. The Special Representative on Conflict Diamonds shall have the following functions:

(1) To serve as chairperson of an interagency working group established by the President to address the issues relating to the use of proceeds from the sale of diamonds mined in certain regions in Africa to support armed conflict in the countries in these regions. The interagency group shall include representatives of the Department of the Treasury (including the Customs Service), the Policy and Planning Staff and the Bureau of Democracy, Human Rights, and Labor of the Department of State, the Office of the United States Trade Representative, and the Department of Commerce.

(2) To represent the United States at international meetings on the issues described in paragraph (1).

Id.

146. *See* H.R. 3188, *supra* note 139, § 7. The term "gem-quality diamond" in this Act refers to any diamond whose retail value is at least US$100. *Id.*

147. *See* H.R. 5147, *supra* note 142, § 101.

148. For an argument against Representative Hall's proposed CARAT Act, see Michael Lane, *Danger in a Diamond Embargo: American Jewellery Imports May Help to Finance African Wars*, FINANCIAL TIMES, Aug. 29, 2000, at 17, *available at* LEXIS, Financial Times File. In this article a former United States Customs Service official criticizes the proposed legislation on the basis that it would be unenforceable by U.S. Customs and that it would ultimately have damaging effects. *See id.*

149. Dickey, *supra* note 27, at 9.

150. 145 CONG. REC. E2232 (Nov. 1, 1999).

151. *See id.*

152. *See infra* notes 155-57 and accompanying text.

World Diamond Congress[153] on July 17, 2000, he asserted that while a certification scheme is necessary, it alone probably would not be enough given the public's current scrutiny of the diamond industry.[154] The Congressman proposed that the industry make charitable contributions to atone for past injustices and to fulfill its corporate responsibility to those Africans whose resources have been exploited at the expense of improving the industry's image.[155] He also proposed possible reparations and investment plans.[156] Representative Hall suggested that the diamond industry invest in a so-called Sparkle Fund, designed to provide loans to the poor for savings and entrepreneurship opportunities.[157]

Former President Bill Clinton played a recent role in stopping Sierra Leone's illicit diamond trade by focusing on diplomatic steps by which to deal with the issue of conflict diamonds.[158] On October 11, 2000, President Clinton signed a proclamation "suspending the entry into the United States, as immigrants and non-immigrants, of all persons - who plan, engage in, or benefit from activities that support the Revolutionary United Front (RUF), or that otherwise impede the peace process in Sierra Leone."[159]

In his statement, President Clinton noted that visa restrictions are applicable to Liberian President Charles Taylor, senior members of the Liberian government, as well as to supporters and family members of these government officials.[160] He called on the Liberian government to end its illicit traffic in arms and diamonds with the RUF, and instead to use its influence over the rebels to restore peace to the country.[161] President Clinton concluded his statement by noting that visa restrictions will continue until Liberia stopped participating in activities that support the RUF.[162]

Representative Hall's proposed CARAT Act suggests an economic approach to curbing illicit diamond trade in Sierra Leone via the implementation of a strict regulatory scheme on diamond imports into the

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153. The World Federation of Bourses (WFDB) decided in 1947 to create a worldwide network of diamond clubs, which subsequently led to the creation of the World Diamond Congress. *See The World Diamond Congress, at* http://www.diamond-key.com/calendar/jul2000/16jul2000.html (last visited Sept. 3, 2000). The World Diamond Congress meets every two years, at which time delegates from affiliated bourses discuss issues facing the industry. The 29th World Diamond Congress was held this year in Antwerp, Belgium from July 16th to the 19th. *Id.*

154. *See* Representative Tony Hall, *Address to the World Diamond Congress* (July 17, 2000), *available at* http://www.house.gov/tonyhall/pr152.html.

155. *See id.*

156. *See id.*

157. *See id.*

158. *The White House: Office of the Press Secretary-Statement by the President,* M2 PRESSWIRE, Oct. 12, 2000, *available at* LEXIS, M2 Presswire File.

159. *Id.*

160. *See id.*

161. *See id.*

162. *See id.*

United States.[163] President Clinton's diplomatic approach of imposing visa restrictions on Liberians who are known to support the RUF complements Hall's pending legislation by focusing on the country known to be the rebel's most notorious smuggling connection.[164] However, these approaches will be meaningless in the absence of a commitment by the diamond industry to halt illicit trading in conflict diamonds.[165]

PART V. INDUSTRY RESPONSE

The diamond industry produces an estimated US$6,800,000,000 worth of rough gems each year, which results in almost US$60,000,000,000 in retail sales.[166] South African based De Beers dominates the international diamond industry.[167] De Beers is one of the most vocal industry respondents regarding the issue of conflict diamonds.[168] The company has good reason to be at the forefront of this issue, given the effect that a negative image of diamonds could have on a business whose life's blood depends on the consumer's belief that "a diamond is forever."[169]

De Beers insists that it is appalled by the link between diamonds and the funding of weapons purchases by rebel armies in Africa.[170] However the company's buying practices in years past call the veracity of this assertion into question.[171] De Beers also disputes the percentage of conflict diamonds reportedly on the market, which it estimates to be only a small 3.7%.[172] However, the actual sincerity of De Beers' outrage regarding conflict

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163. *See supra* notes 149-51 and accompanying text.

164. *See supra* notes 160-62 and accompanying text.

165. *See infra* notes 174-76 and accompanying text.

166. *Diamond Action Plan*, MINING, July 21, 2000, *available at* LEXIS.

167. *See Conflict Diamonds: Possibilities for the Identification, Certification and Control of Diamonds*, *at* http://oneworld.org/globalwitness/press/pr_20000620.html (last visited Oct. 27, 2000) (explaining that De Beers mines approximately 50% of world diamond production, and controls an estimated 70% of the world's diamond sales). *See generally* STEFAN KANFER, THE LAST EMPIRE: DE BEERS, DIAMONDS, AND THE WORLD (1993) (provides an extensive history of De Beers' development as an industry giant, starting from its founding by Cecil Rhodes in 1888, to its modern day status under the leadership of the Oppenheimer family).

168. *See infra* notes 174-76 and accompanying text.

169. *See* Smillie et al., *supra* note 12, at 13.

170. *See Hearings into the Issue of "Conflict Diamonds" Before the Subcomm. On Africa of the House Comm. on International Relations*, (2000) (Written Testimony by De Beers Consolidated Mines Ltd. & De Beers Centenary AG) [hereinafter De Beers' Written Testimony].

171. *See Conflict Diamonds*, *supra* note 167, at 13 (explaining that international attitudes have radically shifted with respect to conflict diamonds. The report notes that it is well known and widely reported that diamonds from conflict areas like Sierra Leone were being sold on the open market. The report goes on to state that dealing in smuggled diamonds was not only accepted business practice, but also promoted by De Beers who credited itself as the stabilizing force in world diamond prices during the 1990s).

172. De Beers' Written Testimony, *supra* note 170.

diamonds is secondary to the industry's greatest fear at the moment: A consumer boycott.[173]

Recently, De Beers took steps to disassociate itself from the controversial topic of conflict diamonds.[174] In February 2000, De Beers began guaranteeing the source of its rough diamonds in response to a UN embargo on Angolan diamonds.[175] At the same time, De Beers also began including guarantees on its sales invoices claiming that the purchased diamond was not procured from an area in Africa controlled by rebel forces.[176]

Aside from guarantees, De Beers also supports documentation indicating a diamond's origin rather than a mere declaration of provenance, which is provided for in both UN Resolution 1306 and the CARAT Act.[177] However, De Beers does not use the phrase "certificate of origin" with respect to such

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173. *See* Smillie et al., *supra* note 12, at 13. In November 1999, De Beers Chairman Nicky Oppenheimer remarked on the negative impact that a consumer boycott would have on African countries that have legitimate diamond industries like South Africa, Botswana, and Nambia. *See id.* He said,

> "[d]amage to the diamond market will not on its own deprive the warlords of their treasuries, but it will kill prosperity and encourage poverty in other well regulated African countries...damage the market and you undermine orderly mining regimes and ensure instead that there will be more...Sierra Leones." *Id.*

174. *See De Beers Guarantees the Source of its Rough Diamonds, available at* http://www.debeers.ca/conflict/29feb0.html (last visited Oct. 8, 2000). According to the guarantee, De Beers proclaims that it is has:

1. Operated in strict compliance with UN Resolution 1173 relating to the sale of diamonds by the UNITA rebel movement in Angola
2. Ceased buying diamonds in Angola from the informal sector of the economy
3. Withdrawn its buyers from its buying offices in the Congo and Guinea (it has had no offices in Sierra Leone and Liberia for more than fifteen years)
4. Instructed its buying offices in Antwerp and Tel Aviv not to buy any diamonds imported from Africa and
5. Consistently and publicly urged the trade to avoid buying any diamonds originating from areas controlled by rebel movements.

Id.

175. *See id.*

176. *See id.* The guarantee on De Beers sales invoices reads as follows:

(a) No diamonds in this box have been purchased in breach of UN Resolution 1173.

(b) The intake of diamonds being purchased by De Beers and its associated companies and being sold into the market through the Sight system does not include any diamonds which come from any area in Africa controlled by forces rebelling against the legitimate and internationally recognised [sic] government of the relevant country.

Id.

177. *See* De Beers' Written Testimony, *supra* note 170. According to Part VII, paragraph 9 of the testimony, "origin" refers to the actual country in which a diamond was procured, whereas "provenance" refers to the country that last exported the stone. *See id.*

documentation; rather, it prefers to refer to such documents as "standard export/import forms."[178]

Unlike De Beers, the Diamond Dealers Club (DDC), an association of roughly 2000 American diamond dealers, does not support the use of certificates of origin or standard documentation that affects the same purpose.[179] The DDC opposes Representative Hall's CARAT Act,[180] which calls for certificates of origin.[181] Eli Haas, the President of DDC, testified before Congress stating that while Representative Hall's proposed legislation is well intentioned, it "would neither lead to the successful implementation of the UN sanctions nor end the ongoing civil wars and the concomitant deaths of innocent civilians. Rather, it would harm the diamond industry worldwide...."[182] The DDC President also criticized the legislation as being overly burdensome because it requires the issuance of tens of millions of certificates annually.[183]

The world diamond industry struck a compromise between De Beers' commitment to certificates of origin and the DDC's opposition to them at its 29th World Diamond Congress[184] held in Belgium last year.[185] While in Belgium, the industry formally announced a nine-step resolution calling for the creation of a global certification plan designed to assure interested parties that the industry does not deal in conflict diamonds.[186] The proposed scheme,

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178. *Id. See also De Beers Calls for Firm Diamond Industry Action on 'Conflict Diamonds,' at* http://www.debeers.ca.conflict/nfogm.html (last visited June 14, 2000). Aside from the introduction of standard documentation, De Beers has also recommended the following: governments enact laws to empower diamond import control offices to deny entry of wrongly documented rough diamonds, diamond import offices obtain alluvial samples from each diamond producing country to help officers identify the true origin of imported rough diamond parcels, that banks that serve the diamond industry cut off services to clients who deal in conflict diamonds, there be an exchange in staff between diamond producing/exporting countries and diamond cutting centers to harmonize paperwork, and finally the start of a mandatory publication of the yearly import/export statistics of rough diamonds by all countries that deal in them. *See id.*

179. *Prepared Testimony of Eli Haas President Diamond Dealers Club Before the Subcomm. on Africa of the House Subcomm. on International Relations*, FEDERAL NEWS SERVICE, May 9, 2000, *available at* LEXIS, Federal News Service File [hereinafter *Eli Haas*].

180. *See generally* H.R. 5147, *supra* note 142.

181. *Eli Haas*, *supra* note 179.

182. *Id.*

183. *See id.*

184. *See supra* note 153.

185. *See* Robert Weldon, *Conflict Diamonds: A Resolution*, PROF. JEWELER MAG., July 19, 2000, *at* http://www.professionaljeweler.com/archives/news/2000/071900story.html (last visited Oct. 26, 2000).

186. *See id.* The nine provisions of the resolution are as follows:

1. Each accredited rough diamond importing country...should enact "redline" legislation. As such, no parcel of diamond rough could be imported unless it has been sealed and registered in a universally standardized manner by an accredited export authority from the exporting country.
2. Each exporting country...should establish accredited export offices or a diamond board that seals parcels of rough diamonds to be exported and

commonly referred to as "Rough Controls," requires country-of-origin certification up until the time rough diamonds reach the cutting and polishing process, but such certification is not provided after the diamond completes the process.[187] As a result, countries that import polished gems are not told where the diamonds were mined, because it will be presumed that all stones in legitimate cutting centers are themselves legitimate.[188]

In general, Rough Controls are intended to create a certification and delivery system for legitimate exports, instead of attempting to exclude all conflict diamonds from international trade.[189] Countries will only be permitted to import diamonds in universal tamper-proof packaging, accompanied by a forgery-proof certificate-of-origin granted by the government.[190] Rough diamond exports are then supposed to be entered into an international computer database both when they leave a country and when they enter one.[191] The resolution also calls for the creation of an International Diamond Council

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registered in an international database. If the country is a producer, it should be accredited only if it has control mechanisms to determine the flow and legitimate ownership of the rough to be exported.

3. Polished-diamond-consuming countries should enact legislation forbidding the importation of polished diamonds from any manufacturing/dealing country that has no redline legislation of rough.
4. As part of the diamond net, every country...should enact legislation calling for criminal penalties against any person or company proven to be knowingly involved in illegal rough diamonds
5. Every diamond organization should adopt an ethical code of conduct on conflict diamonds, labor practices and good business practices. Failure to adhere to this code would lead to expulsion from WFDB, IDMA and other relevant organizations.
6. As a positive measure of compliance, all relevant and interested parties should promote adherence to the code in the consumer marketplace.
7. The trade should enlist the support of banks, insurance and shipping companies and other pertinent providers of goods and services to expose and cease business relations with anyone found knowingly violating these principals.
8. The trade should conduct continual analysis of relevant technologies - and invest in developing them - for implementation leading to greater compliance.
9. Compliance should be monitored and controlled by an International Diamond Council, composed of producers, manufacturers, traders, governments and relevant international organizations. This process would be fully verified and audited.

Id.

187. *See* Holly Burkalter, *Deadly Diamonds*, LEGAL TIMES, Sept. 11, 2000, at 74, *available at* LEXIS, Legal Times File.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

that is expected to oversee the entire system, and expel[192] anyone dealing in conflict diamonds.[193]

A criticism of Rough Controls is that there is nothing to stop a country from packaging and sealing diamonds smuggled from rebel areas as their own and then exporting them as legitimate.[194] In a similar vein, another critic of the resolution argues that it will not effectively reach conflict diamonds because diamonds sold from rebel-controlled areas have never gone through an organized system in the first place.[195] However, the resolution's provisions for criminal liability and expulsion for non-compliance with the guidelines provide a strong incentive for industry representatives to cooperate.[196]

VI. RECOMMENDATIONS

There is no single recommendation that, if implemented, would stop illicit diamond trade in Sierra Leone.[197] However, the international community has taken vital steps toward helping Sierra Leone develop a legitimate diamond industry.[198] The United Nations' adoption of Resolution 1306 illustrates the willingness of its member states to help Sierra Leone create a legitimate diamond trade by implementing a global embargo on diamonds not officially certified by the Government of Sierra Leone.[199] The United States has also offered its support by attempting to affect change in the world diamond industry through legislative action and diplomatic measures.[200] In addition, with its recent approval of "Rough Controls" the world diamond

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192. *See United Nations Takes Unprecedented Steps to Cut Off Illicit Diamond Trade in Effort to End Murderous Campaigns in Angola, Sierra Leone and the Congo*, NATIONAL PUBLIC RADIO SHOW: WEEKEND EDITION SATURDAY, Aug. 12, 2000, *available at* LEXIS, National Public Radio File. President of the World Diamond Congress, Ely Isakoff, said the following in an interview about the industry's understanding of the expulsion provision in "Rough Controls":

> Expulsion means that his picture is posted throughout the world in the trading floor and this man is a pariah, like the list of the FBI Most Wanted. He cannot do any business, and he may well forget about being in the industry. We have here a moral question above business question that we must rid ourselves of conflict diamond [sic], regardless of any business consideration, first of all. I believe we're going to get every diamond dealer throughout the world cooperating.

Id.

193. *See* Weldon, *supra* note 185, ¶ 5.

194. *See* Burkalter, *Deadly Diamonds*, *supra* note 187.

195. *See Sierra Leone: Shipping Gems Under UN Plan*, CHIC. TRIB., Oct. 28, 2000, at N17, *available at* LEXIS, Chicago Tribune File.

196. *See* Weldon, *supra* note 185, ¶¶ 4-5.

197. *See* Smillie et al., *supra* note 12, at 8.

198. *See supra* notes 136-39, 158-59, 185-86 and accompanying text.

199. *See generally* S.C. Res. 1306, *supra* note 111.

200. *See generally* H.R. 5147, *supra* note 142. *See also Office of the Press Secretary-Statement by the President*, *supra* note 158.

industry is finally acknowledging its critical role in stopping rebel trade in conflict diamonds in Sierra Leone and other African states.[201]

While these actions lay the foundation for developing a sustainable and well-regulated diamond industry in Sierra Leone, they are by no means a stopping point. The following recommendations are directed to the RUF, the Government of Sierra Leone, the diamond industry, and the international community.[202] It is important to note from the outset that the establishment of a sustainable diamond trade in Sierra Leone cannot rely solely on diamond-specific recommendations.[203] Accordingly, the following recommendations also focus on state building and human rights issues.[204]

Recommendations to the RUF:

1) Immediately refrain from inflicting additional human rights abuses.[205] This necessarily dictates that rebel soldiers release all civilian abductees and prisoners of war.[206]

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201. *See generally* Weldon, *supra* note 185.

202. *See infra* notes 205-50, and accompanying text.

203. *See* Smillie et al., *supra* note 12, at 8.

> According to this report, the establishment of sustainable peace in Sierra Leone will also require major investment by the government of Sierra Leone and by donors in long-term basic human development and the creation of democratic institutions. Diamond-specific initiatives must be integrated into wider programmes aimed at building fundamental human security and democracy, involving parliamentarians, journalists, teachers and a broad cross-section of civil society.

Id.

204. *See* THE ECONOMICS OF INSURGENCY IN ANGOLA, THE DEOMCRATIC REPUBLIC OF THE CONGO, AND SIERRA LEONE, *supra* note 6, at 4-5. The National Intelligence Council emphasized the importance of state building by noting the following in a recent conference report:

> [E]stablishing the fundamentals of a state is essential in countries trying to construct normalcy out of anarchy. Diamonds can finance insurgency when no state exists. Illicit trade in diamonds can flourish where state institutions have been degraded...The lack of institutions allows criminal activity to bring about such degradation. Buttressing state governance must go hand-in-hand with gaining control of the illicit diamond trade. . . .

Id.

205. *See* GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, *supra* note 10, at 4.

206. *See* Lome Accord, *supra* note 59, art. XXI. This article mandates "[a]ll political prisoners of war as well as all non-combatants shall be released immediately and unconditionally by both parties, in accordance with the Statement of June 2, 1999, which is contained in Annex 3 and constitutes an integral part of the present Agreement." *Id.* Annex 3 notes that the parties agreed to have the UN establish a Committee to handle the release of all prisoners of war and non-combatants. The parties also agreed that the UN Chief Military Observer in Sierra Leone chair the committee, and that committee members should include representatives of the International Red Cross, UNICEF, and other relevant UN agencies and non-governmental organizations. *See id.*

2) Immediately abide by the first and foremost provision of the Lome Accord, which calls for the permanent cessation of hostilities between the Government of Sierra Leone and the RUF.[207]
3) Provide education to all RUF members on the standards of international humanitarian law and the rules of war.[208]
4) Peacefully relinquish control of the country's diamond mines to the Government of Sierra Leone, and begin disbanding rebel forces according to the encampment, disarmament, and demobilization process explained in the Lome Accord.[209]
5) Address human rights violations committed since 1991, via the Truth and Reconciliation Commission provided in the Lome Accord.[210]

Recommendations to the Government of Sierra Leone:

1) Establish law and order throughout the country to facilitate the legal exploitation of Sierra Leone's mineral resources.[211] This requires the total disarmament, demobilization, and reintegration of rebel forces.[212] The Government of Sierra Leone also needs to work swiftly with the United Nations to create an independent special court in which to try offenders of international humanitarian law.[213]
2) Create an autonomous governmental body solely responsible for the management of Sierra Leone's strategic resources.[214] This body should

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207. *See id.* art. I.

208. *See* GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, *supra* note 10, at 5. *See also* Lome Accord, *supra* note 59, art. XXV ¶ 2. According to this provision of the cease-fire agreement, the RUF pledged to promote Human Rights education throughout Sierra Leonean society; including the schools, the media, the police, the military, and the religious community. *See id.*

209. *See* Lome Accord, *supra* note 59, art. XVI. A neutral force of UN and ECOMOG peacekeepers is supposed to oversee this process. *See id.* ¶ 1.

210. *See id.* art. XXVI. Art. XXVI ¶ 1 mandates "[a] Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation." *Id.* Art. XXVI ¶ 2 provides "[in] the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991. This commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations." *Id.*

211. *See* Smillie et al., *supra* note 12, at 9.

212. *See* Lome Accord, *supra* note 59, art. XVI. *See also* Abidjan Accord, *supra* note 50, art. 9. According to this 1996 peace agreement between the RUF and the Government of Sierra Leone, the RUF would disband and its members would be permitted to join the country's sanctioned military which would become Sierra Leone's new unified armed forces. *See id.*

213. *See generally* S.C. Res. 1315, *supra* note 135.

214. *See* Lome Accord, *supra* note 59, art. VII. Art. VII ¶ 1 provides:

> Given the emergency situation facing the country, the parties agree that the Government [of Sierra Leone] shall exercise full control over the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone.

be responsible for all exploitation, sale, and export of the country's diamonds.[215] This government-run diamond commission would also be responsible for issuing all mining licenses.[216]

3) Enlist the help of outside observers, such as a team of UN inspectors, who would have the authority to monitor the government-run diamond commission.[217] This team of inspectors should provide feedback to the Government of Sierra Leone on any strengths or weaknesses the government commission on strategic resources might have.[218]

4) The Government of Sierra Leone should encourage complete transparency with respect to its management of diamonds through its officially sanctioned commission in charge of strategic resources.[219] Complete transparency would necessitate full public disclosure of all records and business transactions related to the government's exploitation of diamond resources.[220] To this end, the government should publish monthly reports disclosing the details of any and all transactions related to its resource management, including budgetary matters and the issuance of mining licenses.[221]

5) Pursuant to an agreed term in the Lome Accord, the Government of Sierra Leone should amend its Constitution to make the exploitation of

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> Accordingly, a Commission for the Management of Strategic Resources, National Reconstruction and Development (hereinafter termed the CMRRD) shall be established and charged with the responsibility of securing and monitoring the legitimate exploitation of Sierra Leone's gold and diamonds, and other resources that are determined to be of strategic importance for national security and welfare....

Id.

See also supra note 60 and accompanying text (explaining that the Lome Accord put Foday Sankoh, the RUF's leader, in charge of the CMRRD, which ultimately enhanced rebel control over Sierra Leone's diamond mines).

215. *See* Lome Accord, *supra* note 59, art. VII ¶ 2.

216. *See id.* ¶ 3. *See also Conflict Diamonds, supra* note 167. This report recommends that a government issued license should be required for all extraction; whether it is by a large company, an alluvial digger, or a village co-operative. *See id.* at 46. Alluvial refers to the name of a type of diamond and the type of shallow mine from which a diamond is extracted. *See id.* at 52. An alluvial digger is someone who extracts alluvial diamonds from riverbeds and shallow deposits. *See id.*

217. *See* Smillie et al., *supra* note 12, at 9.

218. *See id.*

219. *See id.* "The Government of Sierra Leone must ensure full transparency, high standards and rigorous probity in the implementation of its diamond purchasing, valuation and oversight activities. Corruption and conflicts of interest must be dealt with quickly and decisively...." *Id.*

220. *See* Lome Accord, *supra* note 59, art. VII ¶ 10. According to this section of the peace accord, all agreements and transactions by the Commission for the Management of Strategic Resources, National Reconstruction and Development would be subject to full public disclosure. The agreement also provides that all records of matters related to the exploitation and management of strategic resources, as well as records of all correspondence, negotiations, and business transactions shall be deemed public documents. *See id.*

221. *See id.* art. VII ¶ 11.

diamonds the legitimate province of the people.[222] The amendment should mandate that all proceeds from the sale of diamonds by the government be used for state building activities in Sierra Leone such as those related to public education and health, as well as infrastructure development.[223]

6) The Government of Sierra Leone should immediately begin investigating the gross human rights abuses committed by RUF rebels since their 1991 invasion.[224] The government should prosecute all rebels who have violated international law.[225]

Recommendations to the Diamond Industry:

1) The international diamond industry should establish a diamond task force responsible for coordinating various proposals and ideas outlining ways that the industry may prevent conflict diamonds from entering the global market.[226] The task force should have a balanced membership, including large and small companies, and experts within the industry.[227]

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222. *See id* art. VII ¶ 14.

