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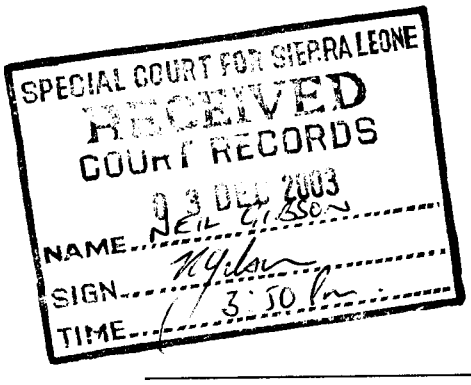
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 3 December 2003



THE PROSECUTOR

Against

MORRIS KALLON

CASE NO. SCSL – 2003 – 07 – PT

PROSECUTION RESPONSE TO THE FURTHER WRITTEN SUBMISSIONS ON BEHALF OF MORRIS KALLON (LOMÉ ACCORD)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

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PROSECUTION RESPONSE TO THE FURTHER WRITTEN SUBMISSIONS ON BEHALF OF MORRIS KALLON (LOMÉ ACCORD)

I. INTRODUCTION

1. The Prosecution files this response to the Defence document entitled "Further Written Submissions on Behalf of Morris Kallon—Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord" (the "**Further Submissions**"), dated 26 November 2003 and filed on behalf of Morris Kallon (the "**Accused**") on 28 November 2003.[1]

2. The Further Submissions add very little to the extensive oral and written arguments that have already been presented on the alleged legal effect of Article IX of the Lomé Accord. The Prosecution's previous oral and written submissions provide a response to the Further Submissions.

3. The Further Submissions assert, as a general proposition, that while amnesties may lead to impunity, "they can also lead to the cessation of hostilities and spare many

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[1] Registry Page ("RP") 3070-3079.

thousands of people from endless suffering".[2] The Further Submissions state that it is for this reason that States have "from time to time" used amnesties to bring an end to armed conflict.[3]

4. The Prosecution does not dispute that in certain circumstances the granting of an amnesty to participants in an armed conflict may facilitate the ending of that armed conflict. For instance, it can readily be imagined that the combatants in a rebel force fighting against the government of a State in a civil war would be more easily persuaded to lay down their arms if they could be assured that they would not be prosecuted for crimes under national law, such as sedition or treason, for having taken up arms against their government. This may well be the effect of treaty provisions such as Article 6(5) of Additional Protocol II to the Geneva Conventions of 1949, which States that "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".[4]

5. However, this in no way answers, or even addresses, the question whether an amnesty can lawfully be granted for crimes under international law (as opposed to crimes under national law). In particular, it does not address the question whether the government of a State can grant an amnesty for crimes under international law that is effective within the sphere of international law (as opposed to the sphere of national law). The examples referred to in paragraphs 4 and 5 of the Further Submissions did not concern crimes under international law (as opposed to crimes under national law).

6. In the very short term, the granting of an amnesty for crimes under international law may facilitate the termination of a specific armed conflict. Participants in an armed conflict who have committed crimes under international law may be more easily

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2 Further Submissions, para. 1.

3 *Ibid.* The subsequent paragraphs of the Further Submissions seek to develop this argument.

4 Having said that, it may be that the purpose behind the adoption of Article 6(5) of Additional Protocol II was not to facilitate the cessation of hostilities as such, but to facilitate the reestablishment of normal relations in the life of a nation *after* the cessation of hostilities: see the International Committee of the Red Cross's Commentary on this provision of Additional Protocol II: "4618 The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided" (http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/c6692eb184b56f56c12563cd0043a476?OpenDocument).

persuaded to lay down their arms if they could be assured that they would not, upon doing so, be prosecuted for crimes under international law committed during the conflict. However, in the longer term, the granting of such amnesties may in fact *encourage* the commission of crimes under international law. Participants in an armed conflict are far more likely to commit crimes under international law if they believe that (1) they will never be prosecuted for such crimes if they win the war, and (2) that if they lose the war, they could negotiate an amnesty for such crimes as part of any peace settlement. Thus, in the long term, a practice of granting amnesties for crimes under international law can be expected to cost more lives than it will save in the short term. In order to deter the commission of such crimes under international law in armed conflict, it is necessary for potential perpetrators to know that they may be called to account for such crimes, whether they win or lose the conflict.

7. One commentator has summed up this equation as follows:

> "Justice and accountability, on the one hand, or impunity, on the other, are not new options for post-conflict societies. They have often been faced with the choice between declaring amnesty in the name of reconciliation, or punishing crimes in order to help those who have suffered to overcome the past and look towards the future. The answer in the past, out of political convenience or otherwise, has also often resulted in impunity even for the most horrendous atrocities.
>
> Different schools view the options in a variety of ways. The liberal approach is that there will be no durable peace without justice, while the so-called realist approach is more sceptical of the ability of the law to play a productive role in international relations. The main arguments in favour of choosing punishment can be summarised as purging threatened leaders, deterring war criminals, rehabilitating former enemy countries, placing the blame for atrocities on individuals rather than on whole ethnic groups, and establishing the truth about wartime atrocities. All of these would promote peace and security, at least in the longer term. The risk, as held out by so-called realists, is that war crimes trials will perpetuate a war or destabilise post-war efforts to build a secure peace. Hence, the choice has been distinguished as one between peace and accountability or, in more practical terms, between justice and forgetting.
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> However, history shows that the choice is rather between justice and vengeance. A culture of impunity may in itself be a contributing factor to atrocities being committed. But individual responsibility may absolve the perception of collective guilt by one group against another in

> societies subjected to decades of incitement to ethnic hatred and violence.
>
> Hence, it has been recognised in recent years that it is necessary to combat cultures of impunity in order to promote long-term reconciliation, peace and democracy. Traditional principles of international relations, such as state sovereignty and non-interference in internal affairs, are being undermined by values to which civil society attaches even greater importance. Quick results should not be expected, however, since the importance of law and courts in post-conflict transitions is a long-term proposition."[5]

8. Thus, as another commentator has said in the Review of the International Committee of the Red Cross:

> "While humanitarian law does provide for amnesties in relation to high intensity non-international armed conflict — the 1977 Protocol II additional to the Geneva Conventions stipulates that at the end of hostilities the authorities "shall endeavour to grant the broadest possible amnesty" — the provision in question has generally been taken to refer only to offences for which amnesty was possible, and thus not to the most serious breaches of the Protocol. The category of those benefiting could be expected therefore to correspond closely to those who would have "combat immunity" in international armed conflicts, and who would as such therefore be entitled to release at the conflicts' end."[6]

9. Consistently with this reality, as long ago as 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and CrimesAgainst Humanity[7] declared that no statutory limitation shall apply to specified war crimes or crimes against humanity, irrespective of the date of their commission.[8] The granting of any amnesty in respect of such crimes would be inconsistent with this provision[9]

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5 Hokan Friman, "The DemocraticRepublic of the Congo: Justice in the Aftermath of Peace?" (2001) 10 *African Security Review* (http://www.iss.co.za/PUBS/ASR/10NO3/Friman.html) ("**Friman**").

6 Colm Campbell, "Peace and the laws of war: the role of international humanitarian law in the post-conflict environment" (2000) *International Review of the Red Cross* No. 839, p. 627-651 (footnotes omitted) (http://www.helpicrc.org/web/eng/siteeng0.nsf/iwpList106/4699BA5AE056143AC1256B66005F00E8).

7 G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (http://www1.umn.edu/humanrts/instree/x4cnaslw.htm).

88 *Ibid.*, Article 1.

9 See e.g. Mertens [in *"L'imprescriptibilité des crimes de guerre et contre l'Humanité", Univ. de Bruxelles, 1974, p. 226*] ("Laws of oblivion (such as amnesty laws) are considered not permissible for crimes perpetrated against a community, nations, and humanity. By their nature, such crimes are not subject to statutes of limitation. If for technical reasons related to the current status of the evolution of positive law, such crimes cannot be repressed

10. This is reflected in international practice in relation to various conflicts.

11. In the case of the conflict in the former Yugoslavia, Article VI of Annex 7 of the Peace Agreement signed in Paris on 14 December 1995 stated that:

> "Any returning refugee or displaced person charged with a crime, ***other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991*** or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty."[10]

Thus, it has been observed by one commentator that this Peace Agreement "did not interfere with or impinge in any way upon the work of the Tribunal. It should be seen as having the purpose of satisfying Article 6(5) of Additional Protocol II, and thereby confirming that Additional Protocol II contemplates amnesty only for having participated in the fighting, and not for having committed violations of international humanitarian law while so participating."[11]

12. In relation to the conflict in Rwanda, a report of the United States Institute of Peace Report dated January 1995, dealing with the establishment of the International Criminal Tribunal for Rwanda, stated that:

> "Participants in the Institute's conference, including Prime Minister Twagiramungu, emphatically argued that any broad-based amnesty for the April-July atrocities, proffered in the name of national reconciliation, would only perpetuate the culture of impunity in Rwanda, facilitating new rounds of violence. The best way to deter potential perpetrators of genocide in Rwanda--and Burundi--is to clearly and firmly replace that culture with one of individual accountability for participants in such crimes".[12]

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beyond the internal arena, then they must be repressed in accordance with international law, recognizing it preeminence over national law") (as quoted in Joan Garces, "Pinochet, Before the High Court of Spain and International Criminal Law", translated by Memoria y Justicia (http://www.memoriayjusticia.cl/english/en_issues-garces.html))

[10] Quoted in John RWD Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia" (1996) 2 European Journal of International Law 226 (http://www.ejil.org/journal/Vol7/No2/art6-01.html) (emphasis added).

[11] John RWD Jones, *ibid.*

[12] United States Institute of Peace, Special Report 13, "Rwanda: Accountability for War Crimes and Genocide", January 1995 (http://www.usip.org/pubs/specialreports/early/rwanda2.html#trialrwa).

13. In relation to the conflict in the Democratic Republic of the Congo, paragraphs 9.1 and 9.2 of the 10 July 1999 Lusaka Peace Agreement, signed by the parties to the conflict, provided that:

> "9.1 The JMC [Joint Military Commission] with the assistance of the UN/OAU shall work out mechanisms for the tracking, disarming, cantoning and documenting of all armed groups in the DRC, including the ex-FAR, ADF, LRA, UNRF II, Interahamwe, FUNA, FDD, WNBF, UNITA, and put in place measures for:
>
> - Handing over to the UN International Tribunal and national courts, mass killers and perpetrators of crimes against humanity;
> - Handling of other war criminals.
>
> 9.2 The parties together with the UN and other countries with security concerns, shall create conditions conducive to the attainment of the objective set out in 9.1 above, which conditions may include the granting of amnesty and political asylum, except for *genocidaires*. The parties shall also encourage inter-community dialogue."[13]

14. With reference to this Agreement, the Secretary-General of the United Nations stated that he was "encouraged in this respect by the provision in the ceasefire agreement that permits the countries of origin of members of armed groups to take themselves all the necessary measures to facilitate repatriation, including the granting of amnesty (***except to persons suspected of crimes against humanity or genocide***)".[14]

15. The Statute of the Special Court, in providing that an amnesty shall not be a bar to prosecution before the Special Court, is simply a further example of the same practice.[15]

16. Paragraphs 6-7 of the Further Submissions refer to a proposal by the United Kingdom Government earlier this year to grant an amnesty to Saddam Hussein for war crimes in order to resolve the Iraq crisis by peaceful means. However, no such amnesty was ever granted, and the proposal for such an amnesty did not avoid military action in

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[13] Quoted in Friman.

[14] "Report of the Secretary-General on the United Nations Preliminary Deployment in the Democratic Republic of the Congo", UN Doc. S/1999/790, 15 July 1999, para. 24 (emphasis added).

[15] See Human Rights Watch, "Sierra Leone—'We'll Kill You if You Cry'—Sexual Violence in the Sierra Leone Conflict", January 2003 (http://hrw.org/reports/2003/sierraleone/) ("Under international law, states have an *erga omnes* obligation-in other words a duty owed to the whole international community-to investigate and prosecute crimes against humanity, genocide and torture even if this means that amnesty laws are in effect annulled. This means that Sierra Leone therefore has an obligation under international law to prosecute those who committed crimes against humanity and torture, irrespective of the Lomé Amnesty and the setting up of the SCSL").

Iraq. At the time that this amnesty was proposed, Human Rights Watch expressed the view that offering amnesty to those responsible for the worst crimes would be inconsistent with the United States' and United Kingdom's international legal obligations and could undermine efforts to promote the rule of law and stability in Iraq.[16]

17. Paragraph 8 of the Further Submissions refers to the 18 August 2003 Peace Agreement between the Government of Liberia, LURD, MODEL and Political Parties, Article 34 of which provides that the National Transitional Government of Liberia shall "give consideration" to a "recommendation" for a general amnesty to all persons and parties involved in the conflict in Liberia. However, that Agreement did not actually purport to confer such an amnesty. It certainly did not in any way suggest that any such amnesty would extend to crimes under international law. With specific reference to that Agreement, Amnesty International said that "There can be no amnesty for war crimes, crimes against humanity and other serious violations of international humanitarian law ... Those responsible for crimes under international law must be brought to justice."[17]

18. Paragraphs 9-21 of the Further Submissions set out an argument to the effect that, even if an amnesty in respect of crimes under international law is not binding on international tribunals, foreign States, or subsequent regimes in the State that granted the amnesty, the amnesty is nonetheless still binding on the regime which actually granted the amnesty.

19. The Prosecution submits that this argument lacks any basis in logic or principle. If, as the Prosecution contends, it is not possible to grant an amnesty for crimes under international law, it follows that any such purported amnesty is of no legal effect at all. The purpose of the prohibition on such amnesties, referred to in paragraph 6 above, would be at least in part defeated if such amnesties were binding (as a matter of international law) on the regimes which granted them. Furthermore, if a person

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[16] Human Rights Watch, "Iraq: No Amnesty for Mass Murderers", 3 July 2003, (http://www.hrw.org/press/2003/07/iraq070303.htm).

[17] Amnesty International Press Release, AI Index: AFR 34/023/2003, 24 November 2003 (http://www2.amnesty.se/aidoc/press.nsf/0/80256DD400782B8480256DE8005D42F8?opendocument).

can be prosecuted for crimes under international law, notwithstanding the grant of any amnesty, by international tribunals, foreign States, or subsequent regimes in the State that granted the amnesty, no purpose would be served by any prohibition on prosecution by the regime which granted the amnesty. In any event, the Accused in this case is prosecuted by an international tribunal (the Special Court), and not by the "regime" that granted the amnesty in the Lomé Agreement.

20. Paragraphs 22-25 of the Further Submissions argue that because Article 10 of the Special Court Statute only provides that an amnesty shall not be a "bar to prosecution", it remains open to a Chamber to find that a prosecution of a person who has been granted an amnesty is nonetheless an abuse of process or a defence.

21. The Prosecution submits that the logic of this argument is difficult to understand and should in any event be rejected on its merits. If a purported grant of amnesty is not a bar to *prosecution*, it is submitted that any prosecution in the circumstances cannot be an abuse of process. How the grant of an amnesty could be a substantive *defence* is not explained in the Further Submission.

22. Paragraphs 26-27 of the Further Submissions argue that the Prosecution has a discretion who to prosecute. The Further Submissions appear to suggest that those who disarmed pursuant to the Lomé Accord should benefit from an exercise of the discretion not to prosecute. The Further Submissions then appear to go further, to suggest that the Chamber should enforce the exercise of the Prosecutorial discretion in this manner.

23. The Prosecution submits that if as a matter of law an amnesty cannot be granted for crimes under international law, there is no reason why a person who committed such crimes should not be prosecuted. The fact that an accused complied with the terms of a peace accord might in some sense be relevant to sentencing, although this is a matter that is unnecessary to be decided for the purposes of this preliminary motion. However, if an amnesty cannot be granted for crimes under international law, compliance with any peace agreement conferring such amnesty can hardly be a fetter on the prosecutorial discretion.

24. Accordingly, the Prosecution submits that the preliminary motion should be rejected in its entirety.

Freetown, 3 December 2003.

For the Prosecution,

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Appellate Counsel

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PROSECUTION INDEX OF AUTHORITIES

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6. United States Institute of Peace, Special Report 13, "Rwanda: Accountability for War Crimes and Genocide", January 1995 (http://www.usip.org/pubs/specialreports/early/rwanda2.html#trialrwa).

7. Human Rights Watch, "Sierra Leone—'We'll Kill You if You Cry'—Sexual Violence in the Sierra Leone Conflict", January 2003 (http://hrw.org/reports/2003/sierraleone/)

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9. Amnesty International Press Release, AI Index: AFR 34/023/2003, 24 November 2003 (http://www2.amnesty.se/aidoc/press.nsf/0/80256DD400782B8480256DE8005D42F8?opendocument).

10 . Joan Garces, 'PINOCHET, Before the High Court of Spain and International Criminal Law",Translated by Memoria y Justicia

Annex 1

Hokan Friman, "The DemocraticRepublic of the Congo: Justice in the Aftermath of Peace?" (2001) 10 African Security Review http://www.iss.co.za/PUBS/ASR/10NO3/Frirnan.html) ("Friman").

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The Democratic Republic of Congo

Justice in the aftermath of peace?

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The armed conflict in the DRC has been characterised by appalling, widespread and systematic human rights violations. It varies from civil war to a war between national armies. Much of the conflict falls between these two categories due to the involvement of foreign troops in civil strife, as well as foreign rebel groups fighting their home government's troops but on Congolese soil. The most pressing need is to cease hostilities and address the humanitarian situation in the country. Questions of justice and accountability, and issues relating to the rule of law will have to be addressed soon in order to achieve a durable peace in the country and in the region. Since there are links between different conflicts in the region, a broader solution should preferably be found. However, this would further complicate an already difficult proposition. Efforts limited to the DRC would be more feasible and could lead to similar measures in other conflict ridden countries in the region. This essay therefore discusses the available processes for justice.

Introduction

The armed conflict in the Democratic Republic of Congo (DRC), consisting of a number of armed conflicts with various participants, has been characterised by appalling, widespread and systematic human rights violations, including mass killings, ethnic cleansing, rape and the destruction of property.[1] At least six national armies and 21 irregular armed groups have been involved. The armed conflict varies from civil war to an outright war between national armies, the latter thus international in nature. Additionally, much of the conflict falls between these two categories due to the involvement of foreign troops in civil strife, as well as foreign rebel groups fighting their home government's troops but on Congolese soil.

The most pressing need right now is to cease the hostilities and to address the appalling humanitarian situation in the DRC. Nonetheless, questions of justice and accountability, as well as broader issues relating to the rule of law will have to be addressed sooner rather than later in order to achieve a durable peace in the country and also in the Great Lakes region, in general. Since there are obvious links between different conflicts in the region — with the DRC being affected by most of them — a broader solution should preferably be found. However, such an aim in itself would add further complexity to an already difficult proposition and probably make any effort implausible. Instead, efforts limited to the DRC would be more feasible to strive for and, if reasonably successful, these could later lead to similar measures being taken in other conflict ridden countries in the region, thus together

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creating a greater whole.[2]

The purpose of this essay is therefore to discuss the available processes for justice. Various government institutions and non-governmental organisations (NGOs) have reported that violations of human rights and international humanitarian law were committed in the conflict. A survey and analysis of the violations fall outside of the scope of this essay, but the material clearly provides primary evidence that both general human rights and rules of international humanitarian law have been violated.

Trends against impunity

Justice and accountability, on the one hand, or impunity, on the other, are not new options for post-conflict societies. They have often been faced with the choice between declaring amnesty in the name of reconciliation, or punishing crimes in order to help those who have suffered to overcome the past and look towards the future. The answer in the past, out of political convenience or otherwise, has also often resulted in impunity even for the most horrendous atrocities.

Different schools view the options in a variety of ways. The liberal approach is that there will be no durable peace without justice, while the so-called realist approach is more sceptical of the ability of the law to play a productive role in international relations. The main arguments in favour of choosing punishment can be summarised as purging threatened leaders, deterring war criminals, rehabilitating former enemy countries, placing the blame for atrocities on individuals rather than on whole ethnic groups, and establishing the truth about wartime atrocities. All of these would promote peace and security, at least in the longer term. The risk, as held out by so-called realists, is that war crimes trials will perpetuate a war or destabilise post-war efforts to build a secure peace. Hence, the choice has been distinguished as one between peace and accountability or, in more practical terms, between justice and forgetting.

However, history shows that the choice is rather between justice and vengeance.[3] A culture of impunity may in itself be a contributing factor to atrocities being committed. But individual responsibility may absolve the perception of collective guilt by one group against another in societies subjected to decades of incitement to ethnic hatred and violence.

Hence, it has been recognised in recent years that it is necessary to combat cultures of impunity in order to promote long-term reconciliation, peace and democracy. Traditional principles of international relations, such as state sovereignty and non-interference in internal affairs, are being undermined by values to which civil society attaches even greater importance. Quick results should not be expected, however, since the importance of law and courts in post-conflict transitions is a long-term proposition.

Trends in international law

International crimes

Traditionally, a distinction is made between *human rights* and *humanitarian law.* While the former are applicable both in peace and war (and not necessarily humanitarian), the latter is mainly aimed at war. There are important overlaps, however, and humanitarian law is currently also considered to encompass human rights of a humanitarian nature, for example, the ban on torture and the right to life, freedom and personal security. Furthermore, the trend against requiring a nexus between crimes against humanity and an armed conflict —such crimes can also be committed in peace time — is another example of a merger of the two fields of law.

General human rights treaties, such as the International Covenant on Civil and Political

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Rights, do not explicitly prescribe a duty to punish violations. Instead, such treaties entail obligations such as to "respect and ensure" or to provide "effective remedies". Conversely, some more specific human rights treaties, primarily the 1984 Torture Convention, both outlaw torture and require states parties to make violations punishable under domestic law and to take measures to establish jurisdiction over such crimes committed within its territory or when either the offender or the victim is a citizen of such a state. Additionally, it has been argued that states are also compelled under international customary law to punish other particularly serious human rights violations, such as extra-judicial killings and disappearances.

While international humanitarian law is primarily directed towards states, which are obliged to ensure that the rules are implemented and followed, it is also directed at individuals, who may be individually held accountable for violations of the provisions. Important treaties have been concluded in this regard.

The 1907 Hague conventions contain rules restricting the conduct of war, particularly between combatants in the field, while the 1949 Geneva conventions and their two additional protocols provide humanitarian protection for certain groups of persons who do not (or no longer) participate in the conflict, such as prisoners of war and - very importantly - civilians. The Geneva conventions explicitly oblige states to search for, prosecute or punish the offenders of certain crimes, so-called *grave breaches*. However, so-called *other violations of the rules and customs of war,* as well as all war crimes applicable in non-international conflicts do not fall within this category.

Hence, there is a distinction between international and non-international armed conflicts (civil wars), with the list of crimes more restricted in the case of the latter. This legal dichotomy complicates the application of the law and may lead to unsatisfactory conclusions with respect to civil wars. There is a trend to move away from this differentiation towards the much more compelling grave breaches regime operating regardless whether the armed conflict is international or internal. However, customary international law is probably not there yet. Nonetheless, the case law of the international criminal tribunals[4] and developments in national jurisdictions have widened the scope of violations that can also be committed in civil wars.

Genocide is codified in the 1948 Genocide convention, which also explicitly obliges the states in the territory on which the crime was committed to prosecute the offender. The different acts that constitute the crime, which can be committed either in times of peace or war, are defined in the convention.

War crimes, genocide and torture are also considered as forming part of customary international law and are thus binding for all states irrespective of the state being a party to the convention or not. In respect of war crimes committed in a civil war, however, the status of at least some of the crimes set forth in the additional protocols is less certain.

More complex crimes, which have only recently been comprehensively codified, are the crimes against humanity.[5] These crimes have long been considered crimes under customary international law, but their exact extent has been (and still is) disputed. Crimes against humanity which, among others, relate to acts against civilians such as murder, extermination, enslavement and torture, are applicable both in peace and war time. These generally have to occur to a significant extent in order to distinguish them from more ordinary crimes, and must form part of a greater campaign of atrocities.

No widely recognised formula for individual criminal responsibility for a 'crime of aggression' has yet been developed.

Enforcement

Today, the structure of constraining rules and principles is largely complete, although admittedly with varying degrees of clarity. The remaining and more arduous task is to

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ensure enforcement of these rules and principles. In general, the international procedural law imposing a duty to prosecute is more limited than the substantive law establishing international crimes.

The primary responsibility rests with states. International law permits each state to exercise jurisdiction over the above international crimes, but it does not necessarily compel them to do so. Genocide, torture and certain war crimes, those grave breaches committed in an international armed conflict, clearly fall within the category of crimes that every state is obliged to punish or, alternatively, to extradite the offender (*aut dedere aut judicare*). The trend is to view this obligation as applicable regardless of the nationality of the offender or the place where the crime in question had been committed (universal jurisdiction). However, the situation is less certain regarding the other crimes mentioned, but there is a definite trend towards extending the duty also to try to extradite violators of such crimes. For example, strong arguments have been made in favour of such a duty in respect of crimes against humanity.

In practice, however, impunity remained the rule and legal proceedings the exception. Hence, international enforcement mechanisms have been discussed. The Nuremberg and Tokyo tribunals set important precedents after World War II, but the Cold War hampered subsequent attempts to create a permanent international court. Today, however, international enforcement mechanisms in different parts of the world, for example, in the Balkans, Rwanda, Sierra Leone, Cambodia and East Timor, signify a trend against impunity for systematic perpetrators of atrocities. The trend indicates that the question is rather by whom and according to what standards prosecution of international crimes should be undertaken, than whether such measures should be taken at all. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were reactions by the international community to the horrendous crimes that were committed in two particular conflicts. They have paved the way for an International Criminal Court (ICC), which will enter into force when 60 states have ratified its statute.[6]

Besides various international initiatives, there is a growing state practice with regard to the national prosecutions of foreigners for international crimes committed abroad. This is based upon the principle of universal jurisdiction. The Pinochet extradition case in the United Kingdom represents a prime example that sets in motion a debate on the limits of the immunities of current and former heads of state. Other examples are the arrest in early 2000 in Senegal of Hissène Habré, the former head of state of Chad, and the international arrest warrant for "grave violations of international humanitarian law", issued by a Belgian judge against the DRC's then Minister of Foreign Affairs, Mr Yerodia Adboulaye Ndombasi. The latter is now being challenged by the DRC before the International Court of Justice.[7]

Another modern trend in societies in transition to democracy or in the aftermath of civil war is the institution of truths-eeking mechanisms and institutions, such as formal truth commissions. The most elaborate example is probably the Truth and Reconciliation Commission in South Africa (TRC), but other prominent examples can also be found in different parts of the world.

The Security Council and the DRC

The UN Security Council has long been engaged with the conflict in the DRC. Already in November 1996, the Security Council concluded that the continuing deterioration of the situation in the eastern part of the country (then Zaïre) constituted a threat to international peace and security in the region and thus called for action under Chapter VII of the UN Charter.[8] This conclusion, now extended to the situation in the whole of the DRC, was reiterated in April 1999.[9] The Council specifically called upon all parties to protect human rights and respect international humanitarian law and for an international investigation into massacres and other atrocities to be conducted with a view to bring those responsible to justice.

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On 10 July 1999, the DRC government and other parties to the conflict signed the Lusaka cease-fire agreement. The fighting nevertheless continued and, in August 1999, the Security Council authorised the deployment of UN military liaison personnel in the DRC.[10] In November 1999, the United Nations Organization Mission in the Democratic Republic of Congo (MONUC) was authorised.[11]

By the November 1999 resolution, the Security Council requested the Secretary-General to keep the Council regularly informed and to submit reports and recommendations on the situation in the DRC. So far, the Secretary-General has submitted seven reports, which have all referred to continued violations and abuses of human rights and international humanitarian law. The Security Council has taken note of this in a series of resolutions. The Council has also amended the mandate of MONUC. It is notable, however, that the mandate has not been extended to allow for assistance in any prosecution of the perpetrators of such crimes. Neither has any such move been recommended by the Secretary-General in his reports. Instead, MONUC has been tasked with human rights monitoring and humanitarian assistance.[12]

The Security Council has also repeatedly called for all parties to the conflict to protect human rights and respect international humanitarian law, bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law. The Council has also reminded all parties of their obligations with respect to the security of civilian populations under the Fourth Geneva Convention (relative to the Protection of Civilian Population in Time of War) and stressed that "occupying forces should be held responsible for human rights violations in the territory under their control."[13]

In its latest resolution, the Council stressed "that those responsible will be held accountable."[14] MONUC's mandate was also expanded to include a civilian police component and an integrated civil-military section to co-ordinate operations relating to "disarmament, demobilisation, repatriation and reintegration," as well as an expanded civilian component to deal with, among others, the monitoring of human rights.

In conclusion, the Security Council has noted and condemned violations of human rights and international humanitarian law throughout the DRC conflict, but not yet indicated any international measures to curb the culture of impunity besides investigating the situation. No commission of experts or international commission of inquiry has been established, measures that have normally preceded initiatives for UN-sanctioned adjudication of international crimes. Instead, the Council has clearly indicated that the parties to the conflict have the primary obligation to institute the necessary measures to bring the violators to book. MONUC's mandate for assisting in such a process is so far very modest.

Lusaka cease-fire agreement

On 10 July 1999, the DRC government and the other parties to the conflict signed the Lusaka cease-fire agreement. The main aspects of the agreement included the immediate cessation of hostilities, withdrawal of foreign forces, deployment of the UN peacekeeping force (MONUC), a new democratic dispensation in the DRC, the disarming, cantoning and documenting of all armed groups, and measures to hand over mass killers and perpetrators of crimes against humanity to the ICTR and to national courts.[15]

After initially being constantly violated, the cease-fire is now taking effect, foreign troops are withdrawing and the deployment of MONUC has begun. With the accession of Joseph Kabila as president of the DRC in January 2001, there is at present new hope for the implementation of the agreement. But violations of the cease-fire still occur.

Already in the preamble to the Lusaka agreement, the parties declare their determination to ensure respect for the 1949 Geneva conventions and the 1977 additional protocols, as well

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as the 1948 Genocide convention. The modalities of the implementation of the agreement are further specified in annex A which, among others, entails provisions on issues such as the cessation of hostilities, disengagement, the orderly withdrawal of all foreign forces, national dialogue and reconciliation, the UN peacekeeping mandate and, important for the issue now at hand, what has been labelled 'disarmament of armed groups'. A Joint Military Commission (JMC) has been instituted.

The latter provisions, given in Chapter 9 of Annex A, read as follows:

> "9.1 The JMC with the assistance of the UN/OAU shall work out mechanisms for the tracking, disarming, cantoning and documenting of all armed groups in the DRC, including the ex-FAR, ADF, LRA, UNRF II, Interahamwe, FUNA, FDD, WNBF, UNITA, and put in place measures for:
>
> - Handing over to the UN International Tribunal and national courts, mass killers and perpetrators of crimes against humanity;
> - Handling of other war criminals.
>
> 9.2 The parties together with the UN and other countries with security concerns, shall create conditions conducive to the attainment of the objective set out in 9.1 above, which conditions may include the granting of amnesty and political asylum, except for *genocidaires*. The parties shall also encourage inter-community dialogue."

It is interesting to note that these provisions seem to address only armed groups other than those who are signatories to the agreement. Neither the DRC and the other states involved, nor the participating rebel groups — the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (MLC) — are explicitly mentioned. Together with the title of this chapter, one interpretation could be that the provisions, and thus accountability for crimes, are intended to apply only to non-signatory armed groups. However, such an interpretation would lead to illogical and unfair results. A better interpretation would be to focus on the expression "all armed groups in the DRC, including ..." and thus to draw the conclusion that all armed forces should be covered.[16]

Furthermore, the provisions indicating punitive justice should be read in conjunction with other provisions on "national dialogue and reconciliation", particularly the Inter-Congolese Dialogue (ICD). These provisions are more general in nature and focus more on the modalities for the ICD than on the substance. While an important process in achieving sustainable peace, the provisions offer little explicit indications of justice as an element for reconciliation. Nevertheless, bearing the South African experience in mind, the task of elaborating a draft constitution, which shall govern the DRC after the holding of elections, could well entail negotiations on, for example, a truth and reconciliation commission.

What could be done?

The international community has traditionally taken different routes in responding to violations of human rights and international humanitarian law. The prevailing reaction has been to do nothing. As described above, however, there is a definite trend to move against impunity in an effort to provide long-term prospects of peace and democracy.

Other options on a national level are:

- the institution of national prosecutions
- the granting of amnesty; and
- the creation of truth commissions.

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In addition or as an alternative, international measures may be taken, such as:

- assistance in national prosecutions; and
- the creation of international tribunals.

Recently, combinations of different national and international measures have been developed and one interesting new option is the creation of hybrid tribunals with national and international elements.

These options will be examined with regard to the conflict in the DRC. In respect of the creation of international tribunals, the impact of the soon to be established ICC will be briefly discussed.

National prosecutions

The DRC and other states involved in the conflict are parties to a number of important international treaties. For example, the DRC is party to the 1948 Genocide convention, the 1949 Geneva conventions and additional protocol I relating to the Protection of Victims of International Armed Conflict, but not to additional protocol II relating to the Protection of Victims of Non-International Armed Conflict.[17] Furthermore, the DRC is party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the 1984 Torture Convention, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child,[18] as well as to the African Charter on Human and Peoples' Rights.

Hence, the DRC is under international obligation to take legal action against many of the crimes that have been committed in the conflict. National laws are also available, in particular Law No 8-98 adopted on 31 October 1998 by the Congolese Transitional Council, which provides the basis to prosecute genocide, crimes against humanity and war crimes. The DRC and the other parties to the Lusaka agreement have explicitly stated that "mass killers and perpetrators of crimes against humanity" shall be brought before national courts (or, where applicable, the ICTR), while "other war criminals" might be dealt with differently.

However, satisfactory national prosecutions also require sufficient capacity. The existing judicial system in the DRC has been heavily criticised, in particular the Military Court of Justice (*Cour d'ordre militaire*). In one of the reports to the Security Council, the Secretary-General has even concluded that:

> "The human rights situation is further aggravated by a justice system controlled at every level by the State, and unable to grant defendants the most elementary procedural guarantees."[19]

Accordingly, it is unlikely that reliance upon the national judicial system in addressing crimes that should be prosecuted would be a satisfactory option, at least not without substantive international support. The lack of independence suggests that this option would not only require new laws, additional resources and training, but also the establishment of a new judicial culture and maybe also a new breed of prosecutors and judges. Furthermore, it is likely that there are not a sufficient number of qualified defence lawyers available for trials, which is an essential prerequisite for providing fair proceedings.

Amnesties

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The granting of amnesty as a political tool in a peacemaking process is commonplace. An offer of amnesty may be a necessary bargaining chip in a process where the violators are to relinquish power. South Africa and many Latin American countries are good examples. Additionally, amnesties for past abuses have been granted in countries such as Sierra Leone and Cambodia with the view to end rebellion.

Amnesty, which can be framed differently in legal terms, is intended to block prosecutions of past violations. It is not, however, necessarily equivalent with impunity, for example, foregoing accountability and redress. In both Haiti and South Africa, for example, amnesty has been tied to some kind of accountability process, albeit less intrusive than prosecution. The process may also be linked to prosecutions. In the words of Justice Albie Sachs regarding the South African TRC process:

> "The fact is, it is not a choice between amnesty and prosecution. We had prosecutions in our country. Without the threat of prosecutions, no one would have come forward to ask for amnesty."[20]

Much debating has occurred in recent years over the limits for granting amnesties for past human rights violations and crimes under international law. Particularly in respect of crimes such as genocide, crimes against humanity and war crimes, as well as torture, strong opinions have been expressed against amnesties. For example, the UN Secretary-General has expressed in many instances — also in respect of the DRC[21] — that, while amnesties may be a necessary means to facilitate disarmament, demobilisation and the reintegration of former combatants into society, it is not an option for crimes like genocide and crimes against humanity.[22] In the Burundi peace process, amnesty has been ruled out in respect of all acts of genocide, crimes against humanity and war crimes.

To what extent international law prohibits amnesty is debatable. It is clear, however, that there is a distinct move towards restricting the violations for which international law allows amnesty and that unconditional or blanket amnesty is no longer an acceptable option.

This development affects the legal status of amnesties. Even in countries where amnesty has been granted, the scope has subsequently been debated. Criminal investigations and even prosecution have sometimes followed irrespective of amnesties granted, for example, in Argentina and Chile. Linked to this is the extent to which domestic amnesties should also be recognised by other states, thus preventing crimes from being prosecuted and punished by foreign courts and international tribunals. National prosecutions have taken place in foreign states in spite of amnesty laws (Pinochet), and the ICTY has held that amnesties for torture are null and void and will not receive foreign recognition.[23] Thus, national amnesty did not hinder international prosecution. In Sierra Leone, the granting of "absolute and free pardon" for war crimes and crimes against humanity in the Lomé peace agreement has not barred the work of setting up a special tribunal. Realising this development, the South African TRC appealed in its final report of October 1998 to the international community to recognise the amnesty process regarding apartheid, also as a crime against humanity.

The DRC's Lusaka cease-fire agreement foresees amnesty as a possible option, except for *genocidaires*. The compatibility of this provision with international law depends on how it is operationalised by the parties. Both the violations and the processes are here of importance.

Truth commissions

The most extensive example of a truth commission is probably the South African TRC, but good examples can also be found elsewhere. The task of such a body is to investigate a past history of human rights violations in a particular country and the process may be purely domestic or sponsored internationally. The purpose is to acknowledge the truth of the past conflict officially, to facilitate political transition, to improve human rights and

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practices, to reduce the risk of future violations, as well as to promote reconciliation. Preferably, reparations to victims are attached to the process. A truth and reconciliation process, however, must not necessarily be linked to the granting of amnesty, although this is commonly the case.

Truth commissions, which have been the focus of much political science and social research also have limitations. Commentators disagree about whether they help to promote national reconciliation or create further resentments and open old wounds. They have increasingly been the focus of political science and social research. Nevertheless, they have become increasingly popular and common in transitional and post-war societies.

A truth and reconciliation process may run parallel with international prosecutions. This is applicable in the case of the conflicts in Bosnia-Herzegovina, Serbia and Rwanda for which international tribunals have been established. Such commissions are furthermore on the table in Sierra Leone, Cambodia and East Timor where mixed international and national tribunals are, or may be established.

These domestic processes have been framed differently. The international community and legal commentators have also assessed them with various degrees of approval or disapproval. Issues that are important are popular approval, widespread participation, a broad mandate and broad powers, and the linkage between this process and other processes, such as prosecutions and institutions for investigation of the current human rights situation. It is obvious that a truth and reconciliation process should also be considered in the DRC, in particular, if amnesty is to be granted.

Assistance in national prosecutions

In recent years, the international response to armed conflicts and transitions to democracy has increasingly entailed assistance in the reconstruction (or establishment) of a national legal system. Rwanda, East Timor and Kosovo are prominent examples and different international organisations are developing their skills in reconstructing the legal systems. The aim is to enable the system to provide justice where this cannot be done in accordance with international standards. Often, this has to be done from scratch. One lesson is that the swift establishment of judicial arrangements, even if of an *ad hoc* nature, is important for the creation of the political stability necessary for the development of democratic institutions.[24] Other elements are the training of lawyers and the restoration of the correctional system.

The conclusion is that international assistance would be required to bring the perpetrators in the DRC conflict to book. However, even with international assistance, national prosecutions are a difficult proposition. Maybe the main obstacle is that substantial resources are needed for dealing with widespread atrocities and a large number of perpetrators. An example is Rwanda where numerous suspects are awaiting trial after the genocide and where the backlog of cases is such that the system will never have the capacity to deal with it. Thus, different measures have been taken such as plea-bargaining arrangements and, recently, a system of village courts (*gacaca*) without professional judges. While community involvement could promote reconciliation, concerns have been raised over due process rights and fairness for the accused. Additionally, the experiences of Rwanda also show that assistance, for example in the form of foreign lawyers in national proceedings, is a mixed blessing that has created tensions.

International tribunals

Ad hoc tribunals

A relatively recent reaction by the international community to serious atrocities is the establishment of so-called *ad hoc* tribunals. Only two such tribunals are in place and their

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jurisdiction is limited to very specific crimes against international humanitarian law committed in clearly defined conflicts. They do not have a mandate to address general human rights violations.

Bearing in mind that most armed conflicts today are not international (between states), but rather non-international (civil wars) or mixed (internationalised conflicts), the statutes of the tribunals also include crimes applicable in non-international armed conflicts. The establishment of an *ad hoc* tribunal is thus also a possible option when the conflict is not purely of an international character, as is the case in the DRC.

The tribunals were established by the Security Council under Chapter VII of the UN Charter. This offers the advantage of creating obligations binding on all states, which is particularly important since the tribunals lack a police force for making arrests and conducting investigations on site. The experience is, however, that in spite of the compelling obligations of states to co-operate with the tribunals, good faith efforts by states are necessary for their effective operation. Additionally, the tribunals are given primacy over national jurisdictions. When both the tribunal and a state therefore exercises jurisdiction over a crime, the former has preference. This is also applicable to extradition from a third state. Naturally, such a regime is likely to create tension and this has particularly occurred between the ICTR and Rwanda.

The way in which the ICTR was created, among other reasons, initially led to a negative attitude towards the tribunal among many African states. Nevertheless, the attitude has evolved into active support since the OAU Summit in Harare on 2-4 June 1997. The shift was an acknowledgement of the tribunal's safeguards, independence and competence. This has also lead to repeated calls by the OAU Council of Ministers and other organs on states to ratify treaties of international humanitarian law and punish the violators, among others, hence, the necessary co-operation can today also be expected in Africa.

Accordingly, one solution for bringing the perpetrators of crimes against international humanitarian law to book in the DRC would be for the Security Council to establish a new *ad hoc* tribunal, modelled after the ICTY and ICTR. However, none of the resolutions on the DRC thus far have even hinted in this direction. On the contrary, the Security Council has consistently stressed the responsibility of the parties to the conflict to bring the violators to book. No new *ad hoc* tribunal has been established after the ICTR despite calls for such measures, for example, by Burundi. Instead, the trend has been to elaborate new types of special tribunals. The prospects for a new *ad hoc* tribunal for the DRC must therefore considered to be very bleak.

There is an obvious nexus between the 1994 genocide in Rwanda and the more recent conflict in the DRC. Thus, another hypothetical solution for addressing crimes against international humanitarian law in the DRC conflict could be to extend the present mandate of the ICTR to include war crimes and crimes against humanity committed in the DRC.[25] For many reasons, however, this would also not be a feasible way forward. Besides the political and legal difficulties involved in amending the mandate, the ICTR would need enhanced capacity to tackle such a task.

Irrespective of this, however, the warring parties have committed themselves, through the Lusaka agreement, to hand over "mass killers and perpetrators of crimes against humanity," and thus to co-operate with the ICTR.

International Criminal Court

Ideally, the ICC would be operational and competent to address the serious crimes against international humanitarian law committed in the DRC. As a permanent and global institution, the ICC would have the legitimacy and tools to do so. The ICC will have jurisdiction over genocide, crimes against humanity and war crimes, and in future, possibly also over crimes of aggression. In addition, the reliance upon a single court would enhance coherence in the development of international law by jurisprudence and avoid the potential

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problem stemming from the proliferation of international courts and tribunals. However, the statute of the ICC has not yet entered into force and even if it had, this court will not be competent to try crimes committed before the entry into force of the statute.[26]

It is important to note that the ICC is not intended to substitute national courts. The ICC will not have concurrent jurisdiction with national courts or primary jurisdiction over them, which is a major difference when compared to the ICTY and ICTR. This is called the principle of complementarity and means that the court shall act only when *bona fide* investigations and prosecutions are not carried out by states. Hence, the Rome statute does not exclude the possibility of national prosecutions. Instead, it presupposes that such action takes place and that the states have a duty and responsibility to exercise its criminal jurisdiction over those responsible for international crimes. Furthermore, the ICC's jurisdiction is limited to some of the most serious crimes against international law, while the obligation of states to protect human rights goes much further.

Mixed international and national tribunals

The latest attempt by the international community to address international crimes in a particular conflict is the creation of mixed national and international criminal tribunals. In addition, there are parallel discussions concerning truth and reconciliation processes.

Cambodia

In 1999, a UN Expert Group proposed that an international criminal tribunal for Cambodia, similar to the ICTY, should be established and placed outside of the country. The Cambodian government rejected the proposal and questioned why foreign judges outside of Cambodia should deal with Cambodian perpetrators and victims. Instead, a mixed model was discussed where judges and prosecutors both from Cambodia and from other countries would be used and the proceedings would take place in the country. No formula that satisfies both the Cambodian government and the UN has been reached so far with concerns relating particularly to the risk of the tribunal being hi-jacked by the Cambodian authorities.

Instead, a Cambodian law has unilaterally been elaborated and adopted on 2 January 2001, which establishes so-called extraordinary chambers within the existing domestic court structures.[27] The subject matter jurisdiction of the extraordinary chambers covers genocide, crimes against humanity, grave breaches of the Geneva conventions, destruction of cultural property during armed conflict pursuant to the 1954 Hague convention, and crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations. Additionally, the chambers have jurisdiction over certain crimes under the domestic penal code of Cambodia: homicide, torture and religious persecution.

Besides the location of the trials in Cambodia and the risk of witness safety therefore being compromised, the major criticism of the chambers relates to the organisation of the model. The chambers and the prosecution consist of both Cambodian and international (foreign) officers (judges and prosecutors). However, the chambers would have a majority of Cambodian judges on all levels. Two so-called co-prosecutors, one Cambodian and one international, will be appointed and a complicated formula has been introduced for settling disagreements between them. Another serious concern is that Cambodian judges and prosecutors lack training and independence from the executive powers.

East Timor

A mixed model is already in place as part of the reconstruction process in East Timor. So-

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called *panels of judges with exclusive jurisdiction over serious criminal offences*, established by the United Nations Transitional Administration in East Timor (UNTAET),[28] consist of both international and national judges. The panels are located in one district court and in the Court of Appeal. They have jurisdiction over genocide, war crimes and crimes against humanity, as well as murder, sexual offences and torture, which are defined in the regulation or in the applicable penal code in East Timor. The regulation provides for universal jurisdiction for war crimes, genocide, crimes against humanity and torture, and exclusive jurisdiction over murder and sexual offences committed during a specified period.

Unlike in Cambodia, international judges will here be in the majority. The appointment process is also different. The regulation does not entail any special provisions on prosecutors.

Sierra Leone

In August 2000, the Security Council expressed its deep concern about the serious crimes committed in Sierra Leone and the prevailing situation of impunity. It requested the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent special court.[29] This resulted in a draft statute for a special court for Sierra Leone and a draft agreement between the UN and Sierra Leone.[30] The Secretary-General has not signed these yet, since the funding for the court has not been secured.

Instead of special panels or chambers in the ordinary domestic courts, the Sierra Leone special court is a new extraordinary institution, restricted to trying:

> "those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law ... including those leaders who, in committing such crimes, have threatened the establishment of the peace process in Sierra Leone."

Crimes under the court's jurisdiction include crimes against humanity, violations of article 3 of the Geneva conventions and additional protocol II (in civil wars), other serious violations of international humanitarian law, as well as certain crimes under domestic law (abuse and abduction of girls, and arson). A hotly debated issue is the age limit for criminal responsibility before the court.

The court will have primacy over the national courts of Sierra Leone. With a Chapter VII mandate, it would have primacy over national courts in other jurisdictions, which would enable it to secure arrests and transfers from other countries. Regarding investigations and prosecutions against international peacekeepers and related personnel, the sending state will have primary jurisdiction. However, the Security Council may authorise the investigation or prosecution of a peacekeeper.

A particular difficulty has been the amnesty for crimes committed before 7 July 1999 pursuant to the Lomé peace agreement. This amnesty has not been considered as applicable to violations of international law, only to crimes under Sierra Leonean law, and the draft statute prescribes that amnesty shall not bar prosecution of the former crimes.

The special court will also have a mixed bench of local and international judges. Like the East Timorese panels and contrary to the Cambodian extraordinary chambers, the majority of the judges - both in the trials chamber and the appeals chamber - will be international and appointed by the Secretary-General. Furthermore, the prosecutor will be appointed by the Secretary-General and a deputy prosecutor will be a Sierra Leonean appointed by the government of Sierra Leone (after consultations with the other party in each case). The Secretary-General will also appoint the court's registrar. Hence, this court is more similar to the *ad hoc* tribunals than to either the East Timorese panels or the Cambodian extraordinary chambers with stronger international components. In Sierra Leone, the

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domestic legal system also lacks the capacity to conduct such investigations, prosecutions and trials.

In addition, a truth and reconciliation process is envisaged in Sierra Leone and a Bill for The Truth and Reconciliation Commission Act, 2000, has been introduced to the Sierra Leone parliament.[31] This is in line with article 26 of the Lomé peace agreement. The commission will consist of both citizens and non-citizens of Sierra Leone, all appointed by the president upon recommendations of, among others, the UN High Commissioner for Human Rights (UNHCHR). Participation of both victims and perpetrators is contemplated and certain powers are vested in the commission, excluding the granting of amnesty. A report with recommendations will be submitted to the president when the commission has concluded its work. The recommendations will be implemented faithfully and as soon as possible by the government, which will be monitored by a special body. The co-ordination between the commission and the special court requires further consideration and the UNHCHR is at present dealing with these issues.

Concluding remarks

The DRC and other states involved in the conflict are obliged under international law to prosecute crimes such as genocide, crimes against humanity, war crimes and torture. That such prosecutions indeed occur is important for long-term peace and stability.

However, whether national, international or mixed, prosecutions have obvious limitations in their peacemaking capacity. Criminal trials will never be truth-finding to the extent necessary for achieving the aims of a truth and reconciliation process. Neither national courts, nor an international tribunal would have the capacity to try all perpetrators. International tribunals should primarily aim at those who are most responsible of the worst crimes. In all criminal proceedings, only a limited number of victims will be heard. Furthermore, a criminal trial cannot fully analyse the historical, political, sociological and economic causes for the war in which the crimes were committed, but only review such issues to the extent necessary for establishing whether the person accused should be held criminally responsible as an individual.

Additionally, many of the violations that need to be addressed will not necessarily call for individual criminal responsibility. Others, correctly under international law, may be subject to amnesty, with or without any conditions.

Besides prosecutions, there are therefore strong reasons for the establishment of a truth and reconciliation process in the DRC. Recent developments suggest that justice and reconciliation, or put differently, prosecutions and truth commissions, do not exclude but rather supplement each other. Both types of mechanisms should therefore be explored.

An appropriate forum for this very difficult task would be the Inter-Congolese Dialogue. However, it is evident that international assistance is needed in these efforts. In respect of criminal justice, purely international proceedings seem unlikely and national proceedings alone insufficient. Instead, mixed international and national solutions should be explored. One useful precedent is the proposed special court for Sierra Leone. Concerning a truth and reconciliation process, mixed solutions could also be chosen. Here, experiences from other countries, not the least South Africa, are very useful.

Whatever the solution, it is important that crimes committed during the conflict are investigated as soon as possible, maybe by an international commission of inquiry. Furthermore, if different processes are chosen, these will have to be carefully co-ordinated with one another. This is a challenging task, indeed, but as shown in other countries, both necessary and possible to carry out.

Notes

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1. Report of the Secretary-General on the UN Preliminary Deployment in the DRC of 15 July 1999, (S/1999/790), paragraph 13.

2. In the Burundi peace process, for example, consideration is given to call upon the Security Council to set up an International Judicial Enquiry Commission and an International Criminal Tribunal, as well as instituting a National Commission on Truth and Reconciliation; see Protocol I of the Arusha Accord for Peace and Reconciliation in Burundi; see also Burundi: Neither war nor peace, *ICG Africa Report* 25, 1 December 2000.

3. G J Bass, *Stay the Hand of Vengeance — The Politics of War Crimes Tribunals*, Princeton University Press, Princeton and Oxford, 2000, p 304.

4. The decision on jurisdiction of 2 October 1995 in the *Tadic case* and following decisions by ICTY. See, for example, *The prosecutor v Busko Tadic case W-IT-1-T.*

5. See article 7 of the 1998 Rome Statute for the International Criminal Court.

6. As of 17 July 2001, 37 ratifications have been obtained and a total of 139 states, including the DRC, Angola, Namibia, Uganda and Zimbabwe, have signed the Rome Statute.

7. DRC v Belgium (*Arrest Warrant of 11 April 2000*), ICJ press release 2000/32, 17 October 2000.

8. Resolution 1080 (1996), 15 November 1996.

9. Resolution 1234 (1999), 9 April 1999.

10. Resolution 1258 (1999), 6 August 1999, and extended by Resolution 1273 (1999), 5 November 1999.

11. Resolution 1279 (1999), 30 November 1999.

12. Resolution 1291 (2000), 24 February 2000.

13. Resolution 1341 (2001), 22 February 2001 and Resolution 1355 (2001), 15 June 2001.

14. Resolution 1355 (2001).

15. See the *Lusaka Cease-Fire Agreement*, chapter 8, paragraph 8.2.2.

16. The explicit mention of non-participating groups with this interpretation would only indicate that the scope of the provisions is not limited to the parties to the agreement.

17. On the other hand, Namibia, Rwanda, Uganda and Zimbabwe are all all also all to additional protocol II. Angola is party only to the Geneva conventions and additional protocol I.

18. In May 2001, the DRC also signed the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

19. *Third Report of the Secreatry-General on the United Nations Organization Mission to*

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the DRC, S/2000/566, 12 June 2000, paragraph 48. See also the various reports by the Special Rapporteur, Mr Roberto Garretón, E/CN.4/1998/65, paragraph 32-37, E/CN.4/1999/31, paragraph 17, E/CN.4/2000/42, paragraph 32-33 and 125, and E/CN.4/2001/40, paragraph 48 and 88-91.

20. A Sachs, Truth and Reconciliation, *Southern Methodist University Law Review* 52(4), 1999, p 1577.

21. *Report of the Secretary-General on the UN Preliminary Deployment in the DRC*, S/1999/790, 15 July 1999, paragraph 24.