223. *See id.*

224. *See* GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, *supra* note 10, at 5. This Human Rights Watch report highlights several other steps the Government of Sierra Leone should take with respect to human rights abuses in the country. *See id.* One recommendation is that the government create a task force to do the following:

1. develop a concrete plan for meeting the needs of abused women and deal specifically with violations inflicted on women during conflict, with the aim of improving the social, medical, and legal response to women's needs.
2. deal with the effects of war on children: child victims, witnesses, and perpetrators. A key function of this task-force would be the development of a concrete plan for meeting the long-term needs of those who were adversely affected by the war. This task force should determine how best to reintegrate children into their communities, provide education and vocational training suitable for older children, and rehabilitate children who have been victims of atrocities, have witnessed atrocities (sometimes against their own parents), or have themselves taken part in atrocities.
3. address the special physical, psychological, and social needs of the thousands of victims of limb amputation and other mutilation.

Id.

225. *See supra* note 134 and accompanying text. *See also* Dickey, *supra* note 27, at 10. The RUF has committed egregious violations of humanitarian law in Sierra Leone. *See id.* The international humanitarian law that governs the conduct of all combatants in war is set out in the Geneva Conventions and the subsequent 1977 Protocols. The rapes, abductions, and murders committed by RUF rebels violate Common Article 3 of the Geneva Conventions, which prohibits parties in a conflict from inflicting violence to the life of a person; including mutilation, cruel treatment, torture and outrages upon personal dignity, taking hostages, and summary executions. Sierra Leone has ratified the Geneva Conventions and the 1977 Protocols. *See id. See also* GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, *supra* note 10, at 5.

226. *See Conflict Diamonds, supra* note 167, at 50.

227. *See id.*

The task force should work closely with importing and exporting countries to create an international diamond committee.[228] In order to ensure the integrity of the international diamond committee, membership should be equally balanced between non-governmental organizations, governments, and industry representatives.[229]

2) The task force should study and research various marking technologies that can be applied to polished and rough diamonds.[230]

3) The industry as a whole should only trade in diamonds with a verifiable audit trail.[231] This would require a provable chain of custody documenting a diamond's entire movement from mine to purchaser.[232]

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228. *See id. See also* Weldon, *supra* note 185, ¶ 9. In its recently adopted resolution at the World Diamond Congress in July 2000, the industry advocated the establishment of a similar international body, which it termed the "International Diamond Council." This international body would be comprised of members from every level of the diamond industry, international organizations, and governments. *See id.* The council would be charged with monitoring and controlling industry non-compliance with respect to dealing in conflict diamonds. *See id.*

229. *See Conflict Diamonds, supra* note 167, at 50.

230. *See id.* at 31. Technology currently exists in the diamond industry for branding and grading cut diamonds. *See id.* Such technology relies on sampling and recording the properties of individual diamonds, or marking a diamond with a bar code or logo for purposes of identification. So-called fingerprinting methodology also exists whereby a laser may scan the unique optical signature of a diamond, which could be stored on a database for recall at a later date. *See id.* A standardized bar code system might prove particularly useful in helping the industry develop a chain of custody for a diamond, as a single bar code could store the entire history of a stone including its country of origin, its original weight, and where it was cut. *See id.* at 33.

See also De Beers' Written Testimony, *supra* note 170. In written testimony before the U,S. Congress in May 2000, a De Beers spokesman stated the following criticism of current diamond identification methodologies:

> While the identification of rough diamond parcels can be extremely difficult, marking a rough diamond so that its identity will remain secure throughout the cutting and polishing process is completely impractical, because more than fifty percent of a diamond's weight is lost in the polishing process. Moreover, the overwhelming majority of diamonds are of a size and quality such that the cost of marking would so erode the margin to the manufacturer as to make it economically unfeasible...It is simply not technically possible, nor is it economically feasible, to mark a stone in such a way that the mark will survive from rough to polished, even with advanced laser techniques. Those who offer this as an easy solution are instead offering a golden opportunity to counterfeiters and fraudsters to pass off conflict or illegal diamonds. This in itself could have the perverse effect of undermining legitimate attempts to curtail the trade in diamonds from conflict areas.

Id.

See also Weldon, *supra* note 185, ¶ 8. In its adoption of "Rough Controls," the industry proposed that it keep itself abreast of relevant technologies in the industry, however it did not specifically reference technologies for the purpose of marking or identifying a particular diamond. *See id.*

231. *See Conflict Diamonds, supra* note 167, at 50.

232. *See* H.R. 5147, *supra* note 142, at § 201. This section of the CARAT Act mandates that a certificate of origin, stating the English name of the country in which the diamond was mined, must accompany products made in whole or in part from diamonds. *See id* at § 201 (B).

Certificates of origin would be the key element in such a chain of custody because they would accompany a diamond from extraction to purchase.[233]

4) Create a register of companies and individuals in the diamond industry that have pledged not to deal in conflict diamonds.[234] Members listed on the register caught dealing in conflict diamonds would be subject to criminal liability as well as lifetime expulsion from influential trade groups.[235] Only diamonds bought and sold from registered members would be considered legitimate.[236]

5) Manufacturers[237] and retailers should only purchase diamonds from registered members of the international diamond committee, who would necessarily provide a verifiable audit trail for each and every diamond product, showing that the product in question is conflict free.[238]

See also S.C. Res. 1306, *supra* note 111, ¶ 2 (mandating that the Government of Sierra Leone develop an effective Certificate of Origin scheme).

233. *See id. See also supra* note 187 and accompanying text (noting that the diamond industry's proposed 'Rough Controls' would only require a certificate of origin up until the time of the cutting and polishing process, but not after because diamonds that have undergone the process will be presumed legitimate).

234. *See Conflict Diamonds, supra* note 167, at 50.

235. *See id. See also* Weldon, *supra* note 185, ¶ 5. According to this provision of the industry's newly adopted 'Rough Controls,' industry representatives should adopt an ethical code of conduct on conflict diamonds. *See id.* Failure to abide by the code would result in expulsion from two influential trade organizations: the World Federation of Diamond Bourses and the International Diamond Manufacturers Association. *See id.* Paragraph four of the Resolution calls on relevant countries to enact legislation that would impose criminal penalties on anyone knowingly involved with conflict diamonds. *See id. See also* H.R. 5147, *supra* note 142, at § 202. The CARAT Act provides a good model for countries that would like some guidance in how to structure criminal penalties for those dealing in conflict diamonds. Section 202 subsection (b), entitled "Criminal Penalties," mandates that any person who willfully or with intent to defraud violates the provisions of the CARAT Act requiring diamonds and products made from diamonds to be accompanied with country of origin documentation upon import to the U.S. shall be subject to the following criminal penalties:

> (1) upon conviction for the first violation...be fined not more than $100,000, or imprisoned for not more than one year, or both; and
> (2) upon conviction for the second or any subsequent violation...be fined not more than $250,000, or imprisoned for not more than 1 year, or both. *Id.*

236. *See Conflict Diamonds, supra* note 167, at 51.

237. The world's major diamond manufacturing centers are located in Israel, Belgium, India (Mumbai and Surat), and New York; cutting and polishing also occurs in South Africa, Botswana, Russia, China, Sri Lanka, Thailand, Vietnam, and Mauritius. *See Centers and Bourses, at* http://www.diamond-key.com/bourses (last visited Nov. 6, 2000).

238. *See Conflict Diamonds, supra* note 167, at 51. This report emphasizes the critical role that retailers play in maintaining consumer confidence in diamond purchases by noting, "[r]etailers are the public face of the diamond industry as far as consumers are concerned. This places a special responsibility upon them and they must ensure that they co-operate fully with the rest of the industry." *Id.* The report also explains that a verifiable audit trail would provide an added benefit to consumers because it would show that the diamond product has not been treated and is not synthetic. *See id.*

Recommendations to the International Community:

1) Given that the majority of rough diamonds are traded on the world diamond market in Antwerp, the Belgian Government should take immediate steps to prevent conflict diamonds from entering Belgium.[239] The Government of Belgium must take direct responsibility for customs, valuation, and statistical procedures of imported diamonds, rather than delegating these duties to the Diamond High Council as it has in the past.[240] The Belgian Government should not only prohibit the import of Sierra Leonean diamonds in accordance with UN Resolution 1306, but also, on its own initiative, ban the import of all diamonds from Liberia.[241]
2) All UN member states should enact legislation implementing Resolution 1306.[242] Countries should also enact legislation banning the import or export of a diamond or parcel[243] of diamonds unless it is registered in accordance with the rules of the international diamond committee, which would require certificate of origin documentation.[244] States should also pass legislation imposing strict criminal penalties on anyone knowingly involved with conflict diamonds.[245]
3) The UN should impose an embargo on all diamonds from Liberia.[246] An embargo of this sort should not be given an arbitrary time period, but rather should last as long as Liberia's leadership continues to be complicit with the RUF's illicit trade in Sierra Leonean diamonds.[247] The UN should also consider imposing a full embargo on diamonds from Guinea, which is the country that borders Sierra Leone to the north.[248]
4) All states that import, export, or act as a transit point for diamonds, along with relevant international organizations, should offer the Government of Sierra Leone assistance in developing a well-regulated

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239. *See* Dickey, *supra* note 27, at 9. Nearly 90% of the world's rough diamonds are traded in Antwerp. *See id.*

240. *See* Smillie et al., *supra* note 12, at 10.

241. *See id.* at 11.

242. *See* S.C. Res. 1306, *supra* note 111, ¶ 1.

243. *See Conflict Diamonds, supra* note 167, at 54. A parcel is defined as a quantity of diamonds that can vary from 10 carats up to thousands of carats. *See id.*

244. *See* Weldon, *supra* note 185, ¶¶ 1-3. The diamond industry has proposed that countries enact so-called redline legislation of the rough, which would prohibit the import of rough diamonds that do not meet universally recognized standards for legitimacy. *See id.*

245. *See* H.R. 5147, *supra* note 142, at § 202.

246. *See* Smillie et al., *supra* note 12, at 11.

247. *See supra* notes 86-89 and accompanying text (explaining the major role that Liberia plays in Sierra Leone's illicit diamond trade in that it provides a conduit through which the RUF may smuggle diamonds out of Sierra Leone and trade them for sophisticated weaponry).

248. *See* Smillie et al., *supra* note 12, at 11.

diamond industry.[249] This assistance may simply entail adherence to Resolution 1306, or may also include the imposition of visa restrictions on persons from Liberia who benefit or support in any way the actions of the RUF or who otherwise impede the peace process in Sierra Leone.[250]

VII. CONCLUSION

Ravaged by almost a decade of war, Sierra Leone could not be in a worse situation today than if it had no diamonds at all. The RUF's illicit exploitation of the country's diamond resources must immediately cease. The end of unlawful diamond trading by the rebels is ever more likely as the Government of Sierra Leone slowly begins to reassert its authority over the country's diamond mines.[251] The sooner Sierra Leone is able to establish a legitimate, government-controlled diamond trade, the sooner it will be able to join in the prosperity and development that other African states now enjoy as a result of their rich diamond resources.[252]

The widespread human rights abuses[253] suffered by Sierra Leoneans during the RUF's rampage are a direct consequence of the country's illegal diamond trade, and are likely to continue in the absence of law and order in Sierra Leone's diamond industry and civil society. The United Nations' efforts thus far in embargoing diamonds not certified by the government, deploying peacekeeping forces, and attempting to establish an independent special court in which to try violators of international humanitarian law have been instrumental in restoring peace in the war-torn country. However, the United Nations' actions alone cannot restore stability to Sierra Leone.

Only a concerted effort by all relevant international actors, including countries that deal with the import or export of diamonds, along with diamond industry representatives, will succeed in preventing conflict diamonds from entering the world market. States must immediately abide by the terms of Resolution 1306 in order to help the Government of Sierra Leone establish a sustainable and well-regulated diamond trade. The United States plays a

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249. *See* S.C. Res. 1306, *supra* note 111, ¶ 11.

250. *See The White House: Office of the Press Secretary-Statement by the President*, *supra* note 158.

251. *See supra* notes 128-30 and accompanying text.

252. *See* Ravi Nessman, *Botswana's Diamond Mines Fuel a More Livable Lifestyle*, INDIANAPOLIS STAR, Nov. 12, 2000, at A24. While diamonds have fueled brutal conflicts in Sierra Leone and other parts of Africa, they have been nothing but a salvation to Botswana where they were discovered in 1967, one year after the country gained its independence from Britain. Botswana's economy has steadily soared as a result of the country's diamond profits, growing at an unprecedented rate of seven percent a year. Overall, salaries have increased, along with education and healthcare standards. Diamond profits are used to invest in the government and to encourage democratic institutions. *See id.*

253. *See supra* note 10; notes 34-38 and accompanying text; note 134; notes 224-25.

critical role in achieving this goal because of its enormous share of the global diamond market. By enacting Representative Hall's proposed CARAT Act and continuing visa restrictions on Liberians who support the RUF, the United States would be a model for other countries to follow in supporting the industry's latest push to rid itself of conflict diamonds. Of ultimate import in Sierra Leone are the thousands of innocent civilian lives subjected to rape, mutilation, and death at the hands of RUF rebels supported by profits from conflict diamonds. Time is of the essence in establishing a legal diamond trade in Sierra Leone.

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* J.D. Candidate 2002, Indiana University School of Law—Indianapolis; B.A., 1999, Denison University. I wish to thank Richard Eric Johnson who is my sharpest critic, fiercest advocate and best editor. I am also grateful to Traci Hoffman for her helpful comments leading to the publication of this Note.

THE LAND PROBLEM: WHAT DOES THE FUTURE HOLD FOR SOUTH AFRICA'S LAND REFORM PROGRAM?

A COMPARATIVE ANALYSIS WITH ZIMBABWE'S LAND REFORM PROGRAM: A LESSON ON WHAT NOT TO DO.

Our land is a precious resource. We build our homes on it; it feeds us; it sustains animal and plant life and stores our water. It contains our mineral wealth and is an essential resource for investment in our country's economy. Land not only forms the basis of our wealth, but also our security, pride and history.[1]

PART I: INTRODUCTION

Land reform is an international issue that frequently sparks revolutions and divides nations.[2] Several factors have put land reform on international and political agendas including awareness,[3] urbanization,[4] demand for human rights,[5] and the creation of social contracts and coalitions.[6] At the heart of all land issues lies one central question: Who owns the land?

The resurgence of land reform in Africa over the last century follows the retreat of colonial rule over many African nations. During European rule,

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1. H. HAVENGA & J. ERASMUS, SETTING THE FOUNDATIONS FOR BUILDING CAPACITIES, NETWORKING & RESEARCH ON LAND REFORMS IN SOUTHERN AFRICA 50 (N. Marongwe & J. Z. Z. Matowanyika eds., 1998).

2. *See* ROY PROSTERMAN ET AL., AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT 311 (Roy L. Prosterman et al. eds., 1990). Other countries that have dealt with land reform include Mexico, the Soviet Union, Japan, China, South Vietnam, Ethiopia, parts of India, Nicaragua and El Salvador. *See id.*

3. *See* Jim Riddell, *Contemporary Thinking on Land Reform, available at* http:www.caledonia.org.uk/land/fao.htm (last visited March 24, 2000). The rural populations of many developing countries are more informed today than they were ten years ago. The movement of people across borders, the opening of the stream of commerce, and the creation of information systems, like television and the Internet, have empowered the rural populations to assert their need for land reform. *See id.*

4. *See id.* Because land distribution prior to land reform implementation did not create viable livelihoods for most of the rural populations, many people were forced to move to the cities to find work. Rural households' dependence on off-farm employment has, in part, led to the failure of some land reform programs. *See id. See also* Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa,* 23 BROOK. J. INT'L L. 465, 480 (1997) (Africans were forced into a migrant labor system for subsistence wages.).

5. *See* Riddell, *supra* note 3. Today, the rural populations of the developing countries associate certain rights with regard to citizenship, "includ[ing] the right to have rights: to land and to other rural resources, to free movement, to information, to the means to have adequate diet and to a sustainable environment." *Id.*

6. *See id.* Partnerships between key groups of individuals and the government, in the form of Non-Governmental Organizations (NGO's), are more effective when they are able to combine their efforts in pursuing land reform. *See id.* The creation of such organizations "underscore[s] the importance of civil society and growing institutional support for land reform as a confirmation of civil rights and social justice." *Id.*

native Africans were dispossessed of the land on which they lived.[7] Land reform in South Africa has become a controversial international and political topic due to recent reports of violence and intimidation. Additionally, as a developing nation, land reform is crucial to South Africa's economic survival.[8] Such concerns are not unique to South Africa. In neighboring Zimbabwe, widespread violence, rampant theft, and farm invasions plague Zimbabwe's land reform program.[9] Zimbabwe's land reform policies and President Robert Mugabe's "endorsement" of such violence have increased international attention toward the implementation of its land reform programs.[10]

In a recent interview, a white South African farmer acknowledged both the impending land crisis and the fear about the future of South Africa's land reform program. The farmer, who watched as his son was murdered in an ambush on the family farm, said he was "under a murderous siege and that land [was] being grabbed just surely as commercial farms were seized by aggressive war veterans in neighboring Zimbabwe."[11] The farmer described the current events in South Africa as "a slow, grinding, insidious process to drive the whites off the land."[12] He continued by stating that "[t]he only difference with Zimbabwe is that [in Zimbabwe the invasions were] overt and blatant and covered by the press."[13]

Other reports give further support as to South Africa's impending land crisis and the fear about the future of its land reform program. In another region of South Africa, it was reported that 5000 people were illegally occupying white-owned farms.[14] In another small farming area, seventy percent of the white-owned farms were invaded.[15] Overall, in 1999, 813 attacks and 144 murders on white-owned farms were reported, which, statistically speaking, makes farming one of the most dangerous professions in South Africa.[16] A spokesperson for the Federal Alliance stated that "if the illegal occupations were not government policy then [President] Mbeki . . .

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7. *See* HAVENGA & ERASMUS, *supra* note 1, at 52. Other countries that are dealing with colonial or racial dispossession include Australia, New Zealand, the Untied States, Canada, and Germany. *See id.*

8. *See id.*

9. *See* Joseph Winter, *Zimbabwe's Shattered Dream*, BBC NEWS, *at* http://news2.thls.bbc.co.uk/hi/english/world/africa/newsid_701000/701275.stm (last visited April 11, 2000).

10. *See id.*

11. Allan Seccombe, *South African Farmers Say Being Driven Off Land, available at* http://uk.news.yahoo.com/000906/1/aic7v.html (last visited Sept. 6, 2000).

12. *Id.* The farmer also stated that he received death threats and constantly contended with arson attacks and rampant theft. *See id.*

13. *Id.*

14. *See 20 Northern KZN Farms Illegally Occupied*, SOUTH AFRICAN PRESS ASSOCIATION, July 7, 2000, *available at* 2000 WL 24053220.

15. *See id.*

16. *See id.*

should act decisively to end the occupations as lack of action would result in a repeat of the Zimbabwe experience."[17]

In addition, reports stated that protesters picketed outside the office of South Africa's Minister of Lands, Thoko Didiza, and threatened land invasions if she failed to meet with them.[18] Another report stated that a group known as The Restitution Forum of the South Cape and Karoo sent a letter to the President of South Africa, Thabo Mbeki, stating that "[c]ommunities in our region are considering mass action and we want to avoid at all costs the same situation as currently in Zimbabwe."[19]

South Africans hope to avoid the situation that currently exists in Zimbabwe.[20] The land crisis in Zimbabwe grew out of frustrations over Zimbabwe's land reform program and has resulted in white-owned farms being seized.[21] Further, white farmers are being murdered, intimidated, and forced from their farms.[22] To add to the growing hostilities, President Mugabe has drawn international attention to Zimbabwe's land crisis by failing to react to the widespread violence, or as some interpret his actions, by endorsing such attacks.[23] Moreover, Mugabe's land reform policies take land from white farmers without compensation and redistribute it to landless blacks. The massive "land-grab" and the eight month campaign of violence and invasions of nearly 1700 farms has caused "massive damage to [Zimbabwe's] international image and is the chief cause of the collapse of [its] once robust

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17. *20 Northern KZN Farms Illegally Occupied*, *supra* note 14.

18. *See* Integrated Regional Information Network, UN Office for the Coordination of Humanitarian Affairs, *South Africa: IRIN Focus on Land Reform*, *available at* http://www.reliefweb.int/IR...ountrystories/southafrica/20000419.phtml (last visited April 19, 2000) [hereinafter *Focus on Land Reform*]. Minister Didiza stated that "[w]e want to move away from the perception that only white farmers in this country can make it commercially and that subsistence farming is only for Africans." *Id.* Since Minister Didiza was appointed, the rate at which restitution claims are finalized has increased. *See id.*

19. *Id.* Other demonstrations have occurred as recently as June 2000. *See No Zimbabwe-Style Land Invasions in SA*, SOUTH AFRICAN PRESS ASSOCIATION, June 8, 2000, *available at* 2000 WL 21218731.

20. North West Premier Popo Molefe stated, "We will invoke the full might of the law to protect peace and stability on our farms." *No Zimbabwe-Style Land Invasions in SA*, *supra* note 19.

21. Lewis Machipisa, *Zimbabwe: Land Acquisition Bill Passed*, *available at* http://www.igc.org/igc/pn/h1/1000411275/h1.html (last updated April 7, 2000).

22. *See id.* In addition to allegations that President Mugabe encourages the war veterans to invade whit-owned farms, President Mugabe and the Zimbabwe government have been accused of corruption. *See* Tendai Madinah, *The Land Act's Losers*, *available at* http://landow.stg.brown.edu/post/zimbabwe/politics/losers.html (last updated Sept. 1993). It has been alleged that at least two million hectares of land acquired for redistribution were in fact redistributed – to the cronies and relatives of President Mugabe. In at least one instance, it is alleged that one minister now owns seventeen farms. *See id.*

23. *See* discussion *infra* Part IV-6.

economy."[24] The international community has reacted with much criticism and concern.[25]

The land problem that exists in South Africa is very similar to Zimbabwe's situation.[26] Problems for both countries emanate from the historical colonial nature of land dispossession and distribution.[27] The similarity of South Africa and Zimbabwe's land problems, the nature of land reform in general, and recent events in South Africa raise the question: What is the future of South Africa's land reform program? Despite the recent reports of violence, threats of mass invasions, and the outcome of Zimbabwe's land reform program, South African police assure that there is "no proof that ongoing attacks on farms countrywide [are] politically motivated."[28] The police assert that such attacks are "motivated by pure criminality."[29] When asked if the developing land situation in South Africa would culminate in violence and intimidation, the Chief Land Claims Commissioner's office stated: "It is very unlikely. Land reform in South Africa is both a constitutional and legislative issue as provided by the Constitution and the Land Restitution Act of 1994."[30]

Although South African leaders remain positive, it remains necessary to analyze South Africa's land problem to avoid recreating a hostile situation like the one that exists in Zimbabwe. South Africa must closely scrutinize Zimbabwe's land reform programs to discover the strong points and shortcomings so that it does not repeat Zimbabwe's mistakes.

This Note addresses South Africa's history, the development of South Africa's land problem, and the implementation of South Africa's land reform program. Ultimately, this Note concludes that, even in the context of Zimbabwe's similar land crisis, South Africa's land reform program will prove to be successful in the years to come. Specifically, Part Two addresses the principles and policies underlying land reform and the implications that flow from implementation of various types of programs. Part Three addresses the policies underlying South Africa's land reform program, the methods employed for bringing about such reform, and the overall effect of

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24. *150 More Zimbabwe Farms Listed for Seizure*, DEUTSCHE PRESSE-AGENTUR, Sept. 8, 2000, *available at* Westlaw, AFRNEWS.

25. *See* Machipisa, *supra* note 21.

26. North West Premier Popo Molefe acknowledged that "South Africa's land problems are similar if not more serious [than Zimbabwe's]." *No Zimbabwe-Style Land Invasions in SA*, *supra* note 19.

27. *See id.*

28. *Still No Proof that Farm Attacks Are Politically Motivated*, SOUTH AFRICAN PRESS ASSOCIATION, August 10, 2000, *available at* 2000 WL 24055258.

29. *Id.* A statement by the police indicated that there was no information to substantiate claims that the recent attacks on farmers were politically motivated. However, the chairman of the Free State Agriculture's safety committee said that he had received information that a militant group had begun launching attacks on farms to demonstrate its dissatisfaction with the pace of South Africa's land reform program. *See id.*

30. *Id.*

implementation of such programs. The development of the land crisis in Zimbabwe is discussed in Part Four. In Part Five, South Africa's land reform program is compared with Zimbabwe's, and any lessons that can be learned from the Zimbabwe experience are identified. Finally, Part Six concludes that although the emerging situation in South Africa is almost identical to Zimbabwe's experience, South Africa's constitutional and legislative commitment to make land reform work should ensure a positive future for South Africa's land reform program.

PART II: LAND REFORM, GENERALLY

Types of Land Reform[31]

Generally, land reform is "[t]he redistribution of property or rights in land for the benefit of the landless, tenants and farm labourers [sic]."[32] The first type of land reform is land redistribution. In a redistributive scheme, "the land is taken from large holders and given to landless and poor farmers."[33] A system of land redistribution expropriates land from absentee landlords, farms that are excessive in size, or land that is underutilized or owned by foreigners.[34]

A second type of land reform is restitution. Land restitution is useful where an individual's property rights, unjustly taken under colonial rule, can be restored to their status at some pre-determined date.[35] When an individual's property rights cannot be restored, restitution provides financial compensation for the individual.[36]

A third type of land reform, known as land tenure reform, is a concept that signifies "'a bundle of rights' and obligations conferred to the land users."[37] Land tenure pervades all types of land reform, but as independently referred to, it "focus[es] on the social, political, and economic support needed

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31. This note does not discuss other land reform measures such as, negotiated tenure reform, land leases, and market-led reform. *See* Riddell, *supra* note 3. For a discussion of other institutions that help strengthen property relations with land, such as the cadastre, a land registry, leasing, and land use contracts, *see generally* Riddell, *supra* note 3.

32. Martin Adams, Overseas Development Institute, *Land Reform: New Seeds on Old Ground?*, *available at* http://www.oneworld.org/odi/nrp/nrp6.html (last updated Oct. 1995) [hereinafter Adams, *New Seeds*].

33. Riddell, *supra*, note 3. Countries that have implemented redistributive land reform programs include Japan, Republic of Korea, Taiwan, Bolivia, Chile, Colombia, Cuba, El Salvador, Honduras, Nicaragua and Peru. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* Restitution is hard to implement because it seeks "to do justice to the dispossessed *and* to the present [l]and holders, through a fair procedure and in a manner which is consistent with national goals and social needs." HAVENGA & ERASMUS, *supra* note 1, at 52. (emphasis added).

37. ISAAC MAPOSA, LAND REFORM IN ZIMBABWE 10 (1995).

for institutionalized transactions in rights in property."[38] Land tenure reform affects the terms and conditions on which land is held, used, and transacted by giving "unambiguous property rights in land" to individuals living and working on land of which they have no rights.[39] Land tenure reform is accomplished through a variety of methods including legal reform, land registration, and targeted legislation.[40] Most important to the success of a land tenure program is public consultation.[41]

There are several components to an effective land reform program. The program should include accessible land information systems, effective methods for dissemination of public information, long-term funding, land use planning, land legislation, and established dispute resolution forums.[42] First, and most critical to the success of any land reform program, a government must establish an effective support and information system.[43] Those who assert title to land secure title through the registration system.[44] Once an individual's claim is legally recognized, such individuals are encouraged and motivated to invest time and effort into the land.[45] This investment leads to economic development and political stability.[46] Land use planning is also important because land is the sustaining force of many individual's livelihood. Land use planning also limits the effects of land degradation,[47] which results from improper land use practices,[48] increasing populations,[49] and weak tenure

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38. Riddell, *supra* note 3.

39. *See id.; see also* Martin Adams, et al., Overseas Development Institute, *Land Tenure Reform and Rural Livelihoods in Southern Africa, available at* http://www.oneworld.org/odi/nrp/39.html. (last updated Feb. 1999) [hereinafter Adams, *Land Tenure Reform*].

40. *See* Riddell, *supra* note 3. Simply distributing property to the landless is not enough to carry out land tenure reform. For land tenure reform, as well as other land reform programs, to be successful, individual property rights must establish a relationship between the property and the beneficiaries. Generally, land rights include the right to occupy a homestead, to use land for crops, to make permanent improvements; rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use; rights to exclude others; and rights to enforcement of legal and administrative provisions in order to protect the rights of the holder. *See id. See also* Adams, *Land Tenure Reform, supra* note 39.

41. *See* Adams, *Land Tenure Reform, supra* note 39.

42. *See id. See also* HAVENGA & ERASMUIS, *supra* note 1, at 1.

43. *See* Riddell, *supra* note 3.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* KHALISO MATSEPE, SETTING THE FOUNDATIONS 4 (N. Marongwe & J. Z. Z. Matowanyika eds., 1998). Land degradation is a major concern when trying to implement a land reform program that will sustain the livelihoods of much of southern Africa's population. Continuous removal of topsoil, deterioration of rangelands, slumping along river stream banks, siltation of rivers and other bodies of water, declining productivity in crops and livestock products, and changes in land uses contribute to land degradation. *See id.*

48. *See id.* Humans contribute to land degradation through improper land uses such as cultivation of marginal lands and overgrazing, clearing of vegetation, and increasing land populations. Further, weak communal land tenure systems have contributed to land degradation. *See id.*

49. *See id.*

systems.[50] Finally, legislation is necessary to establish the purposes of land reform and for legally establishing individual rights to land.[51]

1. The Purpose of Land Reform:

Generally, land reform programs are created to achieve certain goals, like increasing agricultural productivity, increasing overall economic activity, reducing political instability, minimizing environmental impact, and addressing social equity by improving the status and dignity of the landless population.[52] Land reform is most crucial in developing countries where land constitute[s] the principal source of livelihood, security, and status.[53] The need for land reform can be seen in countries where land is under-utilized or where land distribution is grossly unequal. Countries need land reform when individuals have insecure tenure rights, and have no legal claim to the land on which they live.[54] It is such disproportionate distribution of land and weak tenure systems that creates widespread poverty in many rural areas.[55]

Individuals that work and live on land they do not own are referred to as "landless."[56] The mounting frustrations of the "landless" can create social and political instability and economic distress.[57] The effects of landlessness are best understood by understanding that individuals, who are poorly compensated and poorly motivated to invest "sweat equity" into the farms on which they work, are less productive.[58] These individuals have little incentive

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50. *See id. See also* NELSON MARONGWE, CIVIL SOCIETY'S PERSPECTIVE ON LAND REFORM IN ZIMBABWE 14 (1999). "Zimbabwe's resettlement areas have experienced serious problems of environmental degradation such as deforestation, soil erosion and veldt fires." *Id.* at 14.

51. *See* MATSEPE, *supra* note 47, at 5.

52. *See* DANIEL WEINER, AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT 311, 312-14 (Roy L. Prosterman et al. eds, 1990).

53. *See id.*

54. *See id.*

55. *See* Robinson, *supra* note 4, at 481. "As a result of landlessness and overcrowding, it has been estimated that eighty percent of the residents of the homelands live in poverty." *Id. See also* Riddell, *supra* note 3. It has been argued that poverty is the result of unequal access to human capital and resources (including land) and excessive transaction costs. *See id.* The establishment of secure property rights is crucial to achieving the economic and social goals of eradicating poverty. *See id.*

56. *See* CHARLES E. CURRY, AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT ix (Roy L. Prosterman et al. eds, 1990). Approximately 100 million "landless" families make what little they can by farming land that they do not own. *See id.*

57. *See* PROSTERMAN, *supra* note 2, at 1-2. "Where landless families form a significant part of the population, their low productivity and lack of purchasing power in turn become a drag on the entire process of economic development." *Id.* It is further argued that landlessness leads to excessive urbanization and adverse environmental degradation, including deforestation and erosion. *See id.* at 2. Further, it has been noted that "landless [black] farmers lack the dignity, status, and economic stake in their society that accompanies land ownership, limiting the prospects for the development of democratic institutions." *Id.*

58. *See id.* at 1-2.

to make the long-term investments that are necessary for increasing agricultural productivity and economic growth.[59] In such situations, land reform can redistribute land to the landless,[60] secure tenure rights in landless individuals, or restore rights in land that were forcibly taken during colonial rule. In South Africa and Zimbabwe, eradicating the effects of landlessness is a main concern in developing an effective land reform program.

Land reform and a solid property institution are crucial to a country's economic, social, and political success.[61] Three reasons are often cited as justifying the implementation of land reform programs.[62] First, many believe that the redistribution of land to the poor is important for the country as a whole.[63] Second, redistributing land to the landless increases productivity.[64] Finally, many believe that redistribution of land to the landless wins the political support of those that receive land.[65]

Inadequate funding, integrated development, and weak infrastructures, are a few of the constraints inherent in any land reform program. These constraints make it difficult to achieve the stated goals underlying land reform.[66] The enormous sum of money needed to fund a land reform program frustrates the implementation of any type of land reform.[67] In determining the amount of funding necessary to implement a land reform program, transaction costs for transferring land and the costs associated with setting up an appropriate infrastructure, which together usually exceed the value of the land, must be considered.[68] As a result, implementers of such reform must solicit long-term budgetary commitments from governments and donors.[69] This

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59. *See id.* at 1. "Where the mass of the population is unproductive, poor, and hungry, and has little income with which to purchase basic goods and services, the village economy stagnates." *Id.*

60. *See* Adams, New Seeds, *supra* note 32.

61. *See* Riddell, *supra* note 3.

62. *See* RURAL LAND REFORM 24 (David Fig & Catherine Kell eds., 1992).

63. *See id.*

64. *See id.*

65. *See id.* at 25. Along with the notion of political support lies another benefit of land reform in that "many rural people feel that, for the first time, the State is on their side. This empowers them; it allows them to believe that they can change their conditions and improve their lives." *Id.*

66. *See* HAVENGA & ERASMUS, *supra* note 1, at 58. "Integrated development" is a cooperation among the different levels of government, especially in developing a support system for implementation of a comprehensive land reform program. *See id.* For instance, it is not enough to redistribute land to the landless. A rural infrastructure, which provides water supplies, drainage, power supplies, and roads, is necessary for the landless to make productive use of the land that has been redistributed to them. *See id.*

67. *See id.* at 59.

68. *See* Riddell, *supra* note 3. For example, it is estimated that the redistribution program in South Africa would cost approximately R1.1 billion and transaction costs alone would be about R110 million. *See Land Reform in SA Will Not Follow Zim's Example*, SOUTH AFRICAN PRESS ASSOCIATION, May 23, 2000, *available at* 2000 WL 21217425 [hereinafter *Land Reform in SA*].

69. *See* Adams, *Land Tenure Reform*, *supra* note 39.

comes at a price in that "[e]xternal support is likely to be conditional upon appropriate constitutional and legal frameworks."[70] Other obstacles to land reform may include parliamentary opposition,[71] legal opposition,[72] and bureaucratic opposition.[73]

2. *International Perspective on Land Reform:*

International dimensions of land reform circumscribe two predominant ideologies about land ownership; either land is viewed as personal property or as a public good.[74] From an international perspective, intervention by industrialized nations is necessary to establish basic human rights, insure equality, encourage democracy, provide order and stability, and promote economic development.[75] However, even with international assistance, many developing countries lack the institutional structure and information system needed to carry out land reform.[76] These shortcomings have resulted in ineffective international assistance.[77]

The principles that shape land reform policies seem logical and easy to implement on paper. In reality, land reform is a formidable task.[78] Land reform is multidimensional and, to effectively implement such a program, several dynamic factors must be considered.[79] South Africa and Zimbabwe have undertaken land reform with varying degrees of success. After twenty years, the results of Zimbabwe's land reform program have proven disappointing. South Africa should take heed and use the situation in Zimbabwe as a lesson on what not to do.

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70. *Id.*

71. *See* RURAL LAND REFORM, *supra* note 62, at 50-51. Examples of the effects of parliamentary opposition can be seen with the implementation of land reform legislation in Chile and the Indian State of Rajasthan. *See id.*

72. *See id.* at 51-52. Legal opposition occurs when landowners delay land reform measures by appealing to the courts and the government. In Chile, because of the abuse of the courts by the landowners, special courts were established to deal solely with land issues. *See id.*

73. *See id.* at 52-54. Bureaucratic opposition can be seen when civil servants delay or prevent land reform measures because they are opposed to such policies. *See id.*

74. *See* JOHN D. MONTGOMERY, INTERNATIONAL DIMENSIONS OF LAND REFORM (John D. Montgomery ed. 1984). "Most Atlantic countries regard land as a form of personal property; most of Eastern Europe considers it a collective good." *Id.* at 1. Historically, countries subscribing to either ideology have tried to influence other countries "by force or conquest, colonial rule, foreign aid, international conferences, or friendly advice." *Id.*

75. *See* JOSEPH S. NYE, JR., INTERNATIONAL DIMENSIONS OF LAND REFORM 7, 12-16 (John D. Montgomery ed. 1984). Further, international involvement in land reform programs raises several ethical issues. Generally, there are three approaches for addressing ethical dimensions of international involvement in land reform. *See id.* at 8-12.

76. *See* MARONGWE, *supra* note 50, at 15.

77. *See id.*

78. *See id.* at 14.

79. *See* MONTGOMERY, *supra* note 74, at 7.

PART III: THE SOUTH AFRICAN EXPERIENCE

> "Land is the pillar of grand apartheid. Apartheid legislation forbids black ownership of land in white areas and perpetuates mass poverty . . . ."[80]
>
> "Our vision is of a land policy and land reform programme [sic] that contributes to reconciliation, stability, growth and development in an equitable and sustainable way."[81]

1. A Brief History of the Development of the Land Issue in South Africa[82]

The crux of apartheid lies in the fact that the White minority controls eighty-seven percent of the land in South Africa.[83] Given such, South Africa has one of the most inequitable distributions of land - approximately 60,000 white farms cover nearly eighty-six percent of rural land, while fourteen million black South Africans living in communal areas, and occupy about one-sixth of that used by white farmers.[84]

South Africa's land problem began hundreds of years ago. Beginning as early as the 1600's, European settlers dispossessed South Africans of their land.[85] During the 1700s and 1800s, Africans and British colonists fought over land as the Europeans moved further inland.[86] By the twentieth century, Europeans had dispossessed the Africans of most of their land.[87] Moving into

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80. WEINER, *supra* note 52, at 293.

81. DEPARTMENT OF LAND AFFAIRS, OUR LAND: GREEN PAPER ON SOUTH AFRICAN LAND POLICY [hereinafter GREEN PAPER] 1 (1996). The Green Paper is the outcome of an extensive process of public consultation on land policy issues. Over 50 organizations, various government departments, and over 1000 South Africans were on hand to provide input into the formulation of South Africa's land reform policy. The formulation of the Green Paper took into account the views and concerns of the delegates, individuals, and stakeholders in the land reform process. *See id.*

82. For a more extensive overview of South Africa's history and the development of its land problem *see* Robinson, *supra* note 4, at 465-84; HENRY BERNSTEIN, *South Africa's Agrarian Question: Extreme and Exceptional?, in* THE AGRARIAN QUESTION IN SOUTH AFRICA 2-19 (Henry Bernstein ed., Frank Cass 1996).

83. *See id.* at 475.

84. BERNSTEIN, *supra* note 82, at 27. More than 90% of gross farm income and 97% of agricultural export commodities are produced by white-farmers and agricultural corporations and more than 80% of white-owned farmland is used for livestock grazing. *See* WEINER, *supra* note 52, at 294. In comparison, in the bantustans, only one-fourth of the food consumed is produced internally. It is estimated that 30,000-50,000 people die each year in the bantustans of hunger or hunger-related disease. *Id.*

85. *See* Robinson, *supra* note 4, at 468.

86. *See id.*

87. *See id.*

the twentieth century, the Europeans enacted apartheid legislation, which segregated land ownership by race.[88]

As a result of apartheid legislation, namely the 1913 Native Land Act[89] and the 1936 Native Trust and Land Act,[90] black South Africans were rendered landless and relegated to overcrowded communal areas, known as "bantustans."[91] Under the Acts, black South Africans were prohibited from buying land and the land that was reserved for blacks was not sufficient to sustain viable rural communities.[92] Because of landlessness, overcrowding, and the lack of viable economic activities in the communal lands, [93] nearly eighty percent of those that live in the bantustans live in poverty.[94] Such conditions deteriorated when, between 1960 and 1983, at the high point of apartheid, "an estimated 3.5 million Africans were forcibly removed from non-

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88. *See id.*

89. The Native Land Act was "a program of separate development based upon racial distinctions." Catherine M. Coles, *Land Reform for Post-Apartheid South Africa*, 20 B.C. ENVTL. AFF. L. REV. 699, 711 (1993). The Native Land Act of 1913 was also labeled as legislation of "segregation" in that it definitively drew a line between white and black ownership of land. *See* BERNSTEIN, *supra* note 82, at 5. The 1913 Native Land Act did not permit blacks to have fee simple or leasehold rights and also prohibited land transactions between whites and blacks. *See* Robinson, *supra* note 4, at 472-73. The statute also provided that 7% of the land would be reserved for blacks only, who at the time accounted for 75% of the population. Such lands were known as the reserves. *See id.*

90. The thrust of the 1936 Native Trust and Land Act was to increase the amount of land reserved for the Africans from 8 to 13%. *See* Robinson, *supra*, note 4, at 475. The Native Trust and Land Act of 1936 also prohibited black people from purchasing land outside the reserves. *See id.* The Act also created the South African Development Trust, a government body, which was charged with the responsibility buying land and subsequently releasing it to the black population. This system furthered land insecurity among the black population because it still did not provide for direct ownership of land. *See id.*

91. *See id.* Bantustans, also referred to as "homelands" or "reserves," were commonly viewed as "apartheid labor reserves and dumping grounds for Blacks." DANIEL WEINER ET AL., NO MORE TEARS 46 (Richard Levin & Daniel Weiner eds., 1997). One popular image of the bantustans is that:

> . . . poor rural dwellers live for the most part in poverty stricken retirement and refuge settlements, where income is primarily dependent on migrant remittances and pensions, households are largely headed by socially and economically weakened women, family members are deployed on both urban and rural fronts to ensure survival, and tenure is formally insecure. Youth are poorly educated and under-employed, services and infrastructure are poor to non-existent, land is degraded, and governance is illegitimate and ineffectual...jobs and services are the most widely expressed needs.

Id. at 47. Moreover, people viewed black agriculture as "underdeveloped" and the black people, themselves, as "agriculturally de-skilled." *See id.* at 46. In general, residents of bantustan are often described as "landless indigenous people without access to capital and with a minimum of skills." *Id. See also* Robinson, *supra* note 4.

92. *See* Robinson, *supra* note 4, at 472.

93. Many South Africans were forced into a migrant labor system for subsistence wages. *See id.* at 480.

94. *See id.* at 481. Landlessness and overcrowding has increased as the population in the homelands tripled from 1910-1990. *See id.* at 480-81.

Native areas by the government and White farm owners" and relegated to the communal areas. [95]

While the land problem has existed for several hundred years, it was after the dismantling of apartheid in 1994 when the government created South Africa's Reconstruction and Development Program.[96] One purpose of the Reconstruction and Development Program, of which land reform is but one aspect, is to make the transition from apartheid to a democratic nation.[97]

2. *South Africa's Land Reform Policy*

> Our vision is of a land policy and land reform programme that contributes to reconciliation, stability, growth and development in an equitable and sustainable way. It presumes an active land market supported by an effective and accessible institutional framework. In an urban context our vision is one where the poor have access to well located land for the provision of shelter. The land reform programme's poverty focus is aimed at achieving a better quality of life for the most disadvantaged.[98]

The overall goals of South Africa's land reform program include undoing injustices of the past, facilitating national reconciliation and stability, and promoting economic expansion. South Africa's land reform policy was developed in full recognition of the fact that "current land ownership and land development patterns strongly reflect the political and economic conditions of the apartheid era."[99] To overcome the effects of such racially based land policies of apartheid, South Africa's land policy aims to redress the injustices of apartheid, foster national reconciliation and stability, underpin economic growth, and improve household welfare and alleviate poverty by addressing several factors in both rural and urban areas. [100]

To develop an effective land reform policy, the South African government identified several factors that South Africa's land reform program must address.[101] In addition, the government wants to insure that its land

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95. *Id.* at 477. Some look to South Africa's history and determine that land reform is justified in that 1) land is appropriate compensation to Africans because it is their country and their land, or 2) because one believes that Africans should be compensated with land because their dispossession is the source of their oppression, or 3) because compensation in the form of land represents wealth, equity and a source of control and power, especially for African farmers who can achieve a higher degree of political power as property owners with common interests. *See id.* 484-85.

96. *See* GREEN PAPER, *supra* note 81, at 2-3. *See also* Coles, *supra* note 89, at 703-12.

97. *See* RICHARD LEVIN & DANIEL WEINER, *The Politics of Land Reform in South Africa after Apartheid: Perspectives, Problems, Prospects, in* THE AGRARIAN QUESTION IN SOUTH AFRICA, *supra* note 84, at 96-97.

98. GREEN PAPER , *supra* note 81, at 1.

99. *Id.* at i.

100. *See id.* at 5.

101. The land policy needs to consider injustices of racially-based land dispossession, inequitable distribution of land ownership, and the need for security of tenure, sustainable use

reform policy conforms to basic principles of democracy, social justice, flexibility, participation, accountability, and gender equality.[102] Further, to provide a disincentive for individuals to take land reform matters into their own hands, South Africa has an express policy that individuals or groups that participate in land invasions, violence, or intimidation will not be given priority within the land reform programs.[103]

3. *Implementation of the Land Reform Program*

To address issues of social justice, inequality, poverty, and landlessness, and to further the purpose of South Africa's Reconstruction and Development Program, the government recognized that a comprehensive land reform program was necessary.[104] The basic structure requires the national government to maintain a policy of equal land distribution, while the provincial governments provide developmental support.[105] The Department of Land Affairs (DLA) was created to design, implement, and monitor South Africa's land reform program.[106]

The DLA consists of three branches: Land Reform Policy, Land Reform Implementation, and Survey and Deeds.[107] The DLA, with the support of the Chief Directorates of Corporate and Financial Management, began to implement the land reform program through land redistribution, restitution, and tenure reform.[108] The DLA plays several roles in the land reform process. First, as respondent on behalf of the Republic of South Africa, the DLA helps prepare claims before they are subject to review by a court; and second, the

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of land, rapid release of land for development, effective recording and registration systems for land rights, and effective administration of public lands. *See id.* at 1

102. *See id.* at 5. Other land reform principles include economic viability, environmental sustainability, focus on poverty and expressed need, and the role of the government as a facilitator. *See id.*

103. *See id.* at iii.

104. *See id.* at i. Under the RDP, 30% of the agricultural land was to be transferred within five years of the 1994 elections. *See Land NGO's Warn Government of Need for Shake-Up of Land Reform*, SOUTH AFRICAN PRESS ASSOCIATION, June 2, 2000, *available at* 2000 WL 21218326. However, by the year 2000, six years after the election, only two percent of the land had been redistributed to dispossessed individuals and communities. *See id.*

105. *See* GREEN PAPER, *supra* note 81, at 71.

106. *See id.* The Minister of Land Affairs for the Republic of South Africa, Derek Hanekom, stated that

> [t]he mandate of the Department of Land Affairs has been to contribute to the Reconstruction and Development Programme (RDP) by developing a comprehensive and far-reaching land reform programme. The goal of the programme is to address the legacy of apartheid in relation to land distribution and to create security of tenure and certainty in relation to rights in land for all South Africans.

Id. at foreword.

107. *See* HAVENGA & ERASMUS, *supra* note 1, at 51.

108. *See id.* at 51-52.

DLA is involved in negotiations "to secure and transfer the necessary land or to resolve the question of financial compensation."[109]

In addition to the DLA, the Commission on the Restitution of Land Rights (CRLR) and the Land Claims Court (LCC) are involved in the implementation of the restitution process.[110] The CRLR is responsible for handling restitution claims until the Court reviews them.[111] The role of the LCC is to provide South Africa's citizens with a remedy for interference with their property rights. The LCC adjudicates claims by first determining if the claim is legitimate and then by assessing whether the compensation is "just and equitable."[112] Because more than 60,000 restitution claims have been filed, the Court's main challenge is to administratively handle such claims given that the adjudication of such claims must be completed within five years and the settlement must be completed within ten years.[113]

4. *Legislative Framework*

South Africa has adopted three types of land reform in creating the framework of its land reform program. The first prong of the program provides for restitution. The Restitution of Land Rights Act, Act 22 of 1994 [the Land Rights Act], is the foundation of South Africa's land reform program.[114] Generally, there are four parts to the Land Rights Act: qualification criteria,[115] forms of restitution,[116] compensation,[117] and urban

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109. *See id.* at 56.

110. *See id.*

111. *See id.* The role of the CRLR is growing given the fact that its 1999 budget was increased by 50% over its 1996/1997 budget. *See id.* at 52.

112. *See id.* at 56.

113. *See id.* By June of 1998, 27,000 restitution claims had been filed and only 18 had been finalized by the court. *See id.* Several reasons are often given to explain the slow pace of land reform. *See id.* First, the administrative capacity of the Court and the Commission is limited in the number of people and resources. A second reason is low morale within the system. A third reason is that the information-sharing and systems of communication are ineffective. *See id.*

114. *See* GREEN PAPER, *supra* note 81, at 36.

115. To qualify for investigation by the Commission, the claimant must have been dispossessed of a right in land after June 19, 1913 under a racially discriminatory law and was not paid just and equitable compensation. *See* GREEN PAPER, *supra* note 81, at 36.

116. Forms of restitution include return of the land from which the claimants were dispossessed, distribution of alternative land, payment as compensation, a combination of the above, or priority access to government housing and land development programs. *See id.* at 38.