22. Regarding war crimes, additional protocol II to the Geneva convention explicitly provides room for amnesties in internal conflicts.

23. *Prosecutor v Furundzija*, IT-95-17/1-T, 10 December 1998.

24. See H Strohmeyer, Collapse and reconstruction of a judicial system: The United Nations missions in Kosovo and East Timor, *American Journal of International Law* 95(1), 2001, p 60.

25. In fact, this solution has been suggested by the UN Committee on the Elimination of Racial Discrimination, Decision 1 (52) of 19 March 1998, UN Doc. A/53/18, paragraph IIA1.

26. Article 24 of the Rome Statute.

27. The *Law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea*, ie from 17 April 1975 to 6 January 1979 when Pol Pot and the Khmer Rouge were in power.

28. UNTAET Regulation No 2000/15, 6 June 2000 (UNTAET/REG/2000/15).

29. Resolution 1315 (2000), 14 August 2000.

30. Attached to the Secretary-General's report to the Security Council, S/2000/915, 4 October 2000. See also, M P Scharf, The Special Court for Sierra Leone, *ASIL Insight* 53, October 2000 <www.asil.org/insights/ insigh53> (8 July 2001); M Frulli, The Special Court for Sierra Leone: Some preliminary comments, *European Journal of International Law* 11(4), 2000, pp 857-869; R Cryer, A 'Special Court' for Sierra Leone, *International and Comparative Law Quarterly* 50(2), 2001, pp 435-446.

31. Supplement to the *Sierra Leone Gazette* 81(9), 2000.

Annex 2

Colm Campbell, "Peace and the laws of war: the role of international humanitarian law in the post-conflict environment" (2000) International Review of the Red Cross No. 839, p. 627-651 (footnotes omitted)
(http://www.helpicrc.org/web/eng/siteeng0.nsf/iwpList106/4699BA5AE056143AC1256B66005F00E8).

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30-09-2000 International Review of the Red Cross No. 839, p. 627-651 *by Colm Campbell*

Peace and the laws of war: the role of international humanitarian law in the post-conflict environment

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Résumé en français

While international humanitarian law has long generated a rich body of scholarship on substantive legal issues, particularly in relation to combat situations and military occupation, considerably less attention has, until relatively recently, been devoted to its role in post-conflict scenarios. What consideration there was tended to focus on the Nuremberg [1] and Tokyo [2] precedents emphasizing justice-as-accountability, with occasional events, such as the Eichmann trial, serving as a catalyst for broader discussion. [3]

The reasons are obvious: there was little discussion of the role of international humanitarian law in such situations because there seemed little to discuss (though this begs the question as to whether the law might have played a larger role if a broader debate on its possible contribution had emerged earlier). With the closing of the Tokyo and Nuremberg Trials and those under Control Council Order No. 10, an internationally validated infrastructure came to an end. The absence of any similar ad hoc bodies, the unwillingness of the international community to establish a standing tribunal with criminal competence in the area, and the limited use of humanitarian law by national criminal tribunals in post-conflict situations despite the creation of universal jurisdiction over grave breaches of the four Geneva Conventions of 12 August 1949 on the protection of war victims all contributed to a situation in which international humanitarian law seemed to be playing quite a limited role in the post-conflict arena, generating only sporadic academic interest. [4] Compounding matters was a tendency by some lawyers towards compartmentalization, resulting in a perception of humanitarian law as somewhat removed from the mainstream of legal debate.

The picture has now changed almost beyond recognition. Not only has the role of international humanitarian law in post-conflict situations become an area of increasing scholarly focus, there has also been a noticeable whittling away at the perceived isolation of this area of law, with the result that the links between humanitarian law and other areas of public international law have been become more clearly visible.

Three factors have contributed largely to these developments: the first has been the growing convergence of international humanitarian law and international human rights law, most obviously in the adoption, virtually verbatim, of the fair trial provisions of the 1966 International Covenant on Civil and Political Rights in the two 1977 Protocols additional to the Geneva Conventions. [5] This convergence is also evident in the elaboration of a number of codes of conduct and declarations which have attempted to bridge the gaps between human rights law and international humanitarian law in relation to crisis situations of various sorts. [6]

The second factor involves two interrelated developments. One is the emergence in recent years of a trend towards structured (some would say choreographed) peace processes in relation to intractable or stalemated violent conflicts (examples include El Salvador, the former Yugoslavia, Palestine/Israel, South Africa, and Northern Ireland). Since the balance of forces or the circumstances in these conflicts were such that no side was able to achieve a military victory and thus to impose its will on the other(s), the

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negotiating processes have had to attempt to reconcile the interests and concerns of all sides. This has frequently required that questions of past violations of human rights law and international humanitarian law be addressed. The other, related development has been the process of structured transition from military to civilian rule in recent decades, most obviously in Latin America (examples include Chile and Brazil). These processes have generated a discourse on "transitional justice", [7] into which the post-communist transitions in Eastern Europe have fed. [8] Central to this inquiry has been the question of how democratic successor governments should deal with serious violations of previous regimes, with particular reference to the institutional vehicles for engaging with past violations. [9] Its themes therefore mesh neatly with those which have emerged in recent peace processes; indeed, it is possible to subsume many legal issues relating to the latter under the general "transitional justice" umbrella.

The third factor, which is directly related to the peace process issue, is the resurrection of the international criminal tribunal model, firstly through the creative use of Chapter VII of the UN Charter in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), [10] then by following this precedent with the International Criminal Tribunal for Rwanda (ICTR), [11] and finally by the adoption of the treaty-based Rome Statute of the International Criminal Court (ICC). [12] The creation and operation of the ICTY and ICTR have contributed to the overall picture not only though their impact on the development of the substantive law, but also by rekindling a heated debate on "peace versus accountability". This theme most pointedly aired in a 1996-97 exchange between an anonymous contributor [13] and Felice Gaer [14] in the pages of Human Rights Quarterly — connects many of the developments outlined above: do the requirements of peace-making (Realpolitik) trump demands for accountability for past gross violations of humanitarian law, or can these apparently conflicting demands be accommodated?

The purpose of this paper is not to make yet another attempt at seeking a definitive answer to this question — many forests of paper have already been sacrificed in the exercise — rather it is the narrower task of examining and critiquing the roles which the debates have suggested for international humanitarian law (in terms both of substantive law and of legal process). Particular attention will be given to the law's contribution to the stabilization of the post-conflict environment through its contribution to the reconciliation process. The focus therefore is on legal impact, something that can perhaps best be assessed in terms of the institutional vehicles most frequently employed in putting the law into effect: the criminal trial and the truth commission.

It is possible to think of at least three other instances in which international humanitarian law could play an important role in the post-conflict environment. The first is as a reference point in "lustration" processes: the screening out of "bad apples" from security forces by successor governments. [15] The second is in relation to reparation of victims of past abuses. The third is the more generalized contribution which dissemination of the standards and principles of humanitarian law can make to building a culture of rights and responsibilities in the post-conflict environment. And while these concerns are beyond the present inquiry, they will be considered insofar as they help to amplify issues which form the paper's central focus.

Trial, peace and international humanitarian law

First a warning: the terms of reference of the "peace versus accountability" debate are clearly problematic in international humanitarian law. The suggestion that blanket non-prosecution is a legitimate policy option ("peace trumping accountability") runs counter to the direct imperative in the Geneva Conventions to repress grave breaches. A formal amnesty for grave breaches would therefore be unlawful, however attractively presented as a necessary part of an overall peace package. Parallel arguments apply in relation to the most serious violations of international human rights law. [16]

While humanitarian law does provide for amnesties in relation to high intensity non-international armed conflict — the 1977 Protocol II additional to the Geneva Conventions stipulates that at the end of hostilities the authorities "shall endeavour to grant the broadest possible amnesty" [17] — the provision in question has generally been taken to refer only to offences for which amnesty was possible, and thus not to the most serious breaches of the Protocol. [18] The category of those benefiting could be expected therefore to correspond closely to those who would have "combat immunity" in international armed conflicts, and who would as such therefore be entitled to release at the conflicts' end.

But between the black-and-white choices of formal amnesty for all crimes versus explicit commitment to prosecute, there are myriad shades of grey, tinged with greater or lesser degrees of unlawfulness. Rather

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than an explicit amnesty there may simply be a failure to act. This may be the result of an unwritten agreement that nothing will be done to advance prosecution at the national or international levels, or a more obscure "understanding" to that effect. A further possibility is that the failure may be due to a unilateral policy decision, or it may reflect a lack of hard evidence, which may in turn be due either to a genuine difficulty in assembling the material, or to a lack of willingness to investigate. In relation to non-international armed conflicts, while it is now recognized that serious breaches of applicable humanitarian law are international crimes, [19] neither Article 3 common to the 1949 Geneva Conventions nor Additional Protocol II contain provisions equivalent to those in the said Conventions creating universal jurisdiction over grave breaches.

For those who wish to secure the greatest possible respect for humanitarian law, it is important that the arguments currently in the public domain on the utility or otherwise of trials involving use of humanitarian law be taken up, if only to make sure that in the grey areas the likelihood of ensuring respect for international humanitarian law is enhanced. This requires a critical scrutiny of the arguments in favour of resort to the law in order to verify that claims for the utility of the law in such circumstances are based not on overblown assertions but on sustainable reasoning.

The utility of trial

Arguments for the utility of trial in the post-conflict environment fall under three main headings: trial as deterrence; trial as justice; and a relative newcomer: trial as a route to truths. In some instances the structure of argumentation proceeds by a direct extrapolation from standard domestic criminological and criminal justice debate — the reference to deterrence theories providing an obvious example. Such a read-across may be doubly problematic: firstly because the international legal order is quite different from the national, a factor which can impinge significantly on the operation of international tribunals; [20] and secondly because, as Cohen has pointed out, Western-dominated criminology takes as its starting point the existence of a stable democracy — an unwarranted assumption in post-conflict situations. [21] This is not meant to imply that such arguments are invalid, but merely that they need to be approached with considerable caution. It also suggests the need for a more precise identification of the delineation between the domestic and international spheres in relation to trial, since it is arguable that the waters in this area have become muddied, at least partly because of a failure adequately to do so.

In fact, four possible trial scenarios need to be taken into account: trial by an international criminal tribunal (which can proceed only on the basis of a breach of international criminal law); trial in the domestic tribunals of a third country, on the basis of a charge framed as a breach either of international criminal law or of a domestic law transposing an international legal obligation (an option which the Pinochet case has forced into the public consciousness [22]); trial in a domestic tribunal of the State in question for a breach of international criminal law framed as such; and trial in a domestic tribunal of the State on the basis of a charge framed in terms of domestic law which might also have been framed as a crime against international law (for instance a killing might be charged as murder rather than as a crime against humanity). It is in relation to these various possibilities that the validity of the arguments and counter-arguments surrounding the relationship between deterrence, justice, and truth must be judged, rather than in terms of a simplistic "trial-in-the-abstract" standard.

Trial and deterrence

The best that can be said about the viability of deterrence theory in the context of major violations of international humanitarian law is that it is, as yet, unproven. Standard criminological literature describes two kinds: specific (deterrence by trials of those who have already engaged in criminal behaviour), and general (deterrence of potential criminal behaviour in society at large). After the combined experiences first of Bosnia and Herzegovina, and then of Kosovo, there can only be said to be a severe doubt as to the specific deterrent value of international trials in such situations, a conclusion which Cohen had reached well beforehand when he branded the theory as "dubiously relevant". [23]

While the possibility of trial for breaches of humanitarian law before an international tribunal might, because of the gravity which international trial signifies, be taken to have greater deterrent value than trial before a domestic court, this does not appear to be the case. At least part of the problem may be that referred to by Farer: "relative certainty trumps relative severity" in the deterrent stakes. [24] Thus since the numbers tried in international tribunals must, on the basis of logistical considerations alone, be relatively small, individual violators will know that the chances of their being so punished are remote, and the deterrent value will be correspondingly low. The picture might be different if widespread, systematic

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and impartial domestic trial for such breaches were instituted at the domestic level — indeed it is arguable that it could be different only if that were to occur — but until such evidence becomes available, theories of specific deterrence will remain of unproven value in the contexts under examination.

Admitting that the ICTY may have achieved little under the "specific" heading even before Kosovo, Payam Akhavan, who has acted as Legal Adviser to the Tribunal, sees it as contributing significantly to general deterrence in that its operation serves to produce "the gradual internalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles". [25] From this perspective, trial becomes something akin to a social engineering tool: "the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or "reality", or the gradual penetration of principles into given "power realities". [26] This focus on inculturation meshes with a broader discussion, mentioned above, on the possible culture-building role of international humanitarian law generally, while the emphasis on internalization resonates with A khevan's views on trial as a route to truth and will be further explored below.

Justice, accountability and the rule of law

Explicit justice-claims, quite separate from deterrence theories, surface in the trial debate under two main headings: justice-as-fairness (mainly discussed below in the context of the relationship between truth and legal procedure); and a cluster of arguments around the "justice-as-accountability" theme, focusing on the moral obligations of a State faced with massive violations, and on the need to uphold the rule of law as a value in itself. As both Huyse and Cohen note, regimes which have been responsible for serious and systematic human rights violations are taken to have fractured the moral order, producing in the process countless victims of torture, murder and general abuse. [27] The suffering of these victims, it is claimed, renders it morally unacceptable that perpetrators should escape punishment, and since morality also demands that those accused of violations be treated justly, the appropriate route to punishment is through trials which respect due process of law. Where no action or insufficient action is taken at national level (as in the case of the former Yugoslavia and Rwanda), the obligation falls upon the international community. Such arguments dovetail neatly with free-standing claims in relation to the rule of law. Since maintaining the rule of law is a good in itself, the quasi-moral obligation to uphold this good falls upon the State, in the first instance, and then upon the international community.

Sometimes a morality-based demand for justice is presented in terms of a retributionist rationale familiar from national criminal justice debates: the need for some kind of relationship between the suffering of the victim and that to be imposed upon the perpetrators. Few if any commentators burrow further in national debates to argue that punishment may lead to the rehabilitation of violators (although some parallel issues crop up in the debate touched upon below on "reintegrative shaming" in relation to truth commissions).

For the reasons already mentioned, the question of the legitimacy of read-across from domestic criminal justice debates to the post-conflict environment is an open one. The key feature of the transitional aspect of this environment is the move from a situation in which the rule of law was either absent or highly degraded — how else could systematic gross human rights violations have taken place — to one in which the rule of law is established. Thus there is no possibility of *maintaining* the rule of law (at least at the domestic level); at best it can be *recreated.*

As regards morality-based arguments, it is clear that for very many people it is highly repugnant that those who have inflicted so much suffering on victims not be made to account for their actions. And the individual criminal trial offers the paradigm of accountability. As international humanitarian law gives a much more explicit recognition to the principle of individual criminal responsibility than human rights law, outlaws all the gross abuses typically committed in conflict situations and, particularly since the adoption of the two 1977 Additional Protocols, also provides extensive due process guarantees, it is tailormade to serve this purpose. To categorize a particular infraction as a breach of the laws of war, whether this categorization is made by an international or a domestic court, underlines the seriousness of the crime in a way that a trial employing ordinary domestic charges cannot, even if the domestically framed charge has the same elements as that framed in terms of international humanitarian law. Use of international humanitarian law therefore has an important symbolic function, which can make a significant contribution to satisfying victims' thirst for accountability.

The contrary argument gets to the root of the "peace versus accountability" debate: as Cohen points out, "the paradox is that some measure of impunity might be the best way to create the political conditions

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under which the rule of law is eventually attainable". [28] Less prosaically, in the exchange referred to above, "anonymous" asserted accusingly that demands for punishment made during the Bosnian peace negotiations meant that "thousands of people are dead who should have been alive — because moralists were in quest of the perfect peace". [29] Variants of the argument ultimately point in the same direction: an insistence on prosecution of past human rights violators in the post-conflict transitional phase may be profoundly counter-productive because it may either hamper the negotiation of a settlement — "turkeys don't vote for Christmas" — or it may undermine a newly emerging post-conflict democracy, for instance by provoking a military coup. Instead of satisfying the quest for justice, the end result may be more human rights violations, and rather than restoring the rule of law, prosecution may result in its subversion.

While there is no denying the pragmatic force of these arguments, it is not clear that they apply with equal vigour to each of the four possibilities of trials identified above. It might also be claimed that some turn as much on the timing of trials as on their initiation per se, and that to some extent the concerns may, in time, be overtaken by events. Whereas trial at the domestic level, whether employing charges framed in term s of domestic or international law, is conditional upon a favourable balance of forces within the State in question, trial in a post-conflict situation before an international tribunal, or before a domestic tribunal in a third country, is largely free of such considerations — though availability of defendants and witnesses and evidence generally will remain prime considerations. [30] This is not to say that such trials might not conceivably undermine a peace settlement, but it does suggest that such a possibility may be less likely — what would the point be of a military coup which could neither halt the instant trial nor prevent trials in the future? Similarly, the argument put forward by "anonymous" postulates a policy choice with regard to an ad hoc international tribunal in the course of peace negotiations.

Whatever view is taken of its merits (it has been heavily criticized), its applicability largely evaporates in situations in which a standing international tribunal with jurisdiction exists, created by a statute to which the State is a party. This is not to suggest that the initiation of the ICC, if and when it occurs, will provides a panacea and therefore bring the "peace versus accountability" debate to an end. Even if there is a high degree of ratification, there will inevitably be much manoeuvring in relation to the bringing of charges (whether before the ICC or before domestic tribunals), and there are logistical limits in any case on the volume of possible work which one body could be expected to handle. Furthermore, domestic tribunals offer advantages in terms of immediacy of the message they send, and accessibility by witnesses, which international tribunals cannot match. But it does point to the applicability of the debate becoming narrowed: the establishment of the ICC will create some relatively fixed reference points, defining at least some new parameters in the accountability debate.

This possible reconfiguration of the legal matrix still leaves unanswered the question of the precise relationship between accountability and reconciliation, which is a slightly different issue from the calculus of the possible counter-productive effects of prosecution. Tackling this broader question in turn requires engagement with theories of the relationship between accountabi ity and truth, both in the context of criminal trials and in the operation of truth commissions.

Trial and truths: the importance of legal procedure

Whereas much of the established literature on transitional justice envisages two sequential phases, i.e., the truth phase and the justice phase (fact-discovery followed by trial), more recent contributors such as Akhavan have championed the truth-eliciting role of the trial process itself, a view that has not gone unsupported. [31] The essence of this argument is that the ICTY will tell "the truth about the underlying causes and consequences of the Yugoslavian tragedy" through the exercise of prosecutorial discretion. This will create an "optimal" truth that "demonstrates that individuals — primarily leaders — bear liability for crimes, and that there is no justification for the collective attribution of guilt to entire ethnic groups". The truth in question is to be "shared" between the various ethnic groups — just as the values imparted through general deterrence were to be "internalized", as noted above — as providing "a moral or interpretive account ... that appeals to a common bond of humanity transcending ethnic division". [32] Reconciliation is the envisaged end result, as each ethnic group comes to realize that it was not an opposing group that was responsible for the violence, but rather the leaders on both sides. International humanitarian law, with its developed insistence on individual criminal responsibility, seems well equipped to prove precisely this point, but before this new role can be endorsed, a number of possible weaknesses in this "trial-as-truth" argument must be explored.

The most obvious potential weakness is that it stands or falls on the validity of a particular theory, or set

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of theories, about ethnic conflict, which Akhavan labels "instrumentalism". This holds that ethnic conflict comes about largely as a result of manipulation by self-interested power-elites, a truth that is to be proved by the prosecution of leaders — the "big fish". Other theories, by contrast, focus on possible structural causes and historical roots of ethnic conflict, and look to addressing these causes as a route to reconciliation or at least to coexistence. Another possible related weakness is that of the compatibility of Akhavan's suggested strategy with perceptions of due process. While focusing on ringleaders is clearly a good use of resources, the danger exists that what is itself a morally laudable enterprise may be seen as tainted, if it creates a perception that prosecution strategies are being manipulated in order to prove a particular (contested) theory of ethnic conflict.

There may also be problems with the notion of truth, or perhaps with the notion of *the* truth, in the face of what Cohen has referred to as the "postmodernist black hole". [33] This of course raises issues which impact not simply on Akhavan's views, but on any attempt to extract truth from the trial process, and even more forcefully on the project of truth commissions. And assuming that the search for particular truths is a legitimate enterprise, does the criminal trial offer the best or even a good vehicle for determining it?

Akhavan's solution is twofold, relying on legal procedure to provide the pieces of a factual mosaic and upon overarching theoretical insights to provide the principle for assembling them. Thus, in the words of Michael Ignatieff, the formal evidentiary procedures of tribunals such as the ICTY are to be seen as "conferring legitimacy on otherwise contestable facts". [34] From this proven collection of particular facts, the "optimum" truth — responsibility of the big fish — is then to be inferred, extrapolated or constructed.

Not everyone has been as sanguine about the utility of the trial process as a vehicle for discovering truths, even amongst those who see the exercise as potentially worthwhile. Lawyers are not historians, and are concerned not with facts in the abstract, but with the fact-law nexus, with such facts as the rules of the legal world are geared to engage with. Thus Cohen questions whether the "conventional rituals of evidence" [35] of criminal law offer an effective way of obtaining knowledge and, with reference to the *Klaus Barbie* prosecution, raises the possibility (no more than that) that a trial strategy may obliterate or distort rather than serve the cause of truth-telling.

Clearly there is no easy answer to this question, and it may be that paradoxically, the weakness of the trial process in this regard is also its principal strength. At best, trial can conclusively determine a limited truth, since the truth to be decided is circumscribed both by substantive law and by legal procedure, e.g., by rules of evidence which exclude consideration of certain facts — and the only facts that are relevant are those which relate to a particular criminal offence, thus risking a double distortion. But this offers two advantages: the very rigour of procedural rules can produce findings of fact that "stick" because the trial experience resonates with historically validated collective notions of justice — "justice-as-fairness". And the legal categorization of such facts as constituting a specific crime, particularly a heavily stigmatized crime (such as a war crime), may go a long way towards addressing the victims' sense of hurt, combating strategies of denial and, to that extent at least, establishing a truth. Such denial strategies can take many forms, from crude dismissal of facts by Holocaust-deniers to more subtle conceptual failings.

A key to unlocking the truth-trial-law-reconciliation matrix may lie in the notion of "acknowledgement", attributed to the New York philosopher Thomas Nagel. If the concept is unpacked, it can be seen to have elements of both acceptance and evaluation. At its core is an appreciation that the behaviour in question was wrong. There is a subjective recognition/acceptance of particular facts by the wrongdoers, by those associated with them, or by society generally, and an evaluation of these facts by reference to an objective standard, thus defining the wrongness — for instance recognition not only that a particular army unit carried out a specific killing, but that the killing was murder. The truth that is being acknowledged is constructed not in terms of fact-in-the-abstract but rather in terms of "fact *as*", with the "as" capturing the legal, and by extension the moral, culpability.

In this general context, international humanitarian law can provide important reference points for the construction of the "as", whether through a straightforward application of the established law, or more pointedly, through its creative interpretation — though some would question whether any legal formulation can adequately encapsulate the full horror of mass atrocities, and others query whether such creative law-making is compatible with principles of Western legality. [36]

But to suggest, as Akhavan seems to do, that the trial process will produce the establishment or

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acknowledgement of a truth, which of itself will produce reconciliation, is perhaps to overstate the case. A more plausible argument may lie in regarding engagement with the concerns of victims as a prerequisite, or at least as a likely precursor to reconciliation — and thereby as contributing significantly to the stabilization of the post-conflict environment — and seeing trial as a route to such engagement. It could perform this function through punishing wrongdoers (thereby meeting a demand for accountability), and/or by a less ambitious truth-eliciting function which can yet help to acknowledge the enormity of the suffering which the atrocities in question have inflicted upon victims. To suggest, though, that criminal legal processes employing international humanitarian law or any other body of law have the capacity to contribute more directly to reconciliation, particularly by generating reconciliation themselves, is to assign responsibilities to such processes that they are never likely to fulfil.

Commissioning truths

Even firm advocates of the prosecution option as a route to truth recognize that trial is not without its limitations in that regard. Thus for Pakhavan "... the relative remoteness of the ICTY from the region means that it cannot be a substitute for local initiatives (including a commission of truth based on popular participation or public gestures of atonement by leaders)". [37] In many respects the literature on truth commissions parallels that in relation to prosecution. [38] Popkin and Roht-Arriaza analyse the goals to be served by the commissions in terms of "creating an authoritative record of what happened; providing a platform for victims; recommending changes calculated to avoid future abuses; and establishing who was responsible and providing a measure of accountability for the perpetrators". [39] Typically established, as Hayner points out, in periods of political transition, the motivation for their initiation lies in a desire to mark "a break with a past record of human rights abuses; to promote national reconciliation, and/or to promote or sustain political legitimacy". [40]

What truth(s)?

The "authoritative record" referred to by Popkin and Roht-Arriaza is invariably conceived in terms of the general sweep of violations. Thus for Hayner the aim is to "paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time", [41] an approach which requires that strategic choices be made with regard to the focus of the investigation. But unlike Akhevan's insistence on the use of prosecutorial discretion in the trial process to discover the "optimal" truth, the concerns of truth commissions are generally conceived not in terms of the correctness of particular (instrumentalist) theories of ethnic conflict, but relate rather to the somewhat more technical (almost statistical) exercise of selecting a representative sample for examination.

Inevitably, any selection risks distortion, but in the case of truth commissions the danger of distortion of the truth which Cohen suggests may be inherent in the trial process should be less apparent, since the strategic choice of subject matter for investigation is not restricted to those cases in which a specific perpetrator can be identified, and in which the suspect is physically available for trial. By the same token the information to be accessed is not limited by the evidential requirements of the criminal process.

International humanitarian law provides a particularly important reference point in this context for two reasons. The first is that it sets a standard by which the behaviour not only of a State's security forces, but also that of non-State players can be assessed; the second is that this evaluation is tailored to the precise context most frequently advanced in justification or exoneration by those responsible for violations, namely the existence of some kind of war or armed conflict.

State and non-State actors

While in recent years international human rights law has been paying more attention to the legal consequences of the behaviour of non-State players, [42] it remains the case that international humanitarian law articulates a much more deeply rooted doctrine of individual responsibility. Returning to Hayner's analyses of the role of truth commissions, it is likely that the legitimating function that she envisages can be achieved only where the commission itself achieves a kind of popular legitimacy. Achieving this legitimacy requires that truth commissions in post-conflict situations avoid any taint of political partisanship and be insulated against any suggestion that their operation amounts to the truth-eliciting equivalent of victor's justice. At least part of the answer may lie in a willingness to examine violations from across the spectrum. Thus for instance, the Rettig Commission in Chile, [43] the Salvadorean Truth Commission [44] and the South African Truth and Reconciliation Commission [45] all investigated abuses not only by the State's security forces, but also by armed opposition groups, with the

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Salvadorean and South African Commissions in particular drawing explicitly on international humanitarian law to assess the behaviour of non-State entities.

Such use of international humanitarian law challenges head on the self-justification most frequently advanced (or tacitly accepted) by both State and non-State players: "We did what we did because we were fighting a war against terrorism/a civil war/ a war of liberation." Since humanitarian law, strictly applied, takes as its starting point the existence of an armed conflict of some sort, whether non-international or international (including wars of national liberation [46]), it facilitates coming to grips with the rhetoric of those taking part in the conflict and in a sense turning it back upon them. Thus an apparent escape route — the war as justification — can become a channel to some kind of accountability.

Even where the existence of an armed conflict in a technical sense may have been in doubt — it will almost invariably be contested — there is a growing body of opinion that the standards and principles articulated and expressed most sharply in international humanitarian law retain a validity in all conflict situations, irrespective of whether the legal threshold (armed conflict) has been reached. In this respect they may help to fill a gap left by international human rights law, which attempts to deal with conflict situations by means of the heavily criticized derogation mechanism. [47]

The clearest example of this trend is the formulation in recent years of a number of codes of conduct and sets of principles which are based upon humanitarian standards but which also draw upon human rights law. Two somewhat different strategies can be identified: the first aims to devise a code specifically designed to apply in a sub-armed conflict environment: situations of "internal disturbances and tensions"; [48] the second aims to codify a set of standards to be applied irrespective of the categorization of the conflict. Progress on this later line can be traced from the adoption of the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence (1987) [49] to the adoption of the Declaration of Minimum Humanitarian Standards [50] at Turku/Abo (1990), sometimes referred to as the Turku/Abo Declaration. In 1994, an amended version of the text was adopted [51] which received a degree of validation from both the United Nations [52] and the OSCE. [53]

While punitive trials must, by definition, apply hard law, truth commissions may have a considerably greater degree of flexibility in the standards they employ, precisely because their primary purpose is not a punitive one. Thus truth commissions may offer a route, which the trial process cannot follow, to the application of codified humanitarian principles, thereby increasing the reach of such principles in post-conflict situations.

While there is much to be gained by the application of international humanitarian law and standards to the activities of both State and non-State entities, the area is not without its pitfalls. Enhancing the legitimacy of truth commissions by casting the net widely is one thing, but a juxtaposition suggesting a facile equivalence is quite another. As Cohen writing on the parallel issues presented by mutual amnesties notes, treating State and non-State actions in the same way provides "a convenient symmetry to disguise very different social realities". [54] In the same vein Popkin and Roht-Arriaza warn of the dangers of treating State and non-State violence as "functionally equivalent", thereby producing a "distortion of the historical record". [55] Specifically, they caution that the educational effects on the population as a whole could be lost in the notion that "terrible things happen in all war and are committed by all sides". [56]

Clearly there is no easy answer to the questions which these issues raise. Perhaps the best that can be said is that while the use of international humanitarian law to assess the behaviour of armed opposition groups can advance the authoritativeness and therefore the legitimacy of truth commissions, this should not be done in a way which detracts from the focus on the responsibility of the State as the entity with primary responsibility for upholding international law. Of pivotal importance in this regard is the set of strategic choices to be made at the outset as to the legal and factual scope of the truth commission's inquiry. The fact-situations investigated should be those calculated to reach the educational objectives signalled by Popkin and Roht-Arriaza. And it needs to made clear that while armed opposition groups can be held to have committed breaches of international humanitarian law, heed should be taken of Mera's criticism that by characterizing actions of non-State players as human rights violations, the Rettig Commission undermined the educational role of its report. [57]

Truths and reconciliation

Whether the behaviour of State or non-State players is in question, more is at stake than simply the

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discovery of the truth. Thus Hayner, in a passage which again parallels the punishment literature, argues that "...the importance of truth commissions might be described more accurately as acknowledging the truth rather than finding the truth... Official acknowledgement of the facts outlined in a truth commission report by government or opposition forces can play an important psychological role in recognizing a 'truth' which has long been denied". [58]

As with the case of prosecution, international humanitarian law can play an important role in defining the "as" in the process of acknowledgement. The finding that the behaviour of particular actors in a conflict should be thought of as a breach of international humanitarian law or standards (and therefore acknowledged as such) highlights the seriousness of the violation, and may help to address the victims' sense of hurt.

This once again raises the question of possible routes to reconciliation. It was suggested above that to see prosecution as itself producing reconciliation may be to assign a responsibility to the prosecution function that it is unlikely to fulfil, and that it might be more realistic to see engagement with the concerns of victims (through prosecution) as paving the way for, rather than itself generating, reconciliation, though this inevitably leads on to the old calculation about the possible counter-productive effects of prosecution. Employment of international humanitarian law in the findings of truth commissions seems to offer a means of signalling the seriousness of what has taken place while at the same time sidestepping the potential counter-productive effects of prosecution, and therefore offering an alternative route towards reconciliation.

This still leaves open the question of the relationship between the findings of a truth commission and possible subsequent proceedings, whether criminal or otherwise. One possibility may lie in tying the process in with, or reformulating it as, a lustration mechanism, designed to bar violators from the old order from public service in the new, and perhaps involving some engagement with the issue of reparation. A variant may lie in adapting Braithwaite's criminological model of "reintegrative shaming" which, Cohen speculates, might lead to "public shaming and denunciation that would answer the demand for "acknowledgment". [59]

Another option is the South African model whereby full disclosure by a perpetrator before a truth commission may lead to amnesty, but this in turn raises the problem, addressed at the start of this paper, of the formal legality of amnesties. Yet another is to leave the issue of prosecution fully open, but this would probably make the truth-eliciting function of a truth commission much more difficult to discharge since there would be no incentive to perpetrators to participate in the process. But whichever route is taken, it is clear that international humanitarian law and standards have a role to play in defining yardsticks to be employed by either criminal tribunals or truth commissions. Thus even if there is a perception that a pragmatic decision whether to proceed by the trial or the truth commission route has to be made, this need not be equivalent to a decision as to whether international humanitarian law is employed or not, but rather as to the mode by which this body of law is drawn upon.

Conclusions

What this brief survey has hopefully shown is that international humanitarian law can make a much broader contribution in the post-conflict environment than traditional approaches might have suggested, concerned as they tended to be with the question of individual accountability almost as an end in itself. And this paper has been confined to an examination of the employment of humanitarian law in the trial process and by truth commissions, thus putting to one side possible contributions in lustration processes, and in relation to reparation.

Not all the arguments currently in the public domain for the utility of international humanitarian law in the trial process are equally compelling. While its rules provide a highly appropriate route to individual accountability, the deterrent value of trials employing international humanitarian law is at best unproven, and is likely to remain so, unless and until potential violators face a much greater probability of trial, whether at the domestic or the international level. Ultimately this ties in with a broader project calculated to lead to the generalized inculturation of humanitarian standards — a goal which should be central to strategy for the dissemination of humanitarian law.

As regards the question of trial as a route to truth, it is inevitably the case that the rigorous procedures of the criminal trial limit the kind of truth that can be determined, while also, potentially at least, underlining the validity of the truth that emerges. Here international humanitarian law can make a

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particularly useful contribution with regard to acknowledgement of the seriousness of violations. A finding that a particular act was a breach of the laws of war signifies the gravity of a crime much more effectively than a finding that domestic law has been breached.

Invariably, arguments for the utility of humanitarian law in the trial process come up against the "peace versus accountability" calculus. But while this has frequently been presented in terms of a stark "either/or" choice — trial or peace — a closer examination suggests that the question may be as much about timing and mode of trial as about trial in the abstract. There is a difference, in this regard, between domestic trial which is heavily conditional on a favourable balance of forces in the conflict situation, and trial in third countries and before an established international mechanism (such as the International Criminal Court will hopefully become). With the passage of time, if expectations of accountability for serious violations become stronger, it is likely that this calculus will lose some of its force, though it is always likely to remain lurking in the background.

Even in situations in which international humanitarian law is not employed in criminal trials in the post-conflict environment, it can still play an important role in the acknowledgement of truths about the conflict when drawn upon by truth commissions. Humanitarian law offers a specific advantage in this regard in that its reach extends much more clearly to non-State entities than does international human rights law. And because truth commissions need not be tied to well established law, there exists the possibility that the codified standards being developed in the interface between human rights law and humanitarian law can be drawn upon by truth commissions in a way which might not be possible in criminal trials. Overall, the picture that emerges is one in which international humanitarian law can play a much more significant role in the post-conflict environment than some of the more simplistic "peace versus accountability" formulations might suggest.

Notes

1 The Nuremberg trials have generated a vast body of literature. For some early writing see H. Ehard, "The Nuremberg Trial against the major war criminals and international law", *AJIL*, Vol. 43, 1949, p. 223; R.W. Cooper, *The Nuremberg Trial*, Penguin Books, 1947;
V. H. Bernstein, *Final Judgment: The Story of Nuremberg*, Latimer House, 1947; R. K. Woetzel, *The Nuremberg Trials in International Law*, Praeger, 1962.

2 See A. C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, Collins, 1989; R. H. Minear, Victors' Justice: *the Tokyo War Crimes Trial*, Princeton University Press, 1971; P. R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East*, 1945-1951, University of Texas Press, 1979.

3 See H. Arendt, Eichmann in Jerusalem: *A Report on the Banality of Evil*, Faber and Faber, 1963; B. Sharpe, *Modesty and Arrogance in Judgment: Hannah Arendt's Eichmann in Jerusalem*, Praeger, 1999; G. Hausner, *Justice in Jerusalem*, Nelson, 1967.

4 See T. J. Murphy, "Sanctions and enforcement of the humanitarian law of the four Geneva Conventions of 1949 and Geneva Protocol I of 1977", *Military Law Review*, Vol. 103, 1984, p. 3, and R. Bierzanek, "The responsibility of States in armed conflicts", *Polish Yearbook of International Law*, Vol. XI, 1981-1982, p. 93.

5 See generally, R. E. Vinuesa, "Interface, correspondence and convergence of human rights and international humanitarian law", *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 69; Y. Dinstein, "*Human rights in armed conflict: International humanitarian law*", in T. Meron (ed.), Human Rights in International Law, Oxford University Press, 1984, p. 345; T. Meron, "The humanization of humanitarian law", *AJIL*, Vol. 94, 2000, p. 239.

6 These developments are examined further below.

7 See N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols., US Institute for Peace Press, 1995; I. P. Stotzky (ed.), *Transition to Democracy in Latin America: the Role of the Judiciary*, Westview Press, 1993;
A. James McAdams (ed.), *Transitional Justice and the Rule of Law*, 1997; A. Brysk, *The Politics of Human Rights in Argentina: Protest, Change and Democratization*, Stanford University Press, 1994.

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8 See L. Huyse, "Justice after transition: On the choices successor elites make in dealing with the past", *Law and Social Inquiry*, Vol. 20, 1995, p. 51; E. Blankenberg, "The purge of lawyers after the breakdown of the East German communist regime", *ibid.*, p. 223; M. Los, "Lustration and truth claims: Unfinished revolutions in Central Europe", *ibid.*, p. 117.

9 For a particularly insightful piece see S. Cohen, "State crimes of previous regimes: Knowledge, account ability and the policing of the past", *Law and Social Inquiry*, Vol. 20, 1995, p. 7.

10 The literature on the ICTY is fast becoming unmanageable. For some recent writing (other than the sources listed elsewhere in the footnotes) see S. D. Murphy, "Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia", *AJIL*, Vol. 93, 1999, p. 57; K. D. Askin, "Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status", *ibid.*, p. 97; J. R. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed., Transnational Publishers, 2000,

11 See V. Morris, V. and M. P. Scharf, *The International Criminal Tribunal for Rwanda* (2 Vols.), Transnational Publishers, 1998.

12 M. H. Arsanjani, "The Rome Statute of the International Criminal Court", *AJIL*, Vol. 93, 1999, p. 22; P. Kirsch and J. T. Holmes, "The Rome Conference on an international criminal court: The negotiating process", *ibid.*, p. 2; M. McAuliffe de Guzman, "The road from Rome: The developing law of crimes against humanity", *Human Rights Quarterly*, Vol. 22, 2000, p. 335; D. McGoldrick, "The permanent International Criminal Court: An end to the culture of impunity?", *Criminal Law Review*, 1999, p. 627.

13 Anonymous, "Human rights in peace negotiations", *Human Rights Quarterly*, Vol. 18, 1996, p. 249.

14 F. Gaer, "UN-Anonymous: Reflections on human rights in peace negotiations", *Human Rights Quarterly*, Vol. 19, 1997, p. 1.

15 A. K. Stinchcombe, "Lustration as a problem of the social basis of constitutionalism", *Law and Social Inquiry*, Vol. 20, 1995,
p. 245, and Los, op. cit. (note 8).

16 See R. O. Weiner, "Trying to make ends meet: Reconciling the law and practice of human rights amnesties", *St. Mary's Law Journal*, Vol. 26, 1995, 857; N. Roht-Arriaza and L. Gibson, "The developing jurisprudence of amnesty", *Human Rights Quarterly*, Vol. 20, 1998, p. 843; D. Cassel, "Lessons form the Americas: Guidelines for international responses to amnesties for atrocities", *Law and Contemporary Problems*, Vol. 59, 1996, p. 196.

17 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 6(5). Emphasis added.

18 Roht-Arriaza/Gibson, *op. cit.* (note 16), pp. 864-866.

19 T. Meron, "International criminalization of internal atrocities", *AJIL*, Vol. 89, 1995, p. 554. See also *The Prosecutor v. Tadic*, Decision in the Appeals Chamber, ICTY, 2 October 1995, case No. IT-94-1-AR72, and Morris/Scharf, *supra* (note. 11).

20 For a critical examination of this view see T. J. Farer, "Restraining the barbarians: Can international criminal law help?", *Human Rights Quarterly*, Vol. 22, p. 90.

21 *Op. cit.* (note 9), p. 10.

22 *R. v. Bow Street Metropolitan Magistrates and Others*, ex parte *Pinochet Ugarte* (No. 3) [1999] 2 All ER 97. See R. J. Wilson, "Prosecuting Pinochet: International crimes in Spanish domestic law", *Human Rights Quarterly*, Vol. 21, 1999, p. 927.

23 Cohn, *op. cit.* (note 9), p. 42.

24 *Op. cit.* (note 20), p. 92.

25 P. Akhavan, "Justice in The Hague, peace in the former Yugoslavia? A commentary on the United

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Nations war crime tribunal", *Human Rights Quarterly,* Vol. 20, 1998, p. 751.

26 *Ibid.* p. 731.

27 Huyse, *op. cit.* (note 8) , p. 51, and Cohen, *op. cit.* (note 9), pp. 22-24.

28 *Ibid.* p. 34.

29 Anonymous, *op. cit.* (note 13), p. 258.

30 J. Katz Cogan, "The problem of obtaining evidence for international criminal trials", *Human Rights Quarterly*, Vol. 22, 2000, p. 404.

31 J. Pejic, "Creating a permanent international criminal court: The obstacles to independence and effectiveness", *Columbia Human Rights Law Review,* Vol. 29, 1998, p. 291.

32 *Ibid.*, p. 741/2.

33 Cohen, *op. cit.* (note 9), p. 12. See also J. A. Lindgren Alves, "The Declaration of Human Rights in postmodernity", *Human Rights Quarterly*, Vol. 22, 2000, p. 478.

34 M. Ignatief, "Articles of faith", *Index on Censorship*, September/October 1996, quoted in Akhavan, *op. cit.* (note 25), p.770.

35 Cohen, *op. cit.* (note 9), p. 21.

36 M. J. Osiel, "Why prosecute: Critics of punishment for mass atrocity", *Human Rights Quarterly*, Vol. 22, 2000, p. 118.

37 Akhavan, *op. cit.* (note 25), p. 742.

38 See P. Hayner, "Fifteen truth commissions - 1974 to 1994: A comparative survey", *Human Rights Quarterly*, Vol. 16, 1994, p. 597; *Truth Commissions: A Comparative Assessment*, Harvard Law School Human Rights Program, 1997; M. Enselaco, "Truth commissions for Chile and El Salvador: A report and assessment", *Human Rights Quarterly*, Vol. 16, 1994, p. 657; M. Popkin and N. Roht-Arriaza, "Truth as justice: Investigatory commissions in Latin America", *Law and Social Inquiry*, Vol. 20, 1995, p. 79.

39 Popkin/Roht-Arriaza, *op. cit.* (note 38), p. 80.

40 *Ibid.*, p. 604.

41 *Ibid.*

42 This has occurred through the development of the doctrine often referred to (perhaps misleadingly) as *Drittwirkung* or third party effect. See D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Buttersworth, London, 1995, pp. 19-22, and A. Clapham, *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1963, pp. 178-244. For a discussion of the parallel jurisprudence of the Inter-American Commission on Human Rights, see Weiner, *op. cit.* (note 16).

43 Popkin/Roht-Arriaza, *op. cit.* (note 38), p. 85 and pp. 98 f.

44 *Ibid.*, pp. 86-89, and pp. 98 f.

45 J. Sarkin, "The trials and tribulations of the South African Truth and Reconciliation Commission", *South African Journal of Human Rights*, 1996, p. 617; J. Sarkin, "The Truth and Reconciliation Commission in South Africa", *Commonwealth Law Bulletin*, Vol. 23, 1997, p. 528; K. Asmal, L. Asmal and R. Suresh, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, 2nd ed., David Philip, Cape Town, 1997.

46 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 1(4).

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47 For some criticisms see J. Fitzpatrick, *The International System for Protecting Rights During States of Emergency*, University of Pennsylvania Press, 1994; F. Ní Aoláin, "The emergency of diversity: Differences in human rights jurisprudence", *Fordham International Law Journal*, Vol. 19, 1995, p. 101; O. Gross, " 'Once more into the breach': The systemic failure of applying the European Convention on Human Rights to entrenched emergencies", *Yale Journal of International Law*, Vol. 23, 1998, p. 437.

48 See H. P. Gasser, "A measure of humanity in internal disturbances and tensions: Proposal for a code of conduct", *IRRC*,
No. 262, January-February 1988, p. 38.

49 The text of the Oslo Statement is included in the pamphlet *Declaration of Minimum Humanitarian Standards*, Abo Akademi University Institute for Human Rights, 1991, pp. 13-16.

50 The text of the Declaration is appended to T. Meron and A. Rosas, "A Declaration of Minimum Humanitarian Standards", *AJIL*,
Vol. 85, 1991, p. 375.

51 The text is appended to A. Eide, A. Rosas and T. Meron, "Combating lawlessness in gray zone conflicts through minimum humanitarian standards", *AJIL*, Vol. 89, 1995, p. 215.

52 In 1994 the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities decided to transmit the Declaration to the Commission on Human Rights with a view to its adoption (Res. 1994/26).

53 The States participating in the Budapest review meeting of the OSCE (1994) decided to "emphasize the potential significance of a declaration on minimum humanitarian standards applicable in all situations and declare[d] their willingness to actively participate in its preparation in the framework of the United Nations". Budapest Decision VIII on the Human Dimension, quoted in op. cit. (note 51), p. 215.

54 Cohen, *op. cit.* (note 9), p. 35.

55 *Ibid.*, p. 98.

56 *Ibid.*

57 J. Mera, "Truth and justice in the democratic government", quoted in Roht-Arriaza, *op. cit.* (note 38), p. 99.

58 Hayner, *op. cit.* (note 38), pp. 607-8.

59 Cohen, *op. cit.* (note 9), p. 36.

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Annex 3

G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (http://www1.umn.edu/humanrts/instree/x4cnaslw.htm).

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Convention on the Non-Applicability of Statutory Limitations to War Crimes and CrimesAgainst Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

PREAMBLE

The States Parties to the present Convention,

Recalling resolutions of the General Assembly of the United Nations 3 (I) of 13 February 1946 and 170 (II) of 31 October 1947 on the extradition and punishment of war criminals, resolution 95 (I) of 11 December 1946 affirming the principles of international law recognized by the Charter of the International Military Tribunal, Nurnberg, and the judgement of the Tribunal, and resolutions 2184 (XXI) of 12 December 1966 and 2202(XXI) of 16 December 1966 which expressly condemned as crimes against humanity the violation of the economic and political rights of the indigenous population on the one hand and the policies of apartheid on the other,

Recalling resolutions of the Economic and Social Council of the United Nations 1074 D (XXXIX) of 28 July 1965 and 1158 (XLI) of 5 August 1966 on the punishment of war criminals and of persons who have committed crimes against humanity,

Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation,

Considering that war crimes and crimes against humanity are among the gravest crimes in international law,

Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security,

Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes,

Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application,

Have agreed as follows:

Article I

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No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhurnan acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article 2

If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Article 3

The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention.

Article 4

The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles 1 and 2 of this Convention and that, where they exist, such limitations shall be abolished.

Article 5

This Convention shall, until 31 December 1969, be open for signature by any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

Article 6

This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 7

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This Convention shall be open to accession by any State referred to in article 5. Instruments of accession shall be deposited with the Secretary- General of the United Nations.

Article 8

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its own instrument of ratification or accession.

Article 9

1. After the expiry of a period of ten years from the date on which this Convention enters into force, a request for the revision of the Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations. 2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 10

1. This Convention shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States referred to in article 5.

3. The Secretary-General of the United Nations shall inform all States referred to in article V of the following particulars:

(a) Signatures of this Convention, and instruments of ratification and accession deposited under articles 5, 6 and 7;

(b) The date of entry into force of this Convention in accordance with article 8;

(c) Communications received under article 9.

Article 11

This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 26 November 1968.

IN WITNESS WHEREOF the undersigned, being duly authorized for that purpose, have signed this Convention.

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Annex 4

Article 6(5) of Additional Protocol II to the Geneva Conventions of 1949
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commentaries

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Part II : Humane treatment

[p.1395] Article 6 -- Penal prosecutions

[p.1396] General remarks

4597 The whole of Part II ' (Humane treatment) ' is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances; (1) the guarantees defined in this article refer to the two stages of the procedure: preliminary investigation and trial. (2) Just like common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the [p.1397] armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. (3) It supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(d), which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and fourth Conventions, (4) and for the rest is largely based on the International Covenant on Civil and Political Rights, (5) particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation. In Protocol I, Article 75 ' (Fundamental guarantees) ' contains rules with the same tenor.

Historical background

4598 The ICRC draft originally contained two articles: ' Principles of penal law ' and ' Penal prosecutions. ' (6) During the preliminary examination of those articles numerous amendments were submitted; a proposal to combine the two provisions in a single article was put forward, (7) and adopted as a starting point; this was the origin of the present Article 6.

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Analysis of the article

Paragraph 1 -- The scope of application

4599 This paragraph lays down the scope of application of the article by confining it to offences related to the armed conflict; these must be criminal offences and not merely administrative or disciplinaryoffences or procedures. ' Ratione personae, ' Article 6 is quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions.

[p.1398] Paragraph 2 -- The right to be tried by an independent and impartial court

' Opening sentence '

4600 The text repeats paragraph 1, sub-paragraph (1)(d) of common Article 3, with a slight modification. The term "regularly constituted court" is replaced by "a court offering the essential guarantees of independence and impartiality". In fact, some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, (8) which was accepted without opposition.

4601 This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality". Sub-paragraphs (a)-(f) provide a list of such essential guarantees; a indicated by the expression "in particular" at the head of the list, it is illustrative, only enumerating universally recognized standards.

' Sub-paragraph ' (a) -- ' Right to information and defence '

4602 The ICRC draft simply provided for "a procedure affording the accused the necessary rights and means of defence". (9) That formula was clarified and developed following the proposal by a delegation, on which the present text is based. (10) The rules laid down here are very clear and do not give rise to any difficulties of interpretation: the accused must be informed as quickly as possible of the particulars of the offence alleged against him, and of his rights, and he must be in a position to exercise them and be afforded the rights and means of defence "before and during his trial", i.e., at every stage of the procedure. The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witnesses for the defence and produce evidence; these constitute the essential rights and means of defence. (11)

' Sub-paragraph ' (b) -- ' The principle of individual responsibility '

4603 This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already epressed in [p.1399] Article 33 of the fourth Convention, where it is more elegantly worded as follows: "No protected person may be punished for an offence he or she has not personally committed". (12) The wording was modified to meet the requirement of uniformity between the texts in the different

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languages and, in this particular case, with the English terminology ("individual penal responsibility"). Article 75, paragraph 4(b), of Protocol I, lays down the same principle.

' Sub-paragraph ' (c) -- ' The principle of non-retroactivity '

4604 This sub-paragraph sets out two aspects of the principle that penal law (13) should not be retroactively applied: ' nullum crimen sine lege ' and ' nulla poena sine lege. ' The ICRC draft was inspired by Articles 99 of the Third Convention, 67 of the fourth Convention and 15, paragraph 1, of the Covenant. (14) The proposal to adopt this wording was put forward in an amendment which served as a basis for discussion. (15) There was a long debate, followed by a vote in Committee resulting in a large majority. (16) The wording of the Covenant was retained despite some problems of interpretation owing to the specific context of non-international armed conflict. This solution was adopted out of a concern to establish in Protocol II fundamental guarantees for the protection of human beings, which would be equivalent to those granted by the Covenant in the provisions from which no derogation may be made, even in time of public emergency threatening the life of the nation. (17) Article 15 of the Covenant is one of those articles. In fact, the relevance of including the principle on non-retroactivity was never contested, but the first sentence of the sub-paragraph, and in particular the words "under national or international law", were not considered by everyone to be very clear.

4605 The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.

4606 The Conference followed the Covenant, though there was no real explanation given as regards the meaning to be attributed to the term "national law", which appears in the French text though not in the English text of this sub-paragraph (as the reference to "le droit national ou international" in French has been abbreviated to "the law" in English, the following comments apply more particularly to the French text, although clearly "the law" referred to in the English text does include national law). The interests of the accused and good faith require that this should be interpreted in the light of the initial ICRC proposal, i.e., that no one can be convicted for an act, or for failing to act contrary to a duty to act, when such an act or omission was not an offence at the time when it was committed.

[p.1400] 4607 The reference to international law is mainly intended to cover crimes against humanity. A breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed. Some delegations suggested replacing the term under national or international law" by "under the applicable law" or even by "under applicable domestic or international law", (18) but the majority finally considered that it was best to retain the wording of the Covenant "in order to avoid being out of line".

' Sub-paragraph ' (d) -- ' The principle of the presumption of innocence '

4608 This sub-paragraph sets out the principle of the presumption of innocence, which is implicitly contained in Article 67 of the fourth Convention. This refers to the "general principles of law". It is also contained in Article 14, paragraph 2, of the Covenant. In addition, it is laid down in Article 75 ' (Fundamental guarantees), ' paragraph 4(d), of Protocol I.

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' Sub-paragraph ' (e) -- ' The right of the accused to be present at his own trial '

4609 This sub-paragraph reiterates the principle laid down in Article 14, paragraph 3(d), of the Covenant. It is the result of a proposal in the Working Group which recommended "everyone charged with an offence shall have the right to be tried in his presence". (19) The proposal was not adopted in this form because a number of delegations argued that sentences in absentia are allowed. The right of the accused to be present at his trial, which is established here, should be understood as a right which the accused is free to exercise or not.