117. The Green Paper provides a formula for just and equitable compensation as restitution for individuals who have been dispossessed of land, either under racially discriminatory laws or for purposes of restoring land to successful claimants. *See id.* at iv. Further, South Africa's Constitution provides in relevant part that

> The compensation . . . shall be . . . *just and equitable* taking into account the circumstances which prevailed at the time of the dispossession and all other factors as may be prescribed by the (Restitution of Land Rights Act, 1994 [such as factors listed in Section 34]), including any compensation that was paid upon

claims.[118] The Act also sets forth time periods in which to implement the restitution program.[119]

Section 25 of South Africa's Constitution[120] confirms an individual's right to restitution "if they were dispossessed of a right in land after 19 June 1913 under or for the purpose of furthering a racially discriminatory law or practice,"[121] and gives credence to the Land Rights Act. The Land Rights Act established a time period, January 1, 1995 to December 31, 1998, in which victims of forced dispossession under apartheid could lodge claims for restitution.[122] A survey by the South African Institute of Race Relations showed that between May 1995 and May 1998, 63,455 claims were filed with the Land Claims Commission.[123] By June 2000, only 4900 land restitution claims for 9100 beneficiaries were settled. Pursuant to the Land Rights Act, restitution is to be finalized by 2005. [124]

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such dispossession.

Id. at 39 (emphasis added). *See also* S. AFR. CONST. ch. 1, § 123(4)(a).

> In determining what compensation is "just and equitable," as is required by South Africa's Constitution, a number of factors must be considered. *Id.* Specifically, Section 25 of the Constitution provides that a Court of Law shall take into account all relevant factors, including but not limited to, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

S. AFR. CONST. ch. 1, § 25.

118. Claimants are encouraged to form groups to negotiate and settle their claims and to participate in shaping the areas that are to be developed. *See* GREEN PAPER, *supra* note 81, at 40.

119. *See id.* at 34. The restitution strategy provided for a three-year period for filing claims, and five-year period for the Commission and the Courts to finalize all claims, and a ten-year period for the implementation of all court orders. *See id.*

120. Section 25 provides "(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress." S. AFR. CONST. ch. 1, §25.

121. *See* HAVENGA & ERASMUS, *supra* note 1, at 56. Moreover, "[a]ll restitution claims are made against the State." *Id.*

122. *See Focus on Land Reform, supra* note 18.

123. *See id.* Approximately 80% of these claims are for urban areas and restitution is likely to be in the form of financial compensation. *See id.*

124. *See id.* Funding is an obstacle that may hamper the government's goal of finalizing restitution claims by the year 2005. Wallace Mgoqi, South Africa's Chief Land Commissioner stated that "the projected costs for the settlement of land rights cases this year alone exceeded its budget by more than five times." *SA Land Reform Also in Crisis: Mgoqi*, SOUTH AFRICAN PRESS ASSOCIATION, May 24, 2000, *available at* 2000 WL 21217375.

The second prong of the land reform program is redistribution.[125] The Land Reform Pilot Programme created at the end of 1994 marked the beginning of the redistribution prong of South Africa's land reform program.[126] In the context of South Africa's history, redistribution aims to provide the poor with access to land for residential and productive use, in order to secure their tenure and improve their livelihoods.[127] A second legislative enactment, the Development Facilitation Act, was enacted to increase the speed at which land was released for development projects.[128] To support the redistribution legislation, the Presidential Commission of Inquiry into the Provision of Rural Financial Services was created.[129] The creation of a dispute resolution system and the establishment of regional offices further support the redistribution program.[130]

The third prong of South Africa's land reform program is reform of land tenure.[131] The apartheid regime created insecurity in land tenure by not

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125. *See id.* When viewing land reform from the perspective of agricultural land reform, redistribution aspect of the land reform program would necessarily affect the 50,000 large-scale commercial farms, covering 87% South Africa's arable land. BILL KINSEY & HANS BINSWANGER, AGRICULTURAL LAND REFORM IN SOUTH AFRICA 105 (J. Van Zyl, et al. eds., 1996). This commercial farming sector is highly mechanized, and as such, does not require many workers. *See id.* The argument against such redistribution is as follows:

> Redistributing the farms to these workers alone will create holdings that have too few family workers to operate efficiently, or to maintain the current high degree of mechanization, without hiring casual workers. The beneficiaries, however, are unlikely to be sufficiently wealthy or to have access to subsidized credit to enable them to hire the necessary workers or buy the required machines. In order to maintain or increase the productivity of the distributed farms, therefore, additional beneficiary families will have to be resettled onto them.

Id.

126. *See generally* GREEN PAPER, *supra* note 81, at 25-33.

127. *See id.* at 25. The typical redistribution project goes through five phases: (1) Making an Application, (2) Planning for Settlement, (3) Approval and Land Transfer, (4) Detailed Planning and Implementation, and Development and Support. *See* HAVENGA & ERASMUS, *supra,* note 1, at 54-55. Redistribution of land will be ranked in priority in accordance with established criteria. *See* GREEN PAPER, *supra* note 81, at 28. First, "the most critical and desperate needs will command [the] government's most urgent attention." *Id.* Priority will also be given to the marginalised and to women. *See id.* The next in line with respect to priority are projects "where the institutional capacity exists to implement quickly and effectively." *Id.* The third set of priority criteria concerns the viability and sustainability of the projects. *See id.* Finally, the government will give priority in order to ensure a diversity of land redistribution projects. *See id.*

128. *See* GREEN PAPER, *supra* note 81, at 4.

129. *See id.* The Presidential Commission of Inquiry into the Provision of Rural Financial Services, also known as the "Strauss Commission," was used in establishing loan financing for rural development. *See id.*

130. *See id.* It is estimated that land for redistribution would cost over 1.1 billion Rands. *See Land Reform in SA Will Not Follow Zim's Example,* SOUTH AFRICAN PRESS ASSOCIATION, May 23, 2000, *available at* 2000 WL 21217425. In addition, transaction costs would amount to nearly 110 million Rands. *See id.*

131. For a more detailed look at land tenure reform in the Bantustans, *see* Lungisile Ntsebeza, *South Africa's Land Tenure Reform Programme in the Former Bantustans: The*

allowing blacks to establish independent land rights. In many cases, individuals lived on land they did not own and only did so with permission of the landowner.[132] Individuals with such informal land rights had no incentive to invest in their homes because they were vulnerable to eviction.[133] To address these land tenure issues, the government passed several legislative acts including the Land Reform (Labour Tenants) Act,[134] the Extension of Security of Tenure Act,[135] the Interim Protection of Informal Land Rights Bill,[136] and the Communal Property Associations Act, 28 of 1996.[137]

Aside from the types of land reform programs implemented in South Africa, the key to the overall land reform program lies in the system established for surveying and mapping and registration of deeds.[138] The system for the registration of deeds is the start of a complex information system that will document the rights of individuals to certain tracks of land.[139]

Another legislative enactment, the Provision of Certain Land for Settlement Act, also facilitates the overall land reform program by allowing the government "to provide financial assistance and settlement support" to those who desire to purchase land.[140] The Settlement Act goes further by

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Example of the Eastern Cape Province, available at http://www.cali.co.uk/hif/lsa2.htm (last visited Sept. 7, 2000).

132. *See Land Reform in South Africa, available at* http://land.pwv.gov.za/briefin2.htm. (last visited Sept. 7, 2000).

133. *See id.*

134. The Act provides security of tenure and facilitation for the acquisition of land. *See* GREEN PAPER, *supra* note 81, at 4.

135. The Extension of Security of Tenure Act protects over six million people from eviction by securing their legal right to live on the land for which in the past they had to have permission. The Act further provides security by protecting those occupying the land from arbitrary evictions. However, the Act does permit legal evictions if certain circumstances were met. *See id.*

136. The Interim Protection of Informal Land Rights Bill protected informal rights to land until an investigation could be completed. *See id.*

137. The Communal Property Associations Act "enables communities . . . to form legal entities, known as Communal Property Associations (CPAs), in order to acquire, hold and manage property on a basis agreed to by members in terms of a written constitution." HAVENGA & ERASMUS, *supra* note 1, at 53.

138. *See id.* at 53. The deed registration system works so well because South Africa has accurate maps that show hills, rivers, roads and railways, towns and cities, etc. *See id.*

139. *See id.* The registration system "provides security of tenure to individuals and communities and forms a vital part of the economy of the country as financial institutions rely on the security which the title deed provides for the purpose of lending money." *Id.* Land administration reform is also important to making the land reform program work. *See id.* The Land Administration Act, (Act No. 2 of 1995) "provides for the delegation of powers and the assignment of the administration of laws regarding land matters to the provinces and to provide for the creation of uniform legislation." GREEN PAPER, *supra* note 81, at 4. *See also* F.G.T. Radloff, *Land Registration and Land Reform in South Africa*, 29 J. MARSHALL L. REV. 809 (1996).

140. *See* HAVENGA & ERASMUS, *supra* note 1, at 54.

extending the subsidy beyond the purchase of the land[141] and by redefining who may be eligible for such subsidy.[142] Additionally, three financial programs have been established to support the land reform program, namely, the Settlement/Land Acquisition Grant,[143] the Settlement Planning Grant,[144] and the District Planning grant.[145]

5. *Constitutional Issues Concerning Land Reform:*

Because land redistribution involves the taking of property from individuals for redistribution to others, certain provisions of South Africa's Constitution are implicated.

Beginning with South Africa's independence in 1994, a person's right to acquire, hold, and dispose of rights in property, has always been regarded as a set of fundamental rights that should be entrenched in South Africa's Constitution.[146] There are several constitutional issues to be addressed. First, because land reform must be implemented from a national and local level, the allocation of powers and responsibilities of the national and provincial governments must be clarified.[147] A second issue to be addressed is the coordination of functions performed by the national and provincial governments.[148] Third, there is a need for a consistent interpretation of the property clause[149] and a need to insure that the "equality clause," Section 9 of

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141. *See id.* By extending the subsidy beyond the purchase of the land, individuals could make the necessary improvements.

142. *See id.* The amended act permits the government to grant subsidies to individuals who want to acquire more land, those who do not qualify for restitution because of the 1913 cut-off date, those who want a tenure upgrade, and those who want to buy shares in agricultural enterprises. *See id.*

143. The Settlement/Land Acquisition Grant will give households up to a maximum of R15,000 to buy land, establish tenure rights, and make home improvements. GREEN PAPER, *supra* note 81, at 51. For further discussion of the objectives of this grant program, eligibility and disbursement requirements see pp. 51-57.

144. The Settlement Planning Grant provides money to communities for consulting professionals in preparing their settlement programs. *See id.*

145. The District Planning grant provides monetary support for establishing "an integrated framework for decision-making for the allocation of resources for land reform and settlement on a district level." *Id.*

146. *See* BIRTH OF A CONSTITUTION 97 (BERTUS DE VILLIERS ED., 1994).

147. *See* GREEN PAPER, *supra* note 81, at 9.

148. *See id.* at 10-11.

149. The Property Clause, Section 25 of South Africa's constitution provides:

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application –
3. for a public purpose or in the public interest; and
4. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
5. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest

South Africa's Constitution, is upheld by the various types of land reform programs.[150]

The Property Clause, Section 25 of South Africa's constitution, provides the government with an option to expropriate land when it is deemed for "a public purpose" or "in the public interest."[151] Moreover, the Constitution also provides that commitment to land reform is in the public interest.[152]

6. *Results of South Africa's Land Reform Program:*

Notwithstanding the extensive legislation and the government's commitment to land reform, South Africa's land reform program has been described as "flawed."[153] The main criticism is that the process is too slow because it requires that each claim be handled on a case-by-case method.[154] A second criticism is that the parties involved do not fully understand the redistribution or restitution programs, which is the cause for delay in finalizing

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and the interests of those affected, having regard to all relevant circumstances, ...

6. For the purposes of this section –
7. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; . . . .

S. AFR. CONST. ch. 1, § 25.

150. The Equality Clause, Section 9 of South Africa's Constitution provides:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. . . . National legislation must be enacted to prevent or prohibit unfair discrimination. . . . .

S. AFR. CONST. ch.1, § 9.

151. *Id.*

152. *See id.* In accordance with South Africa's constitution, Director of Land Affairs, Dr. Gilingwe Mayende, announced in July that he was considering expropriating land as a "short term solution to stop the illegal eviction of farmworkers." *DP Calls for Mayende to be Censured*, SOUTH AFRICAN PRESS ASSOCIATION, July 5, 2000, *available at* 2000 WL 24053117. Dr. Mayende further stated that the government's motivation behind such actions would be to stop farmers who "were trying to exploit the process by asking exhorbitant prices for their land." *Id.* Other leaders criticized Mayende for making such threats saying that they were "counterproductive" given the "growing restlessness amongst South African farmers and the white community, due to a lack of decisive action by the government on land seizures in Zimbabwe." *Id.*

153. *See Focus on Land Reform, supra* note 18.

154. *See id.*

many of the claims.[155] Five years after the commencement of South Africa's land reform program, only 745,015 hectares have been redistributed.[156] As of March 31, 1999, the Department of Land Affairs had 427 redistribution projects, involving 295,451 people and 480,400 hectares of land.[157] Of 63,000 claims for restitution, only 6500 have been settled.[158] Government officials blame limited funding , and in some instances, the white farmers, for the slow pace the land reform program.[159] a

However, as an indication that the speed of the land reform program may be increasing, the amount of land redistributed in 1997 was more than the previous three years together.[160] As of early 1998, nearly 250,000 people had received land through the redistribution program.[161] Additionally, over 200 redistribution projects were in progress and some 400 claims were recorded.[162]

Recent events in South Africa have called the validity of the land reform program into question. In the context of the crisis in Zimbabwe, many speculate that South Africa will soon experience the violence and societal upheaval that occurred in Zimbabwe.

PART IV: THE ZIMBABWE EXPERIENCE

"As Zimbabwe celebrated 20 years of independence this week, celebrations were marred by the ongoing political crisis and farm violence that has gripped the country in recent weeks."[163] In his independence anniversary speech, President Mugabe described white-farmers as "enemies" of the state when he stated that "[o]ur present state of mind is that you are now our enemies because you have really behaved as enemies of Zimbabwe. . . We are full of anger. Our entire community is angry and this is why you have the war veterans now, . . . seizing land."[164] Violence against white farmers has heightened in recent months. In April a body of a farm worker was found on

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155. *See id.*

156. *See id.*

157. *Land Reform in South Africa, supra* note 132.

158. *See* Seccombe, *supra* note 11.

159. *See Land NGO's Warn Government of Need for Shake-Up of Land Reform, supra* note 104. The National Land Committee (NLC), created by a network of land NGO's has urged the government to speed up land reform by limiting compensation to the minimum allowed by the Constitution. *See id.* An NLC member stated that "[t]he government has to pay less than the market value for there to be fundamental land reform." *Id.*

160. *See* HAVENGA & ERASMUS, *supra* note 1, at 57.

161. *See id.* at 53.

162. *See id.* Of the identified projects, nearly three million hectares of land would be transferred. *See id.*

163. Integrated Regional Information Networks, UN Office for the Coordination of Humanitarian Affairs, *ZIMBABWE:International Reaction to the Crisis, available at* wysiwyg://50/http://www.reliefweb.int/IRIN/sa/weekly/2000421.phtml (last updated April 15-21, 2000) [hereinafter *ZIMBABWE*].

164. Lewis Machipisa, *No Jail Time for Leader of Occupations,* Inter Press Service, April 19, 2000, *available at* Westlaw, AFRNEWS.

the same farm where a white farmer had previously been killed.[165] In May, a policeman was killed in the violent attack on another white-owned farm.[166] In June, just before the national election, farm invasions left thirty-one dead.[167] The invasions of the white-owned farms have plunged Zimbabwe into an economic and political crisis.[168]

While the goal of Zimbabwe's land reform program was to benefit the landless, such has not been the case. In 1990, approximately seventy percent of Zimbabwe's population made their livelihood from the land. The first individuals to benefit from land redistribution did not really "benefit" because they lacked the experience necessary for running a farm.[169]

1. A Brief History of the Development of the Land Issue in Zimbabwe

Following a war that erupted, in part, because of mounting frustration and anger experienced by landless black Zimbabweans, Zimbabwe gained its legal independence from Great Britain on April 18, 1980 with the signing of the Lancaster House Agreement.[170] Since 1980, President Robert Mugabe, with his policy of Reconciliation, has led the charge to address the historical imbalance of land ownership and the numerous problems created by settler colonization and dispossession.[171] The objectives of President Mugabe's Reconciliation policy were "(1) to reduce civil conflict by transferring land

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165. *See ZIMBABWE, supra* note 163.

166. *See* Machipisa, *supra* note 21.

167. Buchizya Mseteka, *African Leaders Back Zimbabwe's Land Policies, available at* http:/dailynews.yahoo.com/h/nm/20000808/w1/africa_sadc_dc_z.html (last updated April 8, 2000).

168. *See id.*

169. *See* RURAL LAND REFORM, *supra* note 62, at 41. "In 1990, the first parliamentary report on resettlement said land had been allocated to people with no idea of how to farm, and the schemes were overrun by squatters." Jan Raath, *In Zimbabwe, The Dream of Land Has Turned, available at* http://www.sn.apc.org/wmail/issues/971128/NEWS14.html. (last updated Nov. 28, 1997).

170. *See* BBC Online Network, *Zimbabwe's History: Key Dates, available at* http://news.bbc.co.uk/hi/english/special.../12/98/zimbabwe/newsid_226000/226542.stm (last updated Dec. 2, 1998).

171. *See* Adams, *New Seeds, supra* note 32. The imbalance of land ownership was created when millions of Zimbabweans were relocated into what are known as communal lands. *See id.* Communal lands were barren and overcrowded and served primarily as "reservoirs for cheap migratory labor." *Id.* Overlapping land rights, which lead to insecure tenure, plague communal areas. *See id.* However, land tenure reform in communal areas has taken second place behind acquiring land for restitution and redistribution. *See id.* Ironically, some feel that Mugabe's 1980 Reconciliation policy, which sought to diffuse the land issue before violence erupted, has "perpetuated the economic and social inequities" that President Mugabe was trying to address. *See* MAPOSA, *supra* note 37, at 18-19. In fact, in 14 years following independence, the Zimbabwean government has retreated from its goal of addressing the land issue. *See id.* For example, in 1983 the Minister of Land's budget was cut by 53%. *See id.* at 20. By 1986, the Ministry of Lands was abolished and the Ministry of Agriculture took over after experiencing a 33% cut in its budget. *See id.*

from whites to blacks, (2) to provide opportunities for war victims and the landless, (3) to relieve population pressure in the communal lands, (4) to expand production and raise welfare nationwide, and (5) to achieve all of the above without impairing agricultural productivity or aggregate production."[172] President Mugabe called for the creation of a comprehensive land reform program to meet the objectives.[173] Initial figures regarding land reform were optimistic in that they called for the resettlement of more than 162,000 rural families on nine million hectares of land.[174]

The development of Zimbabwe's land issues evolved around two themes: inequality and racism.[175] Indeed, the land tenure system that exists today is a "relic" of the system that existed in colonial times. It was the colonial tenure system that created the inequalities and racial overtones that the government seeks to overcome today through land reform. Colonial legislation such as the 1913 Natives Land Act, the Land Apportionment Act of 1930,[176] the Native Land Husbandry Act of 1951,[177] the Land Tenure Act of 1969,[178] and the colonial tenure system "relegated black Africans to infertile, marginalized and disease ridden reserves" known as communal lands.[179] As a result of such policies, the land distribution in Zimbabwe is highly skewed in that one percent of the white-farmers own over half of the available agricultural area and over seventy percent of all fertile lands.[180] The fundamental purpose behind Zimbabwe's land reform program is to eradicate such inequalities and regulations within the existing tenure system that deny the majority of the population access to fertile lands by implementing meaningful reforms aimed at social, economic, and political growth.[181]

Most recently, President Mugabe launched a new initiative calling for compulsory acquisition by the state of white-owned farms. In September 2000, another 150 commercial farms were formally listed for seizure by the

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172. MICHAEL BRATTON, AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT 274 (Roy L. Prosterman, et al. eds, 1990).

173. *See id.*

174. *See* VIMBAI VUDZIJENA, *Land Reform and Community Based Natural Resource Management in Zimbabwe, in* ENHANCING LAND REFORMS IN SOUTHERN AFRICA 78 (F. Mutefpa, et al. eds., 1998). Zimbabwe has 39 million hectares of land, 33.3 million of which are devoted to agricultural purposes. *See also* MAPOSA, *supra* note 37, at 9.

175. *See* MAPOSA, *supra* note 37, at 14. *See also* VUDZIJENA, *supra* note 174, at 77. Colonial land policies and legislation were designed to deprive black Zimbabweans of land and natural resource property rights for the benefit of the white farmers. *See id.*

176. The Land Apportionment Act of 1930 separated all of the land into "European and African reserves." *See* VUDZIJENA, *supra* note 174, at 77.

177. The Native Land Husbandry Act imposed and enforced conservation practices on land owned by those living in the African reserves. *See id.*

178. The Land Tenure Act of 1969 "confined the majority of the black population to infertile and arid areas." *Id.*

179. *See id.*

180. *See* Adams, *Land Tenure Reform*, *supra* note 39. *See also* Mseteka, *supra* note 167.

181. *See* GREEN PAPER, *supra* note 81, at 1.

Zimbabwean government, bringing the total of farms on the list to 2102.[182] President Mugabe's initiative calls seizure of at least 3000 farms. It is estimated that such seizures would force nearly three million workers and their families off of the farms and into unemployment and poverty.[183]

2. *The Mandate of the Lancaster House Agreement of 1980*

The Lancaster House Agreement reached between Great Britain and Zimbabwe was a "negotiated settlement."[184] For the British, protecting existing property rights was crucial.[185] For Zimbabwe, resettlement was the key issue in the transfer of power to an independent Zimbabwean regime.[186] To foster the interests of both sides, President Mugabe, under the Lancaster House Agreement of 1980, could not forcibly procure privately-owned farm land for a period of ten years.[187] In return, Britain agreed to share the cost of buying land sold voluntarily to the government for redistribution.[188]

Although commonly cited as a constraint on Zimbabwe's land reform program, the Lancaster House Agreement did not totally restrict Zimbabwe's ability to acquire land for redistribution in that it did not trump a provision in Zimbabwe's new Constitution that provided for land acquisition.[189] Specifically, Article Sixteen of Zimbabwe's new Constitution permitted the government to expropriate under-utilized land or exercise powers of eminent domain for public utility if the landowners were compensated fully in foreign currency.[190] Notwithstanding the prohibition of the Lancaster Agreement, the Zimbabwean government could have moved forward with its land reform program by expropriating land for the public good, which is the justification

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182. *See 150 More Zimbabwe Farms Listed for Seizure, supra* note 24. Farmers are entitled to object to the listing of their land. Moreover, the government must prove to the court that it is carrying out such acquisitions legally and according to a viable program. *See id.* Many fear the results of such compulsory acquisitions. At a meeting of the Commercial Farmer's Union in September 2000, it was stated that the planned seizure of 3000 farms, nearly 63% of all white-owned rural land would "make the great depression of the 1930's seem like a picnic." *Id.*

183. *See id.*

184. *See* RURAL LAND REFORM, *supra* note 62, at 34.

185. *See id.* at 34-35.

186. *See id.*

187. *See* Chris McGreal, *Blair's Worse than the Tories, Says Mugabe*, ELECTRONIC MAIL & GUARDIAN, December 22, 1997, *available at* http://www.mg.co.za/mg/news/97dec2/22dec-mcgreal2.html. *See also* RURAL LAND REFORM, *supra* note 62, at 35; *The Case for Redistributing Zimbabwe's Land*, ELECTRONIC MAIL & GUARDIAN, Dec. 8, 1997, *available at* http://www.mg.co.za/mg/news/97dec1/8dec-zim_land.html.

Some view Britain's insistence on certain constitutional provisions as a way to "prevent the black majority from redressing the imbalances created by nearly a century of white domination and subjugation." *Id.*

188. *See The Case for Redistributing Zimbabwe's Land, supra* note 187.

189. *See id.*

190. *See* RURAL LAND REFORM, *supra* note 62, at 35.

given today by President Mugabe for his controversial land acquisition program.[191]

3. *Legislative Framework*

Following its independence, the Zimbabwean government talked in terms of a land reform program that included redistribution, restitution, and tenure reform, but the government has focused primarily on land redistribution.[192] Attempts at tenure reform have failed because of competing and ineffective attempts by both the government and NGO's, weak local administration and disingenuous central government interventions.[193] Further, tenure reform is hampered by the lack of constitutional and legal principles governing land and the acquisition thereof.[194]

The Zimbabwean government promulgated the Land Acquisition Act of 1985, which was never really used for its intended purpose of acquiring and redistributing land.[195] Because of the failure of the Land Acquisition Act of 1985 and to rally support for the government in upcoming elections, the Zimbabwean government, once again, tried to establish a national land policy by passing the Land Acquisition Act of 1992.[196] The Land Acquisition Act of

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191. *See id.*

192. *See* VUDZIJENA, *supra* note 174, at 77. For a different view of land redistribution *see* George P. Landow, *The Land Issue, available at* http://landow.stg.brown.edu/post/zimbabwe/politics/land1.html. (Oct. 26, 2000). Is land distribution what the people want? As stated by one respondent, "[m]ost of us young black people have had little if any contact or experience with agriculture or land and we do not see the need to possess any land other than that which we live on. I would rather see the government develop the economy...." *Id. See also* Raath, *supra* note 169. "It's official. The people don't want land. They want jobs in a market economy, and an opportunity to work for a decent living." *Id.* In a survey of 18,000 rural and urban households conducted by the Zimbabwean Ministry of Social Welfare, only one percent felt that poverty was a result of shortage of land and only two percent believed that poverty could be controlled with land redistribution. *See id.* There is also a general concern regarding land redistribution and the threat it poses to Zimbabwe's aggregate agricultural output. *See* BRATTON, *supra* note 172, at 272. It is suggested that Zimbabwe's aggregate agricultural output may be adversely affected because of the inexperience of individuals receiving land. *See id.* Further, in Zimbabwe, peasant farmers have lower crop yields than do the commercial farmers presently occupying the land. *See id.*

193. *See* Adams, *Land Tenure Reform*, *supra* note 39.