' Sub-paragraph ' (f) -- ' The right not to be compelled to testify against oneself or to confess guilt '

4610 This sub-paragraph repeats Article 14, paragraph 3(g), of the Covenant. It was included as the result of a proposal made by the Working Group. (20)

Paragraph 3 -- The right to be informed of judicial remedies and of the time-limits in which they must be exercised

4611 It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right [p.1401] of appeal against sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. (21) However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies. (22)

4612 The term "judicial and other remedies" was originally adopted in English and, in order to maintain uniformity between the languages, was translated into French as "droits de recours judiciaires et autres". The word "autres" is superfluous in the French text since the words "droit de recours" cover all the possible remedies. However, in English the word "judicial" was not considered sufficient to include all the different types of remedies existing in various legal systems.

Paragraph 4 -- The prohibition on pronouncing the death sentence upon persons under eighteen years and on carrying it out on pregnant women and mothers of young children

4613 The authorities retain the right to pronounce the death sentence in accordance with national legislation with one exception: adolescents under the age of eighteen years at the time they committed the offence; the death sentence may be pronounced but may not be carried out on pregnant women or mothers of young children. According to the experts who were consulted it would not have been possible to impose a general prohibition on the death sentence as such a decision would not have taken into account all the penal systems in force. (23) Nevertheless, the ICRC expressed the wish that the penalty should not be executed before the end of hostilities. (24) This proposal, which was included in the draft, reflected the experience that executions result in an escalation of violence on both sides. Moreover, when hostilities have ceased, passions die down and there is a possibility of amnesty. Unfortunately, however modest the proposal, it did not gain a consensus. On the other hand, the limitation laid down in this paragraph was easily accepted in principle; it was inspired by Article 68, paragraph 4, of the fourth

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Convention, (25) and by Article 6, paragraph 5, of the Covenant. The discussions were essentially about two points; fixing the age limit, and extending the rule in favour of pregnant women to cover also mothers of young children.

4614 The age limit of eighteen years was adopted in order to harmonize with the Conventions and the Covenant, which also contain this age limit. The proposal concerning mothers of young children was put forward by a delegation. (26) The concept of "young children" as a legal term remained vague. For this reason a [p.1402] vote was requested on this point, and it was adopted by 37 votes to 2, with 9 abstentions. (27) In any event, the concept is wider than "new-born babies" in the sense of Article 8 ' (Terminology), ' sub-paragraph (a), of Protocol I. It is up to the responsible authorities to reach a judgment in good faith on what is meant by "young children". (28)

4615 The results of the vote suggest that the concept will be broadly interpreted, and that in such special cases the death penalty will not be pronounced.

4616 In any case, Article 76 ' (Protection of women), ' paragraph 3, of Protocol I, which has the same tenor, contains the recommendation not to pronounce the death penalty on pregnant women and on mothers having dependent infants and this recommendation should be considered here.

Paragraph 5 -- Amnesty

4617 Amnesty is a matter within the competence of the authorities. It is an act by the legislative power which eliminates the consequences of certain punishable offences, stops prosecutions and quashes convictions. (29) Legally, a distinction is made between amnesty and a free pardon. The latter is granted by the Head of State and puts an end to the execution of the penalty, though in other respects the effects of the conviction remain in being. This paragraph deals only with amnesty, though this does not mean that free pardon is deliberately excluded. The draft adopted in Committee provided, on the one hand, that anyone convicted should have the right to seek a free pardon or commutation of sentence, and on the other hand, that amnesty, pardon or reprieve of a death sentence may be granted in all cases. (30) That paragraph was not adopted in the end, in order to keep the text simple. Some delegations considered that it was unnecessary to include it because national legislation in all countries provides for the possibility of a free pardon. (31)

4618 The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.

' S.J. '

* (1) [(1) p.1396] See O.R. VIII, pp. 346-355, CDDH/I/SR.33, paras. 22-71; pp. 357-365, CDDH/I/SR.34;

(2) [(2) p.1396] The execution of penalties is not dealt with in this article -- with the exception of the execution of the death penalty on pregnant women and mothers of young children, which is prohibited by para. 4;

(3) [(3) p.1397] Dissident armed forces and organized armed groups within the meaning of Article 1 of the Protocol, which are opposed to the government in power, must be able to apply the Protocol. See supra, p. 1353;

(4) [(4) p.1397] See Arts. 86, 89-108 of the Third Convention and Arts. 64-78 of the Fourth Convention;

(5) [(5) p.1397] Hereinafter referred to as the Covenant;

(6) [(6) p.1397] Draft Arts. 9 and 10. It should be noted that the present heading of the article is incomplete, since it mentions only penal prosecutions, while the provision also lays down principles of penal law;

(7) [(7) p.1397] O.R. IV, pp. 35-36, CDDH/I/262;

(8) [(8) p.1398] See ' Commentary III, ' pp. 411-412 (Art. 84); pp. 484-492 (Art. 105);

(9) [(9) p.1398] See draft Art. 10, para. 1;

10) [(10) p.1398] See O.R. X, p. 145, CDDH/I/317/Rev.1. The amendment submitted during these deliberations is mentioned, but the text is not published in the Official Records as it was a working document;

(11) [(11) p.1398] See ' Commentary Drafts, ' p. 142;

(12) [(12) p.1399] ' Commentary IV, ' p. 224 (Art. 33);

(13) [(13) p.1399] The term "law" is used here in a broad sense, as lex encompasses custom. (14) See draft Art. 9, para. 2;

(14) [(14) p.1399] See draft Art. 9, para. 2;

(15) [(15) p.1399] O R. IV pp. 35-36 CDDH/I/262;

(16) [(16) p.1399] O.R. X p. 130, CDDH/234/Rev.1, para. 87;

(17) [(17) p.1399] Covenant, Art. 4, paras. 1-2;

(18) [(18) p.1400] See O.R. X, p. 144, CDDH/I/317/Rev.2;

(19) [(19) p.1400] Ibid;

(20) [(20) p.1400] Ibid;

(21) [(21) p.1401] Draft Art. 10, para. 2;

(22) [(22) p.1401] This clarification was proposed in an amendment. It was not adopted apparently to avoid making the text too complicated. See O.R. IV, p. 33, CDDH/I/259;

(23) [(23) p.1401] See O.R. VIII, pp. 357-365, CDDH/I/SR.34, paras. 2 ff;

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(24) [(24) p.1401] Draft Art. 10, para. 3;

(25) [(25) p.1401] See ' Commentary IV ', pp. 346-347 (Art. 68);

(26) [(26) p.1401] O.R. IV, p. 33, CDDH/I/259;

(27) [(27) p.1402] O.R. X, p. 131, CDDH/234/Rev.1, para. 90;

(28) [(28) p.1402] The Conventions provide some sort of guide in this respect by mentioning mothers of children under
seven years old (Art. 14, para. 1, Fourth Convention);

(29) [(29) p.1402] "Amnesty" is described as an act of oblivion, a general pardon of past offences by the ruling authority (' Shorter Oxford English Dictionary ', 1978, p. 60). Its mode of operation and effect may obviously differ from country to country. The French definition ("Amnistie: acte du législateur qui a pour effet d'éteindre l'action publique ou d'effacer une peine prévue pour une infraction et, en conséquence, soit d'empêcher ou d'arrêter les poursuites, soit d'effacer les condamnations."), as given in the ' Grand Dictionnaire encyclopédique Larousse ', Vol. I, 1982, p. 414, indicates that it is an act of the legislative whereby the public prosecution of certain offences is ended and the penalty thereon is cancelled, so that no more prosecutions will be instituted, and those already instituted will be discontinued and any convictions for such offences will be quashed;

(30) [(30) p.1402] O.R. X, p. 133, CDDH/234/Rev.1, para. 95;

(31) [(31) p.1402] O.R. VII, pp. 94 and 96, CDDH/SR.50, para. 79 and 99;

Annex 5

John RWD Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia" (1996) 2 European Journal of International Law 226 (http://www.ejil.org/journal/Vol7/No2/art6-01.html)

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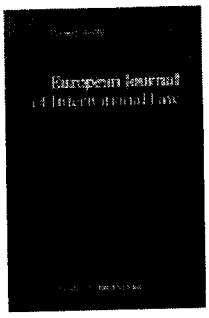

The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia

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II. Co-operation with the Tribunal by the Parties

A. The General Framework Agreement

The General Framework Agreement ("GFA"), signed by the Republic of Bosnia and Herzegovina ("RBH"), the Republic of Croatia and FRY, affirms the duty to co-operate with the Tribunal in three ways. First, Article IX provides that:

> The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.

The Tribunal clearly falls within the compass of this provision, despite the glaring failure to mention it by name.[16]

Second, the Parties agree to 'fully respect and promote fulfilment of the commitments made' in the Annexes to the Agreement, which contain provisions which do specifically mention co-operation with the Tribunal. Third, FRY undertakes to ensure compliance with the Peace Agreement by RS,[17] which is a signatory to the Annexes. Therefore, by signing the GFA, FRY acting on its own behalf and on behalf of RS has recognized, and undertaken to co-operate with, the Tribunal. This duty of co-operation is further elaborated in the Annexes.

B. The Annexes to the Agreement

A number of articles in the Annexes explicitly refer to the Tribunal, while others implicate the Tribunal without mentioning it by name. Those which mention the Tribunal cover subjects falling into five broad categories: 1. General Commitment to Co-operate; 2. Freedom of Movement and Unrestricted Access; 3. Repatriation of Prisoners of War; 4. Exclusion from Public Office; and 5. Amnesty.

1. General Commitment to Co-operate

Several articles reaffirm, in general terms, the duty of the Parties to co-operate with

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the Tribunal. An important example is in Annex 1-A, signed by RBH, the Federation of Bosnia and Herzegovina ("FBH") and RS and "endorsed" by FRY and the Republic of Croatia:

> The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, *including the International Tribunal for the Former Yugoslavia.*[18]

Articles obliging the Parties to provide unrestricted access, discussed below, also mention co-operation with the Tribunal. Article II(8) of Annex 4 notes, in particular, the duty to `comply with orders issued pursuant to Article 29 of the Statute of the Tribunal'. An arrest warrant is the most obvious example of an order which a Party is required to comply with under Article 29, but this article also requires Parties to comply with requests for assistance, for example a formal request to a national court to defer to the Tribunal's competence pursuant to Article 9(2) of the Statute and Rule 10 of the Rules of Procedure and Evidence ("the Rules"). This latter type of request could become important if RS or FRY were to decide to prosecute persons accused by the Tribunal in their own courts.[19] If a Party fails to comply with a request for deferral within sixty days, the Tribunal may, under Rule 11 of the Rules, report the matter to the Security Council. If RS or FRY failed to comply, they would also have failed to fulfil their obligations *under the Agreement*, and might be independently reported to the Council by the High Representative for this breach.[20]

2. Freedom of Movement and Unrestricted Access

Annex 4 and Annex 6 both guarantee unrestricted access to the Tribunal.[21] In addition, under Article II(4) of Annex 1-A, the Parties undertake to facilitate `unimpeded access and movement' to `any international personnel including investigators ... or other personnel in Bosnia and Herzegovina pursuant to the General Framework Agreement'. Since Annex 1-A concerns the military aspects of the Agreement, the IFOR, which was established pursuant to that Annex may employ `the use of necessary force, to ensure compliance' by the Parties.[22] Thus, upon request by the Tribunal, the IFOR could secure sites by force to ensure access to the Tribunal's investigators.[23]

Access to sites is important to the Tribunal in the investigation of possible mass graves.[24] The majority of such sites are in the territory of RS.[25] RS is a party to Annexes 1-A and 6, and has approved, in a separate declaration, Annex 4. Its compliance with Annex 1-A is additionally underwritten by FRY.

The discovery of mass graves may help to demonstrate a systematic campaign of genocide in Bosnia and Herzegovina,[26] although oral testimony attesting to mass killings may be sufficiently probative in itself. The importance of access to suspected mass grave sites was recently affirmed by the Security Council in resolution 1034 (1995) of 21 December 1995. This strongly-worded resolution indicates the Council's firm intention to remain seized of the matter and to dictate the terms of the Parties' compliance with the Agreement. The resolution is worth quoting at length:

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> The Security Council ...
>
> 7. Takes note that the International Tribunal ... issued on 16 November 1995 indictments against the Bosnian Serb leaders Radovan Karadzic and Ratko Mladic for their direct and individual responsibilities for the atrocities committed against the Bosnian Muslim population of Srebrenica in July 1995;
>
> 8. Reaffirms its demand that the Bosnian Serb party give immediate and unrestricted access to the areas in question, including for the purpose of the investigation of the atrocities, to representatives of the relevant United Nations and other international organizations and institutions ...
>
> 9. Underlines in particular the urgent necessity for all the parties to enable the Prosecutor of the International Tribunal to gather effectively and swiftly the evidence necessary for the Tribunal to perform its task;
>
> 10. Stresses the obligations of all the parties to cooperate with and provide unrestricted access to the relevant United Nations and other international organizations and institutions so as to facilitate their investigations and takes note of their commitment under the Peace Agreement in this regard;
>
> 11. Reiterates its demand that all parties, and in particular the Bosnian Serb party, refrain from any action intended to destroy, alter, conceal or damage any evidence of violations of international humanitarian law and that they preserve such evidence;
>
> 12. Reiterates further its demand that all States, in particular those in the region of the former Yugoslavia, and all parties to the conflict in the former Yugoslavia, comply fully and in good faith with the obligations contained in paragraph 4 of resolution 827 (1993) to co-operate fully with the International Tribunal and calls on them to create the conditions essential for the Tribunal to perform the task for which it has been created ...

It may be inferred from this resolution that failure by RS to provide "unrestricted access to the areas in question" would constitute a serious breach of both RS's and FRY's obligations under the Peace Agreement, and would be a ground for the reimposition of sanctions under resolution 1022, provided that the Security Council were first seized of such non-compliance by the High Representative or the IFOR Commander. As discussed below, the Council's perception of the gravity of the breach might influence the views of these officials.

3. Repatriation of Prisoners of War

Article IX(1)(g) of Annex 1-A provides:

> ... each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of

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> or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.

This paragraph has to be read in conjunction with paragraph (c) of the same article, which provides for the release and transfer of all prisoners held by the Parties within thirty days of the transfer of authority from the UNPROFOR Commander to the IFOR Commander. Exchange of prisoners has now officially taken place, although many may remain in custody, without resulting in the surrender of accused to the Tribunal under Article IX(1)(g), a provision which was not, in any event, designed to result in *leaders* being surrendered to The Hague.

4. Exclusion from Public Office

The Peace Agreement contains a number of "office-barring" clauses, most notably in Annex 4, "Constitution of Bosnia and Herzegovina". Article IX(1) of this Annex reads:

> No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.[27]

The natural interpretation of this provision is that it is a corollary of a Constitution which is `determined to ensure full respect for international humanitarian law' and is `guided by the Purposes and Principles of the Charter of the United Nations'.[28] It does not imply that exclusion from public office is an alternative to being tried by the Tribunal; rather it would be a further "sanction" to ensure the appearance of the accused before the Tribunal. Arguably, a private citizen is also easier to arrest than a public official, and the latter might try to claim sovereign immunity, notwithstanding the fact that Article 7(2) of the Tribunal's Statute provides that, `[t]he official position of any accused person ... shall not relieve such person of criminal responsibility ...'. In any event, the main purpose of the provision is to reflect the value judgement that a person convicted by the Tribunal, or indicted and failing to appear before it to defend himself, is not fit for public office.

The phrase, `and who has failed to comply with an order to appear before the Tribunal', in Article IX(1) of Annex 4 is unfortunate, since the Tribunal does not have a practice of ordering persons to appear before it, but of issuing arrest warrants addressed to States.[29] Such an order could, of course, be issued as a summons under Rule 54 of the Rules if `necessary for the purposes of an investigation or for the preparation or conduct of the trial'. Equally, it could be argued that an arrest warrant which has been brought to the attention of the accused operates as a form of summons.

5. Amnesty

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Article VI of Annex 7, which addresses the sensitive issue of amnesty, reads:

> Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty.

By definition, this Article does not interfere with or impinge in any way upon the work of the Tribunal. It should be seen as having the purpose of satisfying Article 6 (5)[30] of Additional Protocol II,[31] and thereby confirming that Additional Protocol II contemplates amnesty only for having participated in the fighting, and not for having committed violations of international humanitarian law while so participating.

The absence of any amnesty for those accused by the Tribunal underscores the point that the Peace Agreement must comply with previous Security Council resolutions relating to the former Yugoslavia, in particular those establishing the Tribunal. An amnesty for those accused of genocide[32] might, in any event, be contrary to *jus cogens* and therefore void.[33]

Many articles could also be invoked in the Tribunal's favour which do not specifically mention it by name, notably articles which remind the parties of their obligations under international humanitarian law,[34] or which refer to co-operation with international organizations or personnel. An example of the latter is Article III(2) of Annex 7, which could be relied upon to provide the Tribunal's investigators with access to refugees and displaced persons for the purposes of taking statements regarding the circumstances of their displacement - an activity "vital to the discharge of their mandate".

A number of clauses mention co-operation with non-governmental organizations ("NGOs").[35] In the early stages of an investigation, the Tribunal often receives valuable information from NGOs.[36] It is also significant that whereas before the Peace Agreement, the Parties were not strictly required to co-operate with NGOs, as they were required by Security Council resolutions to co-operate with the Tribunal, the relevant clauses now impose such a requirement.

C. Sanctions for Non-Compliance

As stated, Security Council resolution 1022 (1995) provides for enforcement of the Peace Agreement by conferring on the High Representative and the IFOR Commander the power to report to the Council significant non-compliance by either RS or FRY. The Council will then reimpose sanctions against those parties, without the need of a decision, after 5 days, `unless the Council decides otherwise taking into consideration the nature of the non-compliance'. Thus sanctions will be reimposed automatically unless members of the Security Council decide to the contrary (although such a decision could of course be vetoed by one of the permanent members).

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The provision for sanctions is, however, subject to an important qualification: it may terminate after six to nine months. Operative paragraph 4 of the resolution stipulates that the Council will terminate sanctions "on the tenth day following the occurrence of the first free and fair elections provided for in annex 3 of the Peace Agreement ...", which are due to take place, under annex 3, six months after the Agreement enters into force or, if the Organization for Security and Cooperation in Europe deems a delay necessary, "no later than nine months after entry into force" (Article II(4)). This raises the issue: what if it proves impossible to organize free and fair elections in that time, given the conditions in Bosnia and Herzegovina, notably the many hundreds of thousands of refugees? Presumably the termination of sanctions under resolution 1022 would then have to await such elections, even if they were not to be held for a year or more. It should be added that, if elections are held in time, termination would not be automatic; operative paragraph 5 of the resolution refers to termination "by a subsequent Council decision in accordance with paragraph 4 above", clearly indicating that the Council must take a decision to terminate sanctions. A permanent member could veto this decision if there were continuing non-compliance by the FRY or RS. Indeed, the prospect of using the veto in these circumstances may have been hinted at by the United States Representative during the debates on resolution 1022:

> .... compliance by the Bosnian Serbs cannot be assumed. After the siege of Sarajevo, the market-place shelling, the years of "ethnic cleansing" and the unforgivable savagery at Srebrenica, the world has had enough of Bosnian Serb arrogance and brutality. Their compliance with this agreement must be demanded by the Government in Belgrade; it must be demanded by this Council; and it must be demanded by every civilized person on earth.[37]

If the two conditions demanded by paragraph 4 were met, namely free and fair elections and withdrawal from the zones of separation, but the Bosnian Serbs were recalcitrant in other areas, for example refusing to co-operate with the Tribunal, sanctions might still not be terminated. To terminate sanctions in the face of bare-faced non-compliance with "an essential aspect of implementing the Peace Agreement" would appear to be inconsistent with the entire spirit of resolution 1022 (1995).

The sanctions suspended under resolution 1022 are contained in a number of resolutions against FRY and, to a lesser extent, RS (notably resolution 942(1994)). Interestingly, it appears that sanctions would be reimposed on both Parties if either of them failed to comply. While it is logical for sanctions to be reimposed on FRY for RS's non-compliance, since FRY is the guarantor of RS's compliance, it is curious that sanctions may be reimposed upon RS for FRY's non-compliance. The close identification of FRY and RS suggests a perception that they are, in fact, one entity. This perception is reinforced by the Agreement of 29 August 1995,[38] and the constitutional provision which would allow RS to establish a "special parallel relationship" with FRY.[39] The *de facto* establishment of a "Greater Serbia" has potential implications for the Tribunal, both in respect of the characterisation of the conflict in Bosnia and Herzegovina as international, based on the notion that Bosnian Serb forces are agents of FRY, for the purposes of the application of international humanitarian law, and in respect of the existence of an expansionist project in Bosnia and Herzegovina on the part of FRY.

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An important feature of resolution 1022 (1995) is that it requires the Security Council to be seized by the High Representative or the IFOR Commander of non-compliance by FRY or RS with regard to a matter within the scope of their respective mandates. Thus these officials have a vital rôle to play in monitoring compliance by these Parties.[40] The High Representative's mandate is to monitor compliance with the civilian aspects of the Peace Agreement,[41] which include such issues as humanitarian aid, rehabilitation of infrastructure and economic reconstruction, the establishment of political and constitutional institutions in Bosnia and Herzegovina, promotion of respect for human rights and the return of displaced persons and refugees, election arrangements, and, notably, co-operation with the Tribunal. The IFOR Commander is responsible for enforcing compliance with the military aspects of the Peace Agreement (Annex 1-A), which includes provisions regarding co-operation with the Tribunal, free movement of investigators, including access to sites, and access to prisoners held by the Parties.

Resolution 1031 (1995) confirms that the IFOR Commander and the High Representative have `final authority to interpret'[42] the military and civilian aspects of the Agreement, respectively. This would seem to imply that the Security Council is not competent to determine, *proprio motu,* non-compliance by a Party, although the words, `in theatre', could be construed to mean that the Council, being `out of theatre', is not subject to this `final authority'. Resolution 1031 (1995) would then represent a partial delegation of power by the Security Council to the IFOR Commander and High Representative, the Council however retaining a residual power to determine, at least, a Party's non-cooperation with the Tribunal. It is possible to imagine tension arising where there is substantial non-cooperation with the Tribunal by RS or FRY, but neither the High Representative nor the IFOR Commander consider it a significant breach of the Parties' obligations under the Peace Agreement. The Security Council would, on the above theory, not be barred from adopting new resolutions to condemn and, if necessary, to apply sanctions against RS and FRY for non-cooperation. Since it has primary responsibility for the maintenance of international peace and security, its resolutions might also mould the views of the IFOR Commander and the High Representative as to the interpretation of the Agreement and of what constitutes significant non-compliance.

It is salient to note that the Tribunal's Rules[43] provide for direct notification to the Security Council where a State fails to co-operate: a useful safeguard against inaction by the High Representative or the IFOR Commander. A finding by a Trial Chamber that failure to execute an arrest warrant is due to the failure of a State to co-operate may implicitly involve finding that a Party has failed to meet its obligations under the Peace Agreement.[44] This judicial determination would be independent of, and not subject to, the High Representative's `final authority to interpret' the Agreement. Thus a system of `checks and balances' may emerge in which the High Representative's `final authority' to interpret civilian implementation of the Agreement is balanced in certain cases by the monitoring activities of other organs enjoying concurrent jurisdiction.[45]

Top ▲ 16 This is a blatant omission. Article X of Annex 1-A is virtually identical save it includes the phrase, "including the International Tribunal for the Former Yugoslavia'.

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Top ▲ 17 See the Preamble, `Noting the agreement of August 29, 1995, which authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republika Srpska, the parts of the peace plan concerning it, with the obligation to implement the agreement that is reached strictly ...'. In side-letters, FRY has also pledged to ensure RS's compliance with Annex 1-A, and Croatia has undertaken to ensure compliance by "personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence", i.e. Bosnian Croats. See letter of Mate Granic to the Acting Secretary General of NATO, dated 21 November 1995.

Top ▲ 18 Article X of Annex 1-A (emphasis added). Another example is Article IV of Annex 9.

Top ▲ 19 A recent article suggests that the Bosnian Serbs might try Radovan Karadzic themselves. See the *New York Times*, 4 January 1996, "Top Leader of the Bosnian Serbs now under attack from within": ` .... there are increasing calls within Serb-held parts of Bosnia for him (Karadzic) to be removed from power and tried as a war criminal, *if not in The Hague, then in Bosnia.* ... "Our main goal now is to take these war criminals, like Karadzic, and put them on trial. *The Bosnian Serbs must punish those who carried out these crimes*, otherwise, in the eyes of the world, we will bear the guilt for the atrocities they committed in our name.'" (Emphasis added).

Top ▲ 20 If acquitted by the national court, the Tribunal could still request the arrest of the accused if `(a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.' (Article 10(2) of the Statute).

Top ▲ 21 See Article II(8) of Annex 4 and Article XIII(4) of Annex 6: `All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to ... the International Tribunal for the Former Yugoslavia ...'.

Top ▲ 22 Article I(2)(b) of Annex 1-A.

Top ▲ 23 IFOR has been equivocal about its willingness to perform this task. The attitude of the Clinton Administration has, on the other hand, been more robust. See, the remarks of US Defence Secretary Perry: `If the War Crimes Tribunal (sic) wants to go to Srebrenica and dig up some graves, we'll provide the security ... I don't consider that mission creep', reported in the *New York Times*, 13 January 1996, "U.S. Sees Bosnia Role Widening to Protect War Crimes Inquiries".

Top ▲ 24 Note that Article IX(2) of Annex 1-A also mentions mass graves. This article, however, only allows access to such sites for the `limited purpose' of recovering the dead by registration personnel of a party, and not by the Tribunal, and it is also qualified by the strange wording, `... where places of burial, whether individual or mass, *are known as a matter of record, and graves are actually found to exist* ...', which appears to be intended to exclude *suspected* sites which have not been confirmed.

Top ▲ 25 See the Report of the Commission of Experts, Annex X, Mass Graves, *passim.* See also *The Times*, 13 January 1996, p.10/1: `War Crimes team told of 8,000 bodies in mineshafts'; and *Le Monde,* 26 January, 1996, p.2, "Les principaux charniers repérés".

Top ▲ 26 The indictment in *Karadzic and Mladic* (IT-95-18-I), charges the accused with, *inter alia,* genocide, for their involvement in the events following the fall of Srebrenica to Serb forces. The confirming Judge in that case noted the evidence of `thousands of men executed and buried in mass graves'.

Top ▲ 27 See also Article VIII(4), Establishment of a Joint Military Commission, of Annex 1-A, and

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Article II(1) of Annex 8, "Commission to Preserve National Monuments".

Top ▲ 28 Preamble to "Constitution of Bosnia and Herzegovina", Annex 4.

Top ▲ 29 This does not apply to Article VIII(4) of Annex 1-A, which does not require that the person be ordered to appear before the Tribunal, but would apply to Article II(1) of Annex 8, which does.

Top ▲ 30 "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict ... ". See Paragraph 4618 of the *Commentary on the Additional Protocols*: "the object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided".

Top ▲ 31 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (16 I.L.M. 1442 (1977)).

Top ▲ 32 To date, the Tribunal has charged five accused with genocide: Zeljko Meakic (IT-95-4-I), Radovan Karadzic and Ratko Mladic (IT-95-5-I and IT-95-18-I), Dusko Sikirica (IT-95-8-I) and Goran Jelisic (IT-95-10-I).

Top ▲ 33 Article 53 of the Vienna Convention on the Law of Treaties. See the International Court of Justice's Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide (1951), in which it stated that genocide was `contrary to moral law and to the spirit and aims of the United Nations'; see also the Separate Opinion of Judge Lauterpacht in the Case Concerning Application of the Convention on the Prevention and Punishment of Genocide (Order of 13 September 1993): `... the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*' (paragraph 100).

Top ▲ 34 See, e.g., the Preamble to Annex 4: `Determined to ensure full respect for international humanitarian law'.

Top ▲ 35 See, again, Article III(2) of Annex 7, and Article XIII(3) of Annex 6, `The Parties shall allow full and effective access to non-governmental organizations for purposes of investigating and monitoring human rights conditions in Bosnia and Herzegovina and shall refrain from hindering or impeding them in the exercise of these functions'.

Top ▲ 36 See the Tribunal's Second Annual Report (A/50/365; S/1995/728), paragraphs 154-156.

Top ▲ 37 S/PV.3595, p.15.

Top ▲ 38 See footnote 17.

Top ▲ 39 Article III(2)(a) of Annex 4.

Top ▲ 40 The present holder of the office of the High Representative, Mr. Carl Bildt, has sought to play down his capacity to ensure compliance by the Parties. Replying to an editorial of 17 December 1995 in the *New York Times*, Mr. Bildt wrote, "You seem to overestimate the powers of the High Representative. His powers are not to execute or enforce but to monitor and coordinate. In contrast to the military implementation with its distinct chain of command and single-key approach, the civilian implementation structures have numerous chains of command and multiple keys"(*New York Times*, 21 December 1995). This passive interpretation of his rôle deliberately overlooks the High

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Representative's power to re-activate sanctions against FRY and RS under resolution 1022 (1995).

Top The Commander of the IFOR, Admiral Leighton Smith, has also appeared at times to labour under a misconception of his responsibilities. In reply to a question whether the arrest, in February this year, of Bosnian Serbs by the Bosnian Government, on suspicion of having committed war crimes, violated the Peace Agreement, Admiral Leighton Smith replied, "The issue rests now, with the international tribunal", thus abdicating to the Tribunal his "final authority in theatre" to interpret the Peace Agreement (see CNN Transcript # 90-3, 7 February 1996). Smith of course had it in his power to state that there was no violation of the right to liberty of movement, guaranteed in the Agreement (for example, by Article I(13) of Annex 6), in effecting *bona fide* arrests of those suspected of committing war crimes or crimes against humanity.

Top Interestingly, new "rules for the road" announced by U.S. envoy Richard Holbrooke in the wake of this affair also led to far greater powers being conferred upon the Tribunal than envisaged at Dayton. After the two detainees referred to were transferred to the Tribunal on 12 February 1996, Holbrooke declared an agreement pursuant to which the Bosnian government would send a list of suspects to the Tribunal and only those certified by the Tribunal as suspects could be arrested at will on the territory of the Federation of Bosnia and Herzegovina. This agreement in effect treats the Tribunal as a `detaining authority', or even a `prosecuting authority', in Bosnia and Herzegovina for those suspected of committing violations of international humanitarian law. While these measures were no doubt expedient as a means to forestall retaliatory arrests by the Bosnian Serbs, one has to question the constitutionality and legitimacy of this abdication by Bosnia and Herzegovina of the right to arrest those it suspects of having committed grave crimes on its territory. It is also highly questionable to what extent the Tribunal, with its limited facilities, may appropriately act as an overall `prosecuting authority' for Bosnia and Herzegovina, with regard to war crimes and crimes against humanity. The principle of an international tribunal has always been conceived as operating *alongside* national courts. For these reasons, Holbrooke's `rules of the road' represent more of a *realpolitik* stop-gap, born of `shuttle diplomacy, than a long-term solution.

Top 41 Article II(1) of Annex 10.'

Top 42 See footnote 9.

Top 43 See Rules 11, 13, 59(B), and 61(E) of the Rules.

Top 44 See Rule 61(E) of the Rules.

Top 45 Another such "check" is the IPTF Commissioner's duty to report directly to the Secretary-General of the United Nations (Article II(4) of Annex 11).

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Annex 6

United States Institute of Peace, Special Report 13, "Rwanda: Accountability for War Crimes and Genocide", January 1995 (http://www.usip.org/pubs/specialreports/early/rwanda2.html#trialrwa).

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SPECIAL REPORT 13

Rwanda: Accountability for War Crimes and Genocide

Complete List of Institute Reports

Release Date: January 1995

CONTENTS

Obtaining Custody of Suspects: A Step in Resolving the Refugee Problem

States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

1. *States shall comply without undue delay with any request for assistance or an order issued*
   - *(a) The identification and location of persons...*
   - *(d) The arrest or detention of persons;*
   - *(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.*

--Statute of the International Tribunal, Article 28

The Rwandan government has placed approximately 6,500 people in detention to date on suspicion of participation in the April-July atrocities. Most of the senior architects and perpetrators of the genocide, however--the first tier referred to earlier--have fled the country, and detaining them for investigation and prosecution is more complicated. The two reports of the Commission of Experts did not address this issue of locating and detaining potential defendants, particularly in the refugee camps in Zaire.

Long-term continuation of the refugee problem will not only be a drain on the host countries but, by enabling the ousted leadership to exercise control over such a large portion of the Rwandan population, will also constitute a very real threat to the stability of Rwanda under the new government. An estimated 30,000 members of the defeated Rwandan army currently control the refugee camps in Zaire--reportedly retaining their command structure, and continuing their training and still receiving salaries from Rwandan treasury funds brought from Kigali. The ousted Rwandan leadership has repeatedly declared its intention to mount an armed invasion from Zaire. Prime Minister Twagiramungu confirmed this assessment during the Institute conference, noting, "We need very much for these people to come back. Otherwise--if they don't come back--we are surely preparing another conflict."

As they have since July, Rwanda's former political, military, and militia leaders continue to terrorize the refugees and prevent their return. They have coerced refugees to remain outside the country through physical intimidation, murder, control of--and profit from--the distribution of relief supplies, and the broadcast of propaganda stating that returnees face certain slaughter at the hands of the RPF. These former leaders have also coerced and threatened international relief workers, prompting several relief organizations to consider withdrawing their operations. In a new development, members of the militias are reported to be killing witnesses to the genocide in the refugee camps, presumably to prevent future testimony against them.

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Identifying and detaining those among the refugees most culpable in the atrocities of April-July is important for at least two reasons: (1) to prevent the flight and disappearance of these defendants (such flight would undercut the authority and credibility of the international tribunal and increase the expenditures of time and resources needed to track down these people and bring them to trial) and (2) to segregate these people--most notably the former military and government leadership and the militias--from the much larger number of innocent Hutus in the refugee camps, facilitating the latter's security and repatriation.

In addition to establishing accountability for the genocide in Rwanda, the tribunal can send a strong message with respect to abuses taking place--again with impunity--in the refugee camps. Under Article 7 of its charter, the "territorial jurisdiction of the International Tribunal for Rwanda shall extend ... to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens." Many of the acts of terrorism, persecution, and intimidation that have been committed in the refugee camps are punishable under the tribunal's jurisdiction to prosecute "persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977." By quickly prosecuting a few of the most egregious violations that have been perpetrated on the refugee population, the tribunal can improve the situation in the refugee camps and simultaneously facilitate the repatriation of refugees to Rwanda.

The statute of the Rwanda tribunal obliges all states to comply "without undue delay" with any request by the tribunal for assistance in locating, de-taining, or transferring persons. Even assuming that authorities in Zaire and Tanzania are willing to act on such requests with respect to individuals in the refugee camps (several participants at the Institute conference expressed some skepticism on this point with respect to Zaire), the rules of the tribunal may make it difficult to promptly issue requests for detention or transfer of suspects.

The domestic criminal laws of many countries permit the arrest of a suspect on the basis of investigation and solid evidence prior to the issuance of a formal indictment. Under the rules of the Yugoslavia and Rwanda tribunals, "orders and warrants for the arrest, detention, surrender or transfer of persons" cannot be issued until the prosecutor first satisfies a tribunal judge that a prima facie case exists and the judge confirms the indictment--a lengthier process and higher burden of proof. Even in the most optimistic scenario, it is doubtful that detention orders will be issued before early or mid-1995, by which time the principal candidates for trial before the international tribunal--the architects of the Rwandan genocide and their senior henchmen--can leave the refugee camps and disappear from view.

Assuming that the statute of the tribunal is not amended to modify this process, the UN must devise an alternative mechanism to isolate and contain the senior echelons of the former Rwandan leadership. Bringing to account those responsible for the April-July genocide will deter an armed invasion by refugees from Zaire; isolating these leaders in the immediate term will buy time to permit the tribunal to demonstrate that accountability.

Questions of Timing

Consistent with the Nuremberg model, it would be reasonable to defer the trials in Rwanda's national courts until the international tribunal completes its work. The UN tribunal would prosecute the smaller number of principals implicated in the Rwandan atrocities. Only after this prosecution of those most culpable would the Rwandan authorities proceed against the much larger number of second- and possibly third-tier defendants. There is clear logic and sound policy to this progression. Various UN and foreign authorities have pressed the new Rwandan government to adhere to this approach; in August 1994, the government agreed to

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defer its own prosecutions accordingly.

To accomplish most of the goals outlined earlier, the trial process must begin quickly. Both the president and the prime minister have stated that the Rwandan government will be willing to postpone genocide trials in Rwandan courts only if the UN tribunal begins its prosecutions by January 1995. It is certain that the progress of the tribunal will not meet this deadline. Despite the fact that the Security Council has acted swiftly in establishing the tribunal and has chosen the most time-efficient course of action by sharing some elements of the Yugoslavia tribunal, it will still be necessary to hire additional staff, including deputy prosecutors, investigators, and registry personnel--a process that is now beginning. As soon as even a skeleton staff is in place, the prosecutor can begin the exhaustive investigation of cases and the preparation of indictments. The charter of the tribunal lays out a process for election of six trial judges by the Security Council and General Assembly, which will likely be completed in early 1995. At that point, the process of indictment, location and detention of suspects, and pre-trial procedures will ensure that, despite all good intentions, the tribunal's first trials will not actually begin before mid to late 1995.

Thus, although the progression from international to domestic trials is preferable in principle, the realities of the Rwandan situation require otherwise. While creation of the international tribunal remains important for all of the reasons outlined earlier, the Rwandan government should begin to assemble its own prosecution program without delay, with extensive use of foreign assistance, participation, and observation. As noted earlier, close coordination will be necessary between Rwandan and UN officials to determine the categories of people to be investigated and prosecuted by their respective tribunals

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Trials Before Rwandan Courts

Limits to Prosecution
Disparity of Penalties
Prosecution of Abuses by RPF Soldiers and Others Since July 1994

Like most of its infrastructure, Rwanda's judiciary has been decimated. From a total of 300 judges and lawyers staffing the courts of first instance, appellate courts, and Supreme Court and 500 in the provincial courts before the events of April-July, only 40 jurists remain in the entire country. The process of establishing the rule of law in Rwanda, rebuilding the judiciary, training judges, prosecutors, defense lawyers, and investigators--in addition to police and corrections officers--will be a long-term proposition, but one to which the international community needs to quickly turn its attention and resources. The absence of a functioning judicial system in Rwanda has contributed significantly to a destabilizing sense of lawlessness in the country.

The task of rebuilding the legal infrastructure and training new personnel will take years to accomplish. More immediately--long before this process bears fruit--the Rwandan justice system must deal with the 6,500 people already detained for their role in the recent atrocities and the thousands more potential defendants whose cases will not come before the UN tribunal. If trials before the Rwandan courts are to serve the ends of justice and reconciliation, it is imperative that they maintain both the fact and the perception of fairness.

One element warranting attention is the need to afford defendants in the second- or third- tier, who will be tried in national courts, at least the same protections as the directors of the genocide will be guaranteed by the international tribunal, lest the subordinates be treated more harshly than the principals.[9] Defendants

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should be afforded the due process and criminal procedure rights guaranteed them under international law, including their right "to trial within a reasonable time or to release."[10] Unless the Rwandan trials are scrupulously fair, they will quickly be criticized as a vehicle of collective retribution rather than a means of justice and accountability, hindering rather than facilitating reconciliation.

The November 8 Security Council resolution stresses "the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects" in the genocide. In a December 13, 1994 press conference in Washington, Vice President Paul Kagame discussed how the United States and the international community can aid in rebuilding and stabilizing Rwanda. The first order of business, he stated, is to provide assistance in rebuilding the country's justice system. The international community should immediately provide staff and equipment to help with this effort.

Prime Minister Twagimarungu, President Pasteur Bizimungu, and Minister of Justice Alphonse Nkubito have all indicated their desire to have foreign jurists serve not only as observers and advisors, but also as judges, lawyers, and investigators within the Rwandan legal system for the period of these trials.

Donor governments and nongovernmental organizations, including bar associations and other legal groups, should rapidly send qualified personnel to fill these roles, so that the trials can get under way relatively quickly. Such foreign monitoring and participation would also significantly enhance the likelihood and the perception that the prosecutions proceed on an impartial basis.

Foreigners who will serve as judges, prosecutors or defense attorneys in Rwandan courts will need French language training as well as education in a similar legal system. American or British attorneys, for example, would likely be less useful in these roles, but they could serve productively as investigators and monitors.

Limits to Prosecution

[I]n the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

-- Security Council Resolution 955

Participants in the Institute's conference, including Prime Minister Twagiramungu, emphatically argued that any broad-based amnesty for the April-July atrocities, proffered in the name of national reconciliation, would only perpetuate the culture of impunity in Rwanda, facilitating new rounds of violence. The best way to deter potential perpetrators of genocide in Rwanda--and Burundi--is to clearly and firmly replace that culture with one of individual accountability for participants in such crimes.

This firm rejection of amnesty, however, must be distinguished from the exercise of prosecutorial discretion. The sheer numbers of active participants in the genocide present a nettlesome dilemma for the international tribunal, and a much greater one for the Rwandan courts: defining limits in determining whom to prosecute.

While the trend in international law is increasingly opposed to impunity for certain particularly egregious violations of human rights, and while the Genocide Convention plainly requires that "persons committing genocide or [conspiracy, incitement, attempt or complicity in genocide] shall be punished," it is less certain

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that international law demands the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country. This approach has been adopted in Argentina and in some of the countries of Central and Eastern Europe in dealing with the legacy of massive human rights abuses by their ousted regimes. South Africa is currently contemplating an arrangement under which amnesty from prosecution will be granted to individuals who come forward and confess their crimes.

This option of limiting the number of prosecutions is particularly relevant to the Rwandan case. Even with a massive infusion of foreign assistance, an attempt to investigate and prosecute everyone in the three tiers outlined above--as many as 100,000 people by some estimates--would be far beyond the financial and personnel resources of the Rwandan judiciary. These numbers would be unwieldy even for a much larger and better financed judicial system. The Rwandan government has declared that "[e]very person who participated in the atrocities must not only be prosecuted but also punished." If attempted, such a prosecution program would necessarily drain resources from other aspects of rebuilding Rwandan society, inevitably dilute the standards of due process afforded to defendants in order to move such enormous numbers through the system, undercut the credibility of the trials, require several years to complete, and hinder progress toward national reconciliation.

One mechanism that has been suggested for reducing the numbers of defendants to a manageable range is the appointment of one or many special commissions, separate from the courts, with authority to grant immunity from prosecution to (a) the many people who were coerced to kill under the threat that refusal would result in their own death or that of their spouse or child; and/or (b) those who confess to their participation, compensate victims, and help them rebuild their destroyed property and communities. This approach, it was suggested, would also facilitate the repatriation of refugees, assuming they could be guaranteed safe passage in coming to testify before the commission.

Disparity of Penalties

The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda....
In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners....
Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons.

-- Statute of the International Tribunal, Articles 23, 26

Under the rules of the UN tribunal for Rwanda, imprisonment and the return of ill-gotten assets are the only penalties that may be imposed on those found guilty of genocide, war crimes, or crimes against humanity. Rwandan Vice President Kagame and other officials of the new government had argued that the tribunal should be authorized to impose capital punishment. Despite its repeated calls for creation of the international tribunal, the Rwandan government ultimately voted against the November 8 Security Council resolution, largely in protest of this point.

Rwandan law permits use of the death penalty in cases of genocide, and Rwandan authorities have repeatedly stated their intention to impose it. This difference between the international and national approaches could result in an anomalous situation in which the large number of second- and third-tier defendants who will be prosecuted before Rwandan courts could be subject to a

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harsher punishment for their role than those most culpable in the atrocities--the top political, military, militia and other leaders who will presumably be tried by the international tribunal. This would severely undermine any sense of justice or fairness.

In addition to this incongruity, the use of capital punishment by Rwanda in such a politically and emotionally charged atmosphere will not contribute to the process of reconciliation, some conference particpants believed. Rwandans may want to employ alternative penalties to imprisonment, including sentences of community service or orders to pay reparations to victims. Whether by legislative amendment or through the exercise of discretion, however, some conference participants urged the Rwandan government not to seek imposition of the death penalty in the trials before its national courts.

In the event that a Rwandan court does attempt to apply the death penalty, the international tribunal has the option of blocking its enforcement by taking the case under its own jurisdiction. Under the rules of the tribunal, it has "primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence," effectively ending the domestic proceeding (emphasis added).

Prosecution of Abuses by RPF Soldiers and Others Since July 1994

Although the propaganda spread by the former Rwandan leadership in the refugee camps regarding retribution exacted by the RPF is vastly exaggerated and falsified, it is clear that some revenge killings against Hutus have been perpetrated by RPF soldiers and others since the assumption of power by the new government in July. Relief organizations, human rights groups, and the foreign press have verified the occurrence of such acts throughout the country. In one example, calling the situation "very dangerous," Kigali's prosecutor recently reported that after the city's senior judge determined that there was no basis for the charges against some Hutu detainees and ordered their release, the judge was abducted from his home by soldiers in early October and has disappeared. In addition to those currently detained in Rwanda's prisons in connection with the genocide, various RPF units are alleged to be taking many others to their own military detention camps.

Rwandan officials and foreign observers have warned that in the absence of justice being administered by the courts--international or domestic--victims will be more likely to take the law into their own hands. Some Rwandan government officials have also implied that the current acts of retribution do not warrant major attention, given that they are incomparable in scale to the earlier atrocities and do not constitute a planned genocide.

Given the gravity of the atrocities that were committed this past spring, individual acts of retribution are perhaps understandable, but they cannot be tolerated. It is essential not only that the prosecution process get under way with respect to those implicated in the genocide of April-July, but that the Rwandan government firmly and visibly demonstrate that crimes of vengeance are unacceptable. To permit impunity for the current abuses would block repatriation of the refugees to Rwanda, undercut the legitimacy of the new government in the eyes of many Rwandans and the international community, undermine any efforts at national reconciliation, and likely contribute to a new escalation in the cycle of violence.

The international tribunal can also address this issue. The November 8 resolution authorizes it to prosecute serious violations of international humanitarian law committed in Rwanda from January 1 through December 31, 1994, meaning that revenge killings and other crimes of vengeance committed through the end of this year fall within the jurisdiction of the tribunal. In its final report, the UN Commission of Experts noted that it "remains disturbed by ongoing violence committed by some RPF soldiers and recommends that investigation of violations of

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international humanitarian law and of human rights law attributed to the Rwandese (sic) Patriotic Front be continued by the Prosecutor [of the international tribunal]." If these dangerous acts of retribution continue or escalate, the Security Council should consider amending the temporal jurisdiction of the tribunal to permit it to prosecute crimes committed after December 31, 1994.

The more effective method to stem these acts of vengeance, however, will be through Rwandan domestic prosecutions, not through the tribunal. This, after all, is not a question of victor's justice, but rather of the victor holding its own people to account. The Rwandan government has shown signs of willingness to enforce its laws against those who would take the law into their own hands. It has reportedly arrested some of the perpetrators of this vigilantism. Unless the civilians and RPF soldiers who are exacting revenge are promptly prosecuted and punished, the trial of those responsible for the genocide will be viewed as nothing more than victor's justice.

In the event that Rwandan authorities succumb to local political pressures, turning a blind eye to these cases or prosecuting them perfunctorily, the international tribunal should exercise its jurisdiction, under Article 9 of its statute, to retry cases of serious violations of humanitarian law following domestic trials if the "national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."

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Annex 7

Human Rights Watch, "Sierra Leone--'We'll Kill You if You Cry'—Sexual Violence in the Sierra Leone Conflict", January 2003 (http://hrw.org/reports/2003/sierraleone/)

Annex 8

Human Rights Watch, "Iraq: No Amnesty for Mass Murderers", 3 July 2003, (http://www.hrw.org/press/2003/07/iraq070303.htm).

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International Justice

Iraq: No Amnesty for Mass Murderers

U.S. and U.K. Should Not Offer Immunity for Information

(New York, July 3, 2003) U.S. and U.K. officials should not offer former senior Iraqi leaders amnesty or immunity from prosecution in exchange for providing information on Saddam Hussein or weapons of mass destruction, Human Rights Watch said today.

"Amnesty for those Iraqi leaders who committed genocide, war crimes, or crimes against humanity would be a devastating affront to the victims of the former Iraqi government. Amnesty deals would signal that justice for the world's most heinous crimes can be brushed aside when it suits governments to do so."

Richard Dicker, director of Human Rights Watch's international justice program

In letters to U.S. President George W. Bush and U.K. Prime Minister Tony Blair, Human Rights Watch said that offering amnesty to those responsible for the worst crimes would be inconsistent with the United States' and United Kingdom's international legal obligations and could undermine efforts to promote the rule of law and stability in Iraq.

Related Material

Background on the Crisis in Iraq

Iraqi Suspect in Mass Killings Released
HRW Press Release, May 30, 2003

"Amnesty for those Iraqi leaders who committed genocide, war crimes, or crimes against humanity would be a devastating affront to the victims of the former Iraqi government," said Richard Dicker, director of Human Rights Watch's international justice program. "Amnesty deals would signal that justice for the world's most heinous crimes can be brushed aside when it suits governments to do so."

In outlining the reasons why the United States and United Kingdom went to war in Iraq, both governments cited human rights abuses committed by Saddam Hussein's regime and the need to hold perpetrators accountable. Past experiences with transitional governments have shown that ensuring justice for past abuses is an important component in building respect for the rule of law and securing peace and stability.

"Prosecuting only those senior Iraqi officials who do not provide useful information would be hypocritical and would cast serious doubts about the coalition authorities' proclaimed commitment to justice," said Dicker.

Discussions have been underway between the coalition authorities, the United Nations, Iraqi jurists, and non-governmental organizations on how to best hold perpetrators of past crimes accountable. Human Rights Watch and others have called on U.N. Special Representative for Iraq Sergio Vieira de Mello to establish a U.N. Commission of Experts to determine the most appropriate mechanisms for delivering justice for the former Iraqi leadership's crimes and coordinating evidence collection and preservation.

"Once you start giving amnesties to the top people, efforts to achieve accountability will certainly be undermined," said Dicker.

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For years, Human Rights Watch has advocated justice for past crimes of the Iraqi leadership. During Ba'ath Party rule, that leadership perpetrated crimes including genocide, crimes against humanity, war crimes, torture, "disappearances," and summary and arbitrary executions. In the genocidal 1988 "Anfal" campaign, more than 100,000 Kurds were trucked to remote sites and executed. In the 1980s, the Iraqi government forcefully expelled over half a million Shi'a to Iran after separating out and imprisoning an estimated 50,000 to 70,000 Shi'a men and boys, most of whom remain unaccounted for. Since the late 1970s, at least 290,000 people "disappeared" in Iraq.

The Human Rights Watch letters to President Bush and Prime Minister Blair can be found at: http://hrw.org/press/2003/06/iraq-bush062703-ltr.htm and http://hrw.org/press/2003/06/iraq062703-ltr.htm

For more information, on justice and Iraq, see http://hrw.org/campaigns/iraq/#Justice.

For Human Rights Watch's position paper "Justice for Iraq" see http://hrw.org/backgrounder/mena/iraq1217bg.htm.

Annex 9

Amnesty International Press Release, AI Index: AFR 34/023/2003, 24 November 2003 (http://www2.amnesty.se/aidoc/press.nsf/0/80256DD400782B8480256DE8005D42F8?opendocument).

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PDF WP

AMNESTY INTERNATIONAL PRESS RELEASE

AI Index: AFR 34/023/2003 (Public)
News Service No: 266
24 November 2003

Liberia: Urgent protection needed as peace remains elusive for thousands of civilians

Despite the peace agreement of 18 August 2003 and the establishment of a United Nations (UN) peace-keeping operation, civilians continue to be killed, raped, used as forced labour and driven from their homes, an Amnesty International delegation recently returned from Liberia concluded.

Speedy deployment of additional UN peace-keeping forces is necessary to provide protection. In addition, the perpetrators of these abuses must be made to understand that they will be held accountable.

"All parties to the conflict who signed the peace agreement a little over three months ago are violating the terms of that agreement - including a commitment to end human rights abuses," Amnesty International said.

Although the capital Monrovia enjoys an uneasy calm after the devastating events of June and July, attacks on the civilian population by former government forces and the two armed opposition groups, the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), are continuing in Bong, Nimba and Grand Bassa Counties.

"Instead of being able to return to their homes, hundreds of thousands of people remain internally displaced. These numbers increase daily as civilians flee killings, rape, beatings, forced labour and extensive looting," Amnesty International said.

During their two-week visit to Liberia, Amnesty International's delegates met large numbers of internally displaced people in camps around Monrovia, in Kakata in Margibi County, Totota in Bong County and also in Sagleipie in Nimba County. Those in Kakata and Totota described how their villages were attacked and looted by LURD forces and how, as they fled, their few remaining possessions were taken by former government forces based around Sanoyie. Those in Sagleipie had fled MODEL forces as they advanced towards Tapeta and Graie, killing, looting and destroying villages. Predominantly Krahn, MODEL forces are attacking those from the Mano and Gio ethnic groups in Nimba County because of their assumed support for former President Charles Taylor.

Amnesty International delegates met representatives of the former government of Liberia, LURD and MODEL who now hold ministerial positions in the National Transitional Government of Liberia and urged them to exert influence on combatants and demand an end to abuses against civilians. It appears, however, that command and control structures have broken down.

"Those now in government should publicly condemn continuing abuses against civilians, urge the

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combatants whom they represent to cease these abuses immediately and make it clear that they will be held accountable," Amnesty International said.

"In addition, the international community - which brokered the peace agreement - must insist that its signatories fulfil their obligations under that agreement to respect international human rights and humanitarian law," Amnesty International said.

The UN Mission in Liberia (UNMIL), deployed from 1 October, has a clear mandate to protect civilians under imminent threat of physical violence. Only some 4,500 of its full complement of 15,000 troops have so far been deployed and UNMIL is unlikely to reach full strength until March next year at the earliest. Despite this shortfall, disarmament and demobilization are due to start on 7 December.

"It is clear that the presence of UN troops offers protection to the civilian population in the few areas where they are currently deployed," Amnesty International said. "What is needed urgently is swift deployment of additional forces, with adequate logistical support beyond Monrovia and the main route to Gbarnga. Once deployed they should vigorously pursue their mandate to protect civilians."

Despite the scale and gravity of the abuses during Liberia's protracted armed conflict, it remains unclear how those responsible will be held accountable. The peace agreement provides for a Truth and Reconciliation Commission but also says that a recommendation for a general amnesty will be considered by the National Transitional Government.

"There can be no amnesty for war crimes, crimes against humanity and other serious violations of international humanitarian law," Amnesty International said. "Those responsible for crimes under international law must be brought to justice."

"There appears at the moment to be a lack of impetus by the international community to address impunity in Liberia," Amnesty International said. " As a first step, there is an urgent need for an international, independent investigation to establish the facts, preserve evidence and identify a process to bring those responsible for these crimes before a competent court."

Background
Amnesty International's delegates also received detailed accounts of the events of June and July as LURD forces encroached into Monrovia. Over a thousand civilians died as a result of indiscriminate shelling by both LURD and government forces of areas with no obvious military target, or in cross-fire. Internally displaced people and refugees in camps in Montserrado County described how the camps were attacked and civilians, including children, abducted and forcibly recruited to fight.

The delegates met a number of former child combatants, both boys and girls and some as young as 10 years, who had been forcibly recruited by both government and LURD forces. Several adolescent girls recounted how they had been taken directly from their school in Nimba County by former government forces; the majority had been raped and forced to carry ammunition or to cook for fighting forces.

Public Document
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SIERRA LEONE

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A woman receives psychological and medical treatment in a clinic to assist rape victims in Freetown. In January 1999, she was gang-raped by seven revels in her village in northern Sierra Leone. After raping her, the rebels tied her down and placed burning charcoal on her body. (c) 1999 Corinne Dufka/Human Rights Watch

I was captured together with my husband, my three young children and other civilians as we were fleeing from the RUF when they entered Jaiweii. Two rebels asked to have sex with me but when I refused, they beat me with the butt of their guns. My legs were bruised and I lost my three front teeth. Then the two rebels raped me in front of my children and other civilians. Many other women were raped in public places. I also heard of a woman from Kalu village near Jaiweii being raped only one week after having given birth. The RUF stayed in Jaiweii village for four months and I was raped by three other wicked rebels throughout this period.

-Testimony to Human Rights Watch

"WE'LL KILL YOU IF YOU CRY"
SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT

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SIERRA LEONE

"WE'LL KILL YOU IF YOU CRY"

Sexual Violence in the Sierra Leone Conflict

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GLOSSARY OF ACRONYMS

AFRC	Armed Forces Revolutionary Council
APC	All People's Congress
CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CCP	Commission for the Consolidation of Peace
CCSSP	Commonwealth Community Safety and Security Project
CDC	Centers for Disease Control
CDF	Civil Defense Forces
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CMRRD	Commission for the Management of Strategic Rescurces, National Reconstruction and Development
C. O.	Commanding Officer
CRC	Convention on the Rights of the Child
DDR	Disarmament, Demobilization and Reintegration Program
DFID	Department for International Development, United Kingdorn
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EIDHR	European Initiative for Democracy and Human Rights
E.U.	European Union
GDP	Gross Domestic Product
HIV/AIDS	Human Immunodeficieny Virus/Acquired Immunodeficiency Syndrome
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMATT	International Military Advisory and Training Team
IRC	International Rescue Committee
FAWE	Forum for African Women Educationalists
MSF	Médecins Sans Frontières
NPFL	National Patriotic Front of Liberia
OAU	Organization of African Unity
OFR	Operation Focus Relief
OHCHR	Office of the High Commissioner for Human Rights
PHR	Physicians for Human Rights
RUF	Revolutionary United Front
SBU	Small Boys Unit
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
SLP	Sierra Leone Police
SLPP	Sierra Leone People's Party
STD	Sexually Transmitted Disease
TRC	Truth and Reconciliation Commission
UNAMSIL	United Nations Mission in Sierra Leone
UNDP	United Nations Development Program
UNIFEM	United Nations Development Fund for Women
UNOMSIL	United Nations Observer Mission in Sierra Leone
USAID	United States Agency for International Development (USAID)
VRF	Vasico-rectal Fistula
VVF	Vasico-vaginal Fistula
WHO	World Health Organization

DEFINITION OF SEXUAL VIOLENCE, RAPE AND SEXUAL SLAVERY

In this report:

Sexual violence is an overarching term used to describe "[a]ny violence, physical or psychological, carried out through sexual means or by targeting sexuality."[1] Sexual violence includes rape and attempted rape, and such acts as forcing a person to strip naked in public, forcing two victims to perform sexual acts on one another or harm one another in a sexual manner, mutilating a person's genitals or a woman's breasts, and sexual slavery.

Rape as defined in the appeals chamber judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the 2002 *Foca* case is "[t]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) [of] the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[2] The appeals chamber rejected the "resistance" requirement argued by the appellants as it is justified neither in law or fact, and stated that the use of force in itself is not a necessary element of rape. The coercive circumstances present in the Foca rapes, which were committed in circumstances similar to the crimes of sexual violence perpetrated in Sierra Leone, made the victims' consent to the sexual acts impossible. The use or threat of force often removes any requirement that a victim show resistance and most jurisdictions have discarded the idea that a rape victim must resist under all circumstances as impractical, if not absurd. This definition also underscores that rape is an attack on the physical integrity of a woman and not an attack against her honor or that of her family or community.

Rape was defined in the judgment of the *Akayesu* case at the International Criminal Tribunal for Rwanda (ICTR) as "[t]he physical invasion of a sexual nature, committed on a person under circumstances which are coercive" and is not limited to the insertion of a penis into a victim's vagina or anus or the insertion of a penis in the mouth of the victim.[3] This definition, however, has been criticized for being too broad and has not been included in the Rome Statute of the International Criminal Court (ICC).

Sexual slavery, defined by the 1926 Slavery Convention and the 1953 Protocol amending the same convention, refers to "[t]he status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence."[4] The Statute of the ICC includes the trafficking of women and children in its definition of enslavement.[5]

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[1] United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur (New York: United Nations, 1998), E/CN.4/Sub. 2/1998/13, pp. 7-8.

[2] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (*Foca* case), Appeals Chamber Judgement, June 12, 2002, IT-96-23 and IT-96-23/1, paras. 127-133.

[3] *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, September 2, 1998, para. 688.

[4] United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, p. 9. Sierra Leone ratified the Slavery Convention on March 13, 1962.

[5] Article 7 (1) (g) lists enslavement as a crime against humanity with the definition given in Article 7 (2) (c). Rome Statute of the International Criminal Court, opened for signature July 17, 1998, Article 7, reprinted in 37 I.L.M. 999 (1998). The Rome Statute entered into force on April 11, 2002 and the ICC has the authority to prosecute the most serious international crimes from July 1, 2002.

I. SUMMARY

Throughout the armed conflict in Sierra Leone from 1991 to 2001, thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape, and rape with objects such as weapons, firewood, umbrellas, and pestles. Rape was perpetrated by both sides, but mostly by the rebel forces. These crimes of sexual violence were generally characterized by extraordinary brutality and frequently preceded or followed by other egregious human rights abuses against the victim, her family, and her community. Although the rebels raped indiscriminately irrespective of age, they targeted young women and girls whom they thought were virgins. Many of these younger victims did not survive these crimes of sexual violence. Adult women were also raped so violently that they sometimes bled to death or suffered from tearing in the genital area, causing long-term incontinence and severe infections. Many victims who were pregnant at the time of rape miscarried as a result of the sexual violence they were subjected to, and numerous women had their babies torn out of their uterus as rebels placed bets on the sex of the unborn child.

Thousands of women and girls were abducted by the rebels and subjected to sexual slavery, forced to become the sex slaves of their rebel "husbands." Abducted women and girls who were assigned "husbands" remained vulnerable to sexual violence by other rebels. Many survivors were kept with the rebel forces for long periods and gave birth to children fathered by rebels. Some abducted women and girls were forcibly conscripted into the fighting forces and given military training, but even within the rebel forces, women still held much lower status and both conscripted and volunteer female combatants were assigned "husbands." For civilian abductees, aside from sexual violence their brutal life with the rebels included being made to perform forced labor, such as cooking, washing, carrying ammunition and looted items, as well as farm work. Combatants within the rebel forces had considerable latitude to do what they wanted to abducted civilians, who were often severely punished for offenses as minor as spilling water on a commander's shoes. Escape for these women and girls was often extremely difficult: In many instances, the women and girls, intimidated by their captors and the circumstances, felt powerless to escape their life of sexual slavery, and were advised by other female captives to tolerate the abuses, "as it was war." The rebels sometimes made escape more difficult by deliberately carving the name of their faction onto the chests of abducted women and girls. If these marked women and girls were caught by pro-government forces, they would be suspected of being rebels, and often killed. Even though many women did manage to escape, some escaped from one rebel faction or unit only to be captured by another. An unknown number of women and girls still remain with their rebel "husbands," although the war was declared over on January 18, 2002.

The main perpetrators of sexual violence, including sexual slavery, were the rebel forces of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the West Side Boys, a splinter group of the AFRC. Human Rights Watch has documented over three hundred cases of sexual violence by the rebels; countless more have never been documented. From the launch of their rebellion from Liberia in March 1991, which triggered the war, the RUF perpetrated widespread and systematic sexual violence. Its ideology of salvaging Sierra Leone from the corrupt All People's Congress (APC) regime quickly degenerated into a campaign of violence whose principal aim was to gain access to the country's abundant diamond mines. The AFRC, which consisted of disaffected soldiers from the Sierra Leone Army (SLA) who in May 1997 overthrew the elected government of President Ahmad Tejan Kabbah, were also responsible for subjecting thousands of women and girls to sexual violence, including sexual slavery. After the signing of the peace agreement in Lomé, Togo, in July 1999, sexual violence, including sexual slavery, continued unabated in RUF-controlled areas and was also perpetrated by the West Side Boys, who operated outside of the capital, Freetown. The human rights situation worsened after the May 2000 crisis when fighting broke out again, until relative peace was re-established, with U.N. and British assistance, by mid-2001. The prevalence of sexual violence peaked during active military operations and when the rebels were on patrol. Even in times of relative peace, however, sexual violence continued to be committed against the thousands of women and girls who were abducted and subjected to sexual slavery by the rebels. No region of Sierra Leone was spared.

Human Rights Watch has documented only a limited number of cases of sexual violence by pro-government forces, the Sierra Leone Army (SLA) and the militia known as Civil Defense Forces (CDF), the latter consisting

of groups of traditional hunters and young men who were called upon by the government to defend their native areas. Human Rights Watch has not documented any cases of sexual violence by the SLA prior to 1997. This may in part be due to the fact that survivors would have often found it difficult to distinguish between rebel and government soldiers, as the latter frequently colluded with and disguised themselves as RUF forces. Sexual violence was committed relatively infrequently by the CDF, whose internal rules forbid them from having sexual intercourse before going to battle and who believe their power and potency as warriors depends upon sexual abstinence. Some of this internal discipline, however, was lost as CDF moved away from their native areas and traditional chiefs and were given more responsibility in national security. Human Rights Watch has documented several cases of rape by the largest and most powerful CDF group, the Kamajors, who operate predominantly in the south and east.

Human Rights Watch has documented several cases of sexual violence by peacekeepers with the United Nations Mission in Sierra Leone (UNAMSIL), including the rape of a twelve-year-old girl in Bo by a soldier of the Guinean contingent and the gang rape of a woman by two Ukrainian soldiers near Kenema. There appears to be reluctance on the part of UNAMSIL to investigate and take disciplinary measures against the perpetrators. Reports of rape by peacekeepers with the Economic Community of West African States Monitoring Group (ECOMOG), the majority of whom were Nigerian, deployed at an earlier stage in the war, were rare. Both ECOMOG and UNAMSIL peacekeepers have sexually exploited women, including the solicitation of child prostitutes, whilst deployed in Sierra Leone.

Rape in wartime is an act of violence that targets sexuality. Moreover, conflict-related sexual violence serves a military and political strategy. The humiliation, pain, and fear inflicted by the perpetrators serve to dominate and degrade not only the individual victim but also her community. Combatants who rape in war often explicitly link their acts of sexual violence to this broader social degradation. The armed conflict in Sierra Leone was no exception. The rebels sought to dominate women and their communities by deliberately undermining cultural values and community relationships, destroying the ties that hold society together. Child combatants raped women who were old enough to be their grandmothers, rebels raped pregnant and breastfeeding mothers, and fathers were forced to watch their daughters being raped.

To date there has been no accountability for the thousands of crimes of sexual violence or other appalling human rights abuses committed during the war in Sierra Leone. The 1999 Lomé Peace Agreement included a blanket amnesty under Sierra Leonean law for offenses committed by all sides, as the price for the RUF/AFRC agreeing to lay down arms. The United Nations (U.N.) stated that it did not recognize the Lomé amnesty insofar as it purported to apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.

Two important transitional justice mechanisms, the Special Court for Sierra Leone (SCSL) and the Truth and Reconciliation Commission (TRC) have been established with U.N. assistance and are tasked with investigating the human rights abuses, including sexual violence and sexual slavery, committed by all parties during the war. Both bodies were operational by the third quarter of 2002. The SCSL, a hybrid national and international court, is mandated by the U.N. Security Council to try "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in the Sierra Leonean conflict since November 30, 1996. As the SCSL is likely to try only a very limited number of persons, due to funding constraints, a clear and comprehensive prosecutorial strategy is essential, with a strong affirmation that gender-related crimes will be thoroughly and competently investigated and rigorously prosecuted as crimes against humanity or war crimes. The TRC, provided for under the 1999 Lomé Peace Agreement partially to offset the controversial amnesty it also included, has the mandate to establish an impartial historical record of violations and abuses of human rights and international humanitarian law from the outset of the war in 1991, promote reconciliation, and make recommendations aimed at preventing a repetition of the violations committed. The final report on the findings of the TRC should highlight the crimes of sexual violence committed throughout the entire country during the armed conflict and make recommendations to strengthen the promotion and protection of women's human rights.

Sexual violence has remained Sierra Leone's silent war crime. Until recently, little attention has been paid either nationally or internationally to this less visible human rights abuse, although sexual violence was committed on a much larger scale than the highly visible amputations for which Sierra Leone became notorious. The underreporting is a reflection of the low status of women and girls in Sierra Leone as well as the internal shame that survivors suffer and their fear of rejection by family and communities. Women and girls in Sierra Leone are subjected to structural discrimination by practice, custom and law. They face discrimination in terms of education and employment, in the political arena, and in other walks of life. Both customary law, which governs the majority of the population, and general law, which was inherited from the United Kingdom and is primarily applied in Freetown, discriminate against women and girls in terms of family law, as well as property and inheritance rights. In addition, the provisions pertaining to rape under general and customary law offer inadequate protection. The misinterpretation of the complicated provisions of general law by the police and courts means, for example, that those who are alleged to have sexually assaulted a minor are generally charged with "unlawful carnal knowledge of a child," for which the sentence is lighter, rather than rape. Under customary law, the perpetrator is generally required to pay a substantial fine to the victim's family as well as to the chiefs. The victim may also be forced to marry the perpetrator.

The concept of sexual violence as a crime in itself is a very recent one in Sierra Leone's patriarchal society. Only rape of a virgin is seen as a serious crime. Rape of a married woman or a non-virgin is often not considered a crime at all: as in many countries, there is often a belief that the woman must have consented to the act, or she is seen as a seductress. The virtual destruction of Sierra Leone's already corrupt and inefficient court system and police force during the war, moreover, created a climate of impunity that persists, allowing perpetrators of sexual violence (as well as other crimes) to escape justice.

The lack of attention to conflict-related sexual violence means that few assistance programs have been established for women and girls who were subjected to sexual violence, including sexual slavery. Survivors not only live with the severe physical and mental health consequences of the abuses suffered, but also fear ongoing non-conflict-related sexual violence, largely perpetrated with impunity. International donors and nongovernmental organizations should work together with the government of Sierra Leone to establish programs (health care, education, adult literacy, skills training, trauma counseling, and income-generating schemes) that will help to rehabilitate the survivors of sexual violence. To combat impunity and work toward changing societal attitudes toward sexual violence, the government of Sierra Leone should, with the technical and financial support of the international community, revise its discriminatory laws to ensure that they meet international standards. The constitution also needs to be reviewed and the provision exempting personal and customary law from the prohibition against discrimination removed. In addition, the government should take steps to improve the response of the legal system to ongoing sexual and domestic violence, including strategies for effective prosecution and protection. A nationwide public awareness campaign also needs to be undertaken to educate the general population on women's human rights.

Women have a crucial role to play at this critical phase in Sierra Leone's history, but they will only be able to contribute fully in a civic culture in which women and girls are respected as equal partners and gender-based abuses are not tolerated.

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II. RECOMMENDATIONS

To the Government of Sierra Leone

- Take all necessary measures to ensure that former rebels release all women and girls abducted during the armed conflict who continue to be held. Provide these women and girls with the necessary social and economic options to enable them to leave these often abusive relationships.

- Prioritize the nationwide establishment of reproductive health clinics for women and girls that can provide testing and treatment for sexually transmitted diseases, along with other services.

- Revoke or revise existing laws (general, customary and Islamic) that discriminate on the basis of gender and ensure that they meet international human rights standards. Take the necessary steps to amend the constitution to remove the provision exempting personal law and customary law from the prohibition on gender-based discrimination. Provide training on these new laws for the judiciary, police, prosecutors, and staff of local courts.

- Establish an inter-ministerial task force with representatives from nongovernmental organizations to deal with the conflict-related sexual violence and related current problems facing women, with the aim of improving the social, medical and legal responses to women's and girls' needs.

- Take steps to improve the response of the legal system to ongoing sexual and domestic violence, including strategies for effective prosecution and protection, such as recruiting and training more female police officers, allowing nongovernment doctors to examine victims and providing legal aid to victims.

- Mainstream gender within the government and government policies. Launch a nationwide public awareness campaign on sexual and domestic violence against women to dispel the prevailing societal attitudes to sexual and domestic violence against women.

- Provide training on human rights and international humanitarian law, with a focus on women's human rights issues and gender-based crimes, to members of the security forces.

- Repeal the provision in the 1999 Lomé Peace Agreement Act that grants amnesty to all warring parties, so that individuals who committed acts of sexual violence (and other crimes) during the war may be prosecuted in the domestic courts.

- Cooperate fully with the Special Court for Sierra Leone and the Truth and Reconciliation Commission.

- Establish an independent national human rights commission as provided under the Lomé Peace Agreement that will contribute to the promotion and protection of human rights beyond the lifespan of the Special Court for Sierra Leone and the Truth and Reconciliation Commission.

To Members of the African Union and Economic Community of West African States (ECOWAS)

- Provide military personnel participating in peacekeeping operations in Sierra Leone (and elsewhere) with training in human rights and international humanitarian law, including a focus on women's human rights issues, and gender-based crimes. Ensure that peacekeepers understand the U.N. Code of Conduct for peacekeepers, which provides that peacekeepers should not commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children. Prosecute any nationals that have been repatriated from Sierra Leone for crimes of sexual violence in line with the zero tolerance policy on sexual exploitation by anyone employed or affiliated with UNAMSIL.

- Issue a statement, jointly, if possible, declaring your willingness to support the Special Court for Sierra Leone and to surrender any alleged war criminals to it. Commit to extraditing to Sierra Leone individuals indicted by the Special Court, take the legal steps that may be necessary to ensure that this can happen (for example, by amending extradition laws), and otherwise cooperate with the Special Court, for example, by locating witnesses or providing information.

To Members of the International Community

- Prioritize the funding of reproductive health clinics for women and girls that can provide testing and treatment for sexually transmitted diseases, along with other services.

- Greatly increase funding for legal reform programs, including training, to ensure that both the laws and domestic courts meet international standards, as well as for programs that will establish better medical, legal and social support services for survivors of sexual violence.

- Monitor all aspects of the Special Court for Sierra Leone to ensure that cases involving sexual violence and sexual slavery are fully prosecuted and that survivors and witnesses of sexual violence receive necessary protection and support throughout the judicial process and post-trial period. Cooperate with the court and take the necessary steps for the extradition or surrender of persons indicted by the Special Court for Sierra Leone.

- Fund the Truth and Reconciliation Commission and monitor it to ensure that conflict-related sexual violence and sexual slavery are fully investigated and properly documented by the TRC in a gender sensitive manner.

- Prosecute military personnel, who have been repatriated from Sierra Leone in line with the zero tolerance policy on sexual exploitation by anyone employed or affiliated with UNAMSIL.

To the Special Court for Sierra Leone

- Conduct thorough investigations into incidents of sexual violence against women and girls including sexual slavery during the war for possible prosecution under the court's mandate. Ensure that gender-integrated teams investigating these acts have competence in investigating rape and conducting interviews with rape victims, who should only be interviewed by experienced female investigators.

- Ensure the gender crimes investigators conduct compulsory gender sensitization training for all staff, and provide more in-depth training for staff members dealing most directly with survivors of sexual violence. Ensure the gender crimes investigators have access to all cases under investigation, even the ones not previously identified as gender cases, to provide guidance and expertise.

- Recruit a staff member with expertise in juvenile justice who can provide training on juvenile justice issues and interviewing skills for staff dealing most directly with young children.

- Establish a strong Victims and Witnesses Unit with protection and support for prosecution and defense witnesses. Protect and support the victims and witnesses not only during the investigation and trial phase but extend this to post-trial protection, where appropriate.

- Provide judges, prosecutors and defense counsel with strict guidance to prevent them from unnecessarily re-victimizing witnesses on the stand or releasing their identity publicly in violation of protective measures.

To the Truth and Reconciliation Commission

- Recruit an experienced gender advisor with expertise in sexual violence, and ensure staff of the Truth and Reconciliation Commission is gender balanced at all levels.

- Recruit a staff member experienced in dealing with child victims and perpetrators who can provide training on how to interview young children.

- Investigate and document fully gender-based abuses committed throughout the country. Ensure survivors of sexual violence are heard in a manner that ensures their dignity and safety, and avoids any re-traumatisation. Guarantee the confidentiality of these hearings when confidentiality is requested.

- Highlight gender-specific abuses in the final report on the findings of the Truth and Reconciliation Commission as well as recommendations on legal reform to ensure that the domestic laws and courts meet international standards; on human rights training for the judiciary and law enforcement officers; and on the assistance needs of survivors.

- Promote public awareness of gender-based crimes through the media umbrella organizations, NGOs and mobile community outreach teams as well as the creation of an information and resource center.

To the United Nations Mission in Sierra Leone (UNAMSIL)

- Investigate fully any allegations of sexual violence by UNAMSIL personnel, which will serve to enforce the policy of zero tolerance for any such acts perpetrated by anyone employed or affiliated with UNAMSIL. Establish a mechanism with the Sierra Leone Police whereby cases of sexual exploitation by persons employed or affiliated with UNAMSIL are immediately reported to the relevant UNAMSIL staff member, including the provost marshal and gender specialist in the human rights section. Establish a mechanism to follow up on cases that have resulted in military personnel who commit such crimes being repatriated to their country of origin to ensure that states properly prosecute the offender. Civilian staff that have perpetuated sexual violence should be fired and their misconduct properly recorded in their personnel file so that they are not rehired in another U.N. mission.

- Provide in-depth gender sensitization training to military and civilian staff and ensure the human rights unit systematically monitors and reports on issues of gender-based violence. Ensure that peacekeepers understand the U.N. Code of Conduct for peacekeepers, which provides that peacekeepers should not commit any act that could result in the physical, sexual or psychological harm or suffering to members of the local population, especially women and children.

- Collaborate with the U.N. Department of Peacekeeping Operations to revise the U.N. Code of Conduct and the Military Observer Handbook, ensuring that the zero tolerance policy for sexual exploitation by persons employed or affiliated with U.N. missions and the consequences of such acts are clearly stated in these guidelines. Compile similar guidelines for civilian staff.

- Provide capacity building with a focus on women's human rights issues to national women's groups and human rights organizations across the country under the guidance of the gender specialist in UNAMSIL human rights units.

III. METHODOLOGY

Over three hundred women and girls were interviewed by Human Rights Watch as part of ongoing research and for this report. For a variety of reasons, including the lack of an ideological aspect and the limited ethnic dimension to the civil war in Sierra Leone and the all-pervasiveness of abuse, victims of human rights abuses, including survivors of sexual violence, generally feel free to talk very openly about their experiences.[6]

Great care was taken with the victims to ensure that recounting their experience did not further traumatize them. While we sought as much information as possible from each interview, the well-being of the interviewee was always paramount and some interviews were cut short as a result. The interviews were conducted in private settings in the presence of a female interpreter. The interviews with survivors were mostly conducted in Krio, the *lingua franca* of Sierra Leone, or in one of the other languages spoken by the different ethnic groups and interpreted into English. In most interviews only females were present and in the few cases where a man was present, it was with the permission of the interviewee. In order to guarantee the confidentiality of all information, interviewees are not identified by name.

In addition to the survivors, government officials, law enforcement officers, lawyers, key figures from the rebel forces, health personnel, religious leaders, and representatives of local and international nongovernmental organizations (NGOs) working in the areas of human rights, women's rights, and health, as well as U.N. officials were interviewed.

IV. BACKGROUND

The Civil War

Sierra Leone is a coastal West African country that shares borders with Guinea and Liberia. It has a population of close to five and a half million (July 2001 estimate) composed of sixteen ethnic groups.[7] These are the Fullah, Gola, Koranko, Kissi, Kono, Krim, Krio, Limba, Loko, Mandingo, Mende, Sherbro, Susu, Temne, Vai and Yalunka. The Mende, in the south, and the Temne, in the north, are the largest ethnic groups (around 30 percent each). The Krio, who are descendants of freed slaves, were settled in the area of Freetown (now the capital) in the late eighteenth century and make up 10 percent of the total population. The educated Krio minority generally still occupies a higher social and economic position and has traditionally been resented by the other groups. Sierra Leone was a British colony, and English is Sierra Leone's official language. Krio, largely based on English vocabulary but with its own grammar, is the first language of the Krios as well as Sierra Leone's *lingua franca*. Though there are no reliable figures, Sierra Leone is a predominantly Muslim country (around 60 percent) with the remainder of the population practicing indigenous religions (10 percent) and Christianity (30 percent).[8]

In 1961, Sierra Leone gained its independence from the United Kingdom. For most of the next three decades, Sierra Leone was governed by the All People's Congress (APC), dominated by the northern Temne and Limba ethnic groups, which came into power in 1967.[9] The corruption, nepotism and fiscal mismanagement under the one-party rule of the APC led to the decay of all state institutions and the impoverishment of Sierra Leone's population, notwithstanding the country's large deposits of diamonds, gold, rutile, and bauxite. Frustration with government corruption and mismanagement led to the formation of the Revolutionary United Front (RUF) in 1984. The RUF claimed to be a political movement with the aim of salvaging the country and overthrowing the APC. Its invasion of Sierra Leone from Liberia on March 23, 1991 triggered the civil war that was to last ten years.

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[6] Women and girls who have been raped can be presented and/or perceived either as victims or survivors and there is an ongoing debate as to which is the more appropriate term. In this report, both terms are used interchangeably without significant distinction.

[7] *See* http://www.odci.gov/cia/publications/factbook/geos/sl.html.

[8] *See* http://www.state.gov/g/drl/rls/irf/2001/5730.htm.

[9] *See* generally, J.A.D. Alie, *A New History of Sierra Leone* (New York: St. Martin's Press, 1990).

At its inception, the RUF consisted of a mixture of middle class students with a populist platform, unemployed and alienated youths, and Liberian fighters from Charles Taylor's National Patriotic Front of Liberia (NPFL), who had helped Charles Taylor in his quest to become the president of Liberia. A lesser-known covert sponsor of the RUF was the Sierra Leone People's Party (SLPP), with its ethnic base among the Mendes from the south, which also sought the overthrow of the APC.[10] The RUF was led by Foday Sankoh, a former army corporal who had been imprisoned in 1971 for his alleged involvement in an attempted coup against the APC. Sankoh had also reportedly received training in Libya with Taylor.[11] The RUF initially consisted of two small groups of only 150 combatants in total. As the RUF captured border towns and villages in Kailahun and Pujehun districts, they used tactics similar to those used to terrorize civilians during the Liberian civil war: seizing and summarily executing chiefs, village elders, traders, government agents and suspected SLA collaborators.[12] The violence and looting or "jah-jah," especially by the Liberian mercenaries within the RUF, was sanctioned by Sankoh who justified them as reward for the mercenaries' support.[13] The RUF's ideology of salvation quickly degenerated into a campaign of violence whose principal aim was to gain access to the country's diamond and other mineral wealth. From the very beginning, the RUF's campaign of terror included sexual violence and sexual slavery, committed on a widespread and systematic basis.

In April 1992, APC President Joseph Momoh was overthrown in a military coup by twenty-six-year-old army captain Valentine Strasser, who formed the National Provisional Ruling Council (NPRC). Strasser vowed to end corruption and create opportunities for all Sierra Leoneans. The new regime, however, was as corrupt as the old. The RUF continued to gain strength and was joined by numerous soldiers from the Sierra Leone Army (SLA) who were disgruntled with their poor conditions. These soldier-rebels or "sobels" discarded their uniforms at night to loot but wore government uniforms and continued to work for the government during the day. The "sobels," who included officers, also provided weapons, ammunition, and intelligence to RUF forces.

Starting in January 1991, Momoh and later Strasser embarked on a recruitment drive that swelled the army's ranks to approximately twelve thousand, aiming to dislodge the RUF including by offering its youthful constituency a lucrative alternative. Many of the new soldiers were unemployed drifters, petty criminals, and street children as young as twelve. Given the inability of the undisciplined and ill-trained SLA to drive out the RUF, in March 1995, Strasser invited Executive Outcomes (E.O.), a South African private security company, to fight the RUF and guard the mining areas, in return for concessions over their production. The RUF was by that time approaching Freetown and controlled most of the diamond mining areas. By December 1995, E.O. had retaken a number of key diamond areas and began to collaborate with the pro-government militia known as the Civil Defense Forces (CDF), of which the Kamajors are the largest and most powerful.

The CDF movement began with the establishment of the Eastern Region Defence Committee in 1993-4 and was greatly expanded in 1996 when regent chief Hinga Norman was appointed deputy minister of defense in Kabbah's government and head of the CDF, with the government providing the CDF with training, weapons and food.[14] The CDF movement consists of groups of traditional hunters and young men who were used by the government to defend their native areas. The Kamajors operate mainly in the south and east, the Tamaboros in the far north, the Gbettis in the north and the Donzos in the far east. Civilians who joined the CDF underwent initiation ceremonies, which were said to bestow magical powers, making them immortal and invincible.[15] Units of fighters were initially deployed only in their own chiefdoms to ensure their loyalty and discipline and make the

[10] Paul Richards, *Fighting for the Rainforest: War, Youth and Resources in Sierra Leone* (London: The International African Institute in association with James Currey and Heinemann, 1996), p. 7. When the RUF first invaded from Liberia, villagers in Kailahun were ordered to cut palm fronds—the symbol of the SLPP—"in support" of the rebels.

[11] Ibrahim Abdullah and Patrick Muana, "The Revolutionary United Front of Sierra Leone," in Christopher Clapham (ed.), *African Guerrillas* (Oxford: James Currey, 1998), pp. 173-178.

[12] Ibid., p. 178.

[13] Ibid., p. 180.

[14] Ibid., p. 185. By 1999, the CDF had grown into a movement of an estimated fifteen thousand fighters who had to be disarmed and demobilized.

[15] Ibid. This is a throwback to the venerated esoteric Mende cult of invincible traditional hunters who were given power through initiation ceremonies. These powers enabled the hunters, *inter alia*, to turn into an animal in order to catch their prey.

best use of their superior bush knowledge. The CDF, in contrast to the SLA and the RUF, had the support of the local civilians and were very effective, overrunning main RUF camps in late 1996 with the support of E.O. and the army.

In January 1996, Strasser was overthrown by his deputy, Brigadier Julius Maada Bio. Bio initiated peace negotiations with the RUF, which had begun to suffer a number of defeats, as well as a program to return Sierra Leone to civilian rule. In March 1996, elections were held, and Ahmad Tejan Kabbah of the SLPP, who pledged to bring about an end to the war, became president of Sierra Leone.

In November 1996, the RUF and Kabbah's government signed the Abidjan Peace Accord, which provided for a ceasefire, disarmament, demobilization, an amnesty to the RUF, and the withdrawal of all foreign forces. The ceasefire was broken in January 1997, however, when serious fighting broke out in southern Moyamba district. In January 1997, Sankoh was arrested in Nigeria on an arms charge and imprisoned by the Nigerian government.

In May 1997, fourteen months after assuming power, President Kabbah was overthrown in a coup led by Major Johnny Paul Koroma, who formed a new government called the Armed Forces Revolutionary Council (AFRC). Koroma had escaped from prison, where he had been held following an earlier attempted coup in September 1996. The AFRC suspended the constitution, banned political parties, and announced rule by military decree. Days of looting by soldiers followed the coup, which also ushered in a period of political repression characterized by arbitrary arrests and detention. An attempt by Nigerian and Guinean troops (who had been in Sierra Leone since 1995 as part of bilateral security accords to give support to the NPRC), supported by South African mercenaries, to oust Koroma failed.[16]

The AFRC consisted primarily of disgruntled ex-SLA soldiers who had become disillusioned by President Kabbah's decision to cut back support for the military. Koroma also cited the government's failure to implement the peace agreement as the reason for the coup. The SLA accused Kabbah of having put greater confidence for the country's defense in and giving more economic resources to the CDF than to the army. Formalizing an alliance between the army and the rebels based on joint opposition to President Kabbah and the SLPP, the AFRC invited the RUF to join its government in June 1997.

From exile in Guinea, President Kabbah mobilized international condemnation for and a response to the coup makers. In response to a plea from Kabbah, hundreds of Nigerian troops based in Liberia as part of the Economic Community of West African States Monitoring Group (ECOMOG) moved to Freetown, reinforcing ECOMOG colleagues already based at the Freetown airport to defend it from attacks by the RUF. Nigerian vessels stationed off Freetown shelled the city, reportedly killing at least fifty people. Nigerian forces were, however, eventually forced to withdraw from around the capital. In August 1997, following the AFRC's announcement of a four-year program for elections and return to civilian rule, which represented a breakdown in negotiations initiated by the Economic Community of West African States (ECOWAS), ECOWAS established a strict economic embargo against Sierra Leone. In October 1997, the U.N. Security Council adopted a resolution also imposing mandatory sanctions on Sierra Leone, including an embargo on arms and oil imports, which ECOMOG forces were mandated to enforce.

After negotiations in Guinea under the auspices of ECOWAS, the Kabbah government-in-exile and the RUF/AFRC signed an agreement on October 23, 1997, providing for the return to power of President Kabbah by April 1998. The RUF/AFRC, however, undermined the implementation of the accord by stockpiling weapons and attacking the positions of ECOMOG forces. In February 1998, ECOMOG forces together with Kamajor militia launched an operation that drove the RUF/AFRC forces from Freetown. In March 1998, President Kabbah was

[16] *See* Human Rights Watch/Africa, "Getting Away with Murder, Mutilation and Rape," *A Human Rights Watch Short Report*, Vol. 11, No. 3 (A), June 1999, p. 8 for a discussion of the role of foreign mercenaries in the armed conflict. *See* Human Rights Watch/Africa, "Transition or Travesty? Nigeria's Endless Process of Return to Civilian Rule," *A Human Rights Watch Short Report*, vol. 9, no. 6, October 1997, for a discussion of the Nigerian intervention in Sierra Leone.

reinstated. Over the succeeding months ECOMOG forces were able to establish control over roughly two-thirds of the country, including all regional capitals: as of mid-1998, the ECOMOG contingent in Sierra Leone was composed of approximately 12,500 troops, predominantly Nigerian with support battalions from Guinea, Gambia, Ghana and Niger.[17] Sankoh was transferred to Sierra Leone from Nigeria and incarcerated in July 1998. In October 1998, the Supreme Court of Sierra Leone tried and sentenced Sankoh to death for his role in the 1997 coup.

Once expelled from Freetown, the AFCR/RUF rebels tried to consolidate their own positions in other parts of the country. The Kabbah government, which had negligible forces of its own, had to rely on ECOMOG to stay in power. Through a series of offensives, the RUF/AFRC managed to gain control of the diamond-rich Kono district and several other strategic towns and areas. By late 1998, the rebels had gained the upper hand militarily and were in control of over half of the country, including all the mineral-rich areas. From this position, the RUF/AFRC launched a major offensive on Freetown in January 1999.

The battle for Freetown and ensuing three-week rebel occupation of the capital were characterized by the systematic and widespread perpetration of a wide range of abuses against the civilian population, and marked the most intensive and concentrated period of human rights abuses and international humanitarian law violations in Sierra Leone's ten-year civil war. At least five thousand civilians were killed and one hundred civilians had limbs amputated, including twenty-six double arm amputations. Thousands of women and girls, including girls as young as eight, were raped and subjected to other forms of sexual violence. In addition, the rebels used civilians as human shields, both while advancing towards ECOMOG positions and as a defense against ECOMOG air power. They also burnt whole neighborhoods, often with the residents in their houses.

Government and the Nigerian-led ECOMOG forces also committed serious human rights abuses, though on a lesser scale, including over 180 summary executions of rebels and their suspected collaborators. Prisoners taken by ECOMOG, some of who had surrendered and many of whom were wounded, were executed on the spot often with little or no effort to establish their guilt or innocence. Officers to the level of captain were present and participated in the executions. ECOWAS officials have yet to initiate a formal investigation into these killings.

As the RUF/AFRC were driven out of Freetown in February 1999, they abducted thousands of civilians, who were used to carry looted goods and ammunition, forcibly conscripted into fighting or used for forced labor. Thousands of girls and women were used as sex slaves by the rebels and forced to "marry" rebel husbands. As they moved eastward, the rebels continued to commit egregious human rights abuses, including killings and amputations, particularly in the villages around the towns of Masiaka, Lunsar, and Port Loko.[18]

In the months following the January invasion, and as a result of intense international pressure, Kabbah's government and RUF rebels signed a ceasefire agreement on May 18, 1999,[19] followed by a peace agreement in Lomé, Togo, on July 7, 1999.[20] Sankoh was released from prison by the Sierra Leonean government to participate in the peace negotiations. The accord, brokered by the U.N., the Organization of African Unity (OAU), and ECOWAS, committed the RUF/AFRC to lay down its arms in exchange for representation in a new government. Sankoh was given the chairmanship of the board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD) and the status of vice-president.[21] Johnny Paul Koroma was made the chairman of the Commission for the Consolidation of Peace (CCP), provided for under Article 6 of the peace agreement.[22]

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[17] *See* Human Rights Watch, "Sowing Terror: Atrocities against Civilians in Sierra Leone," *A Human Rights Watch Short Report*, Vol.10, No. 3 (A), July 1998.

[18] *See* Human Rights Watch/Africa, "Getting Away with Murder, Mutilation and Rape," for a comprehensive report on the January 1999 invasion.

[19] *See* the annex to U.N. Security Council report, S/1999/585, May 18, 1999.

[20] Lomé Peace Agreement at http://sierra-leone.org/lomeaccord.html.

[21] Article 5 (2) of the Lomé Peace Agreement.

[22] The RUF delegation to the peace talks in Lomé included members of the AFRC who were also appointed as ministers as part of the agreement to share power.

The peace agreement also included a general amnesty for all crimes committed by all parties during the civil war until the signing of the peace agreement.[23] At the last minute, the U.N. secretary-general's special representative attending the talks added a hand-written caveat that the U.N. held the understanding that the amnesty and pardon provided for in Article 9 did not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. In addition, the peace agreement mandated the establishment of a Truth and Reconciliation Commission (TRC) and a national human rights commission.

The United Nations Observer Mission in Sierra Leone (UNOMSIL), initially established in July 1998 to monitor the military and security conditions, was transformed into a much larger peacekeeping mission.[24] In October 1999, months later than had been planned, UNOMSIL, which at its maximum deployment included 192 military observers as well as a small human rights unit of four persons, was transformed into the United Nations Mission in Sierra Leone (UNAMSIL). UNAMSIL was mandated to maintain the peace and monitor the ceasefire and had a maximum authorized strength of 6,000 military personnel, including 260 military observers.[25] The human rights unit was authorized to expand to a total of fourteen human rights officers. Two further Security Council resolutions followed, increasing the authorized troop strength to 11,100[26] and then 13,000.[27]

The peace process was marred by cease-fire violations, missed deadlines and infighting within rebel ranks. The RUF/AFRC failed to comply with several commitments, including the release of all civilian abductees. There was a relative decrease in human rights abuses following the peace agreement, although the RUF/AFRC continued to terrorize the civilian population in the north and east, which largely remained under its control. Sexual violence, in particular against the thousands of abducted women and girls, continued. In addition, a splinter group of the AFRC known as the West Side Boys established numerous bases in the Occra Hills near Freetown, from where they staged looting raids. The West Side Boys abducted hundreds of civilians, including girls and women, whom they raped and kept as sex slaves. In August 1999, they took hostage for one week forty-two members of a U.N.-led delegation composed of ECOMOG soldiers, religious leaders, aid workers, and journalists, who had gone to the Occra Hills to have abducted children released to them.

The Disarmament, Demobilization and Reintegration (DDR) program progressed slowly, with only 25,000 out of a total 45,000 combatants demobilized by May 2000.[28] There was also considerable delay in the deployment of U.N. peacekeeping forces, with only 8,700 peacekeepers deployed by the same month. The peace process then broke down completely, when, in early May, the RUF captured over five hundred UNAMSIL peacekeepers and military observers deployed in the north and the east, holding them for several weeks.[29] The conflict erupted again throughout the country and many of the combatants, including child combatants, who had been disarmed and demobilized, were re-conscripted. The human rights situation deteriorated sharply with numerous reports of RUF abuses, including murder, widespread rape, abduction, forced labor, and looting. During a demonstration in Freetown to protest the collapse of the peace process and hostage taking of the peacekeepers, twenty-two civilians were killed outside the house of the RUF leader, Sankoh. On May 17, 2000, several days

[23] Lomé Peace Agreement. Under Article 9 (1) of this agreement, the Government of Sierra Leone was required to grant Sankoh absolute and free pardon. Article 9 (3) refers to the amnesty granted to all combatants of the RUF/SL, ex-AFRC, ex-SLA or CDF for any crimes they may have committed in pursuit of their objectives (*See* below, p. 61, for a discussion on the amnesty).

[24] U.N. Security Council resolution 1181, S/RES/1181 (1998), July 13, 1998.

[25] U.N. Security Council resolution 1270, S/RES/1270 (1999), October 22, 1999.

[26] U.N. Security Council resolution 1289, S/RES/1289 (2000), February 7, 2000.

[27] U.N. Security Council resolution 1299, S/RES/1299 (2000), May 19, 2000.

[28] U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Sierra Leone Humanitarian Situation report, May 29, 2001. *See* http://www.reliefint/w/Rwb.nsf/s/4A58557840970841C1256A5C0050441B.

[29] The hostages in the north were released on May 28, 2000. The hostages in the east, however, were not released until June 29, 2000. Two hundred and thirty-three peacekeepers and military observers who had been encircled by the RUF were finally freed by the U.N. military operation "Khukri" on July 15, 2000.

after the demonstration, Sankoh was arrested by the government and held in custody, together with over 125 members of the RUF, without charge, using powers under a state of emergency declared in 1998.

There was also a disturbing intensification of abuses by pro-government forces. The Sierra Leonean government caused numerous civilian casualties through helicopter gunship attacks during May and June 2000 against the RUF strongholds of Makeni, Magburaka, and Kambia. Abuses by both the government forces and the RUF caused the displacement of some 330,000 civilians from behind rebel lines. Civilians leaving RUF territory were often captured and accused of being rebel sympathizers by the CDF. Whereas previously sexual violence against women had been very uncommon among the CDF, numerous cases of sexual violence were reported, including gang rape by Kamajor militiamen and commanders.

When, in May 2000, it seemed as though the fighting would threaten Freetown again, several hundred British soldiers were rapidly deployed to Sierra Leone—in the first instance to evacuate foreign nationals who wished to leave, but also to secure the airport, allow reinforcement of the U.N. contingent, and assist in the reorganization of the pro-government forces as an effective fighting force. At their maximum, there were more than 1,200 British soldiers in Sierra Leone, though they began to withdraw within two months of the first deployment. UNAMSIL was rapidly brought up to strength: by June 5, 2000 there were 11,350 U.N. troops in the country.

At the behest of Johnny Paul Koroma, the West Side Boys in May 2000 briefly fought on the government side to prevent the RUF from entering Freetown. However, they continued to commit human rights abuses, and in August 2000 abducted eleven British soldiers of the International Military Advisory and Training Team (IMATT) and one SLA officer. In September 2000, the West Side Boys bases were destroyed during an operation by British paratroopers to free the captured soldiers. Numerous West Side Boys, including their leader, were arrested and incarcerated.

From September 2000 through April 2001, RUF rebels and Liberian government forces acting together attacked refugee camps and villages accommodating several hundred thousand Sierra Leonean and Liberian refugees just across the border with Guinea. Following the attacks, Guinean security forces and the local population retaliated against the refugees, frequently looting, raping, and unlawfully detaining them. Guinean forces also responded to these RUF raids by killing and wounding dozens of Sierra Leoneans in indiscriminate helicopter and artillery attacks in the rebel-held areas in the north of Sierra Leone. Guinean troops conducted several ground attacks during which several civilians were gunned down and girls and women were raped.

In November 2000, the government and RUF signed a cease-fire, which committed both parties to restarting the disarmament process, the reestablishment of government authority in former rebel-held areas, and the release of all child combatants and abductees. On March 30, 2001, the U.N. Security Council authorized the further expansion of UNAMSIL to 17,500 military personnel, including 260 military observers. These forces, contributed by Bangladesh, Ghana, Guinea, Kenya, Nepal, Nigeria, Pakistan, Ukraine, and Zambia, were deployed into RUF strongholds, including the diamond-rich Kono district.[30] The DDR program recommenced in May 2001, and by the end of 2001 over three thousand child soldiers, abductees, and separated children had been released by the RUF and the CDF.

During this period, serious human rights abuses continued to be committed, though on a reduced scale. Fighting between the RUF and the CDF broke out in the east of the country in June through August 2001, leaving tens of civilians dead. RUF forces committed scores of serious abuses including rape, murder, and abduction. The victims of these abuses included Sierra Leoneans returning from refugee camps in Guinea; Guinean civilians who were attacked during the cross-border raids by the RUF from September 2000 through April 2001; and Liberians fleeing renewed fighting in Lofa county of Liberia from April 2001. While the RUF released or demobilized more than 1,500 male child combatants, they were reluctant to release Sierra Leonean and Guinean female abductees, most of whom are believed to have been sexually abused.

[30] U.N. Security Council resolution 1346, S/RES/1346 (2001), March 30, 2001.

The human rights situation continued to improve in 2002, with the disarmament and demobilization phases declared completed. By January 2002, 47,710 combatants had been disarmed and demobilized. On January 18, 2002, the armed conflict was officially declared to be over in a public ceremony attended by many dignitaries. In addition, the state of emergency was lifted for the first time in four years on February 28, 2002. Following the end of the state of emergency, the government charged Sankoh, and the other RUF and West Side Boys members held in custody since May 2000, with a number of crimes, including murder and related charges. The resettlement of internally displaced persons (IDPs) and returnees from Guinea and Liberia was ongoing as of the writing of this report. By July 2002, approximately 250,000 refugees and IDPs had been resettled. The RUF transformed itself into a political party and nominated presidential and parliamentary candidates for elections held on May 14, 2002.

In the elections, President Kabbah's SLPP was re-elected for a second term and faced the challenge of rebuilding the country and its economy. After a decade of war, Sierra Leone ranks last out of 162 countries in terms of life expectancy at birth; adult literacy; combined enrolment in primary, secondary and tertiary education; and GDP per capita.[31] Fifty-seven percent of Sierra Leone's population struggles to survive on only U.S. $1 per day.[32] Unemployment is rampant and the current economy is driven by the presence of UNAMSIL and other international organizations. Investors who could create desperately needed jobs remain cautious given the rampant corruption that permeates all levels of Sierra Leonean society and their concerns about regional security.

Women and Girls under Sierra Leonean Law

The Sierra Leonean Legal system

Three systems of law—general, customary, and Islamic—co-exist in Sierra Leone.

General Law

General law consists of the statutory law (codified) and common law (based on case law) mainly inherited from the United Kingdom, the former colonial power. General law is administered through the formal court system, which follows the usual Commonwealth structure, under which the High Court hears more important cases, and magistrates courts the less important ones, both civil and criminal. There is an appeal system, first to the Court of Appeal and then the Supreme Court, which is the ultimate court of appeal and also hears cases relevant to the interpretation of the constitution. The Court of Appeal and Supreme Court are located in Freetown. A High Court and magistrates courts are constituted in Freetown. The High Court was re-established in Kenema and Bo in 2002 and there are magistrates courts in Bo, Kenema and Port Loko.[33] The court system in the provinces, which had a limited infrastructure before the war broke out in 1991, was virtually destroyed during the war—the High Court has not held hearings outside Freetown for six years—and was only gradually being rehabilitated from 2002. Access to the judiciary for rural Sierra Leoneans is further limited by their lack of funds for lawyers, or even transport money.

Only a small number of women, primarily those who reside in the Western Area (where Freetown is located) and women with sufficient funds, have access to the formal court system. As many general law provisions have not been updated since colonial days, the protection that general law affords women is often only marginally better than that provided under customary or Islamic law.

Customary Law

Customary law is defined by the 1991 constitution as "the rules of law by which customs are applicable to particular communities in Sierra Leone."[34] Although there are sixteen ethnic groups in Sierra Leone, a general treatment of customary law is justified, as there are many fundamental similarities between the customary laws of

[31] United Nations Development Programme (UNDP), *Human Development Report 2001: Making New Technologies Work for Human Development* (New York: Oxford University Press, 2001), pp. 141-144.

[32] Ibid., p. 151.

[33] An itinerant judge covers the High Court in both Bo and Kenema.

[34] The Constitution of Sierra Leone (1991), Chapter XII - The Laws of Sierra Leone, Section 170 (3). *See* http://www.sierra-leone.org/constitution-xii.html.

these ethnic groups.[35] Customary law has not been written down or codified and is only applied by the local courts. [36] These courts operate in the provinces and not in the Western Area, which is historically where the Krio and the British colonizers settled. A chairman presides over the local courts with the assistance of chiefdom councilors who are knowledgeable in customary law. The chairmen in theory should be independent from the paramount chiefs who used to preside over the local courts before reforms were introduced both prior to and after independence.[37] Customary law officers who are trained lawyers are supposed to review decisions of local courts and provide training to the personnel of local courts. The government Law Officers' Department, however, remains chronically understaffed, and few of the customary law officers' posts are filled.

As the majority of Sierra Leoneans live in the provinces, customary law governs at least 65 percent of the population in relation to issues not reserved by statute to the magistrates courts or High Court. In practice, issues that should be dealt with in the magistrates courts and High Court are also dealt with under customary law. In addition to problems accessing the formal court system, rural Sierra Leoneans, in particular, have historically always preferred to administer justice amongst themselves to ensure that good community relations are maintained in villages where the other residents are invariably relatives by marriage or descent, rather than turning to outsiders.

Although customary law is not applied in the formal court system, it is recognized and there is some interaction between the two systems. There is the right of appeal from the local courts to the District Appeal Court, where a magistrate sits with two assessors who are chiefdom councilors from the given area of the local court and are knowledgeable about the customary law in their respective areas.[38] The assessors advise the magistrate on questions of customary law, with the decision remaining with the magistrate. Likewise, a decision of the District Appeal Court can be appealed to the High Court, with the High Court judge being advised by assessors with expertise in customary law.[39]

Islamic Law

Islamic law has been recognized by statute in Sierra Leone in relation to marriage, divorce, and inheritance among Muslims.[40] Otherwise, Islamic law, if applicable at all, is considered part of customary law. In this report, Islamic law is therefore treated as part of customary law except when referring to the specific areas dealt with by the Mohammedan Marriage Act, and cases involving Islamic law are heard by the local courts. Criminal *sharia* law is not applicable in Sierra Leone.

Constitutional Status of Women

In theory, Sierra Leonean women are granted equal rights to men under the 1991 constitution, which provides as one of the "fundamental principles of state policy" that the state "... [s]hall discourage discrimination on the grounds of place of origin, circumstances of birth, sex, religion,...."[41] The equal rights of women are again underscored in the human rights chapter of the constitution.[42] Under Section 27 of the constitution, however,

[35] H. M. Joko Smart, *Sierra Leone Customary Family Law* (Freetown: Atlantic Printers Ltd., 1983), p. 6.

[36] *See* 1963 Local Courts Act.

[37] Richards, *Fighting for the Rainforest*, p. 46.

[38] Section 29 (1) of the 1963 Local Courts Act and Section 76 of the 1965 Courts Act.

[39] Section 31 (1) of the 1963 Local Courts Act.

[40] The Mohammedan Marriage Act (Cap. 96 of the revised laws of Sierra Leone, 1960) deals with marriage, divorce, and intestate succession. Joko Smart, *Sierra Leone Customary Family Law*, p. 20. Intestate successions occur when the deceased did not leave a will.

[41] The Constitution of Sierra Leone (1991), Chapter II – Fundamental Principles of State Policy, Section 6 (2). *See* http://www.sierra-leone.org/constitution-ii.html. Under Section 8 (2) (a), "... [e]very citizen shall have equality of rights, obligations, and opportunities before the law...." and specific safeguards of equality before the law in terms of health care, employment and education are provided under Section 8 (3) (d); Section 8 (3) (a), (c), (e) and Section 9 (1) (a), (b) and (2) respectively.