194. *See id.*

195. *See* MAPOSA, *supra* note 37, at 20. The Land Acquisition Act (1985) provided that the government, within a specified time, had the right of first refusal, thus farmers who were selling their lands had to first offer such lands to the government. *See id.* The Act also provided that the government could "involuntarily" appropriate lands that were under-utilized or classified as derelict. *See id.* The Act however was never enforced. *See id.* "By 1990 no land had been forcibly seized, and in some cases public officials did not act swiftly enough to secure available land before the period of the State's right of first refusal expired." *Id.*

196. *See id.* at 21. It is argued that the Land Acquisition Act was unnecessary to implement land reform in Zimbabwe because the Government could either use existing colonial laws to bring about meaningful reform or exercise its powers of eminent domain, pursuant to Article Sixteen of the Constitution, for acquiring land for public utility. *See id.* at 22. Further,

1992 provided two methods of designating land for appropriation by the government and subsequent redistribution: administrative redistribution and resettlement of lands and judicial redistribution and resettlement.[197] Under this new framework, the government and donors were required to provide forty percent of the funding for the resettlement scheme, while the private and civil sectors were to make up the remaining sixty percent.[198]

On April 6, 2000, Parliament took drastic measures and passed the Land Acquisition Bill, which allows the Zimbabwean government to acquire land for the resettlement of landless blacks without compensating those who previously owned the land.[199] The Bill is fast track program to acquire land for redistribution. The Bill required Great Britain to pay compensation for agricultural land that the Zimbabwean government compulsorily acquired.[200] If Great Britain failed to do so, the Act provided that the Zimbabwean government was under no obligation to make such compensation.[201]

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the Government could have created incentives for farmers to sell under-utilized land by creating a land tax per commercial unit of land. *See id.* at 23. Specifically, the 1992 Act, in conjunction with the Eleventh Amendment to the Constitution, provided that 1) payment for land acquired had to be in local currency; 2) the government could now compulsorily acquire land which was being fully utilized; 3) the government could now pay a "fair price" within a "reasonable period"; 4) compensation would assessed by a committee of six people; 5) parties can appeal to the administrative court for arbitration if compensation is disputed; and finally, 6) the willing-buyer-willing-seller principle is no longer applicable. *See id.* at 73. The Land Acquisition Act, in its current form, does not permit individuals to seek judicial review of designation, acquisition, or compensation of land. One commentator asserted that such restrictions on judicial review render the Act illegal. *See id.* at 73-74.

197. *See id.* at 71.

198. *See id.* at 74.

199. *See* Machipisa, *supra* note 21. The Bill passed by all 100 members present out of a parliament of 150 members. *Id.* In October, a poll, based on a sample of 2000 Zimbabwean adults in both urban and rural areas, found that 78% of the voters opposed Mugabe's pland to take over white farms. *See* Justin Arenstein, *Support for Mugabe, Land Grab Collapses,* ZA*NOW DAILY MAIL & GUARDIAN, Oct. 26, 2000, *available at* wysiwyg://103/http://www.mg.co.za/mg/za/news.html. Moreover, the poll showed that only six percent of Zimbabweans found land reform to be an important issue. *See id.*

Economist John Robertson has expressed concerns over Zimbabwe's fast track program. *See A Terrifying Analysis of the Fast Track Land Programme, available at* http://allafrica.com/stories/ 200009110452.html (last visited Sept. 10, 2000).

Robertson criticizes the government's program because it "leaves out of the equation the massive contribution to the economy that arises directly from commercial farming." *Id.* Moreover, Robertson predicts that the lack of respect for property rights will decrease investment throughout the country. *See id.* "Without individual property rights, individuals lack not only the inclination to invest, they also lack the means to invest because the areas without property rights are out of the reach of the banks." *Id.* Robertson predicts that the country's population will "experience deeper poverty, a sharp fall in earnings, a steep fall in government tax revenues, the complete failure of most government services and the country's inevitable isolation from vital developments in the regional and world markets." *Id.*

200. *See id.*

201. *See id.* Zimbabwe accuses Britain of failing to live up to the promise it made under the Lancaster House Agreement when it promised to provide funding for land redistribution and poverty alleviation. *See id.* In response, Britain stated that "it is willing to help fund a

In Zimbabwe 4500 white, commercial farmers own nearly eleven million hectares of prime, arable land, whereas six million Zimbabweans "are crowded onto barren communal areas, reinforcing rural poverty and reflecting an unchanged colonial legacy."[202] Today, it is estimated that two-thirds of the population lives below the poverty line.[203] Such facts demonstrate the past failings and future need for land reform.

4. Zimbabwe's Constitutional Framework as it Relates to Land Reform:

Pursuant to Article Sixteen of Zimbabwe's Constitution, the government does not have the right to compulsorily acquire private lands unless certain requirements are satisfied.[204] Even though the government could not compulsorily acquire such private lands, if an owner decided to sell his farm, the farmer must make the first offer to the government.[205] This approach to expropriating land, known as the "willing-buyer-willing-seller" scheme, requires that the government and the farmer must both be willing to enter into a buy-sell arrangement.[206] A major problem with the "willing-buyer-willing-seller" scheme was that the government, though willing to purchase land, was

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programme [sic] of land reform if the programme [sic] tackles real poverty and is within the rule of law." *Id.*

202. Integrated Regional Information Network, UN Office for the Coordination of Humanitarian Affairs, *ZIMBABWE: Pace of Land Reform Criticized, available at* http://www.reliefweb.int/IRIN/sa/countrystories/zimbabwe/20000106.htm. (last updated Jan. 6, 2000).

203. *See* Winter, *supra* note 9.

204. Article Sixteen of the Zimbabwean Constitution provides:

1. No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –
2. requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;
3. requires that the acquisition is reasonably necessary in the interests of defence, public order, public morality; public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilized, the settlement of land for agricultural purposes;
4. requires the acquiring authority to pay promptly adequate compensation for the acquisition;
5. requires the acquiring authorities, if the acquisition is contested, to apply to the General Division or some other court before, or not later than thirty days after the acquisition for an order confirming the acquisition; and
6. enables any claimant for compensation to apply to the General Division or some other court for the prompt return of the property if the court does not confirm the acquisition and for determination of any question relating to compensation, and to appeal to the Appellate Division.

ZIMB. CONST. art 16, § 1.

205. *See* RURAL LAND REFORM, *supra* note 62, at 35.

206. *See id.*

foreclosed from doing so unless the farmer, too, was willing to sell.[207] An additional problem arises because those farmers who are willing to sell, will only sell their least productive land, effectively, defeating the purpose of resettlement of the landless.[208]

5. *The Role of the Courts in Implementing Zimbabwe's Land Reform Program*

After announcing that he intended to acquire nearly 1500 farms, in December 1997, President Mugabe stated that he would not allow the courts to review his decisions to reclaim white-owned farms.[209] He rationalized that his decision was "a 'political issue' and not a matter for the courts."[210] In March of 2000, a High Court declared that the invasions of white-owned farms were illegal and ordered thousands of squatters to leave within twenty-four hours.[211] The ruling has not curtailed the invasions, however, because the ultimate enforcer of the law is President Mugabe, and he supports such measures.[212] Further, Police have also resisted the court's order to remove the squatters from white-owned farms, fearing that such action against the squatters would end in violence.[213] In September 2000, the High Court intervened again to stop the first one-hundred evictions under President Mugabe's fast track plan to acquire land without paying compensation.[214] The court stated that only it could issue eviction orders.[215]

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207. *See id.* at 35.

208. *See id.* at 35-36.

209. *See Mugabe Warns Courts Over Land*, Za*Now Daily Mail & Guardian, *available at* http://www.mg.co.za/mg/za/archive/97dec/08dec-news.html. (last updated Dec. 8, 1997). *See also CFU to Meet with Mugabe Tomorrow over Lawlessness Crisis*, SOUTH AFRICAN PRESS ASSOCIATION, July 30, 2000, *available at* 2000 WL 24054361. President Mugabe told veterans and police to ignore court orders. *See id.*

210. *Id.*

211. *See Zimbabwe's White Farmers Win Court Battle Over Invasions*, AGENCE FRANCE-PRESSE, March 17, 2000, *available at* 2000 WL 2755238. Ironically, the judge that handed down the decision was black. *See id.* Hostilities toward the court's intervention were demonstrated by picketing war veterans carrying placards directing three judges to "step down or we'll (make) [you] bow down through physical force today." *Id.* Another poster stated that the "country was born through a barrel of the gun" and encouraged problem solving through revolutionary means, not "repressive law courts." *Id.* A third placard warned the white farmers that brought the court action – "Don't play with fire. Now we will grab the whole land." *Id.*

212. *See id.*

213. *See* Ravi Nessman, ASSOCIATION PRESS NEWSWIRES, *Police Mount Security Operation in Harare, Resist Evicting Squatters*, April 15, 2000.

214. *See Zimbabwe Court Halts Impending Eviction of 100 White Farmers*, DEUTSCHE PRESSE-AGENTUR, Sept. 22, 2000, *available at* Westlaw, AFRNEWS. *See also Zimbabwe Court Grants Temporary Reprieve on Farm Evictions*, DOW JONES INTERNATIONAL NEWS, Sept. 22, 2000, *available at* Westlaw, AFRNEWS.

215. *See id.*

In September 2000, the Commercial Farmers Union[216] decided to resume their legal battle challenging Zimbabwe's land reform policies by filing an application with the Supreme Court of Zimbabwe.[217] This most recent challenge opposes the government's "fast-track" program to acquire nearly 2000 farms without paying compensation, which clearly violates Article Sixteen of Zimbabwe's Constitution.[218]

6. *International Response to the Crisis in Zimbabwe*

Today, the Zimbabwean government has become the target of international condemnation for its failure to stop "[the] campaign of political violence in the countryside."[219] In April 2000, the British Prime Minister, Tony Blair, told Parliament "the recent attacks on white farmers were 'barbaric' and the situation in Zimbabwe was 'totally and utterly unacceptable."[220] In response to the violence and President Mugabe's endorsement of the farm invasions, Great Britain has ceased providing funds to Zimbabwe's land reform program.[221]

Hoping to reopen talks with Great Britain, the Southern African Development Community (SADC) appointed Presidents Thabo Mbeki of South Africa and Bakili Muluzi of Malawi to make representations on its behalf to Great Britain for London to finance Zimbabwe's land reform program.[222] Great Britain responded by establishing conditions that must be met before it will reconsider its position on Zimbabwe's land reform.[223] First, the occupation of farms by squatters must end, and secondly, there must be free and fair parliamentary elections.[224] Great Britain has stated that it would provide fifty-seven million dollars over the next two years for land

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216. *See Zimbabwe's White Farmers Win Court Battle Over Invasions, supra* note 211. The Commercial Farmers Union represents almost 4000 white farmers. *See Annan Gives Mugabe Guarded Support, Urges Dialogue,* Reuters, *available at* http://uk/news.yahoo.com/000906/1/aic19.html (last visited Sept. 6, 2000).

217. *See id.*

218. *See Zimbabwe Farmers Resume Legal Battle,* BBC NEWS, *available at* http://uk.news.yahoo.com/000906/79/aif4x.html. (last visited Sept. 6, 2000). "Since June [of this year] President Mugabe has served notice to acquire 1,952 of nearly 3,000 white-owned farms he has earmarked to resettle black people." *Id.*

219. *ZIMBABWE, supra* note 163.

220. *See id.*

221. *See id.*

222. *See* Mseteka, *supra* note 167. The South African Development Community has 14 member nations: Angola, Botswana, Namibia, Lesotho, Tanzania, the Congo, Mozambique, Mauritius, Seychelles, Swaziland, South Africa, Zambia, and Zimbabwe.

223. *See* Chris Chambers, *Britain and Zimbabwe Discuss Land Issue,* Radio Netherlands, *available at* http://www.rnw.nl/hotspots/html/zimbabwe000427.html. (last updated April 27, 2000).

224. *See id.*

redistribution,[225] on top of thirty-five million dollars unconditionally promised to help alleviate poverty, if the Zimbabwe government complied with its conditions.[226]

Because of concerns about corruption within the Zimbabwean government, Great Britian has mandated that the funds it may provide cannot go through the Zimbabwean government, but rather will only be made available through Non-Governmental Organizations (NGO's).[227] As evidence of corruption, Great Britian points to reports that the Zimbabwean government terminated white-farmers' leases on state-owned farms and subsequently leased such farms to officials of the Zimbabwe African National Union ("ZANU") party.[228] More recently, Great Britian asserts that President Mugabe's Vice-President, Joseph Msika, while acting as President when Mugabe was in Cuba, ordered an end to the land invasions. President Mugabe quickly responded by condemning Msika's actions.[229]

United Nations Secretary-General Kofi Annan has stated "the United Nations deplores the violence in Zimbabwe" and has called for a "peaceful and constitutional" settlement.[230] In April 2000, the United States suspended assistance to Zimbabwe's land reform program because of "the government's inaction against the farm invasions."[231] Additionally, the International Monetary Fund (IMF) suspended key to aid Zimbabwe mainly over land reform and is encouraging other supporters to do the same.[232]

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225. *See id.* Britain has also unconditionally promised another thirty-five million dollars to help alleviate poverty. *See id.*

226. *See id.*

227. *See id.* In addition to allegations that President Mugabe encourages the war veterans to invade whit-owned farms, President Mugabe and the Zimbabwe government have been accused of corruption. *See* Madinah, *supra* note 22. It has been alleged that at least two million hectares of land acquired for redistribution were in fact redistributed – to the cronies and relatives of President Mugabe. In at least one instance, it is alleged that one minister now owns 17 farms. *See id.*

228. *See* Raath, *supra* note 169. *See also* BIRTH OF A CONSTITUTION, *supra* note 146, at 316; Machipisa, *supra* note 21. A list of government officials that benefited from land reform ahead of deserving landless people was recently circulated by opposition leader, Margret Dongo. *See id.*

229. *See* Machipisa, *supra* note 21. *See also Zimbabwe's Vice President Calls for End to Occupation of Farms,* THE NEWS & OBSERVER, April 14, 2000, *available at* Westlaw, AFRNEWS.

230. *See ZIMJBABWE, supra* note 163.

231. *See* Machipisa, *supra* note 21. The United States has already committed over $1 million dollars for land reform. *See id.* The United States Embassy called on the Zimbabwean authorities to enforce the nations laws and uphold the Constitution. *See id.* The Embassy also stated that "[t]he important issue of land reform can only be resolved through a peaceful, orderly and transparent process." *Id.*

232. *See* Buchizya Mseteka, *Annan Gives Mugabe Guarded Support,* URGES DIALOGUE, *available at* http://uk.news.yahoo.com/000906/1/aic19.html (last visited Sept. 6, 2000).

PART V: COMPARATIVE ANALYSIS

South Africa and Zimbabwe have similar land problems created by years of colonial dispossession and unequal land distribution.[233] Racially based land policies in both countries caused insecurity, landlessness, and poverty among the majority black populations. Some have stated that the current events in Zimbabwe, where the landless majority black population have invaded vast tracts of commercial farmland, foreshadows what lies ahead for South Africa's land reform program. "Zimbabwe's land invasions were a wake-up call that necessitated a proactive land acquisition plan in South Africa to avoid the potential for political misuse of the land issue later."[234]

The main criticism of both Zimbabwe and South Africa's land reform programs is that they implement land reform too slowly.[235] People have waited for as many as twenty years in Zimbabwe for the government to reform its land policies.[236] In Zimbabwe, as frustrations mounted people took land reform into their own hands.[237] South Africa gained its independence six years ago and is in a much different situation.[238] While it may be argued that six years is enough time for frustrations to rise to the level in Zimbabwe, the South African government has taken monumental steps in developing a land reform program that addresses the inequities that resulted from apartheid.[239] South Africa has developed a land reform program that includes land redistribution, land restitution, and tenure reform, while Zimbabwe has only attempted to make progress with land redistribution. South Africa has considered potential problems and provided for them through the creation of a court to deal exclusively with restitution claims, while President Mugabe has divested the courts of all powers with respect to land issues.[240] South Africa is also developing the necessary infrastructure by creating a land deeds registration system.[241] South Africa has just begun its quest for land reform, but it has a long way to go. Once the South African government develops its

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233. *See Mbeki Speech in Excerpts,* BBC NEWS, *available at* http://news2.thls.bbc.co.uk/hi/english/w...g/media_reports/newsid_738000/738280.stm (last updated May 5, 2000).

234. *Land NGO's Warn Government of Need for Shake-Up of Land Reform, supra* note 104.

235. *See* Integrated Regional Information Networks, UN Office for the Coordination of Humanitarian Affairs, *SOUTH AFRICA: Land Reform, available at* wysiwyg://50/http://www.reliefweb.int/IRIN/sa/weekly/2000421.phtml (last updated April 15-21, 2000); *SA Land Reform also in Crisis: Mgoqi, supra* note 124; *ZIMBABWE: Pace of Land Reform Criticised, supra* note 202.

236. The Zimbabwe government initiated its land redistribution program in 1980, just after it gained its independence from Great Britain. *See* VUDZIJENA, *supra* note 174, at 76.

237. *See supra* Part IV.

238. *See supra* Part III.

239. *See id.*

240. *See supra* Part III-3; *supra* Part IV-5.

241. *See supra* notes 107, 138-39 and accompanying text.

administrative capacity through education and training, the settlement of land claims will proceed more fairly and efficiently.

A recurring issue with many land reform programs is the government's commitment to making such programs work. "An essential, . . . ingredient for land reform is genuine political commitment of the country's leadership."[242] Such political support marks another fundamental difference between Zimbabwe and South Africa's land reform programs. In South Africa, the government is committed to fulfilling its promise through legal reforms that are consistent with basic constitutional principles.[243] The South African government has been proactive by asserting that it will not tolerate land invasions, intimidation, or violence.[244] The government also has a stated policy that it will not give priority to individuals who have participated in such acts.[245] On the other hand, Zimbabwe's government is plagued by uncertainty and corruption and its courts have been divested of legal authority needed to maintain order. President Mugabe's "support" of the farm invasions is intolerable, especially considering there are no legal checks on his executive actions. A recent poll showed that support for President Mugabe has plummeted to thirteen percent.[246] Moreover, half of those interviewed feel that Mugabe should be impeached, while 51 % believed that Mugabe should be put on trial for his crimes.[247]

An effective land reform program needs to be flexible and sensitive to local conditions and demands. Zimbabwe approached land reform as a national policy and had a weak local administration system. In most cases, people are just confused about the nature of their rights. South Africa, on the other hand, has considered decentralization and community empowerment. Increasing citizen participation in land reform programs, including formulating policy, makes land reform more effective and easier to implement. In Zimbabwe, land reform has been a "government" problem. In South Africa, the government has taken the concerns of its citizens seriously, as evidenced by its efforts in developing the Green Paper policy and the involvement of various NGO's.[248]

Another common issue that plagues most land reform programs is the lack of administrative capacity. Effective administration requires adequate land valuation procedures and a system for compiling public land tenure records. In addition to an administrative system, an economic infrastructure, at the local and national levels, needs to be developed to assist the new farmers

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242. *See* Adams, *New Seeds, supra* note 32.

243. *See supra* note 103 and accompanying text; *see also* Green Paper, *supra* note 81 at iii.

244. *See id.*

245. *See id.*

246. *See* Arenstein, *Support for Mugabe, supra* note 199.

247. *See id.*

248. *See* GREEN PAPER, *supra* note 81.

that receive land under one of the land reform programs. As previously stated, in Zimbabwe, redistribution of land proved ineffective because those who received the land were without the knowledge and tools to work the land.

If it appears that South Africa's land reform program is headed down the same path of violence, a "short-sharp-shock" treatment, whereby the government would expropriate land in accordance with constitutional provisions, may be necessary for a redistributive program to be successful. After 20 years, Zimbabwe leaders have only recently exercised a similar provision in its constitution. If things get out of hand in South Africa, the Democratic Party has stated that the government should consider expropriating land as a short-term solution to stop the illegal invasions. Such is consistent with South Africa's Constitution.[249]

PART VI: CONCLUSION

South Africa cannot afford to look at the current expression of anger by Zimbabweans in an uninterested manner. Inadequate administrative capacity is the main shortcoming of South Africa's land reform program, but such does not compare to the many shortcomings and pitfalls of Zimbabwe's land reform program. Indeed, many have criticized the implementation of the program as being too slow and clogged with bureaucratic red tape, but I would characterize the program as "cautious." While there have been a few isolated incidents of violence reported in South Africa, such incidents have not been linked to political issues. Genuine political commitment by the leaders of South Africa and its administrative capacity to implement and process the land reform program should ensure that South Africa does not follow the same path of destruction and violence that Zimbabwe has experienced. To avoid a repeat of the Zimbabwean experience with regard to land reform, President Mbeki and other officials must act decisively.

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249. *See DP Calls for Mayende to be Censured, supra* note 152.

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INTESTATE SUCCESSION IN SOUTH AFRICA: THE "WESTERNIZATION" OF CUSTOMARY LAW PRACTICES WITHIN A MODERN CONSTITUTIONAL FRAMEWORK

I. INTRODUCTION

The Republic of South Africa is in a period of reform, attempting to carve a unified and democratic nation from the remnants of centuries of foreign interference and over four decades of apartheid rule that ended in the early 1990s. Indigenous peoples living in the rural areas of South Africa, ostracized and ethnically segregated for generations, have come to rely on a system of customary law in order to regulate the traditional practices and norms that make up their daily lives. The new Constitution of the Republic of South Africa was adopted in 1996. Its goal is to unite the country and all of its diverse peoples into one solid democracy in which equality is guaranteed to every citizen. However, the Constitution also expressly recognizes the benefits inherent in cultural diversity and therefore espouses continued acceptance of the various systems of customary law in place in South Africa.

This Note, using intestate succession procedures in South Africa as an example, proposes that the recognition given to customary law in the new Constitution is scarcely more than lip service and that, if reform movements in other areas of law follow a path similar to the movement for intestate succession, customary law will soon be no more than an insignificant aspect in what will effectively become a completely "Westernized" South Africa.

II. SOUTH AFRICAN HISTORY

A. *Ethnic Division*

The Republic of South Africa's colorful history goes back many centuries.[1] As the southernmost country on the African continent, the area has been the goal of successive groups of invaders – from the earliest hominids, through the Stone and Iron ages, to the Khoisan peoples, and finally to the Bantu.[2] European presence began in 1652 with the Dutch occupation of Table Bay.[3] The British seized the area, now known as Cape Town in 1795, and

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1. *See generally* ROGER B. BECK, THE HISTORY OF SOUTH AFRICA (2000), for a comprehensive historical discussion of Southern Africa from 4 million B.C.E. – 1999, including an extensive timeline of historical events.

2. *See South Africa: History, at* http://www.comptons.com/encyclopedia/ARTICLES/0150/01709056_A. html (last visited Sept. 16, 2000); J.D. OMER-COOPER, HISTORY OF SOUTHERN AFRICA 1-16 (2d ed. 1994) (background information about the Khoisan peoples and Bantu-speaking settlements).

3. *See generally South Africa Post-Colonial History: Recent History, at* http://www.

colonized it in 1815, using it as a naval base.[4] Determined to obtain control of the gold mines in Transvaal, the British defeated the Boer armies in the 1899 Boer War[5] and in May 1910 Britain formally declared the Union of South Africa a dominion under her crown.[6]

In 1948, Jan Smuts,[7] a South African World War II leader and member of the United Party, lost the general election to the Nationalist Party.[8] The Nationalist Party (NP) ran on a platform that stressed ethnic separation, including the prevention of mixed marriages, the removal of certain blacks from the common voters' roll, and the segregation of all cities and towns into four distinct ethnic residential areas, or Group Areas.[9] As leader of the NP, Daniel Malan commenced putting a system of apartheid[10] into practice, which

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newafrica.com/history/ southafrica/post_colonial.htm (last visited Sept. 16, 2000). Now known as Cape Town, the Dutch East Indian fleets used Table Bay as a halfway port. *See id. See also* T.R.H. DAVENPORT & M.F. KATZEN, A HISTORY OF SOUTH AFRICA TO 1870 187-232 (Monica Wilson & Leonard Thompson eds., 1982) (discussing the Dutch settlement of Table Bay and the development of a White Colonial community between 1652-1778); OMER-COOPER, *supra* note 2, at 17-34 (discussing the establishment and early development of the Cape Colony, including commentary on the introduction of slave labor, Colonial expansion, Khoisan reactions to the European presence and the early development of racial attitudes at the Cape).

4. *See South Africa Post-Colonial History: Recent History*, *supra* note 3.

5. The British referred to the 1899 war as the Boer (or Anglo-Boer) War, while the Afrikaners referred to it as the Second War of Freedom (the first being the Anglo-Transvaal War). *See* BECK, *supra* note 1, at 92. All South Africans, black and white, were eventually pulled into the conflict, thus making it a civil war as well as an imperialist war. *See id.* Many historians today, therefore, refer to it as the South African War. *See id.* For an in-depth analysis of events leading up to the Boer War and the resulting White domination following the War, see T.R.H. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY 97-169 (1977).

6. *See South Africa Post-Colonial History: Recent History*, *supra* note 3.

7. Smuts, a World War I hero, was also an Afrikaner General in the Boer War. *See* BECK, *supra* note 1, at 93. He later served as Deputy Prime Minister of South Africa. *See id.* at 103. He had become a "major figure on the world scene" by the end of World War II. *Id.* at 123. Smuts played a substantial role in the post-war formation of the United Nations. *See id.* "In one of the supreme ironies of the twentieth century, Smuts was asked to draft the Preamble to the Untied Nations Charter." *Id.* Ironically, Smuts, who endorsed White superiority and racial segregation, drafted a document that called for the nations of the world "to guarantee fundamental human rights, individual dignity, and nondiscrimination between the sexes, none of which Smuts guaranteed in South Africa." *Id.*

8. *See South Africa: History*, *supra* note 2.

9. *See id.*

10. The doctrine of apartheid espoused the separation of every race and nation so that each would develop to the fullest along its own inherent lines. *See South Africa Post-Colonial History: Recent History*, *supra* note 3. Each racial group maintained its own territorial area within which to develop its unique cultural personality. *See id.* "Apartheid was separation by race and separation by location." LINDSAY MICHIE EADES, THE END OF APARTHEID IN SOUTH AFRICA 33 (1999). Scholars debate whether apartheid consisted merely of separation by another name, albeit involving more ruthless tactics. *See* NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA 105 (3d ed. 2000). *See id.* at 74-136 for a detailed analysis of the segregationist ideas and policies that led to the apartheid regime's formation and the tactics which defined the heyday of apartheid in South Africa from the 1950s to 1976. *See also* L.E. NEAME, THE HISTORY OF APARTHEID (1962) (discussing the general history dating to Dutch occupation of Table Bay in 1652); GWENDOLEN M. CARTER, THE POLITICS OF INEQUALITY:

led to a series of interrelated laws and measures aimed at restructuring South African society.[11]

South Africa withdrew from the British Commonwealth in 1961 and became a republic. That same year, the African National Congress (ANC)[12] formed a military wing under the leadership of Nelson Mandela.[13] The group opposed the NP's repressive policies and attempted to force the government to negotiate by attacking white-owned property, while at the same time trying to avoid causing harm to people.[14] The government detained Mandela in 1962 and sentenced him to life imprisonment in 1964 on charges of sabotage.[15] Nevertheless, he remained a focal point for opposition to apartheid.[16]

Hendrik Verwoerd, who gained control of South Africa in 1958,[17] is generally known as apartheid's chief architect and leading ideologue.[18] He took the first steps toward a new version of apartheid that replaced explicit racism as a rationale for the denial of civil rights to blacks. The new version rationalized territorial segregation on the grounds that the Native Reserves

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SOUTH AFRICA SINCE 1948 75-118 (1958) (discussing apartheid's effects on specific racial groups and detailing various acts that the government passed between the 1948 election and the mid-1950s); EADES, *supra* (discussing the historical background of apartheid, the crisis point reached in the 1980s due to the economic strains and conflicting nature of its ideology, and the system's eventual collapse in the 1990s); *and* WORDEN, *supra*, at 137-69 (discussing the decline and fall of apartheid).

11. The Malan government introduced the following laws and measures between 1948-1959 with the purpose of conforming South African society to the doctrine of apartheid: the Population Registration Act, which provided for the classification of the entire population on the basis of race; the Immorality Act, banning sexual relations between whites and blacks, was extended to include relations between whites and coloreds; inter-racial marriages were forbidden; the Group Areas Act served to intensify urban segregation by designating particular residential areas for specific races; race segregation in public places was introduced on a widespread basis and was given legislative sanction by the Separate Amenities Act, which stated that separate amenities need not be of equal standard; the Bantu Education Act removed black education from the care of the ministry of education to that of native affairs; the Extension of University Education Act removed the right of non-white students to attend certain previously available universities; and, in order to protect itself against radical opposition, the government introduced the Suppression of Communism Act, banned the South African Communist Party, and decreed that persons named as communists could be subjected to a wide range of restrictions. *See South Africa Post-Colonial History: Recent History*, *supra* note 3.

12. The ANC, formed in 1912, saw its members become active protesters of the NP's policies in the 1950s. Early tactics consisted primarily of mass civil disobedience. *See id.*

13. *See generally* ANTHONY SAMPSON, MANDELA (1999), for a comprehensive biography separated into distinct segments of the leader's life, from his birth in 1918 through 1999. *See also* NELSON MANDELA, LONG WALK TO FREEDOM (1994) (autobiography); NELSON MANDELA, NELSON MANDELA SPEAKS: FORGING A DEMOCRATIC NONRACIAL SOUTH AFRICA (Steve Clark ed., 1993) (various speeches given by Mandela between 1990-1993, the formative years leading toward constitutional reform).

14. *See South Africa Post-Colonial History: Recent History*, *supra* note 3.

15. *See id.*

16. *See id.*

17. Hard-liner J.G. Strydom replaced Daniel Malan in 1954. *See id.* Verwoerd succeeded to control four years later upon Strydom's death. *See id.*

18. *See id.*

constituted the historic homelands of different African nations.[19] The idea was to lead the homelands to individual self-government while maintaining the balance of power in the hands of government-appointed chiefs.[20] The government's interest in reducing the settled population of Africans in white areas grew during this time and culminated in the launch of a massive campaign to force Africans into overcrowded homelands.[21] Measures were more drastic than those taken during the early stages of apartheid and thus required more ruthless repression to enforce them.[22]

B. Movement Toward Reform

Change loomed on the horizon in 1978 when P.W. Botha succeeded as prime minister of South Africa.[23] Under Botha, the government took steps toward reform,[24] including approval in 1983 for the creation of a tricameral

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19. *See id.* The 1913 Natives Land Act set up the "Native Reserves." *See* Z. Pallo Jordon, *The National Question in Post 1994 South Africa, at* http//:www.anc.org.za/ancdocs/discussion/natquestion.html (last visited Feb. 9, 2001). The government set aside 13% of the nation's land area for Africans and effectively disallowed them from owning land in the remaining 87% of the country except by special license. Under Verwoerd, the government passed the Bantu Self-government Act in 1961, supposedly as the first step in granting independence to the developing "bantu nations." The "Native Reserves" were now redefined as "Bantu homelands" and any claims by Africans in the rest of the country were illegitimate and viewed as "intrinsically seditious." This was the beginning of the South African "Homeland" system. *See id.*

20. *See id.* The South African government granted "Independence" to Transkei (1976), Bophuthatswana (1977), Venda (1979), and Ciskei (1981), each of which utilized a parliamentary government (all remained dependent on South Africa for financial support). *See South Africa: History, supra* note 2. The remaining six homelands were territorial authorities, having much autonomy but remaining part of the republic. *See id.* The charade of "decolonization" (i.e. granting so-called "independence" to some homelands, or *Bantustans*, while at the same time continuing to forcibly remove "surplus" Africans to those *Bantustans*) fooled no one; indeed, foreign governments refused to recognize the "independent" *Bantustans*. *See* BECK, *supra* note 1, at 165-66.

21. *See South Africa Post-Colonial History: Recent History, supra* note 3. Between 1960 and 1970 the government forcibly resettled more than 1.5 million Africans. *See id.*

22. *See id.* Powers of the security police were greatly extended at this time. *See id.* In 1968, the state security services were centralized under the authority of the Bureau of State Security. Statistics demonstrating an increase in the number of people who died in police custody supported reports of widespread torture. *See id.*

23. *See* WORDEN, *supra* note 10, at 138.

24. The balance of security-related influence shifted from the police to the armed forces with the abolishment of the Bureau of State Security. *See South Africa Post-Colonial History: Recent History, supra* note 3. The state security council became the primary decision-making organ, which greatly reduced the roles of the NP and parliament. Racial job restrictions were abolished and trade union rights further extended. The government repealed laws prohibiting inter-racial marriages and extra-marital sexual relations, as well as restrictions on multiracial sports participation. A president's council made up of nominated Coloureds and Indians, along with white nominees, replaced the senate and proposed the establishment of a tricameral parliament comprising separate houses for each group (blacks were denied inclusion in the central parliament, though the need for some political representation for the black population

legislature under a new constitution.[25] Although the United Democratic Front (UDF)[26] promoted rejection of the constitutional plan based on its failure to provide representation for the black majority, elections were held in 1984 for the Colored House of Representatives and the Indian House of Delegates.[27] The electoral college chose Botha as the country's first executive president.[28] In January 1989, Botha withdrew from his official duties due to illness.[29] His successor, F.W. de Klerk, gave little indication of any radical intentions upon entering as the new president.[30] However, in response to increasing international and internal pressures on the government,[31] President de Klerk took dramatic steps in February 1990. He released Nelson Mandela; he lifted bans on 36 different political organizations, including the ANC and UDF; he announced that the government intended to begin negotiating with black leaders, with a view toward a new constitution based on universal franchise; and he stated that the government would establish an independent judiciary to guarantee equality of every citizen, regardless of race.[32] The end of 1990 saw the virtual disappearance of the remnants of traditional social segregation.[33] In early 1991, de Klerk announced to parliament that all remaining legislation enshrining apartheid was to be repealed, including the Group Areas Act and

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in the towns was recognized). *See id. But see* EADES, *supra* note 10, at 48 (noting that, although Botha's regime introduced reforms and insisted that Africans would be included in politics at the national level, it soon became apparent that a real change was not forthcoming for the African population). Education, health, and welfare reforms were minor and, most importantly, the government continued to resettle African peoples. *See id.*

25. *See South Africa: History*, *supra* note 2. The new constitution, which took effect in 1984, set up an executive system with separate legislatures for Whites, Coloureds, and Indians, but none for Blacks. *See id.*

26. Various groups opposed to apartheid, including many with church affiliations and with multiracial memberships, formed the UDF in 1983 to further their anti-apartheid message. *See South Africa Post-Colonial History: Recent History*, *supra* note 3. The UDF won strong support from both Coloured voters (only 18% of whom participated in the presidential election) and Indian voters (even lower participation). *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See* EADES, *supra* note 10, at 77-99. Many intellectuals in South Africa, as well as a majority of the NP, were convinced by 1989 that apartheid was an unsustainable option in the country and that the government should adopt the ANC as a negotiating partner. *See South Africa Post-Colonial History: Recent History*, *supra* note 3. In the U.S. President Bush began initiating a more active approach towards democratic change in South Africa. Representatives of the ANC, the NP, various African states, and both the U.S. and the former U.S.S.R. attended informal meetings in the United Kingdom. In September 1989, the U.S. indicated that if moves were not made within six months to release Nelson Mandela, President Bush would assent to an extension of economic sanctions against South Africa. *See id.*

32. *See id.*

33. *See id.* The government repealed the Separate Amenities Act – an important symbol of apartheid – in October 1990. *See id.* Polls in 1990 indicated a high degree of pessimism among South African Whites over the future of the country. *See* EADES, *supra* note 10, at 96.

the Population Registration Act.[34] The so-called "legal revolution" was complete by the end of June 1991.[35] In March 1992, white voters approved a referendum to end apartheid, setting the stage for party conferences to prepare for an interim constitution[36] and the first-ever multiracial general election in South Africa.[37]

The ANC won the 1994 election with a convincing defeat of the National Party.[38] The new government of National Unity met on May 10, 1994, with Mandela as president and de Klerk as vice-president.[39]

III. RESTRUCTURING SOUTH AFRICA

A. *A New Constitution*

After nearly two years of negotiation, South Africa adopted a new majority-rule constitution on May 8, 1996.[40] The new Constitution, as the "supreme law of the Republic,"[41] advocates a broad acceptance of democracy.[42] Indeed, visions of democracy and national unification were the

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34. *See supra* note 11 (briefly describing the Acts). In all, over 100 pieces of discriminatory legislation were repealed. *See South Africa: History, supra* note 2.

35. *See South Africa Post-Colonial History: Recent History, supra* note 3. The NP responded favorably by altering its own constitution, opening membership to all races. The EC and U.S. abandoned most economic sanctions, and the International Olympic Committee agreed to readmit South Africa, whom they previously banned because of the country's repressive policies. *See id.*

36. Talks between the government and the ANC in 1990 resulted in a Convention for a Democratic South Africa (CODESA) to be held in late December 1991. *See South Africa: History, supra* note 2. A later conference, CODESA 2, resulted in a committee to write the interim constitution. *See id.* The new document was to include a "bill of rights, recognition of minority language, cultural and civil rights, the creation of nine new provinces to replace old political boundaries, acceptance of 11 official languages, and provision for the reabsorption of the homelands into South Africa." *Id.*

37. *See id.*

38. *See id.* Following the election, with its basis for popular support dwindling, the National Party began to lose prominent progressive members and became a mere shadow of its previously-dominant affiliation. *See id.*

39. *See id.* In recognition of their efforts to bring an end to the apartheid era, Mandela and de Klerk each received the 1993 Nobel prize for peace. *See id.*

40. *See South Africa Index: Constitutional Background, at* http://www.uni-wuerzburg.de/law/sf_indx.html(last visited Sept. 16, 2000). The Republic of South Africa ratified the interim Constitution on December 22, 1993, and it went into effect in April 1994. *See id.* Although the main features of the interim document were expected to remain in the final Constitution, the goal was to utilize the interim Constitution for a five-year transitional period in which a unified national government would attempt to end all ties with the past apartheid regime. The Republic adopted the new Constitution on May 8, 1996, and it entered into force in amended version on February 7, 1997. *See id.*

41. S. AFR. CONST. preamble.

42. For a brief discussion of the Constitution's main provisions, see *South Africa Constitution and Cabinet, at* http://www.newafrica.com (last visited Sept. 21, 2000).

driving forces behind its formation, as evidenced by its Preamble.[43] The "new" South Africa vows not to base protection for peoples on ethnic or racial characteristics, but rather to defend "fundamental human rights"[44] and to ensure that "every citizen is equally protected by law."[45] The country no longer tolerates a system of segregation, but strives to be "united in . . . diversity."[46]

Although racial prejudices were the primary catalyst for a movement toward reform, the new Constitution addresses a much broader spectrum of discriminatory concerns. The Founding Provisions state that "[t]he Republic of South Africa is one sovereign democratic state founded on the following values: . . . b) [n]on-racialism and non-sexism."[47] The inclusive nature of the Provisions is further demonstrated by section three, regarding citizenship: "[a]ll citizens are . . . equally entitled to the rights, privileges and benefits of citizenship."[48]

This broader spectrum of concerns can best be observed in the Bill of Rights, [49] the "cornerstone of democracy in South Africa."[50] Based on the long-standing tradition of ethnic oppression in South Africa, the Bill of Rights is arguably the Constitution's most significant feature, barring discrimination directly or indirectly against anyone on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour [sic], sexual orientation, age, disability, religion, conscience, belief, culture, language . . . [or] birth."[51]

With a view toward expansive protection of the aforementioned rights, the framers of the Constitution made the courts readily accessible to those wishing to redress a situation in which their fundamental rights are

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43. Preamble of the new Constitution:

> We, the people of South Africa, Recognise [sic] the injustices of our past; Honour [sic] those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people . . . .

S. AFR. CONST. preamble.

44. *Id.*
45. *Id.*
46. *Id.*
47. S. AFR. CONST. ch. 1, § 1.
48. *Id.* § 3(2)(a).
49. *See generally* S. AFR. CONST. ch. 2.
50. *Id.* § 7(1).
51. *Id.* § 9(3).

threatened.[52] When interpreting the Bill of Rights, a court must "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[53]

The new Constitution provides for various state institutions whose primary mission is to support constitutional democracy.[54] Examples include the Human Rights Commission;[55] the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;[56] and the Commission for Gender Equality.[57] As a complement to the various state institutions vested with authority to investigate constitutional concerns, the new Constitution provides a specific, judicial enforcement mechanism in the Constitutional Court.[58] The eleven-member Court[59] is the highest court in South Africa with regard to all constitutional matters.[60] It deals solely with constitutional matters and issues connected with decisions on those matters.[61]

B. Conflicting Ideals

Part of what remained in 1993 from centuries of ethnic separation, including the regime of apartheid and the homeland system, were the various rural units of indigenous peoples in South Africa.[62] Indeed, this predominantly black segment of society constituted a majority of the South African popula-

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52. Judicial standing is given to:

> (a) [a]nyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

Id. § 38.

Further, "[e]veryone has the right to have any dispute . . . decided in a fair public hearing before a court . . . ." *Id.* § 34.

53. *Id.* § 39(1)(a).

54. *See generally id.* ch. 9.

55. *See id.* § 184. The objects of the Commission are to: "(a) promote respect for human rights and a culture of human rights; (b) promote the protection , development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic." *Id.* § 184(1).

56. *See id.* §§ 185-86. Included in the primary objects of the Commission are: "(a) to promote respect for the rights of cultural, religious and linguistic communities; . . . and (c) to recommend the establishment of recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa." *Id.* § 185(1).

57. *See id.* § 187. "The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality." *Id.* § 187(1).

58. *See generally id.* ch. 8.

59. "The Constitutional Court consists of a President, a Deputy President and nine other judges." *Id.* § 167 (1).

60. *See id.* § 167 (3).

61. *See id.* The Constitutional Court has the inherent power to protect and regulate its own process, and to develop the common law "in the interests of justice." *Id.* § 173.

62. *See* BECK, *supra* note 1, at 188.

tion.[63] These groups continue to engage in traditional and often distinctive cultural practices, which they regulate through a system of "customary law."[64] Although today's South African government espouses unification of the country's diverse peoples, it also recognizes the cultural benefits inherent in that diversity.[65] The Constitution seeks to protect customary law and its practice by indigenous peoples.[66] The Bill of Rights states that "[e]veryone has the right to use the language and to participate in the cultural life of their choice . . . ,"[67] and that "[p]ersons belonging to a cultural . . . community may not be denied the right . . . to enjoy their culture . . . ."[68] Further, chapter twelve of the Constitution expressly recognizes traditional leadership and the system of customary law.[69]

Although the Constitution offers protection for the rights of indigenous groups to practice cultural traditions and maintain a system of customary law, questions arise as to whether it does so on a merely facial basis. A limitations clause follows each grant of cultural freedom in the Bill of Rights and restricts that grant to situations that are consistent with the Bill of Rights as a whole.[70] Section thirty-six of the Constitution specifically addresses the general limitation of rights and provides courts with a set of criteria to apply when balancing competing rights and interests. [71] Since many customary law

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63. The Transkei, Ciskei, Bophuthatswana, and Venda *Bantustans* together totaled over seven million citizens at the time. *See id.*

64. "In South African jurisprudence, there is no single interpretation of the concept Customary Law. It is however generally understood as the cumulative of all legislative enactments and judicial pronouncements on African social tradition and custom." Yvonne Mokgoro, *The Customary Law Question in the South African Constitution*, 41 ST. LOUIS U. L.J. 1279, 1281 (1997). Customary law is primarily unwritten and based largely on acceptance of standards of behavior. *See* 7 GEOFFREY V. DAVIS, SOUTH AFRICA 195 (Robert G. Neville et al., eds., 2 Rev. ed. 1994). For a general discussion of the concept of customary law see Mokgoro, *supra*, at 1281-83.

65. *See, e.g.*, S. AFR. CONST. § 6. Subpart (1) lists the eleven official languages of South Africa, after which subpart (2) states "[r]ecognising [sic] the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages." *Id.* § 6(2).

66. There are two systems of law that are enforced in South Africa, Roman-Dutch common law and customary law.

67. S. AFR. CONST. § 30.

68. *Id.* § 31(1)(a).

69. *See id.* ch. 12 § 211. Customary law is also expressly provided for in § 39, which states in subpart (3) that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised [sic] or conferred by . . . customary law . . . ." *Id.* § 39.

70. *See, e.g., id.* §§ 30-31. Although the Constitution protects various cultural, religious and linguistic freedoms, the rights may not be exercised "in a manner inconsistent with any provision in the Bill of Rights." *Id.* This "subject to" idea is found in § 39 (recognizing customary law) and § 211 (recognizing traditional leadership and customary law) as well. *See id.* § 39(3), 211(1).

71. *See id.* § 36. The rights in the Bill of Rights can be limited in very few situations. Relevant factors include: "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." *Id.* § 36(1). This clause

practices result in discrimination,[72] the question arises whether such practices can rationally be upheld under a constitution that specifically forbids such conduct.[73]

Intestate succession[74] procedures demonstrate the difficulties encountered by the South African government in attempting to recognize and maintain a system of customary law under the new Constitution and, specifically, a Bill of Rights that espouses equality among all South Africans.

IV. INTESTATE SUCCESSION

A. *Customary Law – Official Version*

Customary laws were shaped by a pre-colonial society in which patriarchy and an extended family structure were distinctive features.[75] Patriarchy implied that senior males exercised all significant rights and powers.[76] "The extended family structure implied an extension of the nuclear unit through polygynous marriages and through connections with ascending and descending generations in the male line."[77] A secure basis of support and protection resulted from this expansive network of kin.[78]

The key items of property in the subsistence-based pre-colonial economy were land and livestock.[79] The head of the family had overall control of this property; however, his primary responsibility was providing for dependants.[80] Thus, the entire family had an interest in the land and herds and, consequently, customary law recognized outright ownership in very few items of property.[81]

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would presumably come into play in a court's consideration whether to apply customary law in a case in which such application would be inconsistent with the common law and the general principles of the Constitution (human dignity, equality, and freedom).

72. An example is the discrimination against women that is prevalent in the customary law of intestate succession, which is based on the male-dominated system of primogeniture.

73. *See generally* Mokgoro, *supra* note 64; Yvonne Mokgoro, *The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?*, 52 SMU L. REV. 1549 (1999) (discussing the apparent contradiction between cultural identity and national unity under the Constitution of the Republic of South Africa).

74. A person dying without a will is said to have died intestate. THE HON M M CORBETT ET AL., THE LAW OF SUCCESSION IN SOUTH AFRICA 581 (H R Hahlo ed., Juta & Co, Ltd. 1980). Intestate succession laws determine distribution of a person's property after death. *See generally id.* at 581-90.

75. *See* South African Law Commission, Project 90, Discussion Paper 93, *Customary Law* § 1.2 (2000) [hereinafter South African Law Commission, Discussion Paper 93].

76. *See id.*

77. *Id.*

78. *See id.*

79. *See id.* § 1.3.

80. *See id.*

81. *See id.* Recognition of complete ownership existed for only certain intimate items of property such as "wearing apparel, tools of trade and the livestock that for ritual reasons were deemed to belong to specific individuals." *Id.*

From this socio-economic structure, certain important principles of succession developed within customary law. Individuals could not devise property by will; rather, property had to pass by intestacy.[82] Nor was property divided into shares under the system.[83] The inheriting individual effectively "stepped into the shoes" of the deceased, whose possessions, rights and duties all transferred to the heir.[84] Further, heirs were determined by their relationship to the deceased through the male line only.[85] To summarize, traditional customary law systems of succession in South Africa were "intestate, universal and patrilineal."[86] With regard to the patrilineal nature of inheritance, the principle of male promigeniture guided customary succession.[87] Finally, the deceased's family privately regulated the system of customary succession, without any interference from outside authorities in most cases.[88]

Traditional custom law succession, alternatively termed the "official" version,[89] revolved around the marital status of the deceased.[90] Where the deceased was monogamous, the various systems of customary law in South Africa were uniform in applying the law.[91] The deceased's oldest son was the first choice as heir.[92] If that son had already died, then the oldest son's oldest son succeeded.[93] Failing any male issue in the oldest son's line, succession passed to the deceased's second son and his male descendants.[94] This process continued through the line of all the deceased's sons, in order of seniority.[95]

If a deceased had no male descendants, his father was heir.[96] If the father was dead, the deceased's oldest brother was heir, and if he was dead, the oldest brother's oldest son, or, alternatively, the oldest surviving male descendant

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82. *See id.* § 1.4.

83. *See id.* § 1.5.

84. *See Harmonisation of the Common Law and Indigenous Law (Draft Issue Paper on Succession)*, § 2 (1998). This process represents a true example of succession, which means transmission of all the rights, duties, powers and privileges associated with a social status. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, §1.5. Although the terms "inheritance" and "succession" are often used interchangeably, inheritance really involves the transmission of property rights only. *See id.*

85. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, §1.6.

86. *Harmonisation of the Common Law and Indigenous Law*, *supra* note 84, § 2.

87. *See id.* "A deceased's heir is his oldest son, failing whom, the oldest son's oldest male descendant." *Id.*

88. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, § 1.8. This procedure is distinguishable from common law practice, under which the appointment of heirs and distribution of the estate are supervised by state officials. *See id.*

89. *See generally id.* § 4.1.

90. *See id.*

91. *See id.* §§ 4.1.2 –4.1.4.