[42] Ibid., Chapter III - The Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual, Section 15. *See* http://www.sierra-leone.org/constitution-iii.html. Section 15 provides that "every person in Sierra Leone is entitled to the fundamental human rights and freedoms of the individual, that is to say, has the right, whatever his race, tribe, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public

discrimination is permitted, *inter alia*, under laws dealing with "adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law," which have direct bearing on the rights of women, as well as under customary law.[43] This important contradiction in the constitution—similar to that in many African constitutions—has contributed to the low status of women in Sierra Leone, as it legitimizes the application of discriminatory customary law. No protection from discriminatory customary law can be sought under the constitution on the basis of sex. Customary and Islamic laws also continue to be widely applied, notwithstanding the fact that legislation provides that general law should prevail over customary law when customary law is "repugnant to statute or natural justice, equity, and good conscience."[44]

Marriage

The rights of married women remain limited, particularly for those married under customary and Islamic laws, which govern most marriages. Women married under the general law have comparatively more rights.[45]

A married woman's position under customary law is comparable to that of a minor: a woman is generally represented by her husband who has the right to prosecute and defend actions on his spouse's behalf.[46] Sierra Leonean women can gain status through marriage as well as through their role as mothers: a woman's status within society and the polygynous household increases with the number of children she bears. Sierra Leone has one of the highest birth rates in the world, with the average number of children born to each woman estimated at 6.5.[47] Most households are polygynous, apart from the monogamous Christians (approximately 30 percent of the population); under customary law, a husband can marry as many wives as he wishes. Muslims (60 percent of the population) can marry up to four wives.

Under customary law, a girl is considered of marriageable age once her breasts have developed, her menses have started and she has been initiated, which could mean as young as twelve. Marriages are usually arranged, and the consent of the bride-to-be is not considered essential in most ethnic groups, but the consent of the girl's/woman's family is required.[48] The fact that a girl is considered "ready" for marriage at such a young age and her consent is not sought has contributed to the common practice of early forced marriages. Men wishing to marry do not need to seek consent from their own parents. The statutory age of marriage under general law is twenty-one years.

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interest, to each and all of the following—(a) life, liberty, security of person, the enjoyment of property, and the protection of law; (b) freedom of conscience, of expression and of assembly and association; (c) respect for private and family life, and (d) protection from deprivation of property without compensation."

[43] Ibid., Section 27. Subsection 27 (1) provides that "Subject to the provisions of subsections (4), (5), and (7), no law shall make provision which is discriminatory either of itself or in its effect." Under Subsection 4, however, the protection provided under Subsection 1 does not apply "... (d) with respect to adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law, or (e) for the application in the case of members of a particular race or tribe or customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons." Discrimination is also permitted against persons who are not citizens of Sierra Leone or naturalized Sierra Leoneans. According to Dr. Tucker, former Chairperson of President's Kabbah's Advisory Committee, the original intent of Section 27 was "to preserve certain areas of segregation which are embedded in traditional practices and are generally acceptable to both sexes, such as the segregation between male and female secret societies. What was taken up in the constitution was more extensive than what was intended." Human Rights Watch interview with Dr. Tucker (Consultant on the Law Development Program funded by the U.K.'s Department for International Development (DFID)), Freetown, April 25, 2002.

[44] Section 2 of the 1963 Local Courts Act and Section 76 of the 1965 Courts Act.

[45] Marriages under the general law are governed, *inter alia*, by the Christian Marriage Act, (Cap. 95), the Civil Marriage Act (Cap. 97), and the Matrimonial Causes Act (Cap. 102).

[46] Joko Smart, *Sierra Leone Customary Family Law*, p. 98. Under customary law, a Sierra Leonean woman is always under the guardianship of a male relative.

[47] UNDP, *Human Development Report 2001*, p. 157. This figure is based on births recorded for 1995-2000.

[48] Consent is a very relative term, as girls generally will find it very difficult to disobey their parents' wishes, which can result in severe punishment, including ostracism from the immediate and extended family.

Under Islamic law, a male or female dependant can be given in marriage against his or her will, and the legal guardian of an adult woman has the right to object to her choice of husband if the prospective husband is not of equal birth.[49] Under customary law, a dowry is usually paid to the wife's family. Under Islamic law, the dowry is paid to the bride, although the contract is concluded with the legal guardian of the bride-to-be.[50]

Under customary law, a wife can only refuse to have sexual intercourse with her husband if she is physically ill, menstruating or suckling a young child. She can also refuse intercourse during the daytime, in the bush or during Ramadan.

Under customary law, a wife's decision-making powers are limited since she is obliged to always obey her husband. This lack of decision-making power means that women in families where the breadwinner is the man find it very difficult to influence decisions on how the (generally) little income that the family makes is disbursed. Under customary law, a married woman must ask her husband for permission to work outside the house or visit her family. In families where the woman has been given permission to work outside the house and is the breadwinner, it seems that the added responsibility has not necessarily come with increased decision-making power.

A wife, especially in rural communities, is expected to cultivate food for herself and her children, whilst the husband's responsibility is limited to providing accommodation and clothing.[51] A wife residing in an urban area is generally given a lump sum of money by her husband to start a small business, usually petty trading. If the business fails, the wife must refund the capital to her husband. Given the heavy work burden on women, however, there is little opportunity for women to seek remunerated work outside the house.

Divorce and Death of Husband

Under customary law, both parties can bring divorce proceedings either extrajudicially or judicially before a local court, but in practice women are generally not as free to do so as men.[52] Only the husband has the right to divorce through unilateral repudiation.[53] A wife married under customary or Islamic law may, however, seek dissolution of marriage on grounds of impotence of the husband, for example.[54]

Under customary law, the dowry is refundable upon divorce. Dowries paid to poor families are sometimes set purposely excessively high to ensure that the wife's family will not sanction a divorce given their inability to repay the dowry, again highlighting how little control women married under customary law have over their lives.[55] Under general law, a husband is expected to pay alimony for his wife and children on divorce, which both parties may initiate.[56]

When a husband dies, the widow is expected under customary law to undergo a mourning period and rituals.[57] It is only after these rituals that widows are considered purified and can remarry. Some ethnic groups

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[49] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1965), pp. 161-2.

[50] Schacht, *Introduction to Islamic Law*, p. 161.

[51] Full maintenance of his wife is only the responsibility of the husband during the rainy season (approximately between the months of May and November) or when his wife is sick or nursing a baby. Joko Smart, *Sierra Leone Customary Family Law*, pp. 106-7.

[52] Judicial divorces are rare as they are more expensive. Ibid., pp. 146-149.

[53] Ibid., pp. 143-4.

[54] Schacht, *Introduction to Islamic* Law, p. 165.

[55] Joko Smart, *Sierra Leone Customary Family Law*, p. 79. Strict tribal Muslims do not require that the dowry be repaid on divorce.

[56] Christian Marriage Act, Cap. 95 of the revised Law of Sierra Leone, 1960, s. 7 (2), s. 15 (1) (b), and s. 5 respectively.

[57] A widow must mourn for forty days. Her head is shaved or, in some chiefdoms, disheveled and her body is washed with the same water used to wash her husband's corpse. In some chiefdoms her body is smeared with mud to indicate her mourning. After either one week or forty days for strict Muslims, widows are taken to a stream to be ceremonially washed.

still insist that if the widow remarries, she does so within her deceased husband's family, otherwise all marriage payments are refundable.[58]

As Sierra Leone is a patrilineal society and the husband has custodial rights over children, children are handed over to the husband's family head upon his death.[59] Under Islamic law, the mother has the right to care for a boy child until the age of nine and a girl child until she comes of age.[60]

Under customary matrimonial property law, a wife is generally only able to keep her own possessions and her self-acquired property in the event of divorce or death. A wife is generally not entitled to keep property acquired through the joint efforts of husband and wife and has no rights over the matrimonial home.[61] Nor can a wife inherit under Islamic law: either the eldest son or brother or the official male administrator of the deceased inherits.[62] Under general law, a wife is also only entitled to one third of her deceased husband's property, if he has not made a will.

This denial of inheritance rights of women is a major problem given the large number of war widows who are now able to return to their villages of origin, but have no access to land.

Domestic Violence

Societal attitudes to domestic violence are another indicator of the status of women and girls in society; physical violence against women and children is common in Sierra Leone. Indeed, under customary law, a husband has the right to "reasonably chastise his wife by physical force."[63] If the husband is persistently cruel and frequently beats his wife to the point of wounding her or causing her great pain, the wife can divorce her husband, but under customary law a single act of physical and brutal force is permitted. A population-based assessment of war-related sexual violence in Sierra Leone carried out by Physicians for Human Rights among 991 female-headed households in camps for displaced people found that, although 80 percent of women surveyed expressed that there should be legal protections for the rights of women, more than 60 percent of the women believed that a husband had the right to beat his wife.[64]

Rape as a Crime under General Law

The laws governing rape in Sierra Leone are very confusing even for persons working in the criminal justice system, such as members of the judiciary and police force. They are also archaic and date back to the British 1861 Offences Against the Person Act. Under this Act, rape is defined as "the unlawful carnal knowledge of a woman without her consent by force, fear or fraud."[65] Penetration (however slight) is required to constitute the crime of rape.[66] In addition, although a child is defined as a person under the age of sixteen,[67] Sierra Leonean law makes the extremely unhelpful distinction between unlawful carnal knowledge of a girl under the age of thirteen and

[58] The Mende, Krim, Sherbro, Vai, Karonko and Yalunka adhere to this custom, whereas the Temne, Susu, Limba, Loko, Kissi and Kono allow a widow to select her own husband and do not require a refund of the marriage payments if she marries outside her deceased husband's family. Joko Smart, *Sierra Leone Customary Family Law*, p. 138.

[59] If the couple was married under general law, the custody of the children is often determined by the courts, which generally grant the mother custody of the children.

[60] Schacht, *Introduction to Islamic* Law, p. 167. In practice, the mother and children will stay with whomever has the money to provide for them.

[61] As customary marriages are generally polygynous, a divorce with one of the wives would result in the dissolution of the whole household if she were to ask for a refund for her contribution to building the house. Joko Smart, *Sierra Leone Family Customary Law* , pp. 113-120.

[62] Mohammedan Marriage Act, Cap. 96 of the revised laws of Sierra Leone, 1960, s. 9.

[63] Joko Smart, *Sierra Leone Family Customary Law*, p. 152.

[64] Physicians for Human Rights, *War-related Sexual Violence in Sierra Leone: A Population-based Assessment* (Boston: Physicians for Human Rights, 2002), p. 55 (hereafter referred to as PHR report).

[65] Offences Against the Person Act, 1861 (24 & 25 Vict. c 100), s. 63. Unlawful carnal knowledge refers to sexual intercourse between unmarried persons. The law does not actually forbid or make sexual intercourse between unmarried persons a punishable crime, but it only recognizes the right to sexual intercourse for married couples.

[66] Ibid.

[67] Prevention of Cruelty to Children Act (1926), Cap. 31 of the revised Laws of Sierra Leone 1960, s. 2.

unlawful carnal knowledge of a girl between thirteen and fourteen years of age. The law is unclear about unlawful carnal knowledge committed against persons aged between fourteen and sixteen, although the few cases involving this age group that have gone to trial have reportedly been prosecuted as rape.[68]

Nor is the age of consent explicitly stated, although it is presumably by necessary implication sixteen years old. Marital rape does not exist under Sierra Leonean statutory law, and most Sierra Leoneans firmly believe that it is the duty of a wife to have sex with her husband even if she does not want to.[69]

Unlawful carnal knowledge of a girl under the age of thirteen, whether with or without her consent, is a felony and carries a maximum sentence of fifteen years of imprisonment.[70] Unlawful carnal knowledge of a girl between the ages of thirteen and fourteen, whether with or without her consent, is, however, only considered a misdemeanor and carries a maximum sentence of two years.[71] The language "with or without her consent" refers only to cases of unlawful carnal knowledge that do not constitute rape; for example, an eighteen-year-old man who has sexual intercourse with a thirteen-year-old girl with her consent.

The police and judiciary seem to have misconstrued the meaning of the law. When an offence of rape against a girl under the age of fourteen is reported, the police and judiciary turn to either Section 6 or 7—depending on the age of the victim—of the Prevention of Cruelty to Children Act and determine that the girl did not consent. Based on her age, they then charge unlawful carnal knowledge and not rape. This misinterpretation therefore leads to a lesser charge for the rape of a child than for the rape of an adult.[72]

Rape of a person over the age of sixteen is considered a felony and carries a maximum sentence of life imprisonment.[73] Indecent assault—sexual assault without penetration—on or attempts to have carnal knowledge of girls under the age of fourteen years carry the same maximum sentence as unlawful carnal knowledge of girls between the age of thirteen and fourteen i.e. only two years of imprisonment.[74] No person can be convicted of unlawful carnal knowledge, indecent assault or attempted unlawful carnal knowledge "upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused."[75]

The law pertaining to the abduction of girls for immoral purposes applies to any unmarried girls under the age of sixteen.[76] Abduction of girls for immoral purposes is a misdemeanor, carrying a maximum sentence of two years of imprisonment.

In addition to the legal confusion that exists in general law concerning rape, attempts by women to obtain the prosecution of rapists are frustrated by the collapsed state of the judiciary and the lack of effective law enforcement, which has contributed to the ongoing climate of impunity for offenders.

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[68] Human Rights Watch interviews with Abdul Tejan-Cole (human rights lawyer and acting coordinator for the national nongovernmental organization Campaign for Good Governance), Freetown, February–May, 2002.

[69] As the right to have intercourse between a husband and wife is recognized, a husband cannot be guilty of raping his wife unless he has been legally separated from his wife. *See* also PHR report, p. 55.

[70] Prevention of Cruelty to Children Act, s. 6.

[71] Ibid., s. 7. If a man were legally married to a girl under fourteen years of age, sexual intercourse with her would not be an offence.

[72] Human Rights Watch interview with Bill Roberts and Anne Hewlett (respectively crime adviser and criminal investigation trainer with the Commonwealth Community Safety and Security Project), Freetown, May 1, 2002.

[73] Offences against the Person Act, s. 48.

[74] Prevention of Cruelty to Children Act, s. 9. Section 9 stipulates that "whosoever commits an indecent assault or attempts to have carnal knowledge shall be guilty of a misdemeanor, and shall on conviction before the Supreme Court be liable for imprisonment, with or without hard labour, for any period not exceeding two years." Consent is no defense to a charge of indecent assault of a child under fourteen years.

[75] Ibid., s. 14.

[76] Ibid., s. 12. There are also problems with the term "unmarried" because abduction of persons should obviously be prohibited irrespective of their marital status.

Prosecution of Sexual Violence under Customary Law

The manner in which rape is dealt with under customary law is indicative of the societal values towards sexual violence and the low status of women and girls in Sierra Leone. Although all serious criminal cases should automatically be tried under general law, rape cases continue to be prosecuted under customary law in the local courts.[77]

Under customary law, when a case is brought to the local court, the perpetrator is generally required to pay a substantial fine to the victim's family as well as to the chiefs. "Virgin money" is payable to the victim's family if the victim was a virgin. In some communities, in particular Muslim communities, the victim is forced to marry the offender, as a girl who is not a virgin is considered less eligible for marriage. Traditionally, in some ethnic groups, both the victim and the perpetrator will be made to undergo a purification ceremony. For the victim, the purification ceremony is supposed to restore her virginity and for the perpetrator to cleanse the guilt. Any man who invades the husband's exclusive sexual rights over a wife compensates the husband, and not the wife, for "woman damage."[78]

In addition to applying discriminatory laws, the local court system is problematic as women of some ethnic groups do not have direct access to the local courts, but must be represented by a male guardian.[79] The situation is further exacerbated as the chairmen and chiefdom councilors of the local courts are generally all male, which makes it difficult for women to bring cases of sexual violence as the women are often embarrassed and their cases are generally dealt with insensitively by the male court staff. The local courts are also prone to interference by the chiefs as well as the concerned parties, especially in cases dealing with sexual violence.

Many people in rural areas prefer to settle the case between the families and do not go to court. In cases settled between the two families, money or goods are given to compensate the victim's family. Paradoxically, the giving of gifts or money to a rape victim may even elevate her status within her family.

Some families turn to the local chiefs who can arbitrate between the two families but have no right to impose any fines. In practice, however, the local chiefs have been known to impose fines.

Discrimination against Women and Girls in Practice

In addition to being subjected to discriminatory laws, all women and girls face structural discrimination in Sierra Leone's patriarchal society, which accords automatic respect to its older male members. As a result of the low status accorded to them by law and by custom, women in Sierra Leone face substantial discrimination in practice.

Education

Systemic discrimination against women starts in childhood, when many parents prefer to spend their scarce resources on the education of their sons rather than their daughters. According to the United Nations Development Programme's (UNDP) Gender-Related Development Index, females account for only 21 percent of the combined primary, secondary and tertiary gross enrolment ratio, compared with 32 percent males.[80] This gender disparity illustrates not only that fewer girls attend school but also that their education is discontinued at an earlier age than boys. This is reflected in the literacy rate of persons over fifteen years: only 20 percent of females are literate compared to 40 percent of males.[81]

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[77] Under Section 13 (1) of the 1963 Local Courts Act, the local courts have no jurisdiction in seduction actions, which includes any act intended to lead the wife astray. Joko Smart, *Sierra Leone Family Customary Law*, footnote 34, p. 121.

[78] Joko Smart, *Sierra Leone Customary Family Law*, p. 5.

[79] Human Rights Watch interview with Dr. Mariane Ferme (Lecturer, Department of Social Anthropology, Cambridge University, U.K.), Freetown, April 19, 2002.

[80] UNDP, *Human Development Report 2001*, p. 213.

[81] Government of Sierra Leone, *The Status of Women and Children in Sierra Leone: A Household Survey Report (MICS-2)* (Freetown: 2000), p. 30. The literate population includes those who are able to read "easily" or "with difficulty." Only 30 percent of the total population over fifteen years is literate.

The high illiteracy rate among women can in part be explained by the higher demand for female labor in the family. Girls are required to work in the house at an early age given that their mothers have to take care of the household and the children and do farm work. Another contributing factor to women's illiteracy is the harmful traditional practice of early forced marriage, which is very common in the provinces (see below).

The Workplace

Sierra Leone has ratified numerous international labor conventions.[82] Some discriminatory practices, such as restricting the right to maternity leave to married women, which was the norm in the formal sector in the 1970s, have been prohibited by law. Extremely poor working conditions, however, persist in Sierra Leone for the majority of workers. In addition, women working for male bosses continue to be subjected to sexual harassment. According to the president of the Sierra Leone Labour Congress, the trade union federation, much work remains to be done to ensure the full and even application of the labor laws, especially in the provinces.[83]

Sierra Leone's rural population is primarily engaged in subsistence farming, with women constituting 80 percent of the labor that produces 70 percent of the nation's food.[84] This agricultural labor is generally not remunerated by cash wages and women have unequal access to land or technology. In Sierra Leone, the different ethnic groups continue to operate under communal and family land holding systems. Women can use the land for subsistence farming but the control and management of the land and any property on it is vested in the male head of the family. With the post-war resettlement process underway, war widows returning to their villages of origin often lack the legal means or community support to reclaim their families' properties. As women have little or no property to offer as collateral, their access to credit is limited. Women therefore tend to rely on traditional sources of credit such as rotating savings, which only provide small loans.[85]

Due to the limited number of educated women, which is partly the result of the high demand for girls to perform household tasks at a young age, the preference of sending boys to school, and early forced marriages, few women are represented in the better remunerated professional or managerial jobs. Sierra Leone's crushing poverty and high unemployment have also meant that positions that in the West are perceived as women's jobs are often held by men in Sierra Leone, leaving even fewer openings for women. In the formal employment sector, women therefore constitute only 40 percent of the clerical staff and a mere 8 percent of the administrative and managerial cadre.[86] In the informal sector outside agriculture, where the cash returns are low, women are mainly involved in petty trading, soap making and tie-dying. Given the lack of opportunities for remunerated work, women tend to be heavily dependent on their husbands.

The breakdown of community values as the result of the war, combined with cultural practices, also serves to make girls and women vulnerable to abuse and sexual exploitation, which has historically been rampant in Sierra

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[82] Multilateral Convention (no. 29) concerning Forced or Compulsory Labor, as modified by the Final Articles Revision Convention, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 28, 1947); Multilateral Convention (no. 105) concerning the Abolition of Forced Labor, June 25, 1957, 320 U.N.T.S. 291 (entered into force January 17, 1959); Multilateral Convention (no. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953); Multilateral Convention (no. 111) concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960). Sierra Leone has not signed Convention 47 (40 hour week), Multilateral Convention (No. 95) concerning the Protection of Wages, July 1, 1949 (entered into force September 24, 1952), Multilateral Convention (No. 102) concerning Minimum Standards of Social Security, June 28, 1952, 210 U.N.T.S. 131 (entered into force April 27, 1955) or Multilateral Convention (No. 182) concerning the Worst Forms of Child Labor, although a social security system for both the public and private sector was recently established.

[83] Human Rights Watch interview with Uriah O. H. Davies, president of the Sierra Leone Labour Congress, Freetown, April 14, 2002.

[84] Ministry of Social Welfare, Gender and Children's Affairs, *National Policy on the Advancement of Women* (Freetown: Government of Sierra Leone, 2000), p. 7.

[85] Ibid., p. 15. Rotating schemes are schemes whereby groups of women pool their resources and each member of the group has access to the funds on a rotating basis.

[86] Ministry of Social Welfare, Gender and Children's Affairs, *National Policy on Gender Mainstreaming* (Freetown: Government of Sierra Leone), p. 3.

Leone.[87] Many women and girls have been driven to prostitution as a result of the increased poverty caused by the conflict and their lack of other opportunities and skills.

In the Political Arena

Discrimination against women is evident in the political arena. Women were not granted the right to vote or stand for election for any political office until after independence in 1961. Given their economic dependence on men, it is also much more difficult for women to raise the necessary campaign funds. In the Northern Province, women continue to be excluded from contesting and voting for the elections for traditional leadership positions (although there are reportedly several female chiefdom councilors).[88] Out of the 149 paramount chiefs in the country, only three are female, all based in the south.

Under the new block voting system which was introduced for the 2002 elections, 112 parliamentary seats are elected by popular vote. An additional twelve parliamentary seats are reserved for paramount chiefs who are elected in separate elections by chiefdom councilors. There are presently only eighteen female parliamentarians, including two female paramount chiefs. This does represent an increase over the previous government, which had a total of eight women parliamentarians, including two female paramount chiefs. At government level, there are only three female ministers and three female deputy ministers, which is a marginal increase from President Kabbah's previous Cabinet.[89]

Harmful Traditional Practices and Their Impact on Women's and Girls' Health

Early forced marriages

The health of many women and girls in Sierra Leone is compromised by early forced marriage.[90] Early forced marriages are very common in the provinces, where men often sponsor a girl from birth (paying for school fees, clothes, etc.) and marry her after she has been initiated (see below for an explanation of the initiation process).

Early forced marriage is one of the factors contributing to Sierra Leone's high maternal mortality rate, since young girls have several children before their bodies are fully mature. At 1,800 maternal deaths per 100,000 live births, Sierra Leone's maternal mortality rate is one of the highest in the world. This mortality rate translates to approximately 4,000 maternal deaths per year based on a total population of five million.[91]

Girls who are forced to marry early not only miss out on education, but also on skills training opportunities and are therefore highly dependent on their husbands.

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[87] Human Rights Watch interview with a highly respected international observer who has worked in Sierra Leone for two decades, Freetown, February 27, 2002.

[88] Only persons paying tax can contest and participate in elections for paramount chiefs who are elected from ruling houses. The paramount chieftaincy system was introduced by the British Colonial Administration to administer the various chiefdoms in the Protectorate (i.e. the whole of Sierra Leone excluding the Western Area). Although there is reportedly no law against women paying taxes, women in the Northern Province have historically not done so probably due to lack of opportunities to find remunerated work. The tax is a negligible amount that women are willing to pay to ensure their eligibility for these elections. Human Rights Watch interview with Joseph Hall and Honerin Muyoyatta from the National Democratic Institute (NDI), Freetown, March 22 and 23, 2002.

[89] The three ministerial posts are Minister for Social Welfare, Gender and Children's Affairs, Minister for Trade and Industry, and Minister of Health and Sanitation. The three female deputy ministers are in the Ministry of Social Welfare, Gender and Children's Affairs, the Ministry of Trade and Industry, and the Ministry of Works, Housing and Technical Maintenance. The new government was sworn in on July 12, 2002.

[90] Early forced marriages are marriages whereby the consent of either party is not sought or more commonly whereby the consent of the girl is not sought and whereby one or both spouses is/are under the age of consent (which under international law should not be less than fifteen years of age). This harmful traditional practice contravenes article 16(3) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which states that the betrothal and marriage of a child shall have no legal effect, article 16(1) and (2) of the Universal Declaration of Human Rights, and article 23(3) of the International Covenant on Civil and Political Rights (ICCPR), which says that "[n]o marriage shall be entered into without the free and full consent of the intending spouses."

[91] Government of Sierra Leone, *The Status of Women and Children in Sierra Leone*, p. 63.

Female Genital Cutting

Sierra Leonean girls as well as boys are traditionally initiated into secret societies at adolescence. The secret societies that perform the initiation rites take the adolescents into a sacred place in the bush where they are circumcised and taught about traditional practices. The male and female societies are segregated and males are not supposed to know what happens in female secret societies or vice versa.

Traditionally, initiation for girls entailed spending an extended period (up to two years) in the bush with girls of the same age, being taught various cultural skills (dancing, singing, drama, arts and craft, how to use local herbs, how to respect elders, etc.) and being a good wife (cooking, cleaning, child welfare, hygiene, fishing, etc.) by older women. Girls who undergo initiation through the secret societies are treated with deference after having completed the ritual and are feted by their communities.[92] Today, the duration of the initiation ceremony has been greatly reduced, minimizing the skills transfer aspect, and thus focusing on the cutting itself. Because it was not always possible to hold the ceremonies during the war, initiation rites are now often practiced on adults, girl mothers, and pregnant girls—whereas traditionally it was seen as a rite of passage into adulthood for adolescent girls, who had to be virgins. In recent years, girls and/or adult women who do not wish to be initiated have been abducted and circumcised by force by female members of the community.

Ninety percent of Sierra Leonean women have undergone female genital cutting, which can have major health repercussions, including pain, injury to adjacent tissue of the urethra, hemorrhage, shock, acute urine retention, and infection.[93] Longer-term health effects include recurrent urinary tract infections, pelvic infections, infertility, keloid scar, and problems during childbirth.[94] The high prevalence of conflict-related sexual violence, which causes trauma to the genital area, can only have served to aggravate these health repercussions and both have in turn contributed to the increased spread of sexually transmitted diseases, including Human Immunodeficieny Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS).

This harmful traditional practice, which is contrary to provisions of several international human rights instruments, continues to be practiced due to the significant societal pressure exerted by adults as well as peers.[95] Girls who have not been initiated are seen as less eligible for marriage and many future husbands sponsor the initiation of their bride-to-be.

Societal Attitudes to Sexual Violence against Women and Girls

The low status of women and girls is highlighted by the prevalent societal attitudes towards sexual violence. The notion of sexual violence as a crime is a very recent concept in Sierra Leone. It is still widely believed that only rape of a virgin is rape, which in Krio is called "to virginate." Rape of a non-virgin, on the other hand, is not considered rape, and there is often a belief that the woman must have consented to the act or is a seductress. Marital rape is not recognized under either customary or general law in Sierra Leone.

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[92] Human Rights Watch interview with Dr. Mariane Ferme, (lecturer, Department of Social Anthropology, Cambridge University, U.K.), Freetown, April 19, 2002.

[93] Dr. Olayinka Koso-Thomas, *The Circumcision of Women: A Strategy for Eradication* (London and New Jersey: Zed Books Ltd., 1992), p. 19. The type of female genital cutting performed in Sierra Leone is clitoridectomy (removal of the prepuce of the clitoris) and excision (removal of the prepuce, the clitoris and all or part of the labia minora). The extreme form of infibulation is not practiced in Sierra Leone.

[94] U.S. Agency for International Development (USAID), *Report on the First Donors Meeting For FGM/FGC Elimination* (Washington D.C.: USAID, 2001), p. 12.

[95] Female genital cutting violates the right to be free from violence (Article 1 of the CEDAW) and the right to bodily integrity (Article 6 of the CRC). Under Article 5 (a) of the CEDAW, states are called upon "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 24 (1) and (3) of the CRC also requires states to abolish traditional practices that are harmful to the health of children. General Recommendation 19 of the CEDAW Committee also links traditional attitudes which subordinate women and violent practices, including female genital cutting, that "... justify gender-based violence as a form of protection or control of women."

Given the lack of statistics about rape cases before the war, it is impossible to establish the historical prevalence of sexual violence, but several doctors reported to Human Rights Watch that, before the war, they only treated a limited number of young girls who generally had been raped by older men.[96] According to the doctors interviewed, many cases of rape before the war occurred within the extended family and were considered family matters. They were rarely discussed or reported, in order to ensure that the victim's chances of marriage and obtaining a good dowry were not destroyed. Rape was also apparently unlikely to occur within a village community, where everyone knew each other and the shame attached to the offender would be too great. Rape outside the extended family was more likely to be committed in environments where there were mixed ethnic groups, such as in mining areas or larger towns. The cultural definition of rape and lack of reporting, however, may have led to the understanding that rape rarely occurred before the war. Sexual exploitation, however, has always been rampant in Sierra Leone, where economic options for women are limited and which has traditionally condoned a high level of promiscuity, despite the high value placed on virginity. With the increased poverty caused by the war, sex has become even more of a commodity.[97]

The societal attitudes to rape and the low status of women have meant that no cases of conflict-related sexual violence and few cases of non-conflict-related sexual violence are prosecuted.[98] (See also below at p. 61 for a discussion on the amnesty included in the Lomé Peace Agreement.)

V. SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS DURING THE CIVIL WAR

Prevalence of Sexual Violence during the War

Throughout the ten-year civil war, thousands of Sierra Leonean women and girls were subjected to widespread and systematic sexual violence, including rape and sexual slavery. A survey of 991 female heads of households in communities of displaced persons carried out by Physicians for Human Rights (PHR) in 2002 found that approximately one of every eight household members (13 percent) had been subjected to one or more incidents of conflict-related sexual violence; among the actual respondents to the survey, the prevalence rate of conflict-related sexual violence was 9 percent (94 out of 991).[99] Based on this prevalence rate, as many as 50,000 to 64,000 internally displaced women may have been subjected to sexual violence as a result of the war.[100] Adding extrapolated data for other types of victim, PHR calculated that as many as 215,000 to 257,000 Sierra

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[96] Human Rights Watch interview with Dr. Olayinka Koso-Thomas, Freetown, February 25, 2002; Dr. Noah Conteh, Freetown, March 1, 2002 and Dr. Bernard Fraser, Freetown, March 3, 2002. The latter two doctors practiced in the provinces as well as in Freetown.

[97] Sex can be bought for as little as U.S. $0.50. United Nations High Commissioner for Refugees and Save the Children U.K., *Sexual Violence and Exploitation: The Experience of Refugee Children in Liberia, Guinea and Sierra Leone* (Geneva/London: UNHCR/SC-UK: 2002). Human Rights Watch has some concerns about this report as the report does not provide an adequate review of the context, including the status of women and girls within the given countries. Given the low status of women and girls in these countries, the sexual exploitation is much wider than reported: the power dynamic means that men of all walks of life, such as teachers, pastors, police, businessmen as well as aid workers or peacekeepers, exploit girls and women. It would also appear that the short-term solutions proposed do not adequately address the underlying structural issues, such as poverty, lack of education or alternative means of income generation for many women.

[98] It was not possible to obtain reliable statistics as reporting and recording of cases by the police and judiciary are not consistent.

[99] PHR report, p. 2. The PHR report captures some of the different types of sexual violence that women were subjected to. Of the ninety-four internally displaced women reporting their own experience of sexual violence to PHR, interviewees reported among other things: rape (89 percent); being forced to undress/stripped of clothing (37 percent); gang rape (33 percent); abduction (33 percent); molestation (14 percent) and insertion of foreign objects into genital opening or anus (4 percent). It should be noted that the definition of rape used by the PHR report differs from that used throughout this report. The definition used in this report, as mentioned above, is that used by the International Criminal Tribunal for the Former Yugoslavia, in the *Foca* case.

[100] Ibid., p. 3. As PHR points out this figure might be an underestimate due to deliberate non-disclosure of sexual violence and the lack of privacy in some of the interviews, despite efforts made to ensure privacy.

Leonean women and girls may have been subjected to sexual violence in the conflict period.[101] Although these figures are necessarily no more than estimates, they do give an indication of the widespread nature of sexual violence during the war.

Human Rights Watch has primarily documented sexual violence committed during the latter stages of the war when the organization had a full-time presence in the country, beginning April 1999. This does not mean that sexual violence was at its worse during this period. Since that time, Human Rights Watch extensively documented crimes of sexual violence during the January 1999 invasion of Freetown as well as ongoing human rights abuses. Human Rights Watch has also received numerous reports of sexual violence dating from earlier in the war.

Perpetrators

Survivors of sexual violence mostly reported being raped by rebel forces, but were at times not able to identify which rebel faction the perpetrators belonged to or whether—especially given the frequent collaboration between soldiers and rebels—the perpetrators were indeed rebels or rather soldiers from the Sierra Leone Army (SLA). In addition, survivors explained that they often deliberately did not want to look at their rapists out of fear and because they did not want to make eye contact. For example, D.T., a twenty-five-year-old woman raped by four rebels, including one child combatant, said that she would not be able to recognize any of the perpetrators, as she was too afraid to look at them (see below at p. 36).[102] A. B., a thirty-year-old who was raped by two rebels, also said that:

> When you are with these people [rebels], you do not ask questions. I did not even look into their faces. Many of them rubbed black chalk on their face and when you looked at them would say, "What are you staring at?"[103]

Rebel Forces

The RUF committed crimes of sexual violence—often of extreme brutality—from the very beginning of the war when they invaded Sierra Leone from Liberia in March 1991. RUF rebels committed crimes of sexual violence in the course of their military operations, during which thousands of women and girls were abducted and forced to "marry" rebel "husbands." These abducted women and girls were repeatedly raped and subjected to other forms of sexual violence throughout the duration of their captivity, which in many cases lasted years. During captivity, these women and girls were also made to carry out forced labor, including carrying heavy loads, cooking, cleaning, etc. Many women and girls have given birth to children fathered by rebels. Especially during the early years of the war, the RUF were assisted by Liberian forces, who also committed rape and other sexual violence.

The AFRC committed crimes of sexual violence from May 1997, using the same tactics as the RUF. Sexual violence by the RUF and the AFRC continued to be committed after the signing of the Lomé Peace Agreement on July 7, 1999, and they were joined in this by the West Side Boys, a splinter group of the AFRC formed after the signing of the Agreement. An unknown number of abducted girls and women still remain under the control of their rebel "husbands" who did not want or feel able to relinquish the "families" they had founded in the bush; in many cases the abductees' own families would not have welcomed them back.

Sexual violence peaked during the rebels' military operations, which occurred countrywide as the rebels sought to capture more territory. After capturing a town or a village, the combatants rewarded themselves by looting and by raping women and girls, many of whom they later abducted. Crimes of sexual violence committed during and following military operations, such as "Operation No Living Thing" and "Operation Pay Yourself"

[101] Ibid., pp. 3-4. PHR's calculation is not inclusive of all categories of victim: to the IDP women reporting conflict-related sexual violence, PHR added non-conflict-related sexual violence among non-displaced women, assuming a prevalence rate of 9 percent.

[102] Human Rights Watch interview, Foriah, March 6, 2002.

[103] Human Rights Watch interview, Bo, February 9, 2000.

that took place in 1998, have been documented by Human Rights Watch.[104] Human Rights Watch has also extensively documented the January 1999 invasion of Freetown by the RUF/AFRC, during which sexual violence was systematically committed against women and girls on a massive scale. The sexual violence committed during January 1999 serves as an illustration of the widespread nature of sexual violence committed by the rebel forces. Among the perpetrators were child combatants, and many of the victims were also children. Members of the Small Boys Units (SBUs) within the rebel forces were known to be particularly cruel and committed egregious human rights abuses.

Although there are no exact figures for the number of women and girls subjected to sexual violence during the January 1999 invasion, Médecins Sans Frontières (MSF) and the Sierra Leone chapter of the Forum for African Women Educationalists (FAWE Sierra Leone), a nongovernmental organization that has been treating survivors of sexual violence since 1999, provided medical treatment and counseling to 1,862 female survivors of sexual violence who had been raped and/or abducted during the invasion. According to MSF, 55 percent of these survivors reported having been gang raped and 200 had become pregnant.[105]

As the RUF/AFRC rebels controlled most of the countryside apart from pockets of government-controlled areas in the south and some key towns, including Bumbuna and Freetown, at different times throughout the war, women and girls living in these rebel-held areas were also subjected to sexual violence when the rebels went on patrol or simply sought to assert their domination over the population. Women and girls in government-controlled areas also lived in fear of rebel hit-and-run attacks, during which many women and girls were subjected to sexual violence and abducted. Women and girls residing in Freetown were "spared" until the January 1999 invasion by the RUF/AFRC.

Pro-Government Forces

Human Rights Watch has not documented any cases of sexual violence by the Sierra Leone Army (SLA) prior to the time of the 1997 AFRC coup. According to the survey conducted by Physicians for Human Rights, of seventy-five women and girls who reported having been raped and identified the rapists' affiliation, only three said they were raped by SLA soldiers.[106] This may in part be due to the fact that survivors would have often found it difficult to distinguish between the rebel factions and the SLA. With the "sobel" phenomenon, the SLA soldiers would disguise themselves as rebels (the rebels were also known to disguise themselves as members of the SLA or the ECOMOG peacekeeping force).

Human Rights Watch has documented only a few cases of sexual violence committed by the pro-government Civil Defence Forces (CDF). The CDF movement consists of groups of traditional hunters and young men organized into militia. They were initially only deployed by the government in their own chiefdoms, in order to ensure their loyalty and discipline and make the best use of their superior bush knowledge.[107] The government provided training, weapons and food to the units. The relatively small number of identified cases of sexual violence perpetrated by the CDF may be related to the CDF's internal rules that stipulate that warriors cannot have sexual intercourse before going to battle, as they would lose some of their protective powers that are bestowed on them during their initiation ceremonies. These powers are meant to make the fighters invincible and immortal. During the initiation ceremonies, the fighters are also instructed not to harm civilians, and required to take an oath to that effect. Thus, it is likely that the pro-government forces did not actually commit sexual violence on a widespread and systematic basis; however, the low number of identified cases may also be partially due to Human Rights Watch's human resource constraints, faced with the overwhelming number of abuses committed by the rebel forces. Research on the CDF was mainly conducted in the south where the Kamajors, the

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[104] *See* Human Rights Watch, "Sowing Terror: Atrocities against Civilians in Sierra Leone," *A Human Rights Watch Report*, July 1998.

[105] Human Rights Watch interview with MSF, Freetown, March, 2000.

[106] PHR report, p. 48. and Table 5 on p. 52. *See* also Binta Mansaray, "The Invisible Human Rights Abuses in Sierra Leone: Conflict-related Rape, Sexual Slavery and Other Forms of Sexual Violence," June 2001. On file with UNAMSIL human rights section.

[107] The Kamajors operate predominately in the south and east, the Tamaboros in the far north, the Gbettis in the north and the Donzos in the far east. See also "Background" section.

largest and most powerful group of the CDF, are based. In recent years, as the Kamajors have been moved away from their villages of origin and the influence of their traditional chiefs, they have become increasingly undisciplined and cases of rape by Kamajors have become more common.

Peacekeeping Forces

Human Rights Watch has documented several cases of sexual violence by UNAMSIL peacekeepers, including the rape of a twelve-year-old girl in Bo by a soldier of the Guinean peacekeeping contingent in March 2001 and the gang rape of a woman by two Ukrainian peacekeepers in April 2002 near Kenema (see below). There appears to be reluctance on the part of UNAMSIL to investigate and take disciplinary measures against the perpetrators. Reports of rape by ECOMOG peacekeepers, the majority of whom were Nigerian, were rare.

Both ECOMOG and UNAMSIL peacekeepers have sexually exploited women and solicited child prostitutes.

Sexual Violence Committed by the Rebel Forces

"Virgination"—Targeting Young Girls

The rebel forces subjected women and girls of all ages, ethnic groups, and socioeconomic classes to individual and gang rape. Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins. This was evident not only by their actions, but was also explicitly stated by them as they chose their victims. As in many countries, Sierra Leonean society places a high value on virginity. Girls who have been "virginated" and are therefore no longer virgins, are considered less eligible for marriage. M.B., a fifteen-year-old girl from Freetown, described how RUF/AFRC rebels deliberately sought out virgins for violation during the January 1999 invasion of Freetown:

> We were hiding in the mosque when two rebels dressed in civilian [clothing] entered. It was dark but they shone their flashlights looking for girls and said, "We are coming for young girls ... for virgins, even if they tie their heads like old grandmothers, we will find them." They also said that if the people did not hand over the young girls, they would open fire on all of us.[108]

Some victims explained that female rebels physically checked girls to see whether they were virgins.[109] M.W., a thirty-eight-year old nurse who was captured by the RUF/AFRC during the January 1999 invasion of Freetown and forced to treat wounded rebels and civilians, said that the youngest rape victim she treated was "a little nine-year-old from Calaba Town [an area of Freetown]. Her perineum was bleeding and had been badly torn. Every day we gave her sit baths and she eventually recovered."[110] The consequences of sexual violence for virgins can be particularly severe as these testimonies highlight, although mature women also reported experiencing similar consequences.[111]

R.T. was about sixteen when she was brutally raped vaginally and anally by ten RUF rebels in the forest near Koidu in Kono district in January 1997. R.T. developed vasico-vaginal fistula (VVF) and vasico-rectal fistula (VRF) from her brutal gang rape:

> I was hiding in the bush with my parents and two older women when the RUF found our hiding place. I was the only young woman and the RUF accused me of having an SLA husband. I was still a virgin. I had only just started my periods and recently gone through secret society. There were ten rebels, including four child soldiers, armed with two RPGs [rocket propelled grenades] and AK-47s. The rebels did not use their real names and wore ski masks so only their eyes were

[108] Human Rights Watch interview, Freetown, May 1, 1999.

[109] It should be noted that virginity can not be medically proven.

[110] Human Rights Watch interview, Freetown, October 21, 1999. The victim probably suffered from vasico-rectal fistula (a tear or opening in the tissue between the rectum and the vagina, usually resembling an open blood vessel), which would have left her incontinent.

[111] International humanitarian law prohibits all rape and other acts of sexual violence, of course irrespective of whether the victim was a virgin or not.

visible. The rebels said that they wanted to take me away. My mother pleaded with them, saying that I was her only child and to leave me with her. The rebels said that "If we do not take your daughter, we will either rape or kill her." The rebels ordered my parents and the two other women to move away. Then they told me to undress. I was raped by the ten rebels, one after the other. They lined up, waiting for their turn and watched while I was being raped vaginally and in my anus. One of the child combatants was about twelve years. The three other child soldiers were about fifteen. The rebels threatened to kill me if I cried.

My parents, who could hear what was happening, cried but could do nothing to protect me. I was bleeding a lot from my vagina and anus and was in so much pain. My mother washed me in warm water and salt but I bled for three days. I can no longer control my bladder or bowels as I was torn below. We stayed in the bush until ECOMOG took over Koidu. When we came out of the bush, even adults would run away from me and refused to eat with me because I smelled so badly. I had an operation in 2000 but it did not work. Before I got a catheter in 2001, I had no friends, as I smelled too bad. I am still in pain and have a problem with vaginal discharge. I also have nightmares and feel discouraged.[112]

This extreme sexual violence is illustrated also by the following testimony by F.B., who describes the resultant deaths of eight young girls in one Liberian refugee camp alone (no doubt many others died from similar treatment during the war). F.B.'s testimony also illustrates the RUF's connection to Liberia and the role of Liberian mercenaries in the RUF movement. F.B. was a ten-year-old girl living in Mano village in Kailahun district near the Liberian border when the RUF accused civilians in her village of helping the SLA. Her family decided to flee to Liberia in November 1991, but was fired upon by the rebels as they fled. At least fifteen civilians were killed, including her father and several women with babies on their backs:

Only six of my family survived; my mother, one brother, two sisters, one uncle, and me. After hiding and fleeing through the bush for three days, Mohammed, my uncle, found someone with a boat to help us cross over to Liberia. We crossed into Vahun where there was a sort of refugee camp. We were there for two weeks and terrible things happened. We thought we had escaped from the rebels but we found many of them there. They controlled the camp. Even though food was being air dropped, the rebels took it all. They took everything we had, our money, salt, and all our food. The rebels were mixed Sierra Leoneans and Liberians.

About a week after arriving, the rebels came into our house in the evening and took my fifteen-year-old sister away. My mother stayed up the whole night. The next day my uncle went from hut to hut looking for her. He called her name and heard her groaning inside a hut. He picked her up and carried her home. When my mom saw her she burst out crying. I was only ten and didn't know anything about man business. My sister was crying all the time and couldn't walk. She cried, "Oh mother, I'm going to die." My mother just held her and told her it would be O.K. My uncle exchanged five gallons of palm oil so we could get some salt, which my mother later mixed with water and had my sister sit in. She was bleeding a lot. She told me they had tied her mouth and raped her many times, but I didn't know what rape was.

After that my uncle shaved my head, gave me trousers and made me look like a boy. When I was walking around a camp I saw a few girls aged under twelve years old, lying on the ground with their legs spread open and blood coming out between their legs. Some had their dresses pulled up and others had cloth stuffed in their mouths. During the two weeks I was in Vahun I saw eight girls like this. Sometimes their family would come and wrap them in white so I knew they had

[112] Human Rights Watch interview, IDP camp called "Lebanese Camp," March 2, 2002. Women and girls with obstetric fistulae suffer from a constant wetness that results in genital ulcerations, frequent infections and a terrible odor. These fistulae generally require surgery although occasionally they spontaneously heal.

died. Other times no one picked them up and they stayed there for days until someone buried them. There were so many girls who had lost their parents and were there alone, so no one would come for them.

I saw the rebels catching young and even older women. Once they caught an old woman. She said, "No, leave me. I'm too old for this business." But they made fun of her saying, "Oh look, we have caught a young *Bundu* [initiate into secret society] girl here." Other times I heard women screaming in the middle of the night. Everyday people were dying—from hunger, illness, and this rape. After that I had dreams about a dead person coming to hurt me.

The only reason we stayed that long was because people were still moving across the border and we figured things were even worse in Sierra Leone. Besides, the rebels stopped us from going back home, and we did not know anyone in Liberia so we would have died of hunger.[113]

M.M. was only eleven when she was abducted, together with her aunt and her aunt's four children, when Koidu was attacked during the dry season[114] in 1994. M.M. had not yet experienced her first period or been initiated into secret society:

I was raped by seven child combatants, who were aged between fifteen and sixteen years old, on the way to Kailahun. I was raped in my vagina and anally. Other rebels and also civilians saw me being raped but the civilians were too afraid to protect me. My aunt put native herbs on my genital area but I bled for five days. The RUF had medicine but would not give it to us civilians. My aunt carried me on her back, as I could not walk because of the pain. It took us five days to reach Kailahun. A rebel commander wanted my aunt to be his wife but she refused so he killed her. In Kailahun, I was not raped again. Since my rape, I have only experienced irregular periods and my belly is always swollen like I am pregnant.[115]

M.F. was abducted from Koinadugu town in Koinadugu district in September 1998 when the RUF/AFRC attacked the town. She was only thirteen at the time and was brutally raped both vaginally and anally by five RUF rebels. During the same attack, the RUF killed over thirty older women:

I was only thirteen and a virgin. They forced me to go down on my hands and knees with my bottom in the air and raped me both vaginally and anally. Five rebels raped me on that first day. My clothes were bloodied and it hurt to urinate and defecate afterwards. The rebels who raped me promised to take me to Freetown and give me money and dresses. They gave me nothing after they used me. I was given to one of them, Mohammed, as his wife. We stayed in Koinadugu town for four days. I was with my parents but could not tell them about the rapes although my mother heard me being raped.

The RUF said they came to kill civilians who were ungrateful and talked bad about the RUF. The RUF cut my grandmother with a knife and beat her with a pestle. She died. The RUF told the older women to go to the mosque to attend a ceremony. More than thirty women, some of whom had children, went to the mosque. The RUF set fire to the mosque. Another old woman was rolled into a mat and the mat was set on fire.[116]

[113] Human Rights Watch interview, Bo, February 9, 2000. *Bundu* is one of the secret societies that initiate girls and perform female genital cutting.
[114] The dry season in Sierra Leone is approximately between November and May.
[115] Human Rights Watch interview, Lebanese Camp, March 2, 2002.
[116] Human Rights Watch interview, Kabala, March 7, 2002.

Rape Victims Subjected to Multiple Human Rights Abuses

Rapes were often preceded by or followed by other human rights abuses against the victim, her family members and/or her community. Hardly any family was unscathed by abuse during the war. The PHR report highlighted that 94 percent of the 991 female-headed households surveyed had experienced at least one serious human rights abuse during the ten-year period.[117] M.P., who was twenty-four years old when the RUF attacked Jaiweii village in Kailahun district in May 1991, testified:

> I was captured together with my husband, my three young children and other civilians as we were fleeing from the RUF when they entered Jaiweii. Two rebels asked to have sex with me but when I refused, they beat me with the butt of their guns. My legs were bruised and I lost my three front teeth. Then the two rebels raped me in front of my children and other civilians. Many other women were raped in public places. I also heard of a woman from Kalu village near Jaiweii being raped only one week after having given birth. The RUF stayed in Jaiweii village for four months and I was raped by three other wicked rebels throughout this period.
>
> The rebels, who spoke Liberian English, said they were fighting for the SLPP to be in power. When the RUF first entered Jaiweii, they accused my husband of giving information to the SLA, so they tied his hands behind his back and beat him mercilessly. They kept him tied up and continued to beat him. After six days, he died and they threatened to kill me if I cried. The RUF also shot three other men whom they accused of giving information to the SLA. My three children all died because they became sick and there was no medicine. The older one who was five years died one week before the two younger ones who died on the same day. They were only three and seventeen months old.[118]

M.P. added that the RUF had said that they could do whatever they want with women whom they "owned." A.J., a fourteen-year-old student, was abducted by the RUF from Pujehun and was held by them from February to May 1994. She was first tortured, caged, and then brutally raped:

> On February 3, 1994 at around 8:00 p.m., the RUF attacked Pujehun. There was lots of firing because the SLA was deployed here. As we were fleeing, we ran straight into a group of over one hundred RUF. They were dressed in civilian clothes and nearly all had guns. Among those rebels was one named Maliki, who was actually from Pujehun. RUF Commander Bai Bureh started to select several people from our group. As he was doing the selecting, Maliki told him to choose me because if they let me go, I would go back to Pujehun and tell the SLA that he was there. They chose eight of us, four young men and four young women, including three of my cousins. They told the rest of the civilians to go back into the bush and said that if they found them the next day they would be killed. We were taken to their camp.
>
> Two weeks later, the four young men managed to escape. When the rebels found out, they blamed us for what happened. They said the boys were really SLA solders that were there to get information on the RUF. I was then tortured by a Liberian RUF commander named C.O. Rackin. He said I was "bright and bold" and must have known how they escaped. He interrogated me, asking me if the boys were SLA's. During the interrogation he cut me in twenty-one places with a knife including a deep cut on my left breast. He drew a small, small circle in the dirt and told me to step inside and walk around in it. Any part of my body left outside he stabbed with a knife.
>
> Then a commander called Momoh Rogers, who was the battalion commander, ordered that my cousin and I be put in a wooden cage smaller than one square meter. He said that if our brothers

[117] PHR gave the following examples of serious human rights abuses: beating, bodily injury, amputation, torture, killing, forced labor, captured for less than one day, sexual assault without rape, rape, abduction, burned dwelling, looting. PHR report, pp. 45-47.

[118] Human Rights Watch interview, Lebanese IDP Camp, March 2, 2002.

who had gone to tell the SLA came to attack, it would be very easy for them to kill us. The cage was what the village people used to store their husk rice in and it had almost no ventilation. We were only let out to defecate. They told me I had to pee on myself in the box. They poured water into the cracks but it was never enough and was dirty. Sometimes they dropped cassava and boiled bananas into the cage, feeding us like we were animals. The stab wounds I had got infected and I got sores all over my body. They were painful and smelled very badly.

After about two weeks in the cage, one of Patrick's bodyguards took me to C.O. Patrick's house. When I saw him, I told him about the sores on my feet and breasts. I told him I was in pain and asked for treatment. C.O. Patrick told me to shut up and ordered me to go into the house. He turned to his bodyguard and said that if I refused, I was to be taken behind the house and executed. When we got inside, Patrick told me to lie down on the floor. Then he forced himself upon me. I was a virgin. He was violent and rough. Then he told me to turn over and give him my behind. But I told him I could not lie down because my breast was so swollen. So he brought a chair and told me to stand up and lean onto the chair. Then he stood behind me and tried to shove his penis into my vagina. The first time he did this I fell over onto my chest, which was so painful. I started bleeding from my chest wound. Then he told me to get up and said if I did not hold the chair firmly he was going to kill me. He took a long time doing that thing to me. I was crying from the pain of my breast and because it was painful, being the first time. He told me to shut up. As he was sexing me he accused my brothers of being spies and said he was going to kill me and that he was only waiting for the others to come from the frontline to do it.

C.O. Patrick asked if I had done sex before and I told him "No, I am a school-going girl." Then he said, "Well, tonight you are going to have sex, because you are going to be killed and you should do it before you die." I was terrified. I started crying. All I could think of was my death and all that guy could do was do that thing to me. After he was satisfied, I was taken back to the cage.[119]

A.M. was eighteen when she fled Freetown with her two children, two sisters, and brother after the 1997 AFRC coup. Not only was she first forced to watch the execution of three male civilians by Nigerian ECOMOG soldiers in Fadugu, Koinadugu district, but also the rebel execution of her brother and sister. The RUF tried to get her to eat her brother's liver and heart. Her sister's head was also placed on her legs:

After the rebels were driven out of Kabala by ECOMOG, the rebels spread to different towns, including Mongo, Badela, and Dankawali. One day I went with my brother to wash in the stream, as I was afraid to go by myself. We heard shots, which my brother thought must have come from ECOMOG soldiers. I was afraid. We met three rebels with guns who accused my brother of being a SLA soldier. "Superman" was the commander. They beat my brother with their gun butts and took off his clothes. "Superman" forced my brother to go down on his hands and knees and made me sit beside him. They cut his neck from the back and then took an axe and cut his back. They removed his heart and liver and put them on my hands. The heart had more shape and the liver was flat. They tried to force me to eat them but I refused to. Another rebel, Colonel Titus, a mercenary who spoke Liberian English, arrived and told the others not to force me to eat my brother's heart and liver. He said he would show me how they will deal with me. He said they should abduct me. They took me back into the village of Dankawali where we met my grandmother on her veranda. She was tied up and she said that another rebel commander, Hakim, had carried my two children and small sister away in the first group.

The rebels had abducted another group of twenty-five persons and held them by the cotton tree. My big sister was under the cotton tree. I told her that the rebels killed our brother. Colonel Titus slapped my sister and told her not to cry. They killed my sister and two other women and placed

[119] Human Rights Watch interview, Pujehun, February 12, 2002.

> their cut off heads on my legs. The rebels also locked some villagers in the houses and set all houses on fire.[120]

H.K., a sixteen-year-old student, was abducted from Freetown during the January 1999 invasion. She was taken to Makeni where she was "virginated" and forced to be the wife of Colonel "Jaja," a twenty-two-year-old half-Liberian who threatened to kill her entire family if she escaped. H.K. was brutally tortured after Colonel "Jaja" accused her of stealing his money, which was in fact taken at gunpoint from her by "Superman," a notorious rebel commander and his bodyguard called "Yellowman." She described what happened afterwards:

> Then the rebels took me into a stream and tied me to a tree in the water. They told people to beat me. I was in water up to my head. "Jaja" said the boys should cut down the tree and let me drown. I was there for several days, maybe up to a week or so. Once a water snake swam by and ate my foot in the water. When I was tied there, Jaja cut my neck and put cocaine into my body. He also gave me marijuana cigarettes to smoke. Finally he untied me and put me in an old container where I stayed for several days. While in the guardroom Jaja and Alhaji "Cold Boots" came several times to give me drugs.[121]

The rebels often used psychological torture against civilians by, for example, making them clap or sing in praise while watching family and friends being killed, raped or mutilated. They further exerted their domination over civilians by not allowing them to show any emotion, and threatening to kill anyone who did. In 1997, when K.M. was abducted by the RUF from Kabala in Koinadugu district, her brother was shot in front of her. The RUF accused him of planning to escape. She was not allowed to show any emotion and was forced to throw his body in the river. In 1999, K.M.'s husband was killed in front of her by RUF Captain Solvelar in Yomandu in Tonkolili district, when a child combatant accused her husband of not doing his job properly. As Captain Solvelar shot K.M.'s husband, he warned her not to cry otherwise she would be killed. Later in the same year, K.M.'s baby was killed in front of her in Kambia district by a rebel captain who wanted to rape her:

> Captain "Danger" pulled my baby from my back and before I could do anything, he sliced my child in two. I was told not to cry as otherwise I would be killed as well.[122]

Rape with Objects and Other Sexual Torture, including Sexual Mutilation

The rebels frequently used objects, including weapons, burning wood, and hot oil, to rape or otherwise torture (including sexually torture) women and girls, sometimes resulting in their death. In 1994, J.M., an elderly man from Giehun village in Kailahun district, witnessed the killing of nine civilians accused of plotting to set Foday Sankoh up for a government ambush. One of those civilians, a woman named Janneh, was alleged to have been one of Sankoh's "wives." J.M. described how rebels brought her into the village square, forced her to lie down and then poured boiling palm oil into her vagina and ears:

> The RUF rounded up about seventy of us civilians, including Abi and Janneh, and accused us of making a plot to arrest Sankoh. The commmander said we were to be killed but that first he would do an investigation. First he called upon Abi who accused Janneh of calling people in Freetown to arrange something against Sankoh. So Janneh was the first to be killed. The rebels grabbed her, stripped her and threw her down in front of the whole village. Several of them pulled her legs apart and held her tightly. They poured a pan of boiling palm oil into her vagina and then into her ears. This terrified us. She started shaking all over and was bleeding from the nostrils and mouth. While on the ground they struck her with a gun and danced around her saying, "When you were loving with the old man [Sankoh], you didn't show us any respect, but now your time for punishment has come." She died about an hour later. The rebels said they were sent by Sankoh who was living in Kailahun about seven miles. Nothing small or big happened without his

[120] Human Rights Watch interview, Kabala, March 9, 2002.
[121] Human Rights Watch interview, Freetown, October 12, 1999.
[122] Human Rights Watch interview, Kabala, March 7 and 9, 2002.

knowledge. After killing Janneh they poured hot oil in the mouths, eyes and noses of three other villagers, and then shot five others. I guess Janneh must have known all of Sankoh's secrets.[123]

M.F., the thirteen-year-old who was raped by five rebels (see above, p. 30), witnessed how her stepmother's mother was beaten by the RUF with a long pestle in Momoria village in Koinadugu district in 1998. The rebels then shoved the pestle into her anus. M.F. said that her stepmother's mother was still alive when they left her with the pestle in her anus, which was bleeding.[124] One woman also reportedly had pepper put in her vagina as the RUF suspected her of being the wife of a SLA soldier. Rebels inserted burning firewood into the vagina of twenty-five-year-old F.T. and another woman during the January 1999 invasion of Freetown:

> On 21 January 1999, I went to a neighbor's house to buy rice, as I had not eaten for over two days. The rebels had been in the area and as I bought two cups from my neighbor, we heard the rebels coming again. My neighbor told me to leave quickly so that he could lock up his house. When I left with another woman and a man, we met a group of ten rebels who surrounded us. They were dressed in full combat [uniform] and asked us where we were going in Krio.
>
> The rebels asked us what we could give them, so the man took out all his money and gave it to them. He was then allowed to go. As the other woman and I did not have any money, they told us to take off our clothes at gunpoint. We begged them not to harm us. The rebels then told us to lie on the dirt ground and open our legs. They put their guns to our throats and stomachs to make sure that we followed their order. Once we were on the ground all the rebels surrounded us, and a tall rebel well over six feet went to the kitchen of Parliament House and took a piece of burning firewood from the fire. He then squatted down and with his two hands inserted it into my vagina. Then he returned to the fire and got another piece and then a third. I felt like I was being stabbed inside.
>
> He did the same to the other woman. While they did this to us, I heard them say "This is the way we are going to fuck you. We are not able to do to you half of the things we do to people in the provinces. You bastard civilians, you hypocrites; as soon as you see ECOMOG, you start to point fingers at us."
>
> They left shortly afterwards and I managed to drag myself to a nearby house with blood gushing from my vagina. I went to a clinic where the doctor removed bits of firewood from my vagina. I feel so unhappy and fear my husband will find another wife to satisfy his sexual desire. The treatment is very slow and I do not have money for treatment. There are sores inside me. I can not sleep at night or walk more than one hundred yards.[125]

H.K., the sixteen-year-old Freetown student forced to be the wife of Colonel "Jaja," had an umbrella shoved up her vagina as part of the torture that followed her being accused by "Jaja" of stealing his money:

> When Jaja came home, I told him what happened and instead of believing me, he blamed me and accused me of having stolen the money. He dragged me out of the house into the street and started beating me. He caused a great scene. He stripped me, tied me up and hit me again and again with a stick. He also beat with the butt of his gun. Then he took an umbrella and pushed it up inside me two times—he shoved it up into my privates—hard. Many people were standing around watching and even some of the other rebels told him to leave me. He went crazy. He started shooting up in the air. I lay there for a few days, naked and bleeding. I was three months pregnant but after this I aborted. I bled for over a month. Once a boy named Junior came by and put his hand inside my vagina. He brought out his hand, which was all bloody and said, "Look at

[123] Human Rights Watch interview, Freetown, November 11, 1999.
[124] Human Rights Watch interview, Kabala, March 7, 2002.
[125] Human Rights Watch interview, Freetown, May 21, 1999.

your blood, you're sick." All the civilians seeing this felt sorry for me, but of course they couldn't say anything.

Rebel forces were known for mutilating pregnant mothers to find cut the sex of the unborn child. According to witnesses, they would bet large sums of money, and the rebel who had rightly guessed the sex of the unborn child after the women's belly had been cut open would keep the money. Some women were cut open alive, but sometimes the women were killed before the rebels cut their abdomens open. K.M. who was abducted during the 1997 attack on Kabala, witnessed the killing and sexual mutilation of a pregnant woman near Kono in Kono district (see above):

> They captured a Koranko woman who was pregnant. Two RUF Captain "Danger" and C.O. "Cut Hand" argued about the sex of the child. They bet 100,000 leones [approximately U.S.$50] on the sex of the child. Then they shot the woman dead and opened her belly. The RUF held up the baby with the placenta, which they shook in the air. The baby cried and then died. I wanted to run away but my husband said that the civilians would think that I was a rebel and that they would kill me.[126]

Fifteen-year-old F.K. was raped by the RUF in Lunsar in Port Loko district in May 2000 and witnessed the sexual mutilation of a pregnant woman as well as the killing of her three male relatives, and six amputations:

> I was raped when the RUF attacked Lunsar in May 2000 by four rebels including one man called "Put Fire," who had made me his rebel wife from 1997 to 2000. One of the other rebels was called "Kill Man No Blood." While I was being raped, the rebels found my three male relatives who were hiding under their beds. They stabbed them with their bayonets and then shot them. They raped me in my bedroom and then brought me into the living room. Three men and three women were also brought into the room. They were put in line and then the rebels gave them the choice between their life or their money. The rebels strip searched each one and then killed them on the spot. The group was forced to watch as each was killed.
>
> One of the women was six months pregnant and slightly disabled. She was last in the row. When it was her turn, she was stabbed in the neck and fell down. The rebels started to discuss whether she was carrying a boy or a girl. They bet on the sex of the baby so they decided to check it. Kill Man No Blood split open her belly. It was a boy. One of the other rebels took the baby out and showed everyone that it was a boy. The baby was still alive when he threw it on the ground next to the woman but died shortly after. As the rebels took me away, I saw six men who had just been amputated. Some had an arm cut off below the elbow, others above the elbow. They were screaming, "Please kill us, don't leave us this way."[127]

Sexual Violence with the Added Element of Violating Cultural Norms

The rebel forces have used sexual violence as a weapon to terrorize, humiliate and punish, and to force the civilian population into submission. The rebels sought complete domination by doing whatever they wanted with women, including sexual acts that, by having the additional element of assailing cultural norms, violated not only the victim but also her family or the wider society. The rebels have forced civilians to commit incest, one of the biggest taboos in any society. One survivor witnessed the RUF trying to force a brother to rape his sister in Sambanya village in Koinadugu district. When the brother refused to do so, the rebels shot him.[128] Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa. In Sierra Leone, postmenopausal and breastfeeding women are presumed not to be sexually active, but rebels violated this cultural norm by raping old women and breastfeeding mothers. Child combatants also raped women who could have been their mothers or in some instances even their grandmothers. Many rapes were committed in

[126] Human Rights Watch interview, March 7 and 9, 2002.
[127] Human Rights Watch interview, Freetown, May 25, 2000.
[128] Human Rights Watch interview, Kabala, March 9, 2002.

full view of other rebels and civilians. Victims were also raped in mosques, churches, and sacred places of initiation.

During the January 1999 invasion of Freetown, A.C. was forced to watch the rape of his daughter by RUF/AFRC rebels:

> The rebel in charge was a thirty-year-old ex-SLA known as "Amos." I knew him from before. He had plasters on his face. The others were called "Junior" and "Blood," who did most of the talking. They gathered five young girls together, including my fifteen-year-old daughter, and put them in the back room. They asked us for five million leones [approximately U.S. $2,500] otherwise they threatened our girls would be killed. We managed to collect 350,000 leones [approximately U.S. $175], which we gave to them.
>
> Then they brought out the girls. They pushed my daughter and a seventeen-year-old on the bed in the parlor and started tearing off their clothes. I peeked through a crack in the door and could see them fighting with my daughter. They put clothes in her mouth so she would not scream. The rebels punched, slapped her and knocked her head with the butt of their rifle. Then one of them opened the door and asked who the fathers of the girls were. One of them took us and lined us up right in front of the bed and said, "Don't you want to see what we do to your daughters?" We begged them to leave them alone but they said, "If you continue to talk, we will burn this house and kill everyone of you." A rebel had his gun pointed at us the whole time and there were two more at the door. Amos raped my daughter and Blood raped another girl. Then the rebel with the gun and the one guarding took their turns. My daughter was crying but they covered her mouth and told her to shut up. Blood then told the girls to get dressed and they took them away.[129]

S.G., a fifty-year-old widow, was raped by a teenage rebel called Commander "Don't Blame God" and subsequently had both arms amputated in Mattru village in Bo district prior to the 1996 elections:

> I pleaded but Commander Don't Blame God said he was going to kill me if I didn't lie down. I told him it had been such a long, long time since I had sex. During the rape I was pleading with him saying, "Don't kill me, please don't kill me." He was so rough with me. Then he took me up a big dune above Mattru village. As we were walking, he said he was going to kill me. I pleaded with him and he then said, "I've changed my mind, I'm going to give you a letter." Once we got there I saw many more rebels, about twenty. I was stripped naked down to my underwear. It was humiliating. Then they asked me to sit down and wait. Commander Don't Blame God said: "I have a letter for you but wait for the cutlass man to come." Then the one with the machete came and told me to put out my left arm. It took them three chops with the cutlass to cut off my arm. After this I begged them not to cut my other arm but they struggled with me and a rebel held it down and cut it off. The cutlass man said, "We belong to Foday Sankoh's group." Then one of them took my left arm and put it under my vagina and kicked me twice in the vagina ... very, very hard.[130]

D.T. was gang raped by a child combatant and three other RUF rebels in the rainy season in 2000 near Foriah village in Koinadugu district:

> I was hiding in the bush from the rebels with about fifteen other villagers when the rebels found us. The rebels separated me from the others because my nine-month-old son was crying. A child combatant ordered me at gunpoint to put my son down. He then raped me. I do not know how young he was but he had not yet been circumcised. He was maybe as young as twelve. Then three other rebel men raped me. When I was being raped, I made no movement as they might think that

[129] Human Rights Watch interview, Freetown, May 3, 1999.
[130] Human Rights Watch interview, Bo, March 2, 2000.

> I was trying to resist. I was bleeding after being raped by four males. After being raped, the rebels forced me to carry a heavy load and walk to Kania town. I escaped the same day and returned to the farm. I explained to my husband that I had been raped but he was happy to accept me back.[131]

R.F., a thirty-three-year-old farmer, explained how she felt after she was gang raped by West Side Boys, including four child combatants, at Petifu village in Port Loko district in November 1999:

> Four children between ten and twelve years used me. They were so small I could barely feel them inside me. The small ones tried to imitate the older ones and one of them kept saying, "I'm trying it, I'm trying it." It was the war that brought that humiliation. I kept comparing them to my own children; my first-born son is ten. I forgave them because they are children. It was not of their own making. They must have been drugged.[132]

In December 1994, thirty-year-old A.B. was abducted with six other women from Yonibani in Tonkolili district by the RUF when they launched a surprise attack with the collusion of the SLA. The RUF made the women carry looted items to their camp, where A.B. stayed for a week before escaping. She herself was repeatedly raped by two rebels, including one Liberian, and witnessed the rape of an old woman with gray hair:

> At least four of the women I had been abducted with were raped. Before they raped me, the rebels went for an old woman with white hair. When she realized what they wanted, she took off her headscarf to show her white hair and said, "I'm old, I have stopped having sex." At first the commander said the rebels should not touch her because she was old. But the other rebels got annoyed and started insulting the commander saying, "Fine, you can fuck any woman you want, anytime you want, but now that we have one we want, you say no." The commander finally said that they could go ahead so all five rebels, including a small boy of fifteen years raped her. One was on his knees with his trousers down while the others stood around watching.
>
> When I saw that I felt sick. When I saw a young boy and that old woman, I realized they could do anything and that they were going to do the same thing to me. But I guess I was lucky as only two did it to me.[133]

S.J., a wealthy forty-five-year-old woman, was raped by RUF rebels, including a child combatant, and then burnt in late January 1999 in Manjoro village in Bombali district:

> Thirty rebels attacked our village. The rebels said that we, the civilians don't want peace. I saw them kill three people and were it not for God, I would have been the fourth. Then they burned thirteen houses and looted all our things. I ran with my four children to the house in the bush where we tend to the cows. We slept there with the cows for a few days but then seven rebels surprised us there. The commander of this group was called C.O. Caca Scatter. He was a Mende. Others were speaking Mandingo and Temne.
>
> They started stealing what few possessions I had and then C.O. Caca Scatter said that I should be raped. When I heard that order I pleaded, "Please, don't do that one to me." But they said they would do whatever they wanted. Four raped me and the last one to rape me was a fifteen-year-old. I could have given birth to him, he was so young. He put a knife to my throat and said he was going to kill me but the C.O. said I shouldn't be killed.
>
> Then they tied my hands behind me and C.O. Caca Scatter burnt me. He scooped up hot charcoal from the fire we had been cooking with and tried to burn my face with it. I struggled and turned

[131] Human Rights Watch interview, Foriah, March 6, 2002. The rainy season starts in May and ends in October.
[132] Human Rights Watch interview, Port Loko, November 27, 1999.
[133] Human Rights Watch interview, Bo, February 9, 2000.

> my face so he burned my chest instead. He did this four times on my front and seven times on my back. Each time they picked up the charcoal and held it on my body until it burned deep into my skin. They left me with my skin burning but I could not roll on the ground for fear it would catch fire and burn me even more. When they started to burn me I pleaded for them to kill me. I started screaming and my children came around to try and save me. They took two of my children, gave them looted property to carry and took them away. That is the last I have heard of them.[134]

T.B., a fifty-year-old woman was abducted from Freetown during the January 1999 invasion and made to walk to Magburaka in Bombali district. There, a RUF/AFRC rebel raped her until she developed an abscess in her vagina:

> In Magburaka, I was first raped by three rebels. While doing it they called me a bastard child and that civilians wanted to burn them all alive. After that I was taken as a wife by a commander called "Bird Bod" who was in his thirties. He raped me every day. They were always on drugs. He said he didn't have a wife so I cooked and washed for him. He roughed and beat me and used to put his fingers violently up inside me. He would get an erection while he was doing this and would sometimes rape me afterwards. I think this is how I started to get boils—I had five or six of them. It started to create an ulcer. Over the two months I was with them it got worse and worse. It was terribly painful but Commander Bird still raped me and put his fingers up me even though I had this problem. I don't know why the RUF would treat an old woman like me in such a way.
>
> The abscess got very swollen and started to hang down between my thighs. I could barely walk. It started to smell very bad and it was then that the commander finally drove me away. I walked for two to three weeks through the bush going from village to village until I got to Masiaka. In every village I went, the women felt for me and would give me food and make a bath of herbs and salt for me to soak in. Then when I felt strong enough, I would walk to the next village. When I reached Freetown, I received medical treatment. My husband has accepted me back and feels sorry for me.[135]

Breastfeeding mothers were also not spared by the rebel factions even though in Sierra Leonean culture, women are not supposed to have sexual intercourse until their children have been weaned and can walk, which can take up to three years.[136] Sierra Leoneans believe that doing so will weaken the breast milk and the ability of the child to fend off infection. Women whose infants died from malnutrition after they—the mothers—had been raped frequently attributed the death of their child to the fact that they had been raped. It is also a specific crime for a man to commit adultery with another man's wife while she is breastfeeding. Traditionally, the guilty spouses are thought to be under a curse and will suffer misfortune.[137] A.B., who was raped by two rebels and witnessed the rape of an old woman, tried at first to dissuade the first rebel from raping her by telling him that she was a breastfeeding mother with full breasts, but the rebel said he did not care.[138] M.C. was breastfeeding her two-week-old baby when she was brutally gang raped by RUF/AFRC rebels in early January 1999 near Mabang in Tonkolili district; she breastfed her baby while being raped. She suffered a prolapsed uterus[139] as a consequence of the rape:

> At the time of the January 1999 offensive, my husband who is a policeman was based in Mile 91. I became very worried about him and decided to travel to find him. I left Bo on January 8. I had just given birth to a baby girl two weeks before so was still feeling very weak but I desperately wanted to find my man.

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[134] Human Rights Watch interview, Freetown, September 17, 1999.
[135] Human Rights Watch interview, Freetown, July 8, 1999.
[136] Mariane C. Ferme, *The Underneath of Things: Violence, History, and the Everyday in Sierra Leone* (Berkeley: The University of California Press, 2001), p. 131.
[137] Joko Smart, *Sierra Leone Customary Law*, pp. 127-8 and 131.
[138] Human Rights Watch interview, Bo, March 2, 2000.
[139] A prolapsed uterus is a condition in which the uterus drops from its normal position. In severe cases, such as those that may be associated with injury from sexual violence, the cervix and uterus may protrude beyond the vaginal opening.

I arrived late in the evening. Then all of a sudden we heard firing. There was confusion and armed rebels captured me. They took me to their bush camp in a place called Mabang. They started sexing me two days later. I tried to fight and told them to leave me, but several times they put a pistol into my vagina. I gave myself up to God and asked that he save me. The first day, about ten sexed me. After the first day there were fewer men, between three and six a day. Every day they came and stood in line waiting to rape me. All together there were over thirty different men. They were aged between seventeen and twenty-five years old. The younger ones were rough and most of them seemed to be on drugs. I think these were RUF people. Most of them seemed to be Mendes. I saw many young girls in their camp. I guess the lucky ones only had one rebel. But I'm from Bo and wouldn't allow myself to be together with one of them. I told them I wasn't a Kamajor and that my husband was a policeman and they said, "Oh policemen are our enemies ... we've killed them all. Forget about your husband."

Sometimes they tied my legs to my arms with my legs spread and raped me one after the other. They said since I was from Bo and I was a Kamajor's wife that they were going to rape me to death. [Sometimes] I held my baby Hawanatu in my arms while they were raping me. When she cried they said they wanted to shoot her so I gave her the breast.

They raped me for two or three weeks and then in early February, my vagina came out [i.e. she suffered a prolapsed uterus]. It was so, so painful. I can't tell you how much it hurt. When this happened, I thought I was going to die. In order to get it to go back in I had to lie down and push it back in. To urinate, I had to lie down. They provoked me and made fun of me. They said now my Kamajor husband will not be able to have sex with me. A wife of one of the commanders told a villager to help me escape which they did. He took me to a nice woman in another village away from the rebel area and after explaining my problem, she helped me so much. She gave me herbs and tried to cure me and my baby who by that time was vomiting and very sick. It's only God that helped keep my little Hawanatu alive. He decided that this little child is mine to keep. Later, when I was stronger, I made it to Freetown and had an operation for my prolapsed uterus. I feel much better now.[140]

Rebels also raped pregnant women. In polygynous marriages, pregnant women generally stop having sexual intercourse with their husbands once their pregnancy has been confirmed, to protect the fetus. R.F, the thirty-three-year-old farmer gang raped by West Side Boys at Petifu, Port Loko, in November 1999 (see above, p. 39), was six months pregnant at the time. As the result of the gang rape she delivered prematurely, causing the baby's death:

I went with Isatu, her husband and my five-year-old son to harvest rice in Isatu's village, Petifu. We traveled by boat and at night to avoid the rebels. When we were resting having worked all the next day, we heard the rebels. They were all over the village and told us to give them our rice and palm oil. Several of them started hitting me on the head with their guns. Three were wearing uniform, the others wore civilian clothes. They spoke all different languages.

One of them tied a rope around my waist like a goat and pushed me out of the door screaming, "Show me where your people are." My little boy was left sleeping on the bed. Seven of the rebels then led me about a mile out of the village, screaming at me to tell them where we had hidden the rice and palm oil. I told them I was a stranger there but they did not believe me. They took me into a small farmhouse where they all used me. This went on for a few hours until the cloth I was lying on was soaked. I could barely walk. Then they ordered me to get up and dragged me like a sheep back to the village.

[140] Human Rights Watch interview, Freetown, September 5, 1999.

> Once back in the village, they put me in a house and more of them started raping me. I was used by at least twenty rebels. I think the whole unit raped me throughout the night. The only one who did not use me was the commander. He kept coming in and saying, "Have you had your turn?" He was the one they kept calling "Commander."
>
> When one of the Temne speaking rebels was raping me I said, "Please brother, talk to these people and ask them to leave me." But he said he could not do anything. Another rebel pulled out a knife when he was on top of me and said if I said anything he would kill me. I told them I was pregnant and said, "Can't you see? I have a six month belly." But they said, "We do not care. We see your belly but so what." Two of them told me to stoop down, but I couldn't and they just pushed me down and used me. After many had used me one of them said, "Oh, there is no more sweetness there," so they turned me over and did it to me from behind. Three of them did it to me like that, and now when I go to the toilet it is so painful; I am still bleeding and it feels like my insides are coming out. One rebel had sex with me several times. He said he was punishing me for not having shown him where the rice and palm oil was hidden. I yelled for the commander and complained, saying, "He wants to kill me, tell him to leave me!" but he said, "We have killed others that are better than you." I did not complain after that. They kept saying they were about to stop fighting—that they really want peace and that after peace comes, they won't do these things any more.
>
> In the early hours of the morning, they finally left. They wanted me to carry their looted items but I could not walk. They took other people whom they used to carry the looted goods. At one point I tried to get up but could not, I slipped and fell down to earth. By this time I had started bleeding. I felt my baby trembling in my belly. A few hours later the water broke and then I started to have contractions. I have five children and had never even had a miscarriage. I had about three hours of labor before giving birth. The little thing shook for a minute or so and then it died. It was so beautiful; it had fine hair and the face was so pretty. I wrapped it with a cloth. I could not bear to look whether it was a boy or a girl. I was gushing out blood and shortly after I delivered the placenta. I felt dizzy. I was barely able to walk.
>
> Later when I had a little more strength I covered my baby and threw it in a pit latrine. I felt so bad for throwing it away like that but I did not have the strength to bury it properly. After thinking everything over, I am only angry at this war and thankful that I still have my life and that the life of my child [her five-year-old] was spared. It's only God that saved him. He was lying on the bed the whole time.[141]

Forced Pregnancies

Many women and girls became pregnant as the result of the rape(s) they were subjected to. Although some women were reportedly able to abort without the knowledge of the rebels using traditional herbal treatments, the majority had no choice but to carry the child to full term. M.W., the abducted nurse already quoted above (see p. 28), said that many girls who had been raped had miscarriages that might have been self-induced with herbs. I.S., a twenty-seven-year-old student who was abducted by the AFRC during the January 1999 invasion, tried to abort, but was unsuccessful:

> When I got pregnant I didn't tell my rebel husband for months. I asked a woman who knows about medicine to give me herbs to abort the baby, but it never worked and after my belly started to swell, he found out. He warned me that if I tried to flush the baby out, he'd kill me. He said he wanted the baby and that he hoped it would be a boy.[142]

M.W., the abducted nurse, also mentioned that medical personnel were instructed by a rebel doctor, Dr.

[141] Human Rights Watch interview, Port Loko, November 27, 1999.
[142] Human Rights Watch interview, Freetown, September 17, 1999.

Lahai, not to perform abortions, give birth control, or advise that traditional herbal treatments be taken, as the rebels felt that too many people had died and they needed to increase the population.[143] Many women did have miscarriages because of the brutal rapes and trauma they were subjected to by the rebels, as well as the difficult conditions in the bush.

Forced Abortion by West Side Boys

Human Rights Watch has documented one case of forced abortion by the West Side Boys, the splinter group of the AFRC that took power in the 1997 coup. Twenty-year-old M.K. was abducted from Magbele village in Port Loko district in July 2000, when she was four months pregnant. She was raped by four West Side Boys and was made the wife of a rebel who forced her to abort:

> I was abducted with two other civilians, including my brother-in-law, by the West Side Boys. They were all wearing uniforms; some uniforms were new, and others wore old ones. We were taken to their base in Magbele Junction where there were many other abductees. At nighttime one of the rebels called Umaro Kamara came to me and said he wanted to have sex with me. He spoke nicely with me and said that he wanted to take me to Makeni and make me his wife. He raped me that day. The rebels saw that I was pregnant and said to Umaro, "We are not going to work along with any pregnant woman, we should kill her." Umaro said that he wanted to take me as his wife and that I should be given an injection instead. Umaro called me and tried to convince me to get rid of the baby. He said, "They will kill you if you do not agree so you better have the injection." I was taken to the doctor who gave me an injection and some pills. Two days later I started bleeding. I felt weak and had pain all over my body. Then I lost the baby.
>
> When Umaro was on patrol, three other rebels raped me. When we moved out to go to another base, I saw the body of my brother-in-law. After one day I started bleeding again so Umaro took me to the doctor who gave me another injection. When we reached Lunsar, Umaro wanted to make me his wife. Even while I was bleeding, Umaro used me. He told me to wash myself before raping me.[144]

Rape by Female Combatant

Human Rights Watch has documented a case of a female rebel manually raping female abductees. The virginity checks performed by female rebels on abductees prior to their "virgination" by male rebels, noted above, also constitute rape given that penetration occurred without the consent of the victim. More of such abuses may have been committed but not reported due to shame, as expressed in the testimony below. The rebels captured sixteen-year-old F.P. on January 7, 1999 when—as she was fleeing the fighting in central Freetown with two other girls—she ran into a patrol of five heavily armed rebels, including one female rebel. They knew the female rebel from before as Aminata; she had lived in their neighborhood before the 1997 AFRC coup. She had joined the rebels at that time and had not been seen since the AFRC was driven out of Freetown in February 1998. F.P. remembered having had an argument with her several years ago. The rebels called her "C.O. Sally." F.P. was taken with her sister and another girl whom she did not know to a rebel base. Her friend was raped by five men, which she was made to watch. F.P.was also "virginated" by male rebels and sexually molested by "C.O. Sally," along with another girl, also called Sally:

> C.O. Sally came into the room where we were kept and said, "Why are you hollering? These are my boys, why are you refusing them?" Since we knew C.O. Sally, we asked her to help us get away, so finally on January 10 she took us at gunpoint to another house. She made us cook and wash for her. Once she told us to go into a room and take off our clothes. She had an RPG [rocket propelled grenade] on the ground as well as a gun. We took off our clothes and then she took two long sticks and tied our hands to them straight out from our shoulders. She stood us in front of her and asked if we remembered her to which I answered, "No." Then she said that she remembered

[143] Human Rights Watch interview, Freetown, October 21, 1999.
[144] Human Rights Watch interview, Port Loko IDP camp, July 13, 2000.

> me and that we had fought last time we had met each other. She made me put one leg up on a drum and then she fingered me with two fingers. I was so embarrassed and ashamed. I asked her why she was doing this but she screamed at me to shut up. She did not touch herself or say anything, but kept on fingering me. Then she called Sally and did the same thing to her. When she was finished, she left us standing there with our arms tied. A little later she fingered us again. It did not seem sexual to me and I do not know why she did it. An hour later a young rebel came and said he thought he was hearing gunshots from ECOMOG. C.O. Sally ordered the boy to untie us as "I have punished these people already."[145]

Rape and Other Sexual Violence against Boys and Men by Male and Female Rebels

According to FAWE Sierra Leone, boys and men were also raped by male rebels. FAWE Sierra Leone treated fourteen boys aged between nine and fifteen years old who had been raped, but suspects that there are more cases. Due to the stigma attached to homosexuality in Sierra Leone, male victims of rape feared they would be perceived as homosexuals and therefore few boys were willing to report it. Human Rights Watch has not documented any of these crimes of sexual violence, which were apparently committed on a much smaller scale than sexual violence committed against women and girls. FAWE Sierra Leone did not want Human Rights Watch to interview the boys they had treated as they feared that interviewing them would re-traumatize them.[146]

Human Rights Watch documented two cases in which female rebels forced men to have sexual intercourse at gunpoint. One case involved a female rebel forcing a male civilian to have sex during the January 1999 invasion of Freetown, and the second involved a RUF female training commander and male conscripts in Kono. Cases of these crimes of sexual violence were also reported by FAWE Sierra Leone. It is impossible to determine the prevalence of this type of sexual violence, but—given the general level of violence within the rebel forces and the power that female combatants had over civilians—Human Rights Watch believes that such incidents did happen more often than has been reported, albeit again on a much reduced scale compared to male combatants raping female civilians.

Abduction, Sexual Slavery, Forced Labor, and Conscription

Abduction

The rebel forces used abduction as their primary method for recruitment. During an attack on a town or village, rebels typically rounded up civilians as they tried to flee or were found hiding. Men were abducted to carry the looted items as well as being forcibly conscripted. The abducted children were also given military training and forcibly conscripted.

In thousands of cases, women and girls were abducted after being subjected to sexual violence. The rebels often killed family members who tried to protect their women and girls. Abducted women and girls described being "given" to a combatant who then took them as their "wives" (see also "Sexual slavery" section, below).[147] Abduction of civilians continued for the duration of the armed conflict. In the early years of the conflict, the RUF went on hit-and-run raids, returning to their base camps with looted items and abducted civilians. As the RUF took over more territory, an increasing number of civilians were abducted. As their ranks increased with more men and boys being forcibly conscripted, so did their abduction of women and girls. The AFRC and West Side Boys used the same tactics. Some women had the extreme misfortune of escaping from one rebel faction, or unit, only to be abducted by another. One such victim, thirteen-year-old M.F. (see above, p. 34), who was first

[145] Human Rights Watch interview, Freetown, May 18, 1999.

[146] Human Rights Watch interview with Christiana Thorpe (founding Chairperson of FAWE Sierra Leone Chapter), Freetown, March 22, 2002.

[147] The PHR report found that 9 percent of women reporting having themselves experienced sexual violence had been forced to "marry" their rebel "husband." PHR report, p. 2. These types of marriage are similar to marriages by capture, which were common at the turn of the nineteenth to twentieth centuries. In tribal wars, the conquerors would kill the male inhabitants of the vanquished village and capture the women who subsequently became the wives of the conquerors. The "marriage" was validated by the captor's public declaration of his intention to cohabit with his captive. Such a wife was regarded as a slave and her children could not inherit from their father. Joko Smart, *Sierra Leone Customary Family Law*, p. 29.

abducted from Koinadugu by the RUF/AFRC and gang raped, was driven out of Makeni in October 1999 when it came under attack by the RUF. She was subsequently abducted by the West Side Boys and raped by two child combatants.[148]

Sexual Slavery and Forced Labor

Women and girls were primarily abducted to be the sex slaves of the rebels and to perform slave labor. The survey conducted by Physicians for Human Rights found that 33 percent of the interviewees reporting war-related sexual violence had been abducted and 15 percent had been subjected to sexual slavery. Consistent with fairly common practice among the Sierra Leonean male population at large, many rebels had polygynous "marriages," including with abducted women whom they had forced to "marry" them. Rebels also changed "wives" frequently when they tired of them or when their "wives" were too ill to perform their tasks (a consequence of the brutality that they were often subjected to). Victims interviewed by Human Rights Watch reported attaching themselves to one rebel to avoid gang rape and be given a degree of protection. The more highly ranked the commander, the more protection a woman had. Women and girls, however, remained vulnerable to sexual violence by other rebels. M.F., the thirteen-year-old who was gang raped by the RUF/AFRC in Koinadugu was raped by two other commanders when her "husband" Mohammed was out on patrol.

Women who were "married" to high-ranking rebels benefited not only from "protection" but also were able to exert power over others. The women and girls often benefited from the looted items that their rebel "husbands" gave them, and took part themselves in looting raids to steal clothes, shoes, and jewelry. Not all were abductees: some women and girls voluntarily joined the rebel forces and sought to benefit from their relationship with the rebels, i.e. from the looted goods or escaping from their parents (some girls would use a relationship with a rebel boyfriend to gain freedom from parental control, by threatening to involve the boyfriend in their dispute over parental restrictions). Such women consenting to marry a rebel were probably still vulnerable to sexual violence from other rebels.

Numerous victims described being subjected to abuse or forced to work by commanders' wives. FAWE Sierra Leone also reported that female combatants "married" to rebels killed new abductees if their "husbands" showed a preference for them. A.J., the fourteen-year-old student who was abducted in Pujehun and tortured by the RUF from February to May 1994 (see above, p. 31) is an example of how some "wives" were treated by other female abductees or combatants:

> I was put under the control of Commander Patrick, a Liberian. He was married to a woman called Neneh who was very jealous of me. Once, after the commanders had gone to the war front, Neneh told one of our guards to open up the cage where I was being held and take me out. She said, "My husband is interested in you. If you accept him to have sex with you, I'll kill you, so be forewarned." Neneh and Patrick have one child. She told me she'd joined the rebels voluntarily. She said, "You are just a captive. Do you think I was abducted? I was not abducted. I joined voluntarily. So you have no right to fall in love with my husband."[149]

A few victims also described how some of these women, usually the wives of commanders, used their power to try and protect, and at times facilitate the escape, of other abductees. For example, M.C., who was brutally raped by rebels in early 1999 in Mabang and suffered a prolapsed uterus (see above, p. 38) was helped to escape by a commander's wife who felt sorry for her.[150]

Abducted women were made to carry out forced labor during their captivity, including cooking, cleaning, washing clothes, and carrying heavy loads of ammunition and looted items. In many instances, women—intimidated by their captors and the situation they were in—felt powerless to escape their lives of sexual slavery, and were advised by other female captives to tolerate the abuses, "as it was war." The rebels often deliberately

[148] Human Rights Watch interview, Kabala, 7 March 2002.
[149] Human Rights Watch interview, Pujehun, February 12, 2000.
[150] Human Rights Watch interview, Freetown, September 5, 1999.

marked abducted civilians with the letters "RUF" or "AFRC" carved mainly onto their chests. This made escape more difficult because, were they to be caught by government forces, they would likely be suspected of being rebels and killed. Some women used traditional herbal remedies to remove their markings, and international organizations have also performed surgery on these victims to remove the scars.

Relationships between Rebels and Abductees

The relationships that developed between the abductees and rebels were very complex and varied. Most relationships were obviously very volatile, as described by I.S., the twenty-seven-year-old student who was abducted by the AFRC in the January 1999 invasion (see above, p. 40). She stayed with the AFRC/West Side Boys until August 1999 when she was able to escape:

> We stayed there for months and they were always going on attacks in the Port Loko area. Occasionally C.O. Blood was nice to me and I had to kiss him and play love with him. But I could never tell him what was really in my heart; that I missed my family and wanted to escape. Other days he would beat me for nothing. He did the same thing to his other "wife." Neither of us could complain.[151]

H.K. was assigned as the wife of "Jaja" and was so badly treated by him that even the other rebels sometimes tried to prevail on him to be less violent:

> Jaja was already "married" to another abductee, and when she saw what he had done to me, she escaped. He always beat both of us. He used to sex me twice every night. He made me take his penis in my mouth. I tried to refuse him but he always threatened to kill me. He was actually an SLA soldier but had joined the RUF. His C.O. was Colonel Stagger, who used to criticize him for how he treated us. Colonel Stagger used to say, "Look, when we take these kids, we should take care of them and now you beat her for nothing." Jaja used to say it was not Stagger's business. Stagger's own abductees were treated pretty well. He never beat them.[152]

Some women fled at the first opportunity. Other women, especially those who had children with the rebels, found it difficult to leave these abusive relationships. Many women and girls experienced their first sexual relationship with their rebel "husband" and may have developed aspects of the "Stockholm Syndrome," whereby the hostage identifies with the hostage-taker. They adjusted to the level of violence with the rebels, which over time became "normal," in order to survive.[153] Others feared that their "husband" might seek revenge if they escaped and returned to their family. The rebels instilled fear in their "wives" by telling them that their families would not accept them back. The abductees also feared to some extent that they would be blamed for what happened to them. For some women who had lost their families, the rebels became a surrogate family. As many rebels had themselves lost their families or could not return to their villages of origin, given that they had in some cases committed human rights abuses in their communities, they did not want to relinquish their surrogate families or their slave labor.

As the women and girls were never registered in the Disarmament, Demobilization and Reintegration (DDR) program and there was insufficient documentation of this large category of victims throughout the armed conflict, it is unclear how many girls and women were abducted. It is now impossible to establish how many remain under the control of their rebel "husband" or have returned to their village of origin.

The ones who have remained involuntarily will only re-examine their situation when alternatives become available. Women who wish to sever links with ex-combatants have few alternative economic or social options. They are a very vulnerable group that has little or no means of support. They are often not able to return to their

[151] Human Rights Watch interview, Freetown, September 17, 1999.

[152] Human Rights Watch interview, Freetown, October 12, 1999.

[153] A group of female ex-combatants and abducted women, for example, defined to Human Rights Watch domestic violence as "wounding or losing consciousness."

villages out of fear, lack of funds and social stigma, especially if they have given birth to children fathered by rebels. The women are therefore often forced to remain in situations in which they are vulnerable to continuing abuse. Numerous victims end up being commercial sex workers, selling their body for as little as U.S.50¢ Exploited girls and women can end up abandoned with several children to raise by themselves by the time they are in their early twenties.

Rebel Control over Abductees

Life with the rebels was very tough. Civilian abductees, in particular, were treated ruthlessly. The RUF established a military police system and courthouses to administer a form of justice to those who contravened RUF rules of behavior. Some of the RUF rules were written, but the rules, trial and punishment were to a large extent arbitrary, dependent on the particular commander. Interviewees reported that severe punishment was meted out for small incidents such as spilling water on a commander's shoes (one week in a cell with daily beatings) or not lodging complaints through the official channels (imprisonment in a dungeon). "Courthouses" were established to try both combatants and the civilians.[154] A rebel was expected to provide for his "wives" and children during their captivity even if he had taken on another "wife" or "wives." If a rebel reneged on his responsibility, then he could be put in a cell and beaten to death. Civilian women who were tried by the court were raped and beaten if they did not have a commander to stand up for them. According to K.M., who was abducted by the RUF from Kabala, Koinadugu, the three male rebels who presided over the courthouse in Burkina, a training camp in Kailahun, would arrange amongst themselves who could rape the women. She also said that one woman was raped to death by six rebels.[155]

Forced Conscription: Female Combatants

Women and girls were also forcibly conscripted into the rebel fighting forces. The RUF established military training camps for women. During active fighting, female combatants were sent into battle after the men and the Small Boys Units (SBUs). There were only very few high-ranking female commanders in the rebel forces and a much smaller number of female combatants than adult men or boys. Female combatants had more power than female civilians: combatants, including female combatants, who had received military training, had substantial power to do whatever they wanted to civilians. Within the rebel forces, however, women still held much lower status: female combatants were assigned "husbands."

Forcibly conscripted female combatants were in many ways as vulnerable as civilian abductees, and may have decided to stay with their rebel "husbands" for the same reasons as their civilian counterparts i.e. shame, lack of alternative options, and economic dependence on their "husbands."

RUF Officers' Responsibility for Sexual Violence

In addition to their individual criminal responsibility, rebel commanders can bear direct command responsibility for crimes of sexual violence and sexual slavery, for ordering the rape and abduction of women and girls (see below, p. 60, for a discussion of the principle of command responsibility in international law). C.O. Caca Scatter, for example, ordered the gang rape of S.J., the wealthy forty-five-year-old woman (see above, p. 37). A.J., the fourteen-year-old student, was tortured, caged and brutally raped by C.O. Patrick (see above, p. 43). S.G., the fifty-year-old widow was raped and had both arms amputated by Commander "Don't Blame God" (see above, p. 36).[156] Indeed, the organized way in which victims frequently describe being rounded up and taken, as well as the number of rebels involved in these abductions and the number of victims abducted, suggests an element of premeditation and planning on the part of the RUF, AFRC and West Side Boys command. Victims also frequently described being specifically selected to be given to a commander or being sexually abused in the presence of commanders, which again suggest that sexual violence was committed under the direction of and with the consent of members of the rebels' hierarchy. I.S., the twenty-seven-year-old student who was abducted and

[154] Abdullah and Muana, "The Revolutionary United Front of Sierra Leone," p. 189.

[155] Human Rights Watch interview, Kabala, March 7 and 9, 2002.

[156] Human Rights Watch interview, Freetown, May 3, 1999. Under Article 6 (1), persons are held individually responsible for the planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the statute.

gang raped by the West Side Boys from January to August 1999 explained how Commander "Blood" had initiated the "wife" selection process:

> One of the commanders said he was going to amputate all of us too. But another commander, C.O. Blood, said, "Don't kill them, let's chose them as wives." Then we were divided up. The one who seemed to be in charge, C.O. Blood, chose me. When he looked at me I was frightened. His pupils were huge—he was high on drugs. He took me to a house and told me to lie down on the ground. He said if I did not allow him to have sex, he would kill me. He took out a knife and said he would not even waste his ammunition on me. He would just chop me to pieces. I knew he meant what he said. He forced my clothes off and used me twice. He was rough and after the second time I begged him to leave me, but he said he did not care. My insides hurt so much. Then he used me from behind. Other women were being raped in the same room. They [the West Side Boys] did not care.[157]

According to the survey conducted by Physicians for Human Rights, thirty-four of the ninety-four survivors directly reporting sexual violence believed that their attackers' commander was aware of the attack.[158] While it is difficult to generalize from this figure, it does tend to confirm the findings of Human Rights Watch that sexual violence and slavery, which were committed on a widespread and systematic nature, were part of the rebel forces' military strategy to dominate, humiliate and punish the civilian population.

The RUF has made occasional efforts to declare rape a crime within certain areas under their control and disciplined ordinary soldiers accused of raping. The disciplinary measures included summary trials followed by execution. These efforts failed to prevent sexual violence in practice. One commander, for example, prevented at least temporarily the rape of an eight-year-old girl who was abducted by a ten-year-old child combatant by ordering the child combatant to only use the young girl "for cleaning and cooking for now."[159] A.B. witnessed the gang rape of an old woman, which the commander had originally tried to stop but then allowed to happen (see above, p. 37).

Senior male and female figures in the RUF interviewed by Human Rights Watch mainly denied that sexual violence had happened, explaining that the women joined the RUF movement voluntarily and fell in love with their rebel "husbands."[160] A key figure in the AFRC admitted that he had heard of cases of sexual violence and blamed it on the breakdown of law and order.[161] He also said that none of his men had expressed any remorse for the human rights abuses they committed. In the vast majority of the cases documented by Human Rights Watch, those who committed rape were not disciplined or punished in any way

Sexual Violence Committed by the CDF

As already noted, there are relatively few reported cases of rape committed by the CDF. The CDF were reasonably disciplined during the war, although their discipline deteriorated when they were deployed in chiefdoms outside their own native areas. Sexual intercourse is believed to act against the protection bestowed on the fighters during their initiation ceremonies. However, Human Rights Watch has documented several crimes of sexual violence by the Kamajors, the CDF based in the Southern Province.

In March 1998, a forty-five-year-old Temne man, M.B., witnessed the rape of a young Temne woman called Jeneba by the Kamajors in Kenema town. The Kamajors also mutilated and killed Jeneba. M.B. explained that during the ECOMOG intervention to restore the democratically elected government in 1998, Kamajors accused members of the Temne and Limba ethnic groups of being RUF/AFRC supporters and persecuted them. According to M.B., the Kamajors identified Temnes and Limbas as such by their last names and publicly beheaded or

[157] Human Rights Watch interview, Freetown, September 17, 1999.
[158] PHR report, p. 54.
[159] Human Rights Watch interview, Freetown, June 16, 1999.
[160] Human Rights Watch interviews, Freetown and Makeni, April 1999 to May 2002.
[161] Human Rights Watch interview, Freetown, April 26, 2002.

stabbed to death numerous alleged rebels. The Kamajors also ate some of their victims, believing that this would bestow additional powers to them. The accused had no means to defend themselves, as ECOMOG initially backed the Kamajors and did not realize until later that the killings were carried out along tribal lines. After receiving death threats, M.B. sought refuge in the house of a chief who was Temne and the father of Jeneba. A group of about eight Kamajors came to the house, looking for Jeneba, and accused her of having a sexual relationship with an AFRC fighter:

> I saw Jeneba being raped by one Kamajor, while the others were standing around watching. Then the Kamajors threatened to kill us if we did not stop looking at them, so we went into other houses to hide. From there we could not see what was going on but heard Jeneba screaming at the top of her voice, and when the Kamajors had gone we came outside and found Jeneba dead. She was naked and her hands and feet had been mutilated by a machete.[162]

On February 17, 1999, J.K., a thirty-one-year-old woman was raped by two Kamajors in a small village in Bonthe district. A group of Kamajors entered J.K.'s house looking for her brother, who had not been home for the past three years:

> One of the Kamajors called Kinie said that they had been told that my brother was in the village and was planning to attack them. I assured them no one knew where he was. During this argument, the other civilians in village became afraid and fled into the bush. As soon as the Kamajors forced their way into my bedroom, I followed them to check up on what they were doing. Kinie and another Kamajor whose name I did not know pushed me to the ground, tearing off my clothes. I screamed for help but no one came to my rescue. Even my father who was in the house was unable to help me. They both raped me while the others stood around laughing. When they left the village, they looted some goats and chickens. There was no one to report the incident to and I had no money to pay for a hospital visit. I decided to leave everything to the Almighty God.[163]

In another incident, at least three female civilians were raped, including by a Kamajor commander. In July 2000, M.S. and twenty-five other passengers were taken off a bus at Bauya in Moyamba district, beaten, and accused of being RUF rebels. All their possessions were taken off the bus and inspected by the Kamajors but they did not find any incriminating goods. Their possessions were stolen by the CDF. In the evening, M.S. was locked in the guardroom at the CDF office with nine other women and her young child:

> Twenty CDF came to the guardroom and told us, the women that we could choose between [being] raped or killed. I was raped by a young CDF on the ground of the guardroom. I told him that I was a suckling mother but he did not care. My baby was in the room when he raped me. He made me stoop like an animal. He said, "I am a government man so no one will ask me anything about this." My breast milk has gone bad now. I could hear another woman who initially refused to be raped being beaten with the torch. She was raped by two CDF called Mohammed and Ahmed.[164]

In the same incident, an older high-ranking CDF commander raped a thirty-five-year-old trader, R.K.:

> Mr. S. raped me all night. He raped me five times. I cried as I was not used to doing that even with my husband. He was rough and did it from behind like an animal in a bad way. He accused me of being a RUF commander's wife. I told him my husband is a Gbetti [part of the CDF].[165]

[162] Human Rights Watch interview, Kenema, August 12, 2002.
[163] Human Rights Watch interview, Bonthe district, July 8, 2002.
[164] Human Rights Watch interview, Freetown, August 21, 2000.
[165] Human Rights Watch interview, Freetown, August 21, 2000.

Human Rights Watch also interviewed B.R., a Kamajor fighter who reported witnessing the rape of two civilians that took place in 1997 and 1998. He also witnessed the killing of a captured RUF female combatant, who died after being raped with a stick. B.R. explained that the rape that took place in 1997 happened when a patrol of six Kamajors, including B.R., met a group of female civilians in the bush:

> Some of the women started talking bad things about the Kamajors and said that we were taking food off people. Then one Kamajors went for this woman. I saw him raping her. He had stripped her naked and she was screaming. I did not want to see it or be a witness but I had to rush there. At one point I thought he was killing her.[166]

The incident was reported to the high priest, one of the main Kamajor initiators who decided that the offender had to be punished. B.R. explained that the punishment was called "walking the highway," which entailed the offender being made to walk slowly through fifty Kamajors lined up on two sides, with the Kamajors flogging him with canes. B.R. said that the victim would have reported the rape to the Kamajor high priest, but that he and the others on patrol decided to report it first, otherwise it would have made them equally guilty of the crime. The rape committed in 1998 involved a young Kamajor raping a twenty-year-old woman. B.R. explained that the offender was given a trial, during which he admitted to having committed the crime. He was subsequently locked up in prison (probably a local prison).

In another instance, B.R. explained how a twenty-five-year-old female RUF combatant captured in Tongo in Kono district was brutally killed by the insertion of a long stick in her vagina after the Kamajors had cut off her ears and nose and gouged her eyes out with a machete. The Kamajor commander allegedly wanted to teach the woman a lesson and said that: "This stick is your husband and is screwing you. Are you enjoying it? Just say your last prayers, as you are going to die bit by bit."[167]

Sexual Violence Committed by International Peacekeeping Forces

Human Rights Watch has documented several cases of rape by the international peacekeeping forces. Human Rights Watch was informed of a rape committed by a Guinean peacekeeper, Sgt. Ballah, by two reliable sources, including the Sierra Leone Police (SLP), who had interviewed the twelve-year-old victim. The victim was raped on March 26, 2001 when she asked for Sgt. Ballah's assistance in securing a ride to Freetown at the checkpoint that he was manning. The rape was perpetrated in Bo, the area of deployment of the Guinean peacekeeping contingent. Sgt. Ballah was charged to court on the same day. Unfortunately, the SLP dropped the case and the offender was sent back to Guinea. Human Rights Watch was not able to locate the victim.

In February 2001, a Nigerian peacekeeper reportedly raped a sixteen-year-old girl in Freetown. When Human Rights Watch investigated the case, the SLP claimed they had not been able to trace the perpetrator for questioning. UNAMSIL claimed that the Nigerian contingent and UNAMSIL Civilian Police Section had investigated the matter and that the plaintiff had subsequently dropped the charge.