92. *See id.* § 4.1.2.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

was next in line.[97] Failing the deceased's oldest brother and his descendants, the next senior brother and his descendants were next to inherit.[98] Failing any male issue in the first order of male ascendants, the deceased's grandfather succeeded, failing whom, the deceased's oldest paternal uncle or the uncle's oldest male descendant.[99] Failing the paternal uncles, in order of seniority, and their descendants, the estate passed to the next order of male ascendants.[100] The process continued until the oldest male relation in a particular line of ascendants became heir to the estate.[101]

Polygynous marriages necessitated a modification of the succession process, because by there nature these marriages resulted in the male's household being divided into separate "houses."[102] Each of a man's marriages established an independent house, the property of which was kept separate from his other houses because the heir to that house inherited the estate.[103] The nature of the system of polygyny[104] thereafter determined the order in which the house heirs succeeded.[105] If there were no male descendants within a polygynous household, the order of succession followed the basic principles of a monogamous marriage.[106]

The "official" version of customary law prohibited a woman from succeeding to the status of a man because she did not have the legal power to perform typically male roles.[107] Therefore, a woman neither succeeded to a role as head of a family nor did she inherit property from her deceased husband. However, provided that a widow was willing to remain at the homestead of her deceased husband, she was entitled to support out of the estate for the rest of her life.[108]

Marriages under customary law involved two families, not just the individual spouses.[109] At the husband's death, both families attempted to ensure that the marital and family relationships continued with as little disruption as possible.[110] In furtherance of this goal, the male heir would retain

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97. *See id.*
98. *See id.*
99. *See id*
100. *See id.*
101. *See id.*
102. *See id.* §§ 4.1.5 – 4.1.9.
103. *See id.*
104. The system of polygyny could be "simple" or "complex." For a discussion of each system, See *id.* §§ 4.1.6 - 4.1.8.
105. *See id.*
106. *See id.* § 4.1.9. In the unlikely event that a deceased had no male relatives, in the "official" version of customary law a traditional leader took over the estate and was obligated to provide for the deceased's family from estate assets. *See id.* § 4.1.10. Modern practice would likely see the property escheat to the state. *See id.*
107. *See id.* § 4.1.11 (citing *Myazi v. Nofenti*, 1 NAC 74 (1904) and *Kumalo v. Estate Kumalo*, 1942 NAC (N&T) 31.
108. *See id.*
109. *See id.* § 4.10.2.1.
110. *See id.*

and protect the widow with the help of the deceased's family. If the deceased left no male heir, or the widow was still capable of bearing children, she was expected to enter a levirate union[111] with one of her deceased's husband's younger brothers.[112] The widow's support from her husband's estate, therefore, did not come without attached strings.

Finally, the traditional customary law system of intestate succession considered the deceased's male heir the owner of the estate, thus possessing him with the right to dispose of the estate as he saw fit.[113] His rights and powers were subject only to the support duties he had toward the surviving widow and children and tempered by his obligation to consult the widow before disposing of major assets.[114]

B. Customary Law – Living Version

The outline of customary law offered above owes more to the nineteenth century than it does to the present day.[115] "It is now generally acknowledged that the 'official version' of customary law, although frequently consulted as the most readily available source, is often inaccurate and misleading."[116] Socio-economic conditions have slowly but steadily changed in southern African states,[117] resulting in a modern version of customary law, often termed the "living" version.[118]

An independent study, Women and Law in Southern Africa Research Trust (WLSA),[119] reported changes in the system of customary succession.[120] It found that the lower courts of traditional rulers today stand prepared to

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111. By entering a levirate union with her deceased husband's brother, for whom she was expected to perform the normal duties of a wife, the woman retained support obligations from the husband's family. *See id.* § 4.10.2.2. Although Colonial governments in South Africa made no attempts to prohibit the institution of levirate unions, they did require that the widow enter such a union voluntarily. Nevertheless, her freedom to choose was in practice narrowly circumscribed due to the probable loss of support if she refused. *See id.*

112. *See id.*

113. *See id.* § 4.1.12.

114. *See id.*

115. *See id.* § 4.2.1.

116. *Id.* § 4.2.2.

117. With monogamy as the norm today, the extended family structure constitutes a system in decay. *See id.* This has led to a weakening of the support obligations owed to women and children. Further, women have gained a higher status, resulting in wives often acting as breadwinners in the family and playing traditionally "male" roles. *See id.*

118. *See generally id.* § 4.2.

119. Research into South African customary law practices is sparse. *See id.* § 4.2.3. However, an independent group, Women and Law in Southern Africa Research Trust (WLSA), has conducted an extensive investigation with regard to succession practices in Botswana, Lesotho, Mozambique, Swaziland, Zambia, and Zimbabwe. South Africa was excluded from this study; however, based on the numerous shared legal and social institutions among the southern African states, the WLSA findings are a recommended tool for studying succession in South Africa. *See id.*

120. *See generally id.* §§ 4.2.4 – 4.2.16.

disregard the strict rules of customary law in order to respond more readily to perceived social needs as, for example, where strict application would work an injustice on a widow.[121] Second, the WLSA study found that rules of succession have changed somewhat.[122] The overall goal has become less of a desire to uphold the patriarchal order and more to respond to the needs of the deceased's survivors.[123] In this regard, although the oldest son might still take the largest share of the estate, other of the deceased's children inherit individual portions as well.[124] Also in this regard, it appears that widows have stronger estate claims today than they had under the "official" version of customary law.[125] Such is often the case when the deceased has left young children to raise.[126] This "tendency to allow a deceased's children and surviving spouse to become the main beneficiaries of the estate realistically accepts basic social needs."[127]

Notwithstanding the increased attention and deference that have been given to the position of widows and children in the modern system of custom law succession, traditional rules have by no means disappeared.[128] In fact, "[b]y persisting alongside new and emergent rules, they give individuals an opportunity to manipulate the dual system to their own advantage – and the very flexibility and ambiguity of customary law can work against the welfare of deserving beneficiaries."[129] For instance, one method used by self-interested heirs is to deny that the woman making a claim against the estate was actually married to the deceased.[130] Considering that the formation of a customary marriage is a potentially lengthy and ambiguous process,[131] denying the existence of a marriage is not as difficult as it might seem.[132] Further, where an informal union existed between the woman and the deceased, male heirs have better claims to the estate.[133] Finally, it is important to note that

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121. *See id.* § 4.2.4. Interestingly, higher courts (those further removed from the indigenous peoples), although aware of the two applicable "versions" of customary law, tend to refer strictly to the "official" version. In effect, application in this way directly contravenes the original purpose of customary law – "to create an environment conducive to the care and protection of the deceased's family . . . ." *Id.*

122. *See id.* § 4.2.5.

123. *See id.*

124. *See id.* § 4.2.6. However, female children remain excluded when the estate contains a minimal amount of property. *See id.*

125. *See id.* § 4.2.8.

126. *See id.*

127. *Id.* § 4.2.8. Succession in Botswana occurs not as a single event, but as a timely process. *See id.* § 4.2.10. When a man dies, his estate effectively passes to his widow, who exercises control until her own death. At that time, the oldest son inherits his portion of the estate. *See id.*

128. *See id.* § 4.2.13.

129. *Id.* § 4.2.13.

130. *See id.* § 4.2.14.

131. *See infra* note 269.

132. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, at § 4.2.14.

133. *See id.* This holds true no matter how long the union existed between the woman and the deceased. *See id.*

widows are rarely in a position to enforce their rights.[134] Maintaining family peace and harmony is important, and women often waive any rights they might have in order to preserve these attributes – that is, if the deceased's family has not already simply overlooked the woman's rights, which is not unlikely.[135]

C. *Common Law*

For South Africans who follow Roman-Dutch common law, dying intestate leads to application of the Intestate Succession Act.[136] The Act is similar to those found in many jurisdictions in the United States.[137] Distribution of intestate property follows a mechanical approach based on a hierarchy of blood relations.[138] For instance, if the deceased is survived by a spouse, but no descendants, then the spouse inherits the entire estate.[139] If the deceased is survived by both a spouse and descendants, they divide the property among them.[140] Provisions are then made for situations in which the deceased is survived only by parents[141] or by siblings,[142] and finally for the possibility that no one from any of the aforementioned groups survives the deceased.[143] In that case, "the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."[144]

The Intestate Succession Act therefore provides a straight-forward approach to property distribution upon death of the intestate.[145] Unlike

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134. *See id.* § 4.2.16.

135. *See id.*

136. *See generally* Intestate Succession Act 81 of 1987.

137. *See, e.g.*, IND. CODE ANN. § 29-1-2-1 (West 2000) (distribution of net intestate estates in Indiana).

138. *See generally* Act 81, *supra* note 136, § 1(1). Spouses are given primary importance in the distribution scheme. *See id.* § 1(1)(a); § 1(1)(c). The remainder of the interested parties (other than adoptive children) constitute the blood relations of the decedent.

139. *See id.* § 1(1)(a). In the opposite situation, in which the decedent is survived by a descendant and no spouse, the descendant inherits the entire estate. *See id.* § 1(1)(b).

140. *See id.* § 1(1)(c).

141. *See id.* § 1(1)(d).

142. *See id.* § 1(1)(e). Siblings include so-called "half-bloods" as well as whole-blood relations. *See id.* § 1(2).

143. *See id.* § 1(1)(f).

144. *Id.* The Act makes no provision for property distribution if the deceased dies leaving no ascertainable blood relative. *See generally* Act 81, *supra* note 136. Presumably, the estate would escheat to the state in this situation, which occurs in similar systems of intestate estate distribution. *See, e.g.*, IND. CODE ANN. § 29-1-2-1(d)(8) (West 2000).

145. Scholars and professionals continue to debate the merits of a mechanical system of succession as opposed to support-based or behavior-based systems, which give succession-right considerations to those individuals who either offered continuous support to or were dependent upon support from the deceased during his lifetime. *See generally* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998); Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199 (1999). Further, behavior-based schemes imply an ability to keep a "bad" heir from inheriting. *See* Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance be Linked?*, 49 U. MIAMI L. REV. 257, 259-60 (1994) (discussing application in the

customary law procedures, the Act does not foster discrimination against women or children.[146] In fact, the deceased's widow and children are the primary beneficiaries under the Act,[147] thereby meeting the needs and expectations of modern society.

The Intestate Succession Act obviously meets the Bill of Rights' equality and non-discrimination requirements. Customary law practices, at least with regard to intestate succession, fall short of those same requirements. Therein lies the dilemma faced by the South African Government. The Government claims to celebrate diversity amongst its many indigenous groups, and seemingly protects their customary practices in the new Constitution.[148] At the same time, however, the government scrutinizes those practices to determine whether or not they are consistent with the "westernized"[149] version of the Bill of Rights. Where customary laws diverge from the Bill of Rights, changes are sought in order to bring such laws in line with the new Constitution.

V. LAW REFORM

A. *South African Law Commission*

The South African Law Commission (SALC)[150] conducts a majority of the research connected with the government's attempts at bringing customary law in line with the Constitution. The Commission is an advisory body whose aim is the continuous renewal and improvement of the law of South Africa.[151] "Professional independence, careful and comprehensive research and open

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United States of mechanical systems to deadbeat dads and suggesting that behavior-based models should be considered).

146. *See* Act 81, *supra* note 136.

147. *See id.*

148. *See supra* note 69 and accompanying text.

149. Traditional leaders use this term to describe what they consider the undesirable path that the South African Government is taking with regard to customary law. *See* Khadija Magardie, *South Africa: Customary Law Shake-up*, AFRICA NEWS, Aug. 18, 2000. They do not see a need to run their country with "Western" techniques and policies. *See id.*

150. The Commission was established by the South African Law Commission Act 19 of 1973.

151. *See Objects and Constitution of the South African Law Commission, at* http://www.law.wits.ac.za/salc/objects.html (last modified Mar. 10, 1997). The objects of the commission are:

> to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including—the repeal of obsolete or unnecessary provisions; the removal of anomalies; the bringing about of uniformity in the law in force in the various parts of the Republic; and the consolidation or codification of any branch of the law.

Id.

procedures . . ."[152] are characteristic features of the reform process.[153] Within the context of "open procedures," the Commission strives to achieve maximum involvement of the community at large, which it does by following an orderly, step-by-step procedure when acting in the name of law reform.[154]

The process begins with the submission to the Commission of a law reform proposal.[155] Although proposals typically emanate from the Minister of Justice, members of the government, parliamentarians and state departments, proposals may also come from the general public.[156] The Commission itself might also initiate law reform proposals.[157]

After receiving a proposal submission, the working committee[158] considers it for inclusion as a project, or investigation in the Commission's program.[159] Each investigation is given a priority rating so that the most urgent matters are considered and researched first.[160]

The next step, after inclusion of an investigation in the Commission's program, is for the Commission to determine whether to establish a project committee in respect of the investigation.[161] If the Commission deems a committee necessary, it chooses research candidates based on their representation of the population and their knowledge in the particular field under investigation.[162]

The fourth step, publication of an issue paper, is essential to the reform process because it serves as the beginning of the community's participation in that process.[163] The purpose of publishing an issue paper is "to announce a particular investigation . . ., to elucidate the problems that have given rise to the investigation, to point to possible options available for solving those problems and to initiate and stimulate debate on identified issues."[164] Issue papers, which precede the publication of any other document in the law reform

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152. *Functioning and Policies of the [South African Law] Commission, at* http://www.law.wits.ac.za/salc/ function.html (Feb. 9, 2001).

153. *See id.*

154. *See generally id.*

155. *See id.* § 1.

156. *See id.* "[A]ny person or body is at liberty to approach the Commission with a request to investigate a particular branch or aspect of the law which in his or her opinion is in need of reform." *Id.*

157. *See id.*

158. The working committee serves as the executive committee of the Commission. *See generally id.*

159. *See id.* § 2.

160. *See id.*

161. *See id.* § 3. Factors considered when making this determination include the "complexity or specialised [sic] nature of the subject matter of the investigation and the availability of external expertise." *Id.*

162. *See id.* However, the Commission tries to balance a potential member's knowledge and experience in the field with the danger that partisan participation in the project committee itself will result. *See id.*

163. *See id.* § 4.

164. *Id.* The SALC borrowed this process from the Australian Law Commission, who has had encouraging results from the use of issue papers in the past. *See id.*

process, ensure direct involvement of the community at the beginning of an investigation and help to broaden the consultative base.[165] After approving it for publication, the Commission distributes the paper among interested persons, bodies and institutions in hopes of eliciting feedback, usually in written form, on the issues raised.[166]

After considering both the comment received on an issue paper and the project committee's interim research, the researcher in charge of the investigation prepares a draft discussion paper.[167] Included in the paper are the following: "[a] definition of the problems requiring solutions; the existing state of the law in relation to the problems; a comparative legal study; possible preliminary solutions to rectify the problems identified; [and] a summary of the preliminary proposals . . . ."[168] The procedure toward publication[169] mirrors that for issue papers, and the paper is then distributed to interested parties for comment on the proposals.[170]

After the comments on a discussion paper are received and studied, a draft report is prepared.[171] The report contains the Commission's final recommendations and, where applicable, draft legislation to give effect to the recommendations.[172] It is submitted to the Minister of Justice and typically published in the *Government Gazette* in its final form.[173]

Because of the lengthy, orderly, and democratic process that the SALC goes through with regard to law reform, the South African Government gives strong deference to their legislative recommendations. Areas in which the Commission has had an impact, with a resulting effect on the customary law-Bill of Rights question, include marriage law and succession law.

B. Marriage law

As discussed in section III above, customary law application of intestate succession rules traditionally depended on the marital status of the

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165. *See id.*

166. *See id.*

167. *See id.* § 5.

168. *Id.* If considered appropriate, a proposed draft Bill in which the proposals are embodied might also warrant inclusion in the draft discussion paper. *See id.*

169. A notice in the *Government Gazette* and media statements publicize the discussion paper. *See id.* This procedure is used to give all interested parties – including both governmental and non-governmental organizations, as well as the general public – the chance to participate in and contribute to the law reform process. "[I]t also ensures that its [the Commission's] final recommendations are the product of debate, discussion and community involvement." *Id.*

170. *See id.* "It is made clear that the opinions expressed in discussion papers do not represent the Commission's final views and that such documents are merely a further step in the consultation process." *Id.*

171. *See id.* § 7.

172. *See id.*

173. *See id.* § 8.

parties.[174] However, marital inquiries are not limited solely to whether the relationship was monogamous or polygynous. An equally important consideration is the system in which the individuals married.

The Black Administration Act[175] defined the various types of marriages into which an African person could enter. He or she could enter into a marriage in community of property, resulting in co-ownership of the joint estate in equal and undivided shares. At death, it is irrelevant who brought what into the marriage – the estate is simply halved and each party is able to bequeath his or her own half-share as he or she sees fit. Indigenous blacks can enter into such a system, provided that within one month prior to the marriage the couple declares to a magistrate that it is their intention and desire that community of property shall result from the marriage.[176]

Africans could also marry out of community of property by ante-nuptial contract according to the law of the land. This system provides that a husband and wife each have separate estates throughout the marriage.[177] At death, each can bequeath his or her own property as he or she chooses.[178]

Finally, if the indigenous couple chooses neither of the above systems of marriage, they will likely form a union according to traditional customary law and the relationship will be recognized in accordance with the customs and norms pertaining to indigenous African law.

The choice by an indigenous African to marry according to customary law traditionally resulted in dramatic and inconsistent effects on intestate succession procedures followed at the death of a spouse. The South African High Court addressed those issues in the *Zondi* case, in which an illegitimate child of a deceased widower sought a declaratory order stating that regulations that resulted in the deceased's brother inheriting the estate were unconstitutional. [179]

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174. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.1.

175. *See* Black Administration Act 38 of 1927.

176. *See* Zondi v. President of the RSA and Others, 1999 (11) BCLR 1313 (N).

177. Today, there are two types of marriage with regard to ante-nuptial contracts. The traditional form, in which the couple takes an ante-nuptial contract without accrual, results in each party maintaining their own assets and liabilities throughout the marriage, with no financial adjustments to either's estate when the marriage is dissolved. A more modern approach is the ante-nuptial contract with accrual system. Again, each party maintains his or her own estate during the marriage; however, the couple will share equally in the growth of the estate upon dissolution of the marriage. This approach serves to protect the lesser-earning spouse, who may have expended more labor and resources while the other spouse purchased more property in his or her own name. *See* Peter Eggeling, *Ante Nuptial Contract Advisory Services, in* MATRIMONY, April 26, 2000.

178. A difference between this system and a marriage in community of property is the way in which property is divided at death. Under ante-nuptial contract, each individual bequeaths their own property. Under a marriage in community of property, however, each item of property must be effectively halved and the individuals can only bequeath their half of the item, thus creating difficulty when property is bequeathed to third parties. *See id.*

179. *See* Zondi v. President of the RSA and Others, 1999 (11) BCLR 1313 (N).

In *Zondi*, the estate of the deceased was administered in terms of Regulation R200, which forms part of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks. Section 2[180] of the Regulations sets forth how the intestate property of a "Black" shall be distributed. The *Zondi* court determined that the deceased had not been part of a marriage in community of property or under ante-nuptial contract,[181] and the regulation therefore mandated a distribution "according to Black law and custom."[182] Under customary law illegitimate children do not inherit, and the deceased's brother was deemed heir to the estate.[183] The deceased's illegitimate child sought a declaration invalidating the regulations on grounds of being inconsistent with the new Constitution.[184]

The judge noted at the outset that the deceased, whose wife died almost three years earlier, had not been married in community of property when the two were married in 1953.[185] The judge discussed this in terms of the Black Administration Act and the fact that the couple had not declared before a magistrate their intention to marry in community of property.[186] Next, the judge discussed the issue of intestate succession and the fact that the regulations draw a distinction between an out of community property marriage

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180. Section 2 of the Regulations provides:

> If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the [Black Administration] Act shall be distributed in the manner following: . . . (c) [i]f the deceased, at the time of his death was – (i) a partner in a marriage in community of property or under antenuptial contract; or (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European. (d) When any deceased Black is survived by any partner – (i) with whom he had contracted a marriage which . . . had not produced the legal consequences of a marriage in community of property; or (ii) with whom he had entered into a customary union; or (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European. (e) If the deceased does not fall into any of the classes described in paragraphs (a), (b), (c), and (d), the property shall be distributed according to Black law and custom.

Id.

181. Had he been married in one of these two ways, the Regulations provide that his estate pass as if he were a "European." Thus, the Intestate Succession Act of 1987 would apply.

182. *Id.* § 2(e).

183. *See* Zondi v. President of the RSA and Others, 1999 (11) BCLR 1313 (N).

184. *See id.*

185. *See id.*

186. *See id.*

and marriages entered into by ante-nuptial contract or in community of property.[187] In the latter situations, the Intestate Succession Act of 1987 governs the distribution.[188] The Act, in turn, provides that "illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation."[189] Therefore, the deceased's child would have inherited the estate. In this situation, where the marriage was out of community of property, illegitimacy did matter and, in fact, kept the deceased's child from inheriting.

The judge's concern stemmed from the fact that the deceased was not simply married according to customary law practices. He and his spouse intentionally contracted a marriage out of community of property, which the judge viewed as pointing away from customary law.[190] The decisive question became whether the regulations, which differentiated between various types of marriages, were constitutional under the new Bill of Rights.[191]

Ultimately, the judge held that the regulation in question offended the equality provisions of the Constitution.[192] He pointed to the "gross discrimination" that is present when illegitimate children inherit from deceased African persons who married by ante-nuptial contract or in community of property, whereas those same children do not inherit if a marriage was contracted out of community of property.[193] The Court ordered that the deceased's property pass according to the Intestate Succession Act of 1987.[194]

Although case law concerning the conflict between customary marriage systems with their effect on intestate succession and the equality provisions of the new Constitution is somewhat limited at the current time, one need only look to the SALC to find the roots of legislative proposals and statutory changes that affect the rights of indigenous Africans under customary law.

The Commission's research into South African marriage practices culminated in Parliament's 1998 passage of the Recognition of Customary

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187. *See id.*
188. *See id.*
189. Intestate Succession Act 81, *supra* note 136, § 1(2).
190. *See* Zondi v. President of the RSA and Others, 1999 (11) BCLR 1313 (N).
191. *See id.*
192. *See id.*
193. *See id.*
194. *See id.* Judge Levinsohn held:

> [t]o the extent that . . . the Regulations for the Administration and Distribution of the Estates of Deceased Blacks . . . distinguishes for the purpose of intestate succession between the estates of Black persons who . . . had been . . . a partner in a marriage which . . . was not a marriage in community of property on the one hand, and the estates of Black persons who . . . had . . .been a partner in a marriage under ante-nuptial contract or a marriage in community of property on the other hand it is inconsistent with the Constitution of the Republic of South Africa and is accordingly invalid.

Id. But see Mthembu v. Letsela and Another, 1998 (2) SA 675 (T), in which Judge Mpati questioned the correctness of Judge Levinsohn's decision.

Marriages Act ("the Act").[195] The primary aim of the Act is to extend full legal recognition to marriages entered into in accordance with indigenous or traditional rites.[196] This recognition, in turn, serves the goal of improving the position of women and children within customary marriages by introducing measures that bring customary law in line with the Constitution.[197]

Prior to commencement of the Act, South African law failed to recognize any marriage other than a "Western Christian marriage."[198] The Act defines the term "customary marriage" as "a marriage concluded in accordance with customary law."[199] "Customary law," in turn, means "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples."[200] Section 2 of the Act provides for the recognition of all customary law marriages, including polygamous marriages. The recognition is retroactive[201] in nature, thus effectively including every valid customary law union within its coverage.[202]

One of the primary objectives of the SALC in proposing new legislation and of Parliament in passing the Act was to set up a registration system in South Africa for marriages and divorces.[203] Traditionally, indigenous peoples have not considered registration of their marriages to be a high priority.[204] This has led to an inability of the national government to keep track of important statistical information that is necessary if it is to provide any type of support programs to its rural citizens.[205] Section 4 of the Act therefore provides for a registration system for customary marriages.[206]

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195. *See* Recognition of Customary Marriages Act 120 of 1998, REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE, Dec. 2, 1998, at 2 [hereinafter Act 120 of 1998].

196. *See generally id.*

197. *See id.* §§ 6-7. The statute's text summarizes Parliament's goals in passing the Act:

> [t]o make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; . . . .

Id. preamble.

198. Professor T. Nhlapo, *The Customary Marriages Act: Background and Rationale, in Towards Improving the Registration of Marriages and Divorces in South Africa, Part One, at* http://www.statssa.gov.za/Publications/Marrigaes%20and%20dovorce%20proceedings/full%20text.htm (last visited Nov. 7, 2000). The SALC's efforts in its latest research was based on its 1985 report entitled *Marriages and Customary Unions of Black Persons*, for which an investigation was conducted under the Harmonisation [sic] of Indigenous Law and Common Law project. *See id.*

199. Act 120 of 1998, *supra* note 195, § 1(iii).

200. *Id.* § 1(ii).

201. *See id.* §§ 2(1), 2(3).

202. See *id.* § 3 for the validity requirements of customary marriages.

203. *See* Nhlapo, *supra* note 198.