Human Rights Watch interviewed a witness to an alleged rape by two Ukrainian peacekeepers that took place on April 3, 2002 in the village of Joru in Kenema district. K.S., a fifty-five-year-old female farmer testified that she as well as others in her village had witnessed the gang rape:

> Late at night I came out of my house to ease myself [urinate]. Maybe I had been woken up by a big white truck that had stopped about fifty meters away from my house. I hid and watched what was happening; there were people inside. I noticed two white men and one black lady inside the truck. Clearly there was a struggle going on. I could hear her yelling at them to "leave me alone" in what sounded like a Liberian accent, but I can not be sure. The door was open and one of them was on top of her. The lady was really struggling. I saw that one of them was holding her down while the other was raping her. I was able to see because in the process the men had opened the

[166] Human Rights Watch interview, Freetown, July 31, 2000.
[167] Human Rights Watch interview, July 31, 2000. The CDF generally killed any RUF that they had captured.

> door to the car and the light had come on. I am sure they were raping her and she was fighting with them to stop it. I stayed and watched this go on for several minutes. I later learned a few more people were also watching what was going on. In fact we talked about it the next morning.
>
> Then, perhaps afraid of being watched, the two whites moved their truck further down the road ... past my house, further down the road going out of town. Maybe they thought that because there were no houses around, we would not see what they were up to. They stayed another thirty or so minutes in this second location. I saw both of them have their turn on her, but I did not see any guns. After they were finished, I saw one of them drag her out of the cabin and put her in the back of the big truck. I can not remember if one of them got in the back with her but I think so. Then they drove off.
>
> The next morning when I went out to go to the mosque, we found one of her black shoes that she must have kicked off while struggling with those men. The shoe was near the first place they had stopped. We took it to the police but they never came to ask us any questions. We are all a bit frightened of those UNAMSIL people now. We tell our girls never to get in a truck with them or the same thing might happen to them.[168]

Neither the SLP in Joru or UNAMSIL in Kenema conducted a proper investigation into this alleged gang rape, both claiming that the absence of the victim prevented them from conducting their investigation. The UNAMSIL human rights section was not aware of this alleged gang rape until Human Rights Watch informed them, and to date has also not conducted a thorough investigation.

On June 22, 2002, a fourteen-year-old boy was allegedly raped by a Bangladeshi peacekeeper near the Jui transit camp for Sierra Leonean returnees located outside of Freetown in the Western Area. The rape occurred when the victim and his friends were fishing with several Bangladeshi peacekeepers near the camp. The offender was reported to have taken the boy away from the others in the group before raping him. The victim's friends reported that the boy looked disheveled after rejoining the group and immediately told them what had happened. The offender gave the victim the equivalent of U.S $0.25 to silence him. The boy reported the rape to the SLP on June 24 and a medical exam carried out on the same day confirmed penetration had taken place.

The SLP were involved in the case for ten days, until the UNAMSIL provost marshal took it over. The provost marshal concluded that there was no conclusive evidence to link the crime to the perpetrator. After reviewing the case, the UNAMSIL force commander concluded that while the evidence was inconclusive, the circumstantial evidence was strong enough to conclude that the peacekeeper had violated military discipline, and as such issued an order of repatriation. It is not clear to Human Rights Watch whether this violation will be recorded on the offender's file. According to a reliable source, the investigation by the police and UNAMSIL was conducted in an insensitive manner and members of the Bangladeshi contingent spoke with the victim while the UNAMSIL investigation was ongoing, even though they should not have had access to him. Nor did UNAMSIL follow up with the victim or his family to apologize, provide compensation, and explain the outcome of the investigation.[169]

UNAMSIL investigations into allegations of sexual violence by peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence. Human Rights Watch urges UNAMSIL to fully investigate any allegations of sexual violence committed by UNAMSIL military or civilian personnel. The human rights section should systematically monitor and report on sexual violence, including cases involving UNAMSIL personnel. UNAMSIL should establish a mechanism with the SLP whereby allegations of sexual violence by persons employed or affiliated with UNAMSIL reported to the police are immediately reported to the relevant UNAMSIL staff members, including the provost marshal and the gender specialist in the human rights section. UNAMSIL should reciprocate by reporting cases known to it to the SLP. UNAMSIL should ensure that states

[168] Human Rights Watch interview, Joru, May 28, 2002. Other villagers did not want to be interviewed.
[169] Human Rights Watch interview, Freetown, September 15, 2002

report within the prescribed six months on follow up to cases involving military personnel that have resulted in the alleged perpetrator being repatriated to his country of origin, in order to ensure that states prosecute the accused. This will serve to actually enforce a stated "zero tolerance" for sexual exploitation by UNAMSIL staff and persons affiliated with UNAMSIL, which to date has had no teeth and therefore no impact on changing behavior. Civilian staff who commit sexual violence should be fired and their misconduct properly recorded in their personnel file to ensure that they are not rehired in another U.N. mission.

The UNAMSIL human rights section should also provide in-depth gender sensitization training to military and civilian staff. The training should ensure that the peacekeepers understand the code of conduct and the consequences if they do not adhere to it. The U.N. Code of Conduct for peacekeepers and the Military Observer Handbook need to be revised to ensure that the zero tolerance policy for sexual exploitation by persons employed or affiliated with U.N. missions and the consequences of such acts are clearly stated in these guidelines. Similar guidelines for civilian staff need to be widely disseminated to all U.N. missions.

Both ECOMOG and UNAMSIL peacekeepers have sexually exploited women and solicited child prostitutes.

VI. EFFECTS OF SEXUAL VIOLENCE

Health

Sexual violence often continues to impact the physical and mental well-being of survivors long after the abuses were committed. In addition to the reluctance of some survivors to seek medical treatment, the lack of health facilities, especially in the provinces, as well as the survivors' lack of money for transport, medical treatment and drugs has meant that the health status of survivors is poor.[170] Survivors also were often only able to seek medical treatment months after the abuse had happened, for example when they managed to escape rebel captors and make their way to a health center.

The probability of transmission of HIV and certain other sexually transmitted diseases (STDs) is greatly increased in violent sex and any sex where a woman or girl is injured. Doctors and other health personnel interviewed by Human Rights Watch reported a high prevalence of STDs amongst victims, as the armed conflict in Sierra Leone, like other armed conflicts, served as a vector for sexually transmitted diseases.[171]

A World Health Organization (WHO) report found an alarmingly high prevalence rate of HIV/AIDS amongst Sierra Leone Army soldiers. According to the report, the SLA tested 176 soldiers and eighty-two civilians working for the army who had prolonged diarrhea, tuberculosis, weight loss or pneumonia, and found a HIV-positive rate of 41.9 percent (or 108 persons). Among the group tested were eighty female soldiers of whom thirty tested positive (37.5 percent). As many SLA soldiers defected to the rebel factions, it is likely that victims of sexual violence by them have been infected with the virus.[172] A U.N. report on the impact of conflict on children states that rates of sexually transmitted diseases among soldiers are two to five times higher than those of civilian populations, and that during armed conflict the rate of infection can be up to fifty times higher.[173] Commercial sexual exploitation of women by soldiers, including peacekeepers, also contributes to the spread of

[170] PHR report, p. 45.

[171] Human Rights Watch interviews with Dr. Olayinka Koso-Thomas, Freetown, February 25, 2002; Dr. Noah Conteh, Freetown, March 1, 2002 and Dr. Bernard Fraser, Freetown, March 3, 2002.

[172] World Health Organization, *HIV/AIDS in Sierra Leone: The Future at Stake—The Strategic and Organizational Context and Recommendations for Action* (Freetown, 2000), p. 3.

[173] *See* United Nations Security Council resolution 1308 on the responsibility of the Security Council in the maintenance of international peace and security: HIV/AIDS and international peacekeeping operations, July 17, 2000; and Graça Machel, "The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children," report prepared for and presented at the International Conference on War-Affected Children, September 2000, Winnipeg, Canada, p. 12, at http://www.waraffectedchildren.gc.ca/machel-e.asp.

STDs, including HIV/AIDS.[174] In 1997, tests showed that 70.6 percent of commercial sex workers in Freetown were HIV positive compared to 26.7 percent in 1995.[175]

The 2002 report by the Joint United Nations Programme on HIV/AIDS (UNAIDS) on the global AIDS epidemic estimated that by the end of 2001 there were 170,000 persons aged between fifteen and forty-nine living with HIV/AIDS in Sierra Leone. UNAIDS estimates that more than 50 percent of this figure (90,000) are women and girls.[176] More accurate figures on HIV/AIDS prevalence in Sierra Leone, as opposed to estimates, should be known when the U.S. Centers for Disease Control and Prevention (CDC) publish their report based on a nationwide HIV/AIDS prevalence survey conducted in May 2002.[177] The government of Sierra Leone should ensure that future information campaigns on HIV/AIDS are designed both to impart basic information and to help reduce stigma, especially in light of the large number of survivors of sexual violence who may have been infected with HIV.

Other health problems are vasico-vaginal and vasico-rectal fistulas (VVFs and VRFs), as a result of the rape(s) especially of young girls but also of mature women; complications when giving birth; prolapsed uterus; trauma; and unwanted pregnancies. Health professionals have noted high rates of pregnancies amongst young girls with likely resultant illness, injury, and even death, due to pregnancy-related complications. These girls are likely to experience future complications including uterine problems and scarring, reducing their ability to have a normal sex life or to conceive or carry a child to full term in the future. The health of children born to abducted girls is also likely to suffer as the girls often have no one to teach them motherhood skills, contributing to high rates of infant mortality. The health risks are further exacerbated by various factors that impede safe sex, including lack of information about HIV/AIDS, as well as cultural practices and beliefs that undermine the use of reproductive health services and contraception.[178] The lack of attention paid until recently to conflict-related sexual violence has meant that the health needs of women and girls have not received as much attention or funding as required to adequately address the scale of the problem. In general the Sierra Leonean health services lack trained and motivated personnel, medical equipment and supplies, drugs, and blood for transfusion. The reproductive health infrastructure, which was poor before 1991, virtually collapsed during the war.[179] There are only six specialist obstetricians and gynecologists in Sierra Leone.[180] Treatment for sexually transmitted diseases is limited to the main towns and outreach by mobile clinics in some chiefdoms.

Mental health services for survivors of sexual violence are inadequate and as of 2002 there was only one qualified psychiatrist in the country. FAWE Sierra Leone, which has substantial expertise in treating survivors of

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[174] Human Rights Watch interview, UNAMSIL medical personnel, Freetown, April 30, 2002.

[175] Ministry of Health and Sanitation, *National AIDS/STD Control Programme Annual Report for 1998* (Freetown, Ministry of Health and Sanitation, 1998), p. 3.

[176] UNAIDS, *Report on the Global HIV/AIDS Epidemic 2002* at http://www.unaids.org/, p. 190. This figure is based on a total population of 4,587,000.

[177] Human Rights Watch interview with Dr. Joaquim Saweka (WHO Sierra Leone Representative), Freetown, May 3, 2002. The preliminary results of the CDC showed a prevalence rate of 4.9 percent.

[178] Only 297 of 4,923 women (or 6 percent) surveyed by the government in 2000 reported that they used contraceptives. This low prevalence of contraception use is due to lack of access to family planning services within the communities, inadequate health facilities, especially in the provinces, lack of disposable income to pay for these services, and the low education of women. Only 3 percent of women with no education used contraception compared to 8 percent of women with primary education and 14 percent of women with secondary or higher education. Another worrying factor is the unwillingness of partners to use condoms, which does not bode well given the high prevalence of HIV/AIDS and other STDs. *See* Government of Sierra Leone, *The Status of Women and Children in Sierra Leone*, pp. 55-58.

[179] UNDP, *Human Development Report 2001*, p. 198.

[180] WHO and the Ministry of Health and Sanitation, *Assessment of District Hospitals in Sierra Leone for the Delivery of Safe Motherhood and Reproductive Health Services* (Freetown: 2002), p. 10. The Assessment also found that physicians attended only 3 percent of births whereas traditional birth attendants assisted in 38 percent of births nationally. Ibid. pp. 56-57. Only 10 percent of 4,923 women surveyed by the government in 2000 reported that they received antenatal care from a physician. *See* Government of Sierra Leone, *The Status of Women and Children in Sierra Leone*, p. 10.

sexual violence, believes that counseling on a massive scale is needed to ensure that the women and girls can face the future.[181]

Stigmatization and Shame of Survivors

The rebels frequently committed crimes of sexual violence in public places. A.M., a twenty-year-old male, reported that when he was held in captivity in State House in Freetown from January 8, 1999 for three days, he saw from his cell window RUF/AFRC combatants raping about twenty to twenty-five girls each night on the grounds.[182] Given that rape has been committed on such a systematic and widespread scale and was witnessed by many people, it seems that rape survivors, particularly in urban centers, are generally not stigmatized by society. Survivors interviewed have expressed fear of rejection by their families and communities, but in practice it seems that their fears are unfounded. Most survivors are accepted back into their communities, with their families simply overjoyed to find that they are still alive.

Nevertheless, some women, like R.K. who was raped by the CDF (see above, p. 48), have been rejected by their husbands:

> I told my husband what happened. He cried and rejected me. He said he will find another wife. My family has begged him to accept me as it was not my fault. He does not love me anymore. I am annoyed because I was the senior wife and now he does not treat me well.[183]

Girls and women who voluntarily joined the rebel forces are less likely to be welcomed back.

The survey conducted by Physicians for Human Rights gives an indication of survival strategies employed by women who had been raped: of the ninety-four interviewees reporting having themselves experienced sexual violence, sixty-one (or 65 percent) told someone about their case(s) of sexual violence. The majority of these survivors (fifty women and girls or 53 percent) reported their experience to a health care provider in a hospital, health care center or to a traditional healer, albeit on average five months after the incident(s) occurred. Among those not reporting these incidents and who stated a reason (twenty-eight out of thirty-three), the reasons given were feelings of shame or social stigma (eighteen women and girls or 64 percent), fear of being stigmatized or rejected (eight women and girls or 28 percent) and not having trust in anyone (six women and girls or 21 percent). Eighteen women and girls (19 percent) reported that discussions with family members helped them to try to forget about the incident(s). Other survivors reported that what helped most was to try and forget about the incident (46 percent), support of family (35 percent), a health care provider (33 percent) and traditional medicine (32 percent).[184]

Human Rights Watch also found that many survivors feel intense personal shame that the rebels have defiled them, and therefore often do not report the crime or seek medical attention. S.G., the fifty-year-old widow who had both arms amputated after being raped (see above p. 36), described the shame and anger she felt after her ordeal:

> I didn't even tell my people about the rape. It's such a shameful act. Not just because of the rebel's age, but also because never in my life have I had sex with someone besides my husband. I was a good woman. Can you imagine how I felt when this young boy raped me, kicked me and then told me to get out of his sight after doing this to me? And without my arms, how can I as a woman even clean myself, let alone take care of my affairs. We're farmers and how am I to farm now? Both the rape and amputation are awful ... but later when thinking about what happened, I was even angrier about the rape than the amputation because for him to have done that to me was

[181] Human Rights Watch interview with Christiana Thorpe (founding chairperson of FAWE Sierra Leone Chapter), Freetown, March 22, 2002.
[182] Human Rights Watch interview, Freetown, April 12, 1999.
[183] Human Rights Watch interview, Freetown, August 21, 2000.
[184] PHR report, p. 51 and Table 6 on p. 54. Women could select more than one of the choices given.

> like killing me inside because of the shame. Sex is something you should enjoy together with your man. But to do it like that, to handle me like that, to torture me like that and then kick me and leave me like that ... it's too much. But I guess I was somehow lucky. There could have been ten people doing that to me.[185]

P.S. twenty-five, who was abducted and gang raped by the West Side Boys in January 2000, explained why she had not reported her rapes:

> I didn't want to tell anyone what happened. I was ashamed because it is bad enough being done like this, but having a rebel do it is even worse. I felt so bad because I wanted to save myself for someone special. I went to secret society and they instructed us not to be involved in sex until we were ready to marry. And now I'm afraid because of AIDS. When I think of them I feel so angry.[186]

VII. INTERNATIONAL LEGAL PROTECTIONS AGAINST GENDER-BASED VIOLENCE

Introduction[187]

Women and girls have, since time immemorial, been subjected to sexual and gender-based violence, including rape and sexual slavery, during armed conflict. Mass rape of women and girls was documented during the Second World War as well as in more recent conflicts in such diverse countries as the former Yugoslavia, Rwanda and the Democratic Republic of Congo.[188] Sexual violence has traditionally been considered as the inevitable by-product of armed conflict and has been mischaracterized by military and political leaders as a private crime or the unfortunate behavior of renegade soldiers. The use of rape as a weapon of war, however, means that rape is not a private or incidental crime. Rape as a weapon of war serves a strategic function and acts as an integral tool for achieving military objectives.

Conflict-related rape is an act of violence that targets sexuality, but it is also a military and political tool. It functions to subjugate and humiliate both the women and men within the targeted community. Furthermore, rape is generally not committed in isolation and victims are often subjected to multiple human rights abuses, which serve to further traumatize the survivor. In conflicts in which civilians are the principal targets, sexual violence has become an even more deliberate and insidious weapon of war. In the former Yugoslavia, for example, rape and other grave abuses committed by Serb forces were with the intent to drive the non-Serb population from their homes and communities.

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[185] Human Rights Watch interview, Bo, March 2, 2000.

[186] Human Rights Watch interview, Freetown, February 8, 2000.

[187] Some of the information in this section was published previously in Human Rights Watch Women's Rights Project, *The Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995); and Dorothy Q. Thomas and Regan E. Ralph, "Rape in War: Challenging The Tradition of Impunity," *SAIS Review* (Washington D.C.: John Hopkins University Press, Winter-Spring 1994).

[188] *See* for example Human Rights Watch, *War Crimes in Bosnia-Hercegovina: U.N. Cease-Fire Won't Help Banja Luka* Volume 6, Issue 8, June 1994, http://www.hrw.org/reports/1994/bosnia2/; Human Rights Watch, *Bosnia-Hercegovina: The Fall of Srebrenica and the Failure of U.N. Peacekeeping,* Vol. 7, No. 13, October 1995, http://www.hrw.org/summaries/s.bosnia9510.html; Human Rights Watch, *Bosnia and Hercegovina, A Closed, Dark Place: Past and Present Human Rights Abuses in Foca*, Vol. 10, No. 6 (D), July 1998, http://www.hrw.org/reports98/foca/; Human Rights Watch/Africa, Human Rights Watch Women's Rights Project, Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996, http://www.hrw.org/reports/1996/Rwanda.htm; Human Rights Watch, *The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo*, June 2002, http://www.hrw.org/reports/2002/drc/; Human Rights Watch, *Democratic Republic of Congo, War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny*, Vol. 14, No 6 (A), August 2002, http://hrw.org/reports/2002/drc2/; United Nations, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45*, E/CN.4/1995/42 (United Nations, 1994), p. 64.

The ten-year internal armed conflict in Sierra Leone has been characterized by egregious human rights abuses against the civilian population, including the use of sexual violence to achieve military aims.[189] From the testimonies in this report, it is clear that the rebels waged a war through attacking civilians. Sexual violence was therefore used as part of the rebels' military and political strategy, with victims often being used to bring messages to their enemies, including President Kabbah, ECOMOG, the SLA or the CDF. RUF rebels told an older woman whom they first raped and then subjected to amputation that: "There should be peace before the elections. Now you can go and vote. You have got to take a letter to Bo and those hands are the letters."[190] The testimonies also reveal how the rebels sought complete domination over girls and women by doing whatever they wanted to, including breaking numerous cultural taboos, such as raping lactating mothers or elderly women.

Despite being commonplace during armed conflict, rape "remains the least condemned war crime," according to the U.N. special rapporteur on violence against women.[191] It is only in recent years that it has been exposed and condemned alongside other human rights abuses and international humanitarian law violations. Sexual violence remains insufficiently reported, condemned, and prosecuted as war crimes or crimes against humanity. This differential treatment of sexual violence highlights the international community's willingness to tolerate sexual violence against women notwithstanding its obligations under international law.

International law has prohibited rape and other forms of sexual violence against women during armed conflict for over a century.[192] Perpetrators can be held accountable for rape and other forms of sexual violence as war crimes, crimes against humanity, and as acts of genocide.[193] International human rights law, which remains applicable in times of armed conflict, also prohibits sexual violence and sexual slavery.

International Humanitarian Law

International humanitarian law, also known as the laws of war, sets out protections for civilians, prisoners of war and other non-combatants during international and internal armed conflicts.[194] The four Geneva Conventions[195] and their two Additional Protocols[196] implicitly and explicitly condemn rape and other forms of

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[189] United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49*, Addendum, Mission to Sierra Leone, E/CN.4/2002/83/Add.2 (United Nations, 2002).

[190] Human Rights Watch interview, Bo, March 2, 2000.

[191] United Nations, *Preliminary report submitted by the Special Rapporteur on violence against women*, E/CN.4/1995/42, p. 64.

[192] Some examples of how the law prohibiting war-related rape developed include the Italian lawyer Lucas de Penna advocating in the thirteenth century for the punishment of wartime rape just as severely as rape committed in peacetime, and Hugo Grotius stating in the sixteenth century that sexual violence committed in wartime was a punishable crime. Articles 44 and 47 of the 1863 Lieber Code, which served as the basis for subsequent war codes, also lists rape by a belligerent as a war crime punishable by death. *See* the Lieber Code of 1863, Correspondence, Orders, Reports, and Returns of the Union Authorities, From January 1 to December 31, 1863.--#7, O.R.--Series III—Volume III [S# 124], General Orders No. 100., War Dept., *Adjt. General's Office, Washington,* April 24, 1863. Article 4 of the Hague Convention (1907) provides a general prohibition of torture and abuses against combatants and non-combatants. Article 46 of the same convention prescribes that "[f]amily honour and rights...must be respected," which can be interpreted to cover rape. *See* Convention Respecting the Laws and Customs of War on Land, with annexed Regulations (Hague Convention IV) of October 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force January 26, 1910). Kelly D. Askin and Dorean M. Koenig (eds.), *Women and International Human Rights Law* (Ardsley, NY: Transnational Publishers, Inc., 1999), Volume 1, p. 50. *See* also Kelly D. Askin, War *Crimes Against Women: Prosecution in International War Crimes Tribunals* (Dordrecht: Kluwer Law International, 1997), pp. 18-36.

[193] Although genocide did not occur in Sierra Leone, rape and other forms of sexual violence can be defined as constituent elements of genocide. Genocide is defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as "acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group." Genocide has attained *jus cogens* status (a norm that preempts other norms) and is prohibited both in its own right and as a crime against humanity.

[194] *See* the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to the Geneva Conventions. Other sources of international humanitarian law are the 1907 Hague Convention and Regulations, decisions of international tribunals and customary law.

[195] Sierra Leone became a party to the four Geneva Conventions on June 10, 1965.

sexual violence as serious violations of humanitarian law in both international and internal conflicts. In international armed conflicts, such crimes are grave breaches of the Geneva Conventions and are considered war crimes. Violations involving direct attacks on civilians during internal armed conflicts are increasingly recognized as war crimes.

Under international humanitarian law, the civil war in Sierra Leone was an internal armed conflict.[197] Common Article 3 to the Geneva Conventions applies to all parties in an internal armed conflict, including armed opposition groups. Through its prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment," Common Article 3 implicitly condemns sexual violence.

The Fourth Geneva Convention on the protection of civilians in international armed conflicts provides a basis for defining the protections provided under Common Article 3. Article 27 on the treatment of protected persons states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[198] Article 147 specifies that "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body or health" are grave breaches of the conventions.[199] According to the International Committee of the Red Cross (ICRC), rape and other forms of sexual violence are considered to be grave breaches and even a single act of sexual violence can constitute a war crime.[200]

Article 4 of Protocol II, which governs internal armed conflicts and applied to the conflict in Sierra Leone, expressly forbids "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any form of corporal punishment" and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape and enforced prostitution and any form of indecent assault" as well as "slavery and the slave trade in all their forms."[201] According to the ICRC Commentary, this provision "reaffirms and supplements Common Article 3 ... [because] it became clear that it was necessary to strengthen ... the protection of women ... who may also be the victims of rape, enforced prostitution or indecent assault."[202]

As the above language highlights, crimes of sexual violence under international humanitarian law have been mischaracterized as attacks against the honor of women or an outrage on personal dignity—as opposed to attacks on physical integrity. This mischaracterization diminishes the serious nature of the crime and contributes to the widespread misperception of rape as an attack on honor that is an "incidental" or "lesser" crime relative to crimes such as torture or enslavement.[203] Whilst it is true that rape is an assault on human dignity, rape should primarily be viewed as a violent assault on bodily integrity as well as one that dishonors the perpetrator and not the victim.

Sexual Violence as a Crime against Humanity

Acts of sexual violence committed as part of a widespread or systematic attack against civilians in Sierra Leone can be classified as crimes against humanity and prosecuted as such. There is no single international treaty that provides an authoritative definition of crimes against humanity, but such crimes are generally considered to

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[196] Sierra Leone ratified the Additional Protocols on October 21, 1986.

[197] The fighting in 1997-98 between West African ECOWAS forces and the RUF/AFRC government may have met the criteria for an international armed conflict.

[198] Geneva Convention IV, Article 27 (2). Article 76 of Protocol I extends this protection of protected persons to all women. Protocol I, Article 76.

[199] Geneva Convention IV, Article 147.

[200] Theodor Meron, "Rape as a Crime Under International Humanitarian Law," *American Journal of International Law* (Washington D.C.: American Society of International Law, 1993), vol. 87, p. 426, citing the International Committee of the Red Cross, Aide Mémoire, December 3, 1992.

[201] Protocol II, Article 4 (2) (a), (e) and (f).

[202] Yves Sandoz, Christophe Swinarski, Bruno Zimmerman (eds.), *ICRC Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), p. 1375, para. 4539.

[203] *See* Catherine N. Niarchos, "Women, War and Rape: Challenges facing the International Criminal Tribunal for the former Yugoslavia," *Human Rights Quarterly* (Baltimore: The John Hopkins University Press, 1995), vol. 17, pp. 672, 674.

be serious and inhumane acts committed as part of a widespread or systematic attack against the civilian population, during peacetime or war, and that result from the persecution of a specific group.[204]

The charter establishing the Nuremberg tribunal after the Second World War did not specify rape under crimes against humanity or list gender as one of the grounds of persecution; the inclusion of rape could however be derived from the charter's general prohibition against "other inhumane acts."[205] Resolving this ambiguity, rape (as well as torture) was included in the specific list of crimes constituting crimes against humanity in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)[206] and the International Criminal Tribunal for Rwanda (ICTR).[207]

The statute of the International Criminal Court (ICC) expands on this by including gender as one of the grounds of persecution, as well as adding rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[208] This definition of gender-based crimes against humanity, which appropriately makes no reference to the outdated notion of "crimes against honor," has been taken up in the Statute of the Special Court for Sierra Leone (see below for a discussion of the Special Court).

Under the evolving case law on crimes against humanity, formal proof of policy, plan or design is no longer an essential element for the prosecution of crimes against humanity. Both the ICTY and the ICTR have found that the existence of a plan or policy is sufficient: the policy need not be formalized and may be deduced from the way in which the acts occur.[209] The failure to take action to address widespread or systematic attacks against the civilian population can also be considered sufficient to determine the requisite element of policy, plan or design. Both state and non-state actors can be held accountable for crimes against humanity.

An individual case of serious sexual violence can be prosecuted as a crime against humanity if the prosecution can make the link between the single violation and other violations of basic human rights or international humanitarian law that have been committed as a widespread or systematic attack against the civilian population.[210] Each enumerated type of act, such as murder, torture, or rape, does not need to be committed on a

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[204] *See*, e.g. "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808," 32 I.L.M. at 1159 (1993), para. 48.

[205] The Nuremberg Charter, as amended by the Berlin Protocol, 59 Stat. 1546, 1547 (1945), E.A.S. NO. 472, 82 U.N.T.S. 284. Under article 6(c) of the Nuremberg Charter, crimes against humanity included, but were not limited to the following atrocities: "[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds."

[206] Article 5 of the Statute of the ICTY names rape as a crime against humanity. *See* Statute of the ICTY (adopted 25/5/93) at http://www.un.org/icty/basic/statut/statute-con.htm.

[207] Article 3 of the Statute of the ICTR names rape as a crime against humanity. *See* Statute of the ICTR (adopted 8/11/94) at http://www.ictr.org.

[208] Article 7 of the Statute of the ICC enumerates crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute of the International Criminal Court, opened for signature July 17, 1998, Article 7, reprinted in 37 I.L.M. 999 (1998). Sierra Leone signed and ratified the Rome Statute on October 17, 1998 and September 15, 2000 respectively.

[209] *Kunarac* Trial Chamber Judgement, para. 432.

[210] "It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity." *Kunarac* Trial Chamber Judgement, para. 419.

widespread or systematic basis—it is the attack that must be widespread or systematic.[211]

Human Rights Law

Sierra Leone is party to international human rights instruments that provide safeguards for women and girls at all times, including during armed conflict. These include protection from rape as torture and other mistreatment; slavery and forced prostitution; and discrimination based on sex. Armed opposition groups, particularly those in control of territory, have increasingly been under an obligation to respect international human rights standards.[212]

The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[213] prohibit torture and other cruel, inhuman or degrading treatment by officials or persons acting in an official capacity. The Convention on the Rights of the Child (CRC) provides for the right to freedom from torture, sexual exploitation and abuse as well as liberty and security of person.[214] The 1991 constitution of Sierra Leone also prohibits "any form of torture or any punishment or other treatment which is inhuman or degrading."[215]

The United Nations special rapporteur on torture has recognized that rape can constitute torture: "[R]ape is a traumatic form of torture for the victim."[216] The ICTY in the *Furundzija* case noted that "[i]n certain circumstances ... rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture."[217] The ICTR in the *Akayesu* case stated that "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[218]

Sexual violence generally violates women's rights to be free from discrimination based on sex as provided for under the ICCPR.[219] Under Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[220] the definition of discrimination is considered to include "gender-based violence precisely because gender-based violence has the effect or purpose of impairing or nullifying the enjoyment by women of human rights" on a basis of equality with men.[221] The CEDAW Committee enumerated a wide range of obligations for states related to ending sexual violence, including ensuring appropriate treatment for victims in the justice system, counseling and support services, and medical and psychological assistance to victims.[222] In a 1993

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[211] *Prosecutor v. Kupreškic*, Judgement, IT-95-16-T, 14 January 2000 (*Kupreškic* Trial Chamber Judgement), para. 550.

[212] Nigel S. Rodley, "Can Armed Opposition Groups Violate Human Rights?" in P. Mahoney and K. Mahoney (eds.) *Human Rights in the 21st Century: A Global Challenge* (Dordrecht: Martinus Nijhoff, 1993), pp. 297-318, and International Council on Human Rights Policy, "Hard Cases: Bringing Human Rights Violators to Justice Abroad—A Guide to Universal Jurisdiction," (Geneva: International Council on Human Rights Policy, 1999), p. 6.

[213] Sierra Leone ratified the CAT on March 1, 2001.

[214] Sierra Leone ratified the CRC on June 18, 1990. Article 34 protects the child from sexual exploitation and sexual abuse. Article 37 provides for the freedom from torture or other cruel, inhuman or degrading treatment or punishment as well as liberty and security of person.

[215] Constitution of Sierra Leone (1991), Chapter III – The Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual, s. 20(1).

[216] United Nations, *Report of the U.N. Special Rapporteur on Torture, Mr. Nigel S. Rodley, submitted pursuant to the Commission on Human Rights Resolution 1992/32*, E/CN.4/1995/34, Paragraph 19, January 12, 1995.

[217] *Prosecutor v. Anto Furundžija*, Judgement, IT-95-17/1-T, December 10, 1998, para. 171.

[218] *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, September 2, 1998 (the *Akayesu* Trial Chamber Judgement), para. 687.

[219] *See* ICCPR, Articles 2 (1) and 26.

[220] Sierra Leone ratified this treaty on November 11, 1988.

[221] Women, Law and Development International, *Gender Violence: The Hidden War Crimes* (Washington D.C.: Women, Law and Development International, 1998), p. 37.

[222] Committee on the Elimination of All Forms of Discrimination Against Women, "Violence Against Women," General Recommendation no. 19 (eleventh session, 1992), U.N. Document CEDAW/C/1992/L.1/Add.15.

resolution, the U.N. General Assembly declared that prohibiting gender discrimination includes eliminating gender-based violence and that states "should pursue by all appropriate means and without delay a policy of eliminating violence against women."[223]

The CRC also provides for freedom from discrimination on the basis of gender (Article 2), and the right to enjoyment of the highest attainable standard of health (Article 24). Under Article 39, states shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of any form of neglect, exploitation, or abuse; torture of any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. The CRC also calls upon states to provide special protection and assistance to a child "temporarily or permanently deprived of his or her family environment."[224] A child's right to "such measures of protection as are required by his status as a minor" is also guaranteed by the ICCPR.[225]

Under both the ICCPR and CEDAW, slavery and forced prostitution in times of armed conflict constitute a basic violation of the right to liberty and security of person.[226] Furthermore, slavery, which is a *jus cogens* norm from which no derogation is permitted, is prohibited under Article 8 of the ICCPR, which also prohibits forced labor, and by the 1926 Slavery Convention.[227] The right to freedom from slavery is also provided under the constitution of Sierra Leone.[228]

The African Charter on Human and Peoples' Rights, to which Sierra Leone is a party, guarantees the "[e]limination of every discrimination against women ... and protection of the rights of the woman and the child"[229] as well as the right to integrity of one's person, and the right to be free of "... [a]ll forms of exploitation and degradation ..., particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment."[230]

Gender Jurisprudence for Crimes of Sexual Violence

Despite the widespread practice of sexual violence during the Second World War, rape did not figure prominently in the prosecutions brought by the two major tribunals established after the war. Rape was not prosecuted at any of the Nuremberg trials notwithstanding the evidence of sexual violence presented. Rape charges were brought in a few cases before the International Military Tribunal in the Far East (the Tokyo Tribunal),[231] and several accused were convicted of crimes including sexual violence. The Tokyo tribunal was responsible for bringing international attention to atrocities, including sexual violence, committed during the

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[223] United Nations General Assembly, "Declaration on the Elimination of Violence against Women," A/RES/48/104, December 20, 1993 (issued on February 23, 1994). *See* Article 4, in particular.

[224] Article 20 (1) of the CRC.

[225] Although the masculine pronoun is used, the ICCPR is applicable without any discrimination to sex as stated in Article 24 (1).

[226] Article 9 of the ICCPR provides for the freedom from arbitrary arrest, detention or exile, whilst Article 23 prohibits forced marriage. Under Article 6 of CEDAW, states are required to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

[227] Slavery Convention, United Nations, *Treaty Series*, vol. 212, p. 17., July 7, 1955.

[228] Constitution of Sierra Leone (1991), Chapter III – The Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual, s. 19 (1).

[229] Article 3 of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, Organization of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982. Sierra Leone signed and ratified this treaty on August 27, 1981 and September 21, 1993 respectively.

[230] Articles 4 and 5 of the African Charter on Human and Peoples' Rights.

[231] The Indictment for the International Military Tribunal for the Far East (IMTFE) included rape within the crimes charged generally. IMTFE Indictment, p. 31, reproduced in the IMTFE Docs., vol., 20, Annex A-6; *See* also Appendix D, attached to the Indictment, which provides more detail on the charges. The Indictment stated that the accused were responsible for "mass murder, rape, pillage, brigandage, torture, and other barbaric cruelties upon the helpless civilian population of the overrun countries." Appendix D alleged responsibility for "inhumane treatment" and "mistreatment" when "civilian internees were murdered, beaten, tortured, and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces" and "female nurses were raped, murdered and ill-treated," and "large numbers of the inhabitants" were also murdered, tortured, raped, and otherwise mistreated.

"Rape of Nanking." The Tokyo tribunal failed, however, to prosecute members of the Japanese government and military for the 200,000 "comfort women" forced into sexual slavery during the war.[232]

Widespread reports of sexual violence in the conflicts in the former Yugoslavia and Rwanda were instrumental in the U.N. Security Council decisions authorizing the establishment of the ICTY and the ICTR. As noted, the statutes of both the ICTY and ICTR make explicit mention of rape as a crime against humanity.[233] The ICTY also has implicit jurisdiction to prosecute crimes of sexual violence as grave breaches of international humanitarian law, as violations of the laws and customs of war and genocide.[234] The ICTR is explicitly empowered to prosecute rape as a serious violation of Common Article 3 of the Geneva Conventions and can prosecute crimes of sexual violence when they constitute torture or genocide.[235]

Both tribunals have played a critical role in setting precedents in the prosecution of conflict-related sexual violence, including articulating definitions and elements of many gender-related crimes.[236] As noted at this report's opening (see "Definition of Sexual Violence, Rape and Sexual Slavery," p. 2), both the ICTR (in the 1998 *Akayesu* judgment) and the ICTY (in the 2002 *Foca* judgment) defined rape, of which there is no commonly accepted definition in international law, albeit the definition from the Akayesu judgment has been criticized as too broad. The *Akayesu* judgment also provided a legal definition of sexual violence: any act of a sexual nature, including rape, committed on a person under coercive circumstances, but which need not include a physical invasion of the body or even contact.[237] The ICTY has found that sexual violence not only constitutes crimes against humanity, war crimes and grave breaches, but can also constitute torture, enslavement, serious bodily injury and other relevant acts as long as the elements constituting these crimes are present in the act of sexual violence.

In general, however, both tribunals have had an inconsistent record on investigating and prosecuting crimes of sexual violence. The ICTR continues to lack a comprehensive approach to the inclusion of sexual violence charges and has failed to include these charges or seek amendments in the original indictments where the Office of the Prosecutor has witness testimony or evidence of sexual violence.[238]

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[232] *See* the Appendix entitled "An Analysis of the Legal Liability of the Government of Japan for "Comfort Women Stations" Established During the Second World War" to the United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, pp. 38-55.

[233] Article 5 of the Statute of the ICTY names rape as a crime against humanity. *See* Statute of the ICTY (adopted 25/5/93) at http://www.un.org/icty/basic/statut/statute-con.htm. Article 3 of the Statute of the ICTR names rape as a crime against humanity. *See* Statute of the ICTR (adopted 8/11/94) at http://www.ictr.org.

[234] Articles 2, 3 and 4 of the Statute of the ICTY respectively.

[235] Articles 4, Article 3 (f) and Article 2 respectively of the ICTR Statute.

[236] *Akayesu* Trial Chamber Judgment; *Prosecutor v. Tadic*; *Prosecutor v. Delalic, et al.*, IT-96-21-A, November 16, 1998; *Prosecutor v. Anto Furundžija* Judgment, December 10, 1998; *Prosecutor v. Blaskic*, IT-95-14, Judgement, March 3, 2000; *Prosecutor v. Kvocka et al.*, Judgement, IT-98-30-T, November 2, 2001. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Foca case), Appeals Chamber Judgement, June 12, 2002, IT-96-23 and IT-96-23/1.

[237] *Akayesu* Trial Chamber Judgement, para. 688. The ICTR stated: "The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe [Hutu militia] to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."

[238] *See* Human Rights Watch press release "Bosnia: Landmark Verdicts for Rape, Torture, and Sexual Enslavement," February 22, 2001, at http://www.hrw.org/press/2001/02/serbia0222.htm. These facts were reconfirmed from a reliable source from the ICTR, Human Rights Watch interview, Freetown, November 8, 2002.

Command Responsibility[239]

The culpability of superior officers for atrocities that their subordinates commit is commonly known as command responsibility. Although the concept originated in military law, it now also embraces the responsibility of civil authorities for the abuses committed by persons under their direct authority.[240]

Commanders of armed rebel groups, such as in Sierra Leone, are subject to command responsibility. While Common Article 3 of the Geneva Conventions and Protocol II on internal armed conflicts do not explicitly mention command responsibility, the application of Protocol II depends on there being organized armed groups "under responsible command."[241] Command responsibility is now part of customary international law, that is, a universally recognized precept of international criminal law. It is also an explicit feature of many treaties, including the statutes of the ICC, the ad hoc tribunals for the former Yugoslavia and Rwanda, and of the Special Court for Sierra Leone (see below, p. 63).

There are two forms of command responsibility. The first is direct responsibility for orders that are unlawful. When an official authorizes or orders rapes, massacres, or other grave abuses, that individual is criminally responsible for these acts, whether the superior who initiated or conveyed the order also carries out the atrocity or has subordinates perform it. The other form of command responsibility is an imputed responsibility for the crimes of subordinates where those crimes are not based on direct orders. In this case, responsibility is determined on the basis of whether the superior knew or should have known of the abuses committed by subordinates.

Knowledge of the abuses may be actual, either by the army officer or rebel commander witnessing the crimes or being informed of them shortly thereafter. It may also be constructive, where the abuses were so numerous or notorious that a reasonable person could come to no other conclusion than that the superior must have known of their commission or of the existence of an understood and acknowledged routine for their commission. Another basis of constructive notice is that the officer should have known of the offenses, but displayed such serious personal dereliction as to constitute willful and wanton disregard of the possible consequences, which is an extreme form of negligence. The failure of the commander to take appropriate measures to control the subordinates under his or her command and prevent atrocities, and the failure to punish offenders, are further elements in showing command responsibility.

An individual found to have command responsibility for the crime committed by a subordinate is deemed culpable to the same degree as the subordinate. A commander will therefore be found guilty of murder if he or she stood by while the subordinate committed murder.

With regard to the crime of rape, some courts have been reluctant to impute command responsibility for what is seen as random and a private crime.[242] However, the requirements of command responsibility do not vary according to the particular crime; the commander is no more permitted to stand by while rape is committed than to stand by while murder is. If a superior had reason to know that subordinates under his or her command committed rape (such as news reports, or widespread commission of this abuse), and failed to use all feasible means under his or her command to prevent and punish this abuse, he or she may also be found guilty of rape.

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[239] The legal analysis in this section was previously published in Human Rights Watch, *Milosevic and the Chain of Command in Kosovo,* July 7, 2001, http://www.hrw.org/press/2001/07/chain-of-command.htm.

[240] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin Books Ltd., 1999), p. 206-7.

[241] Article 1 (1), Protocol II.

[242] *See* generally Patricia Viseur Sellers and Kaoru Okuizumi, "Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults," *Transnational Law & Contemporary Problems* Volume 7, Number 1 (Spring 1997), p. 45.

VIII. TRANSITIONAL JUSTICE MECHANISMS FOR SIERRA LEONE

Two transitional justice mechanisms are currently underway to address the cycle of impunity in Sierra Leone: a Truth and Reconciliation Commission (TRC) and a Special Court for Sierra Leone (SCSL). Both bodies became operational in the third quarter of 2002.

The Lomé Amnesty

The Lomé Peace Agreement of July 7, 1999, controversially provided for amnesty for combatants in the civil war. Under Article 9 (1), Sankoh was granted an absolute and free pardon (he had been convicted and sentenced to death for his involvement in the 1997 coup); and under Article 9 (3) the government was required to ensure that "no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect to anything done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the time of signing of the present Agreement...."[243] At the last minute, the U.N. secretary-general's special representative attending the talks added a hand-written caveat that the U.N. held the understanding that the amnesty and pardon provided for in Article 9 did not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.

Under international law, states have an *erga omnes* obligation—in other words a duty owed to the whole international community—to investigate and prosecute crimes against humanity, genocide and torture even if this means that amnesty laws are in effect annulled. This means that Sierra Leone therefore has an obligation under international law to prosecute those who committed crimes against humanity and torture, irrespective of the Lomé Amnesty and the setting up of the SCSL. Other states also have an obligation to prosecute these crimes based on the principle of universal jurisdiction (see below at p. 66 for a discussion on this principle). Crimes committed in the post-Lomé period fall outside the amnesty and can be prosecuted under domestic law.

The granting of an amnesty may also be challenged under the Sierra Leonean constitution and international law, as being against the fundamental legal principle of the state's duty to provide an effective remedy against official violation of guaranteed rights. The U.N. Human Rights Commission has ruled that "States may not deprive individuals of the right to an effective remedy, including compensation and such rehabilitation as may be possible."[244] A duty to revoke the amnesty retroactively may even arise under international law. Several Sierra Leonean lawyers have discussed the issue of the amnesty's constitutionality and whether to challenge it in court.

Truth and Reconciliation Commission

The 1999 Lomé Peace Agreement provides for the establishment of a Truth and Reconciliation Commission, which was conceived by nongovernmental organizations attending the peace talks as a counterbalance to the amnesty granted to all parties. Under the peace agreement, the TRC was to 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, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation...."[245]

The commission should have been established within ninety days after the signing of the peace agreement, but the Sierra Leonean Parliament did not pass the Truth and Reconciliation Act establishing the TRC until February 2000. Its establishment was further delayed due to the renewed outbreak of fighting in May 2000, and lack of political will of both the government and the international community. As the selection process for the commissioners took longer than planned, the government also decided to delay the commencement of the TRC until after the May 2002 elections to ensure that the TRC would not be politicized by the elections. The activities of the TRC may well be further hampered by funding shortfalls. Only U.S. $1.5 million had been pledged as of June 2002, partially because the Office of the U.N. High Commissioner for Human Rights (OHCHR) did not

[243] Article 9 of the 1999 Lomé Peace Agreement.
[244] Robertson, *Crimes against Humanity: The Struggle for Global Justice*, p. 260.
[245] Article 26 (1) of the 1999 Lomé Peace Agreement.

launch the funding appeal until January 25, 2002. Its total planned budget was reduced from almost U.S. $10 million to U.S. $6,276,440 in August 2002 and has remained unchanged since then.[246]

On May 13, 2002, President Kabbah announced the seven commissioners. The four Sierra Leoneans are: Rt. Rev. Dr. Joseph C. Humper; Justice Laura A. E. Marcus-Jones; Prof. John A. Kamara; and Mr. Sylvanus Torto. The three international commissioners are: Madam Ajaaratai Satang Jow (Gambia); Ms. Yasmin L. Sooka (South Africa); and Professor William Schabas (Canada). The commission had a three-month preparatory phase, which started in July 2002, and must wrap up its activities and submit a report within twelve months of the start of hearings, which as of this writing have not yet begun.[247] An interim executive secretariat headed by the Sierra Leonean lawyer Yasmin Jusu-Sheriff and staffed with eight other members was established to support the work of the commissioners. The budget will be used to establish the secretariat of the commission in Freetown, which will support the seven commissioners and the office of the executive secretary. In addition, it is likely that six operational units will be established to provide support to the commissioners and the executive secretary.[248] The establishment of regional offices is also provided for under the Act and should encourage Sierra Leonean participation and ownership of the process. These offices are expected to begin functioning in early 2003.[249]

The TRC's mandate is "to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the armed conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."[250] The commission is called upon to give special attention to the subject of sexual abuse and may also implement "special procedures to address the needs of such particular victims as children or those who have suffered sexual abuse ..."[251] Any committees formed by the commission to assist it in the performance of its functions should also take into account gender representation.[252]

Both the UNAMSIL human rights unit and NGOs have conducted sensitization activities, mainly in the key urban centers, to ensure Sierra Leonean awareness of the process, but at the time of writing, there was still considerable confusion about the role of the TRC, especially in relation to the Special Court for Sierra Leone (SCSL).

Human Rights Watch believes that the work of the TRC would be greatly enhanced were the staff of the TRC to be gender-balanced with women represented at all levels and to include persons with expertise in sexual and gender-based violence. The gender adviser, expected to take up the post in January 2003, should provide gender sensitization training and ensure that the work of the TRC, including investigations and hearings, are carried out in a sensitive manner. Human Rights Watch recommends that the TRC explore the relationship between the widespread and systematic nature of conflict-related sexual violence and the low status of and discrimination against women. The final report on the findings of the TRC should highlight gender-specific abuses committed throughout the country during the armed conflict. The TRC should also make recommendations on improvements to the law and judicial system toward eliminating the discriminatory nature of customary and general law, and on legal reform and human rights training for government authorities, including members of the criminal justice system. The report should highlight the need for increased assistance (shelter, medical care, education, skills training, mental health programs, etc.) for women, as well as for strengthening existing women's groups through capacity building.

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[246] Human Rights Watch telephone interview with TRC staff, November 14, 2002.

[247] The TRC can extend its operations for another six months provided that good cause is shown. TRC Act 2000, Section 5 (1). *See* http://www.sierra-leone.org/trcact2000.html.

[248] The six operational units will probably be: Administration and Programming; Public Information and Education; Legal; Investigation; Research; Reconciliation and Protection.

[249] Human Rights Watch telephone interview with TRC staff, November 14, 2002.

[250] TRC Act 2000, Section 6 (1). *See* http://www.sierra-leone.org/trcact2000.html.

[251] Ibid., Section 6 (2) (b) and 7 (4) respectively.

[252] Ibid., Section 10 (2).

Special Court for Sierra Leone

Following the hostage taking of over 500 U.N. peacekeepers and the renewed outbreak of fighting between the RUF and government forces in May 2000, the government of Sierra Leone requested that the U.N. assist in establishing a court "to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of U.N. peacekeepers as hostages."[253] The government expressly mentioned that the RUF, in reneging on their obligations under the Lomé Peace Agreement, continued to subject many women and children to human rights abuses, including sexual slavery. On August 14, 2000, the U.N. Security Council passed Resolution 1315 requesting the secretary-general to negotiate with the Sierra Leonean government an agreement for the establishment of a special court.

Due to delays in funding contributions and agreement on key substantive matters, the agreement between the government and the U.N. to establish the Special Court for Sierra Leone was not signed until January 16, 2002.[254] The total budget for the SCSL is U.S. $56.8 million. The first year of the court has been fully funded and pledges have been received for the second year.[255] The secretary-general appointed the prosecutor and registrar on April 19, 2002, and it is hoped that the first trials will commence in the second quarter of 2003.[256] Given budgetary constraints, it is likely that only a limited number of persons will be tried, perhaps as few as twenty.

The SCSL differs in notable ways from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Firstly, it is based on an agreement between the government and the U.N. and was not established by a Security Council resolution under Chapter VII of the U.N. Charter. This means that the Special Court does not have the power to require international cooperation.[257] Secondly, the SCSL is a hybrid court relying on both international and domestic laws. The professional and support staff of the court will be a mix of Sierra Leonean and foreign nationals.

Article 1 of the SCSL provides that the court has the competence to try "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[258]

Other crimes that the court has the jurisdiction to prosecute are provided under Article 2 to Article 6. Under Article 2, which defines the crimes against humanity that the SCSL has the power to prosecute, the following crimes of sexual violence are specified: "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence."[259] Rape, enforced prostitution and any form of indecent assault can also be prosecuted as violations of Common Article 3 to the Geneva Conventions and Additional Protocol II as stated under Article 3 of the statute. Under Article 4, specific serious violations of international humanitarian law are enumerated, including intentionally attacking civilians and the recruitment of children under fifteen years old into

[253] Letter dated June 12, 2000 and addressed by the president of Sierra Leone to the U.N. secretary-general. Letter and annexed Suggested Framework for the Special Court.

[254] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone at http://www.un.org/Docs/sc/reports/2000/915e.pdf.

[255] Human Rights Watch telephone interview with Robin Vincent (registrar of the SCSL), U.K., July 4, 2002.

[256] S/2002/246, Letter dated March 6, 2002 from the secretary-general addressed to the president of the Security Council. David Crane, a prosecutor for the U.S. Department of Defence, was appointed as prosecutor and Robin Vincent of the U.K. was appointed as the registrar.

[257] See also letter from Human Rights Watch to members of the Security Council and other interested states dated September 27, 2001. Under Chapter VII, which is entitled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression," the Security Council can decide to take non-military and/or military action against states that threaten international peace and security. Decisions taken by the Security Council under Chapter VII—which should be read in conjunction with Article 24, which confers primary responsibility for the maintenance of international peace and security to the Security Council, and Article 25, under which U.N. member states agree to accept and carry out the decisions of the Security Council—are binding on member states.

[258] Statute of the Special Court for Sierra Leone at http://www.sierra-leone.org/documents-specialcourt.html.

[259] The other crimes against humanity are: murder; enslavement; deportation; imprisonment; torture; persecution on political, racial, ethnic or religious grounds; and other inhuman acts.

the armed forces. With the unanimous adoption by the U.N. General Assembly of the Optional Protocol to the Convention on the Rights of the Child (CRC) in May 2000,[260] however, the minimum age for any conscription or forced recruitment has been raised to eighteen.[261] Under Article 5, gender-based crimes can also be prosecuted under domestic law provisions. However, as these provisions do not meet international standards in terms of definition of crimes and punishment, they should not be applied.[262]

In accordance with the U.N.'s statement that it did not recognize the Lomé amnesty as it purported to apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, Article 10 of the court's statute states:

> An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.[263]

This means that those bearing the greatest responsibility for crimes against humanity (Article 2); violations of Article 3 common to the Geneva Conventions and Additional Protocol II (Article 3); and other serious violations of international humanitarian law (Article 4) can be prosecuted for their crimes.

The issue of command responsibility is of crucial import to the SCSL given that its mandate is to try "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders, who in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[264] The court therefore will only prosecute the so-called "big fish" and not the "small fry" or those persons who in many instances actually committed the violations. Article 6 of the statute of the SCSL provides that:

> 3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.[265]

The failure by rebel commanders and army officers to punish combatants involved in abuses, despite documentation of and international attention to crimes of sexual violence perpetrated by rebels and pro-government forces, indicates that such persons of authority knowingly tolerated and even condoned these abuses. Commanders may also bear individual criminal responsibility for crimes of sexual violence in addition to command responsibility, as the testimonies in this report highlight.

It is highly regrettable that the court's temporal jurisdiction does not extend to the beginning of the conflict (March 23, 1991). Instead November 30, 1996, the date of the Abidjan Peace Accord, was chosen as it was felt that including the whole war would impose too great a burden on the court. The U.N. also felt that this date corresponded to a new phase in the conflict without necessarily having any political connotations, and that this

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[260] General Assembly resolution A/RES/54/263 on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, adopted May 25, 2000.

[261] Sierra Leone signed and ratified the Optional Protocol of the CRC on September 8, 2000 and on August 24, 2001 respectively. The Optional Protocol entered into force on February 12, 2002.