204. *See id.*

205. *See id.*

206. *See* Act 120 of 1998, *supra* note 195, § 4. However, the Act does little to truly mandate compliance with the registration requirements. Although the Act states that indigenous

Section 6 of the Act offers wives of customary unions equal status with their husbands.[207] At first view it would seem that, notwithstanding the grant of "full status and capacity,"[208] discriminatory customary practices will nevertheless be upheld. The equality granted is "subject to the matrimonial property system governing the marriage."[209] In other words, if a customary marriage is out of community of property Section 6 really does little to improve the situation of wives; indeed, a wife's right to equal treatment would not take priority over the customary norm of disallowing her to inherit property. However, Section 7 takes care of this issue by stating that customary marriages entered into after commencement of the Act will be in community of property and of profit and loss "unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property of their marriage."[210] The equality provisions of Section 6 are thus given much greater effect because, although a wife's equality is subject to the matrimonial property system governing the marriage, that governing system will now in most cases be a system in community of property.[211]

The Department of Justice, in administering the Act, touted the worthy attempts of the Act to give expression to two constitutional principles, namely "the right to systems of family law based on any tradition or religion and the right to cultural pluralism."[212] It seems, however, that the Act provides little more than lip service to the right to cultural pluralism, at least with regard to property issues. Although the Act allows indigenous peoples to marry under whatever system of law they choose, it effectively deprives them of important cultural practices in the event that they choose customary law. The marriage might be "customary" in name, but in many respects it will be regulated by the common law.

C. *Succession Law*

Along with changes related to marriage systems, South Africa will also begin to see direct effects on the practices of indigenous peoples through various modifications in the laws of succession and related areas affecting succession.

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couples have certain time frames within which they "must" register their customary marriages, the final clause in section 4 effectively releases them from that duty, stating: "[f]ailure to register a customary marriage does not affect the validity of that marriage." *Id.* § 4(9).

207. *See id.* § 6.

208. *Id.*

209. *Id.*

210. *Id.* § 7(2).

211. *See id.* This effective invalidation of customary marriage property systems is not retroactive – "[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law." *Id.* § 7(1).

212. *Department of Justice: Legislation Index, at* http://www.doj.gov.za/legislation/index-acts.html (last visited Nov. 7, 2000).

The SALC published a draft issue paper on succession in May 1998.[213] In September of that year the Amendment of Customary Law of Succession Bill[214] was introduced to Parliament with the purpose "[t]o extend the South African law of testate and intestate succession to all persons . . . ."[215] The Bill proffered amendments to the Intestate Succession Act of 1987 and the repeal of Section 23 of the Black Administration Act of 1927 to "ensure protection of the interests of spouses and children of polygamous marriages."[216] The Council of Traditional Leaders[217] objected to the Bill, accused the SALC of lack of consultation in the process, and warned against attempts at "Westernizing" the customary law of succession.[218] The Bill was quashed in its infancy.[219]

At the same time Parliament was addressing the first draft bill dealing with succession, South African courts were also considering customary succession issues in the *Mthembu* case.[220] The controversy revolved around the legitimacy of a customary union between the plaintiff and the intestate deceased, and whether the plaintiff and the child of her and the deceased should inherit from the estate rather than the deceased's father.[221]

Tebalo Watson Letsela (the deceased) died in August 1993. At his death he was the holder of a ninety-nine year leasehold title in some property on which he lived with the plaintiff and her two daughters, one of whom, Tembi Mthembu, was his child. The deceased had no other issue, but was survived by his father (the defendant), mother, and three sisters. His parents shared a house on the property with the plaintiff and her daughters. At Letsela's death, the property passed to his father by virtue of the customary law rule of

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213. *See* South African Law Commission, Project 90, Issue Paper 12, *Harmonisation* [sic] *of the Common Law and Indigenous Law: Draft Issue Paper on Succession in Customary Law* (1998).

214. *See* Amendment of Customary Law of Succession Bill 109 of 1998, *at* http://www.gov.za/bills/1998 /b109-98.pdf (last visited Nov. 2, 2000).

215. *Id.* preamble.

216. *Id.* § 6.

217. The Council was established by the Council of Traditional Leaders Act 10 of 1997 with the objectives: "(a) to promote the role of traditional leadership within a democratic constitutional dispensation; (b) to enhance unity and understanding among traditional communities; and (c) to enhance co-operation between the Council and the various Houses [of traditional leaders] with a view to addressing matters of common interest." *Id.* § 7(1). Section 7(2) sets forth the Council's advisory role – the Council may advise the national government, investigate and make recommendations relating to any of the following: "(i) [m]atters relating to traditional leadership; (ii) the role of traditional leaders; (iii) customary law; and (iv) the customs and communities observing a system of customary law." *Id.* § 7(2). The Council's name was changed to the National House of Traditional Leaders in 1998. *See* Council of Traditional Leaders Amendment Act 85 of 1998.

218. *See* Magardie, *supra* note 149.

219. *See id.*

220. *See* Mthembu v. Letsela and Another, 1998 (2) SA 675 (T).

221. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA).

succession.[222] The plaintiff sought an order declaring that the customary rule of primogeniture and Regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks were invalid based on their inconsistencies with the Constitution.

The case reached the Supreme Court of Appeal of South Africa in May 2000.[223] The plaintiff-appellant argued that the customary rule of succession, specifically the principle of primogeniture, was grossly discriminatory toward all Black women and that it contravened the equality provisions in Section 8 of the interim Constitution[224] because it discriminated on the grounds of sex and gender. The Court refused to decide the case based on gender, although it did refer to discussion from the first *Mthembu* ruling[225] in which the judge stated that the deceased's customary male heir would have an obligation to support the appellant and the deceased's daughter, thereby keeping the procedure in line with the Constitution's equality principles.[226]

The Supreme Court instead addressed the legitimacy of the daughter.[227] Although the deceased paid the first installment of lobola,[228] the appellant and the deceased never entered into a customary union; therefore, the appellant's child was an illegitimate child of the deceased.[229] The Court upheld the applicability of Regulation 2 and held that the deceased's property was appropriately distributed according to Black law and custom.[230] Because the daughter was illegitimate, and not because she was female, [231] the deceased's father was the proper heir to the estate.

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222. *See id.* The magistrate ordered the property to devolve according to Black law and custom in accordance with the Black Administration Act 38 of 1927. The magistrate was also a defendant in the case. *See id.*

223. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA).

224. The equality provisions are found in Section 9 of the new Constitution of the Republic of South Africa, Act 108 of 1996.

225. Mthembu v. Letsela and Another, 1997 (2) SA 936 (T).

226. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA). (citing Judge Le Roux's opinion from the 1997 judgment).

227. *See id.*

228. "Lobola" refers to the property in cash or in kind which a prospective husband or the head of his family undertakes to give to the head of the perspective wife's family in consideration of a customary marriage. It is often referred to as "bridewealth," and demonstrates the importance of family in the customary union of two individuals. Critics of the practice, however, have cited it as the primary example of male domination and exploitation in pre-Colonial South African socities. *See* Shawn Riva Donaldson, "Our Women Keep Our Skies from Falling": Women's Networks and Survival Imperatives in Tshunyan, South Africa, *in* AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA 257, 262 (Gwendolyn Mikell ed., 1997).

229. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA). The Court also discussed the customary law of succession and explained that the legitimacy of the appellant's daughter would really be irrelevant – "whether or not Tembi is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law." *Id.*

230. *See id.*

231. The Court commented that the holding would have been the same had the illegitimate child been male. *See id.*

In upholding the customary law practice of denying a widow and her daughter the right to inherit from a late husband, *Mthembu* highlighted the conflict between the Constitution and indigenous cultures.[232]

The *Mthembu* ruling was interesting considering its timing. The decision came on the heels of Parliament's passage in February 2000 of the Promotion of Equality and Prevention of Unfair Discrimination Act.[233] The Act reaffirms the goals of the Constitution; its purpose, in essence, is to promote equality and prohibit and eliminate unfair discrimination.[234] The preamble of the Act indicates its applicability to customary law practices that conflict with the Constitution's equality provisions.[235] Further, the Act refers to "discrimination" as "any act or omission, including a . . . practice . . . which directly or indirectly . . . withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds."[236] "Prohibited grounds" include "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour [sic], sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[237]

The Act states that, in its application, the following should be recognized and taken into account: "(a) [t]he existence of systematic discrimination and inequalities, particularly in respect of . . . gender . . . as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and (b) the need to take measure at all levels to eliminate such discrimination and inequalities."[238] The Act is binding on the State and all individuals.[239] It should prevail in the event that conflicts arise

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232. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, §§ 1.4.2 – 1.4.6.

233. *See* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, REPUBLIC OF SOUTH AFRICA GOVERNMENT GAZETTE, Feb. 9, 2000. It appears from the Court's decision that it was unwilling to step out of the Constitutional scope of review at the time of Mthembu, at least with regard to questions of conflict between customary law and the Constitution. The new Act was not mentioned or considered by the Court in its decision.

234. *See id.* The complete scope of the Act is "to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith." *Id.*

235. *See id.* preamble. The Act seeks the "eradication of social and economic inequalities, especially those that are systematic in nature, which were generated in [South Africa's] history by colonialism, apartheid, *and patriarchy* . . . ." (emphasis added). *Id.* It notes that "systematic inequalities and unfair discrimination remain deeply embedded in *social structures, practices and attitudes*" and that "[t]he basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish." (emphasis added). *Id.*

236. *Id.* ch. 1 § 1(viii).

237. *Id.* ch. 1 § 1(xxii). Prohibited grounds also include "any other ground where discrimination based on that other ground: (i) causes or perpetuates systematic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner . . . ." *Id.*

238. *Id.* ch. 1 § 4(2).

239. *See id.* ch. 1 § 5.

between its provisions and those of any other law, "other than the Constitution or an Act of Parliament expressly amending [the] Act."[240]

Section 8 of the Act deals with the prohibition of unfair discrimination on the basis of gender.[241] It states:

> [n]o person may unfairly discriminate against any person on the ground of gender, including -- . . . (c) the system of preventing women from inheriting family property; (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men . . . ; [and] (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources . . . .[242]

In order to determine the fairness or unfairness of a given practice or policy, equality courts[243] will consider the grounds on which the alleged discrimination took place.[244] If the discrimination took place on a ground listed in the definition of "prohibited grounds" it is unfair "unless the respondent proves that the discrimination is fair."[245] In determining whether the respondent has proved that the discrimination is fair the court considers various factors, including the impact of the discrimination on the complainant, the nature and extent of the discrimination, whether there is a legitimate purpose for the discrimination and whether the discrimination is narrowly tailored to achieve its purpose.[246]

The question arises whether the *Mthembu* decision was correct in light of the Equality Act's passage. Although the Court expressed that it was deciding the case based on illegitimacy and not on gender, the discrimination

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240. *Id.*
241. *See generally id.* ch. 2 § 8.
242. *Id.*
243. *See generally id.* ch. 4.
244. *See id.* § 21.
245. *Id.* ch. 3 § 13(2)(a).
246. *See id.* ch. 4 § 14. The complete list of factors that equality courts consider are:

> [w]hether the discrimination impairs or is likely to impair human dignity; (b) the impact or likely impact of the discrimination on the complainant; (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (d) the nature and extent of the discrimination; (e) whether the discrimination is systematic in nature; (f) whether the discrimination has a legitimate purpose; (g) whether and to what extent the discrimination achieves its purpose; (h) whether there are less restrictive and less disadvantageous means to achieve the purpose; (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to – (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity.

Id.

at issue was nonetheless prohibited by the Act on grounds of birth.[247] Doubt arises as to whether the next *Mtembu*-type case will come out in favor of protecting customary law.

Within a few months after the *Mthembu* decision the SALC published its discussion paper on succession in customary law.[248] The paper is a continuation of the project that ended with the withdrawal from Parliament of the 1998 succession law amendment proposals, and it includes a new Draft Bill for the Amendment of the Customary Law of Succession ("Draft Bill").[249]

The Discussion Paper makes the following important proposals: to reform the order of succession so as to provide a material basis of support for the deceased's surviving spouse and children; to amend the Intestate Succession Act to cover the estates of deceased persons who were subject to customary law; to ensure the inheritance of surviving spouses and children; to remove the disqualification of out-of-wedlock children from inheriting; and, to secure the right of the surviving spouse to the matrimonial home and its contents, especially with regard to small estates.[250]

As with the 1998 Draft Bill, the main objectives of the current Draft Bill are to apply the Intestate Succession Act 81 of 1987 to all South Africans dying intestate,[251] to repeal section 23 of the Black Administration Act[252] that regulates succession in respect of black persons, and to enact new provisions which will be consistent with the Constitution.

"The Intestate Succession Act provides a convenient solution for most of the problems in customary law."[253] It complies with the Bill of Rights and secures the material welfare of surviving spouses and children. The Draft Bill proposes the repeal of Section 1(4)(b) of the Intestate Succession Act, which excludes from coverage estates subject to customary law.[254] Thereafter, Section 1(1), which sets forth the different inheritance scenarios, will determine the order of succession in all cases of total or partial intestacy.[255] In other words, failing a testamentary disposition of property by the deceased, all estates will devolve according to the Intestate Succession Act.[256]

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247. *See id.* ch. 1 § 1(xxii).

248. *See* South African Law Commission, Discussion Paper 93, *supra* note 75.

249. *See id.* annexure.

250. *See South African Law Commission, Summary of Discussion Paper 93 on Customary Law*, *at* http://www. law.wits.ac.za/salc/discussn/paper93sum.html (last visited Oct. 4, 2000).

251. *See* Draft Bill for the Amendment of the Customary Law of Succession § 2(1) (2000).

252. *See id.* § 5(b).

253. South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.6.1.

254. *See id.* § 2(2)(cc). Section 1(4)(b) of the Intestate Succession Act states that, for purposes of determining who shall inherit the intestate estate of a deceased individual, "'intestate estate' includes any part of any estate . . . in respect of which section 23 of the Black Administration Act, 1927 (Act 38 of 1927), does not apply." Act 81, *supra* note 136, § 1(4)(b).

255. *See* Act 81, *supra* note 136, § 1(1).

256. Retroactive application to customary marriages is found in section 2(2) of the Draft Bill: "[t]he Intestate Succession Act . . . applies with the changes required by the context to the intestate estate of a person who before the coming into operation of this Act entered a valid

Making the Intestate Succession Act generally applicable will cure other inconsistencies between indigenous practices and the Bill of Rights. Section 1(2) will address the illegitimacy dispute that was prevalent in *Mthembu*.[257] "By providing that illegitimacy does not affect the capacity of one blood relation to inherit the intestate estate of another blood relation, this section will bring customary law into line with the constitutional principle of non-discrimination on the ground of birth."[258]

Section 1(4)(e)(i) of the Intestate Succession Act states that an adopted child shall be deemed a descendant of his adoptive parents.[259] This section will supersede any customary law to the contrary and will provide uniform consequences for the adoption of both males and females.[260]

The SALC proposes the maintenance of certain provisions of Section 1(1) of the Intestate Succession Act and the general applicability thereof. Section 1(1)(d) would thus mandate that the intestate estate pass to the parents of a deceased who is survived by neither a spouse nor descendants.[261] If only one parent survives the deceased, the estate would be split between the surviving parent and the deceased's siblings.[262] Section 1(1)(e) would address the situation in which the deceased is survived only by brothers and sisters. In this case, one half of the estate would be distributed to those siblings that are related to the deceased through the mother and one half would be distributed to those that are related through the father.[263] This provision guarantees greater equality for half-bloods who, while possibly receiving less of an estate share,[264] will not be ignored from the inheritance process. Finally, in the event that the deceased is not survived by a spouse, descendant, parent, or descendant of a parent, subsection (f) would effectively pass the estate to the "blood relations of the deceased who are related to him nearest in degree. . . ."[265]

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customary marriage which subsisted at the time of that person's death." Draft Bill for the Amendment of the Customary Law of Succession § 2(2).

257. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA).

258. South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.6.4.

259. *See* Act 81, *supra* note 136, § 1(4)(e)(i).

260. Indigenous groups following customary law have occasionally used adoption in order to perpetuate a bloodline. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.6.5. An heirless head of a family would place a kinsman's male offspring in his house so that there would be a suitable heir for the estate. Although females might be taken into a house as well, succession rights would not result. General application of the Intestate Succession Act would prescribe equal treatment for adopted males and females, allowing both to succeed to a deceased parent's estate. *See id.*

261. *See* Act 81, *supra* note 136, § 1(1)(d)(i).

262. *See id.* § 1(1)(d)(ii). Under this provision, the parent is entitled to one-half of the estate and the deceased's siblings are entitled to the other half, shared equally. *See id.*

263. *See id.* § 1(1)(e)(i).

264. Half-blood siblings would receive less of a share if the deceased is survived by both full-blood and half-blood siblings. *See id.* § 1(1)(e)(i)(cc).

265. *Id.* § 1(1)(f).

While the SALC recommends general application of most provisions of the Intestate Succession Act, it nonetheless realizes that certain amendments to the Act are required in order to meet the needs of those who are currently subject to customary law.[266] The first amendment proposal concerns the definition of a surviving spouse.[267] Currently, in order to inherit under the Act spousal claimants must establish a valid marriage.[268] This requirement would effectively exclude many customary marriage partners whose marital status often remains ambiguous for an extended period of time.[269] The SALC recommends redefining the term "surviving spouse" to include partners of informal unions.[270]

The second amendment proposal concerns polygynous marriages, which are now recognized as valid by the Recognition of Customary Marriages Act.[271] The SALC's Draft Bill treats all wives equally, stating that if a deceased is survived "by more than one spouse, but not by a descendant, such spouses shall inherit the intestate estate in equal shares."[272]

Finally, the third amendment proposal would require guaranteeing surviving partners certain assets in the estate.[273] The Recognition of Customary Marriages Act makes customary marriages in community of property.[274] Under the Intestate Succession Act a surviving spouse of a marriage in community of property automatically takes half of the marital estate. However, small estates might then be split into fractions, leaving insufficient support for a spouse.[275] Research by the WLSA indicates that "small estates should be kept intact to ensure an efficient transmission of assets to the most deserving beneficiaries."[276] Children will inherit, but they must wait until the

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266. *See* South African Law Commission, Discussion Paper 93, *supra* note 75 § 4.9.1.1.

267. *See id.* § 4.9.1.2.

268. *See id.*

269. *See id.* Customary marriages are not determined by a single event, but rather by a series of events such as the payment of lobola and various family gatherings. In this respect, it might be difficult to say precisely when a couple was actually "married." Therefore, an extension of the Act to cover only "valid" customary marriages would not go far enough. *See id.*

270. *See id.* § 4.9.1.4. The Recognition of Customary Marriages Act has improved the situation somewhat by providing that even unregistered marriages are deemed valid and also by its retroactive application to customary marriages. *See* Recognition of Customary Marriages Act 120 of 1998 § 4(2); § 4(9). Notwithstanding these improvements, however, the "probability exists that many partners may not qualify as 'spouses' under the Intestate Succession Act." South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.9.1.4.

271. *See* Act 120 of 1998, *supra* note 195, §§ 2(3)-(4).

272. Draft Bill for the Amendment of the Customary Law of Succession § 3(a)(ii). The Intestate Succession Act currently addresses only single-spouse marriages. *See* Act 81, *supra* note 136, § 1(1).

273. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.9.3.1.

274. *See* Recognition of Customary Marriages Act 120 of 1998 § 7.

275. *See* South African Law Commission, Discussion Paper 93, *supra* note 75, § 4.9.3.2 - 4.9.3.3.

276. *Id.* § 4.9.3.3.

surviving spouse dies.[277] The result is "a smoother transition of wealth from one generation to the next."[278] The SALC therefore recommends that small estates be exempted from division amongst beneficiaries, and that the surviving spouse be guaranteed rights to the deceased's house and household goods in their entirety.[279]

The SALC, in preparing the Draft Bill, also addressed an issue that was paramount in the *Mthembu* case. In the 1997 judgment (*Mthembu I*), the judge found that the customary rule of male primogeniture was indeed discriminatory, but that it was not unfairly discriminatory because of the concomitant obligations of the heir towards the widow and the rest of the deceased's dependents.[280] Thus, he held that the system was not unconstitu-tional.[281] The Supreme Court of Appeal later declined an invitation by applicant's counsel that it should "develop" the customary law rule to bring it in line with the equality provisions of the Constitution.[282] The Court held that "[a]ny development of the rule would be better left to the legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission."[283]

In response to the *Mthembu* court's "suggestion" the SALC developed the law by substituting equality requirements in place of the heir's support duties. The Draft Bill, by amending the Intestate Succession Act so as to create a system of complete equality and by making the Act generally applicable, negates the necessity of an heir's duty to support the deceased's dependants. The Draft Bill therefore states that "[a]ny customary laws obliging an heir to maintain the dependants of a deceased person or to settle debts by the deceased are repealed."[284]

Recent developments in South African succession law paralleled the changes that have taken place with regard to marriage law. When considering the proposed treatment of illegitimate and adopted children, as well as half-blood siblings, the equal status granted to all wives within a polygynous marriage, the negation of support duties owed by an heir, and, most importantly, the general applicability of the new system to all South African marriages, it appears that mere lip service is being spent on the interest in

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277. *See id.*

278. *Id.*

279. *See id.* § 4.9.3.4. This procedure is actually more in line with the living version of customary law in most areas, where the surviving spouse is left in control of the house and its contents, regardless of what statutory divisions require. *See id.* § 4.9.3.3. Section 2(3) of the SALC's Amendment Act states that "a spouse inherits the deceased's house and personal belongings."

280. *See* Mthembu v. Letsela and Another, 2000 (3) SA 867 (SCA) (citing Mthembu I).

281. *See id.*

282. *See id.* (citing Mthembu II).

283. *Id.*

284. Draft Bill for the Amendment of the Customary Law of Succession, Amendment to the Intestate succession Act 81 of 1987 § 3(c).

maintaining and respecting a system of customary law within the African legal heritage. In reality, if Parliament approves the SALC's proposals, few customary law remnants will remain with regard to intestate succession procedures in South Africa.

VI. CONCLUSION

The new Constitution of the Republic of South Africa makes it clear that legislation must continue to respect the African legal heritage and the cultural practices of indigenous peoples. However, an express caveat exists which mandates that those practices take a subordinate position to the principles of equality and non-discrimination set forth in the Constitution. This contradiction between the desire to protect cultural identity and the need to be faithful to a modern, democratic Bill of Rights was recently tested in the area of intestate succession. The result seems to be a victory for the Constitution and a virtual refusal to accept customary law procedures as valid. The Promotion of Equality and Prevention of Unfair Discrimination Act, the Recognition of Customary Marriages Act, and the Draft Bill for the Amendment of the Customary Law of Succession have all served to create a situation in which indigenous peoples will now be regulated by a "Westernized" system of intestate succession.

The Honorable Yvonne Mokgoro, Justice of the Constitutional Court of South Africa, delivered a paper at the Saint Louis University School of Law in 1997. She concluded the discussion with her optimistic view that, "if customary law can survive the harmonization process, then all skepticism about its continued existence in a human rights legal order should become unnecessary."[285] The following year, Mokgoro again considered the South African conflict between cultural identity and national unity in a paper she delivered at the Southern Methodist University School of Law.[286] Her conclusion this time conceded that "the Bill of Rights exerts a superceding effect on cultural norms, practises [sic], and institutions, severing those features of a culture that are in conflict with the Constitution from the body of the culture and engrafting in their place the values which the Constitution upholds."[287] She then suggested that cultural values that coincide with the Constitution's basic premises will act as a "reinforcement of the required national consensus," and that, "[i]n view of this, the argument that cultural rights are an empty shell – a token offered in the cut and thrust of constitutional negotiations to obtain political consensus from interest groups – may be weakened."[288] Two and a half more years have now passed and it seems that

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285. Mokgoro, *supra* note 64, at 1289.

286. *See* Mokgoro, *The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?*, *supra* note 73.

287. *Id.* at 1560.

288. *Id.* at 1560-61.

the arguments can no longer be weakened. Intestate Succession is one example of proof that cultural rights are indeed an empty shell. Regardless of the light under which South Africans view the reforms, for better or for worse, it is apparent that indigenous cultures are once again being told to discard what they know and to accept what others wish to thrust upon them. This they have done since 1652.

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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]

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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.

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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/sierra1.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

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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

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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]

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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 Callenges of Poverty Reduction and Sustainability, ¶¶ 43-45, *available at* http://www.un.org/Depts/eca/divis/espd/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.intlcrisi...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 Stevens[26] 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]

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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)

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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

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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

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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) [herinafter *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]

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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

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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 conflicts[69] 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

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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]

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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 Tribunal[82] (commonly referred to as the "Nuremberg Charter") for the Prosecution and Punishment of Major War Criminals of the European Axis[83] 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

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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

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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]

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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* BASSIONI, 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

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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]

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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

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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

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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.

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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 Court[141] 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

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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

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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]

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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

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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 interests[168] and to provide the necessary guarantees of juvenile justice.[169] The

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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

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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]

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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.

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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

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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.

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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]

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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

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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 judges[229] 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 Commonwealth[232] 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]

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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/htm/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/htm/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

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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* wysiwyg://mainframe.17/http://Washington...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

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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

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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-l/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

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268. *See Mission Report, supra* note 30, ¶¶ 23, 30, 42-43 (discussing the need to curb the contribution of illegally mined diamondsto 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 volition[274] —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 justice[275] 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

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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

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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 /w980325a.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

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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

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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 Rawandan 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

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297. *See* M. Cherif Bassiouni, *From Versailles To Rwanda In Seventy-Five Years: The Need To Establish A Permanent International Criminal Court*, 10HARV. 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

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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.

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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 contraposition 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.

Jeana Webster[*]

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313. BASSIONI, 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.

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