[262] Article 5 refers to the sections (6, 7 and 12) of the 1926 Prevention of Cruelty to Children Act that relate to abuses committed against girls under the age of fourteen. See above, "Rape as a crime under general law," et seq., for a discussion of these provisions.

[263] Article 10 of the statute of the SCSL.

[264] Article 1 of the statute of the SCSL.

[265] Article 6 (3) and (4) of the statute of the SCSL.

temporal jurisdiction encompassed the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.[266] The temporal jurisdiction is, however, open-ended as the war was still ongoing at the time of the discussions on the court's establishment. The U.N. states that the lifespan of the court will be determined by "a subsequent agreement between the parties upon completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of remaining cases, or the unavailability of funds."[267]

In terms of prosecuting crimes of sexual violence, the statute specifies that "given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice."[268] Likewise, Article 16 (4) specifies that personnel of the Victims and Witnesses Unit should include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

As the TRC and Special Court will be functioning simultaneously, the interaction between the two bodies, whose subject matter as well as personal and temporal jurisdiction intersect, must urgently be clarified. This is crucial in terms of sharing of information, especially confidential information, but also for the sensitization efforts underway. Enabling legislation enacted in March 2002 contains a provision, criticized by many nongovernmental organizations, that establishes the primacy of the SCSL, apparently including over the TRC.[269]

Given that the SCSL will only try a limited number of alleged perpetrators, it needs to establish a clear and comprehensive prosecutorial strategy from the onset. Within the court's mandate, the prosecutor should ensure that gender-related crimes are thoroughly and sensitively investigated and rigorously prosecuted as crimes against humanity or war crimes. The two gender crimes investigators should conduct compulsory gender sensitization training for all staff, and provide more in-depth training for staff members dealing most directly with survivors of sexual violence. The gender crimes investigators should also have access to all cases under investigation, even the ones not previously identified as gender cases, to provide guidance and expertise.

Principle of Universal Jurisdiction

Given the limited number of persons that the Special Court can prosecute due to funding constraints, it is important to note that the principle of universal jurisdiction applies to war crimes, crimes against humanity, slavery,[270] and torture.[271] A resolution passed by the U.N. Commission on Human Rights in April 1999, specifically reminded all factions and forces in Sierra Leone of this principle, stating that "in any armed conflict including an armed conflict of a non-international character, the taking of hostages, willful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for such persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their

[266] United Nations, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, October 4, 2000, para. 25-28. Other dates considered were May 25, 1997, and January 6, 1999, but the U.N. considered that these would be perceived as offering only selective justice.

[267] Ibid., para. 28.

[268] Article 15 (4) of the statute of the SCSL. A Woman's Task Force for the Special Court and TRC was established with the support of the International Human Rights Law Group to advocate that gender-based crimes be properly investigated by both bodies and—in terms of the Special Court—prosecuted. The Women's Task Force has also advocated for the appointment of staff who are experienced in and sensitive to cases of sexual violence, as well as for gender balance i.e. women should be well represented in positions of authority as well as in positions of support (statement takers, investigators, counselors and interpreters, etc.).

[269] Special Court Agreement 2002 (ratification) Act 2002 (March 7, 2002). Article 21 (2) of the Act provides that: "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court."

[270] Slavery can be prosecuted as a war crime and a crime against humanity, but also on an independent basis against both state and non-state actors during wartime and peace given its status as a peremptory norm of customary law.

[271] Draft Code of Crimes Against the Peace and Security of Mankind, Articles 8, 9, 17, 19 and 20, *Report of the International Law Commission on the Work of its Forty-eighth Session*, U.N. Doc. A/51/10, para.50 (United Nations, 1996).

nationality, before their own courts."[272]

The special rapporteur for violence against women also stressed the principle of universal jurisdiction in her report on her mission to Sierra Leone:

> Thus, crimes of gender based violence must be investigated and documented for possible criminal prosecution in the domestic courts of other States which may have jurisdiction ...[273]

IX. THE NATIONAL AND INTERNATIONAL RESPONSE

National Response

Climate of Impunity

Human Rights Watch is not aware of any prosecutions in the Sierra Leonean courts of any cases of conflict-related sexual violence or other human rights abuses. The lack of both categories of prosecutions is due to a number of factors. Firstly, many survivors simply want to try to forget about the sexual violence and other human rights abuses they have been subjected to and just get on with their lives in post-conflict Sierra Leone, which for many is a daily struggle. Secondly, some women and girls fear reprisals. According to the survey conducted by Physicians for Human Rights, thirteen (or 25 percent) of the fifty-one respondents indicating that their perpetrator should not be punished, expressed this fear.[274] Thirdly, women and girls are often ashamed of what happened to them and are therefore reluctant to present themselves in court. Fourthly, women and girls have little faith in the criminal justice system or the customary law system, which were never equipped to deal with crimes of such widespread and systematic nature. If a survivor of sexual violence does decide to prosecute, she is likely to be retraumatized by the whole experience given the very poor track record of the Sierra Leonean criminal justice system. Fifthly, many women and girls lack the financial means to access the court system. As women are generally economically dependent on men, many women who have initiated prosecution of non-conflict-related sexual violence, have dropped their cases once they realize that their husband may be sentenced to prison (dependency means that a previously abducted woman or girl who is still with her rebel "husband" is even more unlikely to bring any charges against him). Sixthly, victims are often not even aware of their rights, given high illiteracy rates, prevalent societal attitudes towards sexual violence, and women's low status in Sierra Leonean society. Many rural women and girls, in particular, see little value in the formal court system as there is often no financial or material benefit from bringing a case. Attitudes towards sexual violence, and the subordinate status of women and girls, mean that there is considerable societal pressure for women not to bring cases before the courts that could bring shame to the extended family, such as sexual violence cases.

The climate of impunity means that violence against women and girls remains a serious problem in post-conflict Sierra Leone. Rape continues to be committed by former rebels, members of the CDF and by civilians who are used to doing what they want with women by force and with impunity. A lawyer who practices in the Eastern Province reported to Human Rights Watch that of the rape victims he was currently representing at least 50 percent had been raped by civilians and the remainder by former combatants.[275] Girls continue to suffer the greatest number of sexual assaults: a lawyer who practices in the Freetown area reported to Human Rights Watch that of the at least fifty rape victims she represented at the time of writing, 98 percent are under fourteen years old.[276] Although there are no reliable statistics on the incidence of sexual or domestic violence, the police doctor in Connaught Hospital in Freetown, which is the largest government-run hospital in the country, sees about thirty victims of recent rape and sexual assault per month.[277] For the reasons enumerated above, this figure is likely to

[272] UN Commission on Human Rights resolution 1999/1, April 6, 1999.
[273] United Nations, *Report of the Special Rapporteur on violence against women* E/CN.4/2002/83/Add. 2, 2002, para. 78.
[274] PHR report, pp. 53-55 and Table 7 at p. 56. Women could select more than one option.
[275] Human Rights Watch interview with Abdulai Bangurah (lawyer), Freetown, March 15, 2002.
[276] Human Rights Watch interview with Claire Fatu Hanciles (lawyer), Freetown, August 9, 2002.
[277] Human Rights Watch interview with Bill Roberts and Anne Hewlett (respectively crime adviser and criminal investigation trainer with the Commonwealth Community Safety and Security Project), Freetown, May 1, 2002.

be the tip of the iceberg. Physicians for Human Rights found that 39 percent of respondents expressed concern ("quite a bit" or "extremely worried") about future sexual violence by family members, friends or civilian strangers. Ninety-one women (or 9 percent of all respondents) had experienced sexual abuse, occurring at an average age of fifteen, from family, friends or civilians during their lifetime.[278]

Despite all these problems, seventeen out of a total of ninety-four respondents (or 18 percent) reporting sexual violence to Physicians for Human Rights supported punishment for "all those involved," thirty women (or 32 percent) supported punishment for the perpetrators, and seventeen women (or 18 percent) supported punishment for the commanders. Thirty-three women believed that punishment of perpetrators would prevent sexual violence from happening to others.[279]

Corrupt and Ineffective Judiciary

Lack of faith in the system, as the few women who have decided to prosecute non-conflict-related rape have experienced, is fully justified. The judiciary—which, prior to the conflict, barely existed in the provinces, and in Freetown was only accessible to those who had sufficient funds—completely collapsed during the war. Many lawyers fled the conflict, and much of the infrastructure, including the law courts in Freetown, was destroyed. The low salaries of personnel working in the judiciary have meant that magistrates, lawyers, and judges are easy targets for bribery and/or intimidation. In addition to these problems, women who seek justice for crimes of sexual violence have to contend with more gender-specific problems. The judiciary is dominated by men and some of its older members, in particular, do not think rape is a serious crime and that the victims are generally to blame. The legal processes are very cumbersome and open to corruption, factors which favor the perpetrator. At the magistrates court level, it is up to the magistrate to determine whether there is sufficient evidence to submit a case to the High Court and whether to grant bail. As the court system is so overburdened this phase can take weeks or months, and it is not unusual for victims to have to appear over ten times before the case is handed on to the High Court. Magistrates have also been known to grant bail even if the offender and victim live in the same compound, which means that the victim is at risk at least of intimidation and even physical violence.[280] Many cases die in the magistrates courts, as victims run out of money, patience, and/or time. Cases at this stage are also frequently dismissed, if, for example, the witnesses do not show in court (after three no shows, the case can be dismissed): witnesses often decide against appearing in court for reasons including intimidation, ignorance of the law, lack of transportation money, and the slow pace at which court cases proceed, or because they simply do not care. The requirement for corroborating evidence is often an obstacle to prosecution and violates international norms.

If the magistrate decides that there is sufficient evidence, the case is handed up to the High Court. Cases in the High Court can also take months especially as there are also continuous indefinite adjournments to contend with. There have been no High Court sittings in the provinces for the past six years, and cases in the provinces have therefore been on indefinite hold. One offender who sexually assaulted two young girls spent five years in pre-trail detention before being sentenced to two years for indecent assault—the five years already served in pre-trial detention were ignored by the court, thus putting the offender in detention for a total of seven years rather than two.[281]

Need for Law Reform

Both general and customary law offer little protection for women and girls (see above, "Women and Girls Under Sierra Leonean Law"). The misinterpretation of the general law provisions pertaining to rape by members of the criminal justice system means that girls are offered even less protection than adults. There is an urgent need for the laws to be revised: the discriminatory provisions in both general and customary law should be removed and brought into line with international standards of human rights, including in relation to the protection of women and girls from violence. The law relating to rape, in particular, should be simplified as well as

[278] PHR report, p. 49.
[279] Ibid., p. 54.
[280] Human Rights Watch interview with John Bosco Alieu (lawyer), Freetown, February 26, 2002.
[281] Human Rights Watch interview with Abdulai Bangurah (lawyer), Freetown, March 15, 2002.

strengthened. Specific legislation on domestic violence, which currently does not exist, should be introduced as women seeking legal redress for domestic violence generally face even more difficulty in convincing the police and members of the judiciary that their rights have been violated.[282] The constitution should also be amended to remove the exemption for customary law and personal law from the prohibition on discrimination. Ending discrimination under customary law in practice will require a major public education exercise, but, as a start, staff of local courts, especially those presiding over them, should be trained in relation to issues of discrimination and the rights of women under the (revised) constitution and international human rights law. The judiciary and the police force need to be trained on the new laws to ensure that they are properly applied.

The Sierra Leone Police

Prior to the civil war, the Sierra Leone Police had been used by politicians for their own purposes and had not received any substantive training for decades. The attitude of the police force to sexual and domestic violence remains insensitive. Police officers, for example, often do not take reports of rape seriously and chastise women who report domestic violence. There are many problems with police investigations of rape cases. Firstly, the police lack basic investigation skills. Secondly, victims must be examined by state-employed doctors, including police doctors, as only a state-employed doctor can present medical evidence in court. Both the police and other state-employed doctors often charge money for these examinations even though they should be free of charge. Thirdly, both the doctors and the police may be intimidated and/or bribed to drop the cases, or police may demand money from plaintiffs before interviewing witnesses and arranging their transport to court. A nationwide system of Family Support Units (FSUs) is in the process of being established with the support of the British-funded Commonwealth Community Safety and Security Project (CCSSP) to deal with cases of sexual and domestic violence.[283] To date, however, only a small number of police officers (approximately sixteen) have received some training and much work remains to be done before the FSUs can deal with victims of sexual and domestic violence in an appropriate manner.

The International Response

In addition to funding UNAMSIL, the international donor community pours approximately U.S. $70 million a year into Sierra Leone for humanitarian assistance. Within the overall humanitarian assistance program to Sierra Leone, only a small percentage of funding is targeted to gender-related programs, notwithstanding the large number of girls and women who have been affected by gender-specific abuses. This funding has also come very late: there were no services specifically for survivors of sexual violence before 1999. After the January 1999 invasion of Freetown, the international community finally took note of the scale of sexual and gender-based abuses and started funding small-scale programs in accessible areas. The Disarmament, Demobilization and Reintegration (DDR) program consistently overlooked the assistance as well as protection needs of abducted women and girls (see below).

Donor funding has contributed to education, adult literacy, health care, trauma counseling, and skills training programs as well as credit and income-generating schemes for a limited number of survivors of sexual violence. These programs need to be expanded into all parts of Sierra Leone, so that more survivors can benefit from these programs. Long-term sexual and gender-based violence programs that aim to educate communities about sexual and domestic violence as well as provide women with health care and some legal aid on a limited scale have been established in camps for internally displaced persons (IDPs) in the east and south. These programs have been quite successful in changing the attitudes towards sexual and domestic violence of the IDP communities these programs serviced. They have also empowered rural women to stand up for their rights.

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[282] Charges of physical assault can be made under the 1861 Offenses Against the Person Act under sections 18 (wounding with intent to maim; causing grievous bodily harm with intent; shooting with intent to maim), 20 (unlawful wounding) and 47 (assault, battery, actual bodily harm).

[283] Human Rights Watch interview with Bill Roberts and Anne Hewlett (respectively crime adviser and criminal investigation trainer with the Commonwealth Community Safety and Security Project), Freetown, May 1, 2002.

To date, funding for the judiciary has focused on the rehabilitation of the infrastructure of the judiciary, but as the peace in Sierra Leone takes hold, donors, including the British government and the World Bank, are considering funding desperately needed judicial reform programs.

The Disarmament, Demobilization, and Reintegration program

The extent to which sexual violence, including sexual slavery, has been ignored throughout the war and in the post-conflict phase is most evident by the lack of attention paid to the thousands of abducted women and girls and their children. The Disarmament, Demobilization, and Reintegration (DDR) process has completely overlooked the protection needs of these women and children. The lack of clear policy and procedural guidelines on these abductees has meant that the responsibility for these women and girls fell between governmental institutions and implementing agencies, resulting in an *ad hoc*, inappropriate and inadequate humanitarian response. Little to no funding was allocated to the protection needs of abducted women and children and only a small number of programs that provide education, skills training and counseling were established for them. This important human rights issue was raised on numerous occasions at different levels with the relevant government institutions, donor governments and the World Bank by UNAMSIL and nongovernmental organizations as well as by World Bank consultants in confidential reports, but did not succeed in bringing about any concrete policy decisions.

The needs of abducted girls and women should, however, be considered an inextricable part of the DDR process and a priority issue that should have been addressed during meetings between the U.N. and government officials or rebel leaders prior to the commencement of disarmament. The abducted girls and women should have been registered and interviewed at the same time that their "husbands" entered the DDR program, with the interviews conducted separately from the "husbands." Information on alternative options could have been disseminated at the DDR camps through social workers and orientation sessions. Alternatively, if it had been possible to gain access to the abducted women and children in rebel-held areas before or during the DDR process then contact should have been established to determine total numbers and inform them of the reintegration support and alternative options available to them. Female social workers in the DDR camps could also have counseled the abductees to help them understand the implications of their decisions, and that the decision is theirs. Basic reproductive health services, including testing and treatment for sexually transmitted diseases, should also be provided at DDR camps.

Donors and the government of Sierra Leone must redress their neglect of survivors' protection needs by drastically increasing funding for women's programs and providing women with desperately needed assistance in terms of health, education, trauma counseling, adult literacy and skills training to promote their rehabilitation into society. In addition, donors should fund legal reform and training programs for the judiciary and police, which will contribute to increase the protection of women's human rights. Donors should also learn from their failure in Sierra Leone and ensure that DDR programs in other countries where large numbers of women and girls have been abducted by the fighting forces, such as the Democratic Republic of Congo, do integrate the protection needs of these abducted women and girls.[284]

United Kingdom

The U.K. has played a key role in restoring peace to Sierra Leone. During the May 2000 crisis, British troops deployed to Sierra Leone, and a standby force was deployed offshore ready to provide additional support to UNAMSIL and the Sierra Leone Army, if required. Since the May 2000 crisis, it has provided technical assistance to most government departments and military training to the new SLA, and has publicly committed itself to remain closely involved in Sierra Leone.

The U.K. is the biggest donor in Sierra Leone, and in 2002 contributed £100 million (approximately U.S. $145 million) of which about £50 million (approximately U.S. $73 million) was disbursed through its development agency, the Department for International Development (DFID). DFID-funded programs aim at

[284] Human Rights Watch, *The War within the War: Sexual Violence against Women and Girls in Eastern Congo* (New York: Human Rights Watch, 2002).

strengthening the protection and promotion of women's human rights. Since September 2001, the Commonwealth Community Safety and Security Project (CCSSP), which is funded by DFID and staffed only by British nationals, has been working to establish a nationwide system of Family Support Units (FSUs) to deal with cases of sexual and domestic violence. Under this system, only female police officers are supposed to interview female victims, while both male and female police officers are responsible for interviewing suspects and witnesses. More officers need to be trained in addition to the sixteen who have received training. As the force has few women, more females need to be recruited so only female police officers interview victims of sexual and domestic violence. The police officers in the FSUs lack strong leadership and require more training and close supervision to ensure that victims are dealt with in a professional and sensitive manner.

DFID also funds a program to promote the participation of women in politics, especially in Parliament, as well as university research into conflict-related sexual violence committed in January 1999.[285] DFID has provided £2.5 million (about U.S. $3.5 million) for a three year Law Development Program which aims at rehabilitating the physical infrastructure of the court system, as well as providing training to administrative staff to ensure proper record-keeping of cases. The Law Development Program is under review to determine its future strategy, in particular with relation to legal reform, including customary law. DFID is currently considering funding a three-year program that will establish sexual and physical assault referral centers across the country.

The U.K. has contributed a total of over U.S. $500,000 to the operations of the TRC and its Interim Secretariat. The U.K. has also pledged U.S. $9,110,000 over three years to the Special Court.

United States

In 1999, the U.S. put considerable pressure on the warring parties to seek a negotiated settlement. However, following the breakdown of the peace process in 2000, U.S. policy revolved around ending external support for the RUF, supporting British military actions and transitional justice mechanisms as well as providing humanitarian aid. From 2000 to 2002, the United States contributed a total of U.S. $170 million to Sierra Leone, which was primarily disbursed on food-for-peace programs, the resettlement of displaced persons, and reintegration of former combatants. The U.S. has funded several women's programs, notably in the field of health, including the provision of obstetric surgery and HIV/AIDS education, a sexual and gender-based violence program, a program aimed at promoting women in politics, and micro-finance schemes for women. The Senate's Foreign Relations Committee recommended that the U.S. Agency for International Development (USAID) expand services to rape victims and fund a public education program on women's rights. The U.S., which is a strong supporter of the Special Court, has contributed U.S. $5 million to this body, and pledged an additional $10 million. The U.S. has contributed $500,000 to the TRC.

After the May 2000 crisis, the U.S. initiated a program called Operation Focus Relief (OFR) to train and equip seven battalions of West African troops for peacekeeping with UNAMSIL. In July 2002, the U.S. pledged to help ECOWAS set up military bases for the rapid deployment of troops in conflict areas. The first steps in this assistance program include the installation of a U.S. $5.3 million early-warning satellite communications system, which will link the ECOWAS secretariat with observation centers in four ECOWAS countries.

European Union

The E.U. did not play a key role in responding to the armed conflict and to date has not been a major donor. Since May 2000, the European Community Humanitarian Office (ECHO) has disbursed approximately €30 million (roughly the same in U.S. dollars) in Sierra Leone. Few ECHO-funded programs have directly targeted women. ECHO has funded child protection programs, which have assisted child-mothers who became pregnant as the result of conflict-related sexual violence.

[285] A survey of 226 victims, conducted by the University of Sierra Leone Gender Research and Documentation Centre in collaboration with the Sierra Leone Association of University Women (SLAUW), Médecins Sans Frontières, UNICEF and FAWE Sierra Leone.

As the situation in Sierra Leone stabilizes, the E.U. will increase its funding to Sierra Leone through the European Development Fund (EDF), which from 2000 to 2002 disbursed €38 million on activities that supported the return to democracy, rehabilitation of infrastructure and resettlement. From 2002 to 2007, a total of €144 million will be made available for disbursement through the EDF on activities that focus on the rehabilitation of rural infrastructure, good governance and institutional capacity building. An additional €76 million can be spent on activities outside of these two focal areas.

In 2002, the European Commission funded a two-year program that supports the reintegration of rape victims and other war-affected persons through the European Initiative for Democracy and Human Rights (EIDHR). Human rights-related programs funded through the EIDHR, which has €6 million for disbursement over the next three years (2002-5), should include women's rights issues, which the EIDHR seeks to mainstream in all its programs.[286]

In addition to the U.K., other member states of the E.U. have bilaterally contributed to Sierra Leone. The Netherlands, in particular, has since 1999 funded sexual and gender-based violence programs. The Dutch government has also been a strong supporter of the Special Court and has contributed U.S. $11.4 million, which is approximately 20 percent of the total budget. A donation for the TRC is being prepared at the time of writing, but has not yet been formalized. A small budget for human rights programs was made available for 2002.

United Nations

Security Council, Secretary-General, and UNAMSIL

Secretary-General Kofi Annan and the members of the Security Council have devoted much attention to the conflict in Sierra Leone. Kofi Annan visited the country in July 1999 and December 2000. The Security Council has frequently denounced the egregious human rights abuses committed during the conflict, in particular by the rebel factions, and has stressed the importance of protecting women in armed conflict.[287]

Following the failure of the U.N. peacekeeping missions in Somalia and Rwanda, there was substantial pressure on the U.N. to ensure that the UNAMSIL peacekeeping mission would succeed when it was established in October 1999.[288] After the slow initial deployment of peacekeepers, which led to the May 2000 crisis, the U.N. committed itself to deploy 17,500 peacekeepers in Sierra Leone: UNAMSIL is the world's largest and most expensive peacekeeping mission, costing the international community over U.S. $700 million annually.[289] As of March 31, 2002, there were 17,455 peacekeepers, 259 military observers, 87 civilian police officers as well as 322 international and 552 local civilian staff in Sierra Leone. The mission is now being hailed as a great success, although Human Rights Watch has criticized UNAMSIL on numerous occasions for failing to fulfill its mandate to protect the civilian population.[290] In a June 19 report to the Security Council on UNAMSIL, the secretary-general stated that the government security apparatus was not yet capable of protecting Sierra Leone from both internal and external threats and warned that the international community must protect the major investments that had made possible the progress achieved so far.[291] On September 24, the Security Council extended UNAMSIL's mandate for a further six months, but envisaged a reduction of 4,500 troops in the peacekeeping mission within eight months. The resolution was based on the recommendation of a further report on UNAMSIL which laid out benchmarks to govern the withdrawal of the U.N. from Sierra Leone, including the ability of the police and army

[286] Human Rights Watch interview with EIDHR representatives Andrew Kelly and Irene Corcillo and the Economic Adviser to the E.U., René Mally, Freetown, April 10, 2002.

[287] In resolution 1370, the Security Council expressed "... its continued deep concern at the reports of human rights abuses and attacks by the RUF and the Civil Defence Forces (CDF) ... against the civilian population, in particular the widespread violation of the human rights of women and children, including sexual violence, [and] demands that these acts cease immediately..." U.N. Security Council resolution 1370, S/RES/1370 (2001), September 18, 2001, para. 4.

[288] U.N. Security Council resolution 1270, S/RES/1270 (1999), October 22, 1999.

[289] U.N. Security Council resolution 1346, S/RES/1346 (2001), March 30, 2001.

[290] *See* Human Rights Watch letter addressed to Secretary-General Kofi Annan at http://www.org/press/2001/11/annanltr.htm.

[291] *Fourteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, S/2002/679, June 19, 2002.

to maintain security, the successful re-integration of ex-combatants, and the situation in the broader sub-region. The resolution also encouraged the government of Sierra Leone to "pay special attention to the needs of women and children affected by the war," and welcomed "the steps taken by UNAMSIL to prevent sexual abuse and exploitation of women and children," and encouraged the mission to continue to enforce a policy of "zero tolerance" for such acts. The Security Council also called on states to bring to justice their own nationals responsible for such crimes in Sierra Leone.[292]

UNAMSIL was initially authorized to field fourteen human rights officers, but for the first two years of UNAMSIL's existence, the human rights unit remained understaffed, which meant that human rights abuses were not effectively monitored. At various times during the lifespan of UNAMSIL, the gender specialist post was not filled. When UNAMSIL's mandate was expanded to 17,500, the human rights unit was authorized to recruit six additional human rights officers and most positions are currently filled. The Physicians for Human Rights report on conflict-related sexual violence was produced in collaboration with the UNAMSIL human rights section and has contributed to focusing the attention of the international community on the issue of sexual violence.

In October 2000, the Security Council held an Open Session on Women and Armed Conflict and adopted a resolution calling for documenting the impact of armed conflict on women and the role of women in peace-building.[293] Since then the U.N. Development Fund for Women (UNIFEM) has undertaken a major study on the impact of armed conflict on women in more than ten countries around the world, including Sierra Leone. In January 2002, a three-woman UNIFEM team visited Sierra Leone in connection with this study.[294] UNIFEM also recently appointed a gender and AIDS adviser in Sierra Leone, who is tasked with strengthening the gender division of the Ministry of Social Welfare, Gender and Children's Affairs and local women's groups as well as mainstreaming gender in the TRC and Special Court for Sierra Leone. She will also research the relationship between gender, conflict and HIV/AIDS with the aim to increase protection against HIV infection.[295]

In November 2001, a team from the Training and Evaluation Service of the U.N. Department of Peacekeeping Operations (DPKO) conducted a two-week training on gender in peacekeeping. The program involved over 1,000 UNAMSIL peacekeepers and civilian personnel from both Freetown and the provinces. Local human rights activists and women's organizations were invited in order to contribute a domestic perspective on gender issues.

UNAMSIL has funded several women's programs for survivors of sexual violence through various trust funds. These trust funds are normally established for quick impact programs whilst the rehabilitation and reintegration of women who have been abducted and subjected to sexual violence and sexual slavery should be seen as long-term projects.

Office of the High Commissioner for Human Rights

The then U.N. High Commissioner for Human Rights Mary Robinson visited Sierra Leone in June 1999, while the Lomé peace negotiations were taking place. The purpose of the mission was "to support the peace process, to encourage future programmes for the promotion and protection of human rights in the country, and to draw attention to the plight of children, women and civilians bearing the brunt of the excesses in Sierra Leone."[296] OHCHR has provided technical assistance for the establishment of the TRC, but was very slow to issue the funding appeal for the TRC. OHCHR has also assisted in the drafting of the statute for the national human rights commission provided under the Lomé Peace Agreement, but the establishment of this body has not progressed beyond that point.

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[292] *Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, S/2002/987, September 5, 2002; U.N. Security Council resolution 1436, S/RES/1436 (2002), September 24, 2002, paragraphs 14 and 15.

[293] U.N. Security Council resolution 1325, S/RES/1325 (2000), October 31, 2000.

[294] *See* the summary of the assessment's findings at http://www.unifem.org/gov_pax_assessment.pdf.html.

[295] Human Rights Watch interview with Jebbeh Forster (Gender and AIDS advisor to UNIFEM Sierra Leone), Freetown, March 11 and April 15, 2002.

[296] United Nations, *Sixth Report of the U.N. secretary-general on the U.N. Observer Mission in Sierra Leone (UNOMSIL)*, S/1999/645, June 4, 1999, para. 39.

The U.N. Commission on Human Rights has condemned the human rights situation in Sierra Leone on numerous occasions.[297] In August 2001, Radhika Coomaraswamy, the commission's special rapporteur on violence against women, visited Sierra Leone to highlight the gender-specific abuses that thousands of women and girls have been subjected to. She highlighted that "systematic and widespread rape and other sexual violence has been a hallmark of the conflict in Sierra Leone" and noted that "the failure to investigate, prosecute and punish those responsible for rape and other forms of sexual and gender-based violence has contributed to an environment of impunity that perpetuates violence against women in Sierra Leone, including rape and domestic violence."[298] She therefore stressed the need for accountability for these abuses.

World Bank

The World Bank established a multi-donor trust fund for the DDR program, which is now focused on the reintegration of ex-combatants. As discussed above, the protection needs of abducted women and girls were ignored by the DDR program even though World Bank consultants had raised this issue in their confidential reports. In 2002, the World Bank agreed in principle to allocate U.S. $140 million to support reconstruction and development efforts in Sierra Leone and U.S. $15 million to go towards HIV/AIDS prevention projects there.

X. CONCLUSION

The decade-long war in Sierra Leone has been characterized by egregious human rights abuses committed primarily by the rebel forces against the civilian population. Throughout the conflict, thousands of women and girls were raped and subjected to other forms of sexual violence of unimaginable brutality, including sexual slavery. The low status of women and girls in Sierra Leone by law, custom and practice remains a contributing factor to their vulnerability and may have contributed to the widespread and systematic sexual violence. In addition to the combatants' motivation to achieve their strategic military objectives through terrorizing the civilian population, the fact that sexual violence during the Sierra Leone conflict predominantly involved *men* raping *women* reveals that conflict-related rape, like most rape, reflects this dynamic of gender inequality and subordination. This assertion by men of their power over women is deeply imbedded in societal attitudes in Sierra Leone. The international community and the government therefore need to think of creative ways to change these deeply embedded attitudes.

The lack of attention paid until recently, both nationally and internationally, to the widespread and systematic acts of sexual violence, sexual slavery and their consequences means that there are few assistance programs for survivors. The international community and the government of Sierra Leone should drastically increase funding to ensure that desperately needed health care, education, adult literacy, skills training, trauma counseling, and income-generating schemes are provided. Nor have there been any prosecutions. Rape therefore continues with impunity and it is little wonder that women and girls in post-conflict Sierra Leone remain vulnerable to non-conflict-related violence, and are reluctant to seek legal redress in the domestic courts or even report the incident given the country's inefficient and corrupt criminal justice system. Although, the establishment of the Special Court for Sierra Leone and the Truth and Reconciliation Commission should help to address this climate of impunity, the domestic legal system must urgently be revised to ensure that crimes of sexual violence are prosecuted in a sensitive manner. The international community therefore needs to fund legal reform and training

[297] The Commission on Human Rights deplored "... the ongoing atrocities committed by the rebels, including murders, rape, abductions ... calls for an end to all such acts." U.N. Commission on Human Rights resolution 2000/24, April 18, 2000, para. 4. The Commission also expressed its grave concern "...at the targeting and abuse of women and girls that have been committed in Sierra Leone by the Revolutionary United Front and others, including other armed groups, in particular murder, sexual violence, rape, including systematic rape, sexual slavery and forced marriages..." U.N. Commission on Human Rights resolution 2001/20, April 20, 2001, para. 2(b).

[298] United Nations, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49*, Addendum, Mission to Sierra Leone, E/CN.4/2002/83/Add.2 (United Nations, 2002), p. 2.

programs for the criminal justice system as a whole, which has a key role in promoting and protecting the rights of Sierra Leonean women and girls.

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The report was edited by Bronwen Manby, deputy director of the Africa Division; James Ross, senior legal adviser; and Ian Gorvin, consultant to the program office. It was also reviewed by Corinne Dufka; Widney Brown, advocacy director in the Women's Rights Division; Zama Coursen-Neff, researcher in the Children's Rights Division; Joanne Csete, director of the program on HIV/AIDS and human rights; and Joanne Weschler, U.N. representative. The final edits were inputted by Max Marcus, consultant. Production and coordination assistance was provided by Jeff Scott, associate in the Africa Division; Patrick Minges, Publications director; and Fitzroy Hepkins, mail manager.

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Annex 10

Joan Garces, "Pinochet, Before the High Court of Spain and International Criminal Law", translated by Memoria y Justicia

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PINOCHET, BEFORE THE HIGH COURT OF SPAIN AND INTERNATIONAL CRIMINAL LAW

(Translation by Memoria y Justicia)

By Joan Garces, Lawyer and Professor International Relations

This article originally appeared in the magazine "*Jueces para la Democracia. Información y Debate,*" number 28, March 1997 in Madrid. It expands upon the article published in Diario 16, also of Madrid, Oct. 9-14 1996.

On July 4, 1996 D. Miguel Miravet, Prosecutor of the Valencia Superior Court of Justice, as President of the Progressive Union of Prosecutors of Spain filed a denunciation for presumed crimes against humanity, genocide (national) and terrorism (national and international) committed between 1973 and 1990 by Augusto Pinochet, Gustavo Leigh and others. The denunciation identifies seven Spanish citizens who were murdered or made to disappear by agents under orders of the accused. Its legal foundations derive from the Bilateral Extradition Treaty between Chile and Spain, and International Criminal Law ratified by both States. Later, the President Allende Foundation of Spain filed a complaint, which identified a dozen Spanish citizens and descendants of Spaniards,

among the more than three thousand people murdered and/or disappeared. The Central Trial Court accepted the complaint and initiated judicial proceedings. After a favorable resolution from the Justice Ministry, the Court declared that it had competency to hear the crimes charged.

This case has awakened hopes and the willingness to cooperate in many countries, first of all, among the families of the victims. Several thousand people have joined the lawsuit as plaintiffs or exercise popular judicial action. They see in this case the possibility to overcome the absolute impunity enjoyed by those responsible for the crimes. International humanitarian law bodies, including the experts at the International Court of The Hague who are prosecuting crimes in the former Yugoslavia, [1], expressed solidarity and support for the confirmation of the High Court's jurisdictional competency to judge crimes against humanity that affected Spaniards and are still unpunished in the country where the crimes were committed. Prosecutors of Washington D.C. and FBI agents, who investigated the assassination by agents of Pinochet of Orlando Letelier and Ronni Moffit, offered to share their experience with the Spanish judge. The initial studies published in universities of the United States praise the way the case has developed. [2].

The case, currently underway in the Audiencia Nacional for crimes against humanity, faces complex technical-legal and political-diplomatic problems. Various different entities of the Spanish government and the international community must collaborate to overcome these problems. In this article, we analyze aspects of the principle of double incrimination.

The "Principles of Nuremberg"

On February 13, 1946 the United Nations General Assembly adopted resolution 3 (1), which "takes note of the definition of war crimes, crimes against peace and crimes against humanity as stated in the Statutes of the Military Tribunal of Nuremberg on August 8, 1945." In its resolution 95 (I) of December 11, 1946, the UN General Assembly "confirms the principles of International Law recognized by the Tribunal of Nuremberg and by the Sentence of that Tribunal." These resolutions have the effect of enshrining as universal law rights created in the Statute and Sentence of the Nuremberg Tribunal. (Nur. U.S. Mil. Trib, 4 Dec. 1947, Justice Trial, A.D., 1947, 282; Canada, High Court of Justice, 10 July 1989, Regina v. Finta, I.L.R., 82, p. 441). Its application in Spain was recognized previously by ratification of the Geneva Convention of 12.VIII.1949 (BOE 5.IX.1952 y 31.VII.1979), which in its art. 85 expressly refers to "Principles of Nuremberg" approved by the UN General Assembly on 11.XII.1946. The UN General Secretary's Report on the creation of an International Tribunal to try persons responsible for crimes committed in the former Yugoslavia since 1991, cites other conventions that, in his opinion, have been incorporated as if common law in International Law, as:

The Norms of The Hague, 1907,

Statutes of the 1945 International Military Court of Nuremberg ,

Convention against the crime of genocide, 1948,

The Geneva Conventions of 1949.

The Secretary General's confirmation of the common law nature of these instruments is binding upon all States in conformance with the art. 25 of the UN Charter, as the Security Council approved the General Secretary's Report without reservations (S/Res. 827, May 25, 1993, parag. 2).

The Geneva Conventions are in force in Spain and Chile:

Geneva Conventions I and II, of 12.VIII.1949 (RCL 1952/1193 y NDL 15192), and the Additional Protocol I of June 8, 1977 (RCL 1989/1646, 2187, 2197),

Geneva Convention III, of August 12, 1949 (RCL 1952/1251 and NDL 24622), and Additional Protocol I of 8.VI.1977 (RCL 1989/1646, 2187 and 2197),

Geneva Convention of 12.VIII.1949 (RCL 1952/1184 and NDL 15379), Additional Protocol I of 1977 (RCL 1989/1646, 2187 and 2197),

Additional Protocols I and II to the Geneva Conventions of 12.VIII.1949, regarding the protection of victims of international and non-international armed conflicts, drafted in Geneva 8.VII.1977 (BOE 26.VIII.1989, 7.XI.1989, 9.X.1989),

Convention II of The Hague of 29.VIII.1899 (on congressmen and persons who accompany them), and Additional Protocol II of 8.VI.1977 (RCL 1989/1946, 2187 and 2197), also incorporated in Spanish Criminal Code (cap. III, art. 608 and ss).

Also incorporated in Chilean national law are conventions prior to those of Geneva, with equivalent principles of International Law. These include the 1925 Military Justice Code; the regulations and principles of The Hague Conventions of 1899 and 1907; the 1863 Lieber Code; the 1874 Brussels Declaration on laws and practices of war; the Geneva Convention of 1864; the St. Petersburg Declaration of December 1864.
In Article 3, the four Geneva Conventions of 12.VIII.1949 establish fundamental provisions applicable to all armed conflicts, including non-international or internal conflicts that prohibit "at any time and at any place" the following acts:
a) To take a life and affect the physical well-being of persons,

and all forms of murder, mutilation, b) taking of hostages; c) violation of the dignity of persons, especially humiliating and degrading treatment...
In all Conventions the list of violations includes premeditated murder, torture, inhumane treatment, including biological experimentation, intentional infliction of suffering or physical injury and conditions injurious to health.
Convention IV prohibits collective convictions, intimidation, looting, reprisals (art. 33). A war crime may also be a crime against humanity if motivated and directed against persons for political, racial or religious reasons, as underscored by the French High Court in its Sentence of 20.XII.1985 (Barbie case), and The International Law Commission (Rapport C.D.I., 1987, doc. UN A/42/10, p. 31).

Resolutions 1074 (XXXIX) and 1158 (XLI) of the UN Economic and Social Council, July 28, 1965 and August 5, 1966, refer to the punishment of war criminals and individuals guilty of crimes against humanity.

Codification of the crime against humanity

The Statutes of the Nuremberg Tribunal, in art. 6.c) define as crime against humanity: "...Murder, extermination, submission to slavery, deportation, and any other inhumane action committed against any civilian population, before or during a war, any politically motivated persecution, or racial and religious persecution, even when such actions or persecutions are not a violation of internal law of the country where they have been committed, constitute a crime under the competency of the Tribunal..."Allied courts applied this article after 1945, and, subsequently, the following courts did also:

In 1961, the Jerusalem District Court and the Supreme Court of Israel (Eichmann case. I.L.R., 36, p. 39-42, 45-48,288, 295),

in 1971, courts of Bangladesh in the request for extradition to India by Pakistani officials "for acts of genocide and crimes against humanity " (C.I.J. Annuaire 1973-1974, p. 125),

In 1981, the Netherlands Supreme Court in the Menten case (N.Y.I.L., 1982, p. 401 and s.),

In 1983, by the High Court of France in the Barbie case, drew from art. 6.c) with the following criteria (subject to application in Spain and Chile):

a) *The concept of incrimination derives from international repressive policy that transcends national borders. b) It also stems from the adhesion of France to this policy of repression, c) the enshrining through UN General Assembly resolution 13.II.1946 of the definition of crimes against Humanity as set*

forth in the Nuremberg Court Statutes, and, d) the recommendation in this UN resolution to member States to prosecute or extradite authors of such crimes. The legal basis rests in article 15.2 of the International Pact on Civil and Political Rights of 19.12.1966 (and art. 7.2 of the European Convention on Rights of Man), that states that the principle of non-retroactivity of criminal laws is not contrary to the prosecution and conviction of persons for actions qualified as "criminal according to general principles of law recognized by the community of nations." This exception —were it so — to the non-retroactivity of criminal law has been applied in the penal prosecution against an individual accused of hijacking an airplane when this action is not punishable for the ius fori at the time it was committed (Sri Lanka, Cr. of App., 28.5.1986, Ekanayake case, I.I.R., 87, p. 298).

> In 1989, by the Ontario Superior Court of Justice (Canada) in the Finta case (10.5.1989, I.L.R., 82, 438 s.).

Essayists Andre Huet and Renee Koering-Joulin [*Droit Penal International* , Presses Universitaires de France, Paris, 1993, p. 52] sustain:
"This class of crimes (...) is broader than war crimes (...) and is susceptible to be committed by States against their own citizens (...)."
For D. Thiam, UN International Law Commission Special Observer,
"An inhuman act committed against a single person may constitute a crime against Humanity if considered in the context of a systematic pattern or if the execution forms part of a plan, or if repetitive in nature and leaves no doubt about the intentions of the author. (...) An individual act may constitute a crime against Humanity if it ascribes to a context of a coherent and repeated set of acts committed under the same motive: political, religious, racial or cultural" (Rapport C.D.I., 1989, p. 147, parag. 147). Likewise, "the characteristics of a crime against humanity" may be ascribed not to one single case of forced disappearance but rather to the "systematic practice" of forced disappearances. (A/Res. 47/133, Dec. 18, 1992, preamble, clause 4). The Nuremberg Court Statute states in its,

> *Art. 6, leaders who have participated in a plan designed to commit crimes against humanity are responsible for the acts others commit in execution of that plan,*
>
> *Art. 7,established that the position of Head of State or any other high-ranking official does not grant immunity from prosecution nor does any government office serve as extenuating circumstances*
>
> *Art. 10 states*

"In all cases in which the Tribunal has proclaimed the criminal

nature of a group or an organization, authorities shall have the right to compel any individual to appear before the courts (...), on the basis of membership in this group or organization. This principle holds that the criminal nature of the group or organization shall be considered as proven and no further discussion on this point shall be entertained ".
The "National Intelligence Directorate" (DINA) was termed a "criminal organization " by the Sentence handed down by the Supreme Court of Chile on May 30, 1995 (Letelier case).

Statutes of the International Criminal Court on the former Yugoslavia.

Created in 1993, its art. 10 provides that the non bis in idem rule does not prevent the court from trying a person who already stood trial in another State, if in that State, that event is not deemed to be a violation of common law, or if the proceeding appears to deny justice. The unequivocal nature of this exception makes it possible to prevent the accused from shielding himself behind pro forma proceedings. In sum, whenever there is agreement on criteria on the serious and massive nature, and political, racial, religious, social or cultural motivated acts, crimes against humanity consist of:

Murder (Nuremberg, art. 6; Statues of the Court on the former Yugoslavia, art. 5.a), homicide (Tokyo, art. 5.c),

Extermination (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.b),

Slavery (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.c),

Deportation (Nuremberg, art. 6.c),

Expulsion (Statutes of the Court on the former Yugoslavia, art. 5.d),

Any other inhuman act committed against any civilian population (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia, art. 5.i),

Persecution for political, racial, or cultural motives (Nuremberg, art. 6.c; Statutes of the Court on the former Yugoslavia , art. 5.h) and *social or cultural motives* (proposal for penal code on crimes against the security of humanity, art. 21),

Genocide (1948 Convention, art.4),

Apartheid (1973, Convention art. II),

Imprisonment (Law n 10 enacted by the Allied Control

Council in Germany, 1945, art. II, 1.c; (Statutes of the Court on the former Yugoslavia, art.5.e),

Torture (Law n 10 enacted by the Allied Control Council in Germany, 1945, art. II, 1.c, Statutes of the Court on the former Yugoslavia, art. 5.e),

Rape (Law n 10 enacted by the Allied Control Council in Germany 1945, art. II, 1.c, Statutes of the Court on the former Yugoslavia, art. 5.g),

The systematic practice of forced disappearances (Resolution 47/133 of the UN Gen. Assembly, 18.XII.1992),

The use of atomic weapons in determined circumstances (Sentence of the International Court of Justice, 1996).

However, motive is not a determining factor in all crimes that affect peace and security of humanity. The International Law Council of the UN considers in this class of crime the "systematic or massive violation of the rights of man," persecution for political, racial or religious reasons, but also persecution for " social or cultural reasons" (proposal for Criminal Code on crimes against the security of humanity, art. 21); as well as crimes that are "systematic or massive violations of the rights of man" — premeditated murder, torture, imprisonment, rape, forced disappearances, slavery - according to art. 5 of Statutes of the Court on the former Yugoslavia.

Range of application ratione personae.

Regarding the victims, unlike war crimes, crimes against humanity exist independent of bonds of nationality or other kind that the author of the crime may share with the victim

Retroactive application of criminal law in crimes against humanity.

The International Pact on Civil and Political Rights, 19.XII.1966, ratified by Chile and Spain (BOE 30.IV.1977), in art. 15 incorporates the principle of "national o international" nullum crimen sine lege, but adds in its paragraph 2: "Nothing set forth in this article shall preclude trial or conviction of a person for acts or omissions that, when committed, were criminal actions according to general principles of law recognized by the international community."
Such is also the case in art. 7 of the Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 (BOE 10.X.1979 and 30.IX.1986).

Neither statutes of limitation nor amnesty laws are applicable.

International Law generally does not admit statutes of limitation. And crimes against humanity must comply with the greater legal framework, in other words, International Law. The following texts establish the inadmissibility of statutes of limitation:

- the UN General Assembly Declaration on forced disappearance of persons, approved by consensus on 18.XII.1992 (A/Res. 47/133),
- Art. 1 of the Europe Council Convention 25.I.1974, on lack of applicability of statutes of limitation n war crimes and crimes against humanity,
- Resolution 291 (XXIII) of the UN General Assembly, approved Dec. 9, 1968, on the non application of statutes of limitation to war crimes and crimes against humanity, "confirms that no time limit for prosecution is set in the solemn declarations, agreements or conventions related to the prosecution and restraint of crimes of war and crimes against humanity."

Its art. I.b) states:
"Regardless of the date committed, (...) crimes against humanity, whether committed in time of war or time or peace (...), are not subject to statues of limitation, even if such acts do not violate internal law in the country committed, are not subject to statutes of limitation."
Its article III establishes the obligation to allow extradition.
This Convention came into effect on Nov. 11, 1970.
The Criminal Code of Spain establishes that "the crime of genocide shall never be subject to statutes of limitation." (Art. 131).
It is the opinion of Mertens [in *"L'imprescriptibilité des crimes de guerre et contre l'Humanité", Univ. de Bruxelles, 1974, p. 226*]:
"Laws of oblivion (such as amnesty laws) are considered not permissible for crimes perpetrated against a community, nations, and humanity. By their nature, such crimes are not subject to statutes of limitation. If for technical reasons related to the current status of the evolution of positive law, such crimes cannot be repressed beyond the internal arena, then they must be repressed in accordance with international law, recognizing it preeminence over national law".

Nor is due obedience an exception.

Such is established in the following documents:

Art. 8 of the Statutes of the International Nuremberg

Military Court,

Resolution 95 (I) of the UN Gen. Assembly, December 11, 1946,

Art. 2.3 of the United Nations Convention Against Torture, 10.XII.1984,

Art. 7.3 of the International Penal Court for the former Yugoslavia,

Art. 6 of the UN General Assembly Declaration, 18.XII.1992, on protection against forced disappearance,

UN International Law Commission, in the formulation of the Principles of Nuremberg in 1950 (Y. bk. of the I.L.C., 1950, II, pp. 374-378), as well as its proposals for Penal Codes for crimes against peace and security of humanity, 1954 (art.4) and 1991 (art. 12)

Rapport C.D.I., 1991, p. 279.

Extradition.

The UN General Assembly Declaration on extradition of individuals guilty of crimes of war and crimes against humanity, adopted 3.XII.1973 (resolution 3074, XXVIII), establishes in its Art. 9:
"When States cooperate in the discovery, arrest, and extradition of individuals against whom there is evidence of having committed crimes against humanity, and when States collaborate in the punishment of these individual if found to be guilty, the States are acting in conformance with the provisions of the UN Charter and the Declaration on the principles of international law related to friendly relations and cooperation between States."
And its Art. 5 states
"When evidence exists that individuals have committed war crimes and crimes against humanity, they must be brought before the Courts and if found guilty, they must be punished, as a general rule, in the countries where these crimes were committed. States shall cooperate in the extradition of these individuals for this purpose."
Consequently, no "exclusive" jurisdiction has been established. Jurisdictional competence is subordinate to special regulations such as multilateral treaties, which in this case include Spain and Chile and bilateral treaties such as the Extradition Treaty of 14.04.1992 — which is governed by the principle of 'aut dedere aut punire'. Thus, in the case of the illegal arrest, torture and assassination of the Spaniard Carmelo Soria by agents of the Military Junta, the Convention of 14.XII.1973 (on the prevention and punishment of crimes against internationally protected persons, including diplomatic

functionaries, N.York, 14.12.1973), which Spain ratified 26.07.1985 (BOE 7.02.1986) and Chile ratified 21.01.1977, applies. Art. 3 of this Convention states:
"This Convention shall not exclude any penal jurisdiction exercised in accordance with national legislation."

The Extradition and Judicial Assistance Treaty between Spain and Chile. 14.04.1992 (BOE 10.01.1995), should be interpreted in conjunction with the later General Treaty of Cooperation and Friendship between Chile and Spain, of 19.10.1990 (BOE 17.09.1991), particularly its art. 1 a), b), d) and h), that states:

Art. 1 "The Parties promise to coordinate efforts internally and internationally in order to foster the full effectiveness of the following principles and objectives: "

a) The free determination of peoples, the non intervention, peaceful resolution of conflicts, judicial equality of the States, international cooperation for the development and struggle for peace and international security.

b) Defense and respect for human rights in the context of a constitutional state, guarantees for dignity, and security of citizens.

d) The firm condemnation of all forms of violence, authoritarianism or intolerance.

h) Support for international actions intended to eradicate terrorism.

The extradition and judicial assistance treaty between Spain and Chile of 14.04.1992, establishes:
Art. 3: "Shall allow for extradition, also in accordance with the present Treaty, of crimes included in multilateral agreements of which both countries are parties."

Therefore, in the case presently before the High Court (Audiencia Nacional) the following apply:

1. In the crime of Genocide, the 1948 Convention, ratified by Chile on 3.06.1953 and by Spain (BOE 8.02.1969), as per art. VII "each State party to this agreement is obligated to grant extradition in accordance with laws and treaties in effect,"
2. In the crime of torture, the Convention on la Torture of 10.12.1984, ratified by Spain 19.10.1987 (BOE 9.11.1987) and subscribed by Chile 23.09.1987, in which art. 4 and 5 extend jurisdiction to the State of which the victim is citizen, even though the crime may have been committed in another State. If such is the case in torture, no regulation explicitly states that the same principle of universal jurisdiction shall not be applied in the most serious of crimes, genocide. Or in the case of piracy, as stated by UN Special Rapporteur B. Whitaker, in his Report of July 1985 on the Convention against Genocide

(E/CN.4/sub2/1985/6/p.38)

Torture is also prohibited:

Universal Declaration of Human Rights, 1948, art. 5,

International Pact on Civil and Political Rights, 19.XII.1966, art. 7, ratified by Chile and Spain (BOE 30.IV.1977),

Convention against Torture and other punishments, or cruel, inhuman and degrading treatment, 10.12.1984, ratified by Spain on 19.10.1987 (BOE 9.11.1987) and subscribed by Chile on 23.09.1987, in which art. 1 includes torture committed by "public agents or any other person who acts in official capacity or on his instigation, or with express or tacit consent."

3. In the case of Carmelo Soria, assassinated in Santiago July 14, 1976 while employed by the UN, the 'Convention of 14.xii.1973 on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents 14.12.1973, applies and its art. 8 establishes:
"1. To the extent that crimes outlined in article 2 are not listed among the cases of extradition in treaties current between the party States, these shall be considered as included in those treaties." "4. For the purposes of extradition between party States, crimes shall be considered to have been committed not only in the place where they took place but also within the territory of the States obligated to established their jurisdiction according to paragraph 1 of article 3."
4. In experimentation of the lethal gas "sarin" on persons in detention by agents or functionaries under authority of the defendants, the Nuremberg regulations previously described shall take effect as well the Convention on the prohibition of the development, production and storage of biological weapons and toxic substances, and above all, the destruction of these, in London, Moscow, and Washington on April 10, 1972 (BOE 11.VII.1979), subscribed by Chile on 10.IV.1972.

The Hague International Court of Justice interpretation of the convention against genocide establishes:

"The principles on which the Convention [for the prevention and repression of genocide] are based are recognized by civilized nations as binding upon the States, even beyond all conventional bonds " (C.I.J., Rec. 1951, p. 23).
These principles have been codified to a certain extent in Convention 9.XII.1948, which is "considered today as part of customary international law " (Report of the UN General Secretary prepared in keeping with parag. 2 of Res. 808 (1993) of the Security, UN/S/25704, May 3, 1993, p. 13, parag. 45).
The most authoritative and recent UN interpretation of the Convention against Genocide and "internal" genocide is that

by Special Rapporteur M. B. Whitaker, in "Study on the Issue of Prevention and Repression of the Crime of Genocide " (commissioned by UN, ECOSOC, E/CN.4/Sub.2/1985/6, July 2, 1985), who states:

"Genocide does not necessarily imply the destruction of an entire group... The term 'partial' in art. 2 appears to indicate a fairly high number in relation to the total members of a group, or also a significant percentage of that group, and its leaders " (p. 19),

"Opinions differ in determining to what extent the terms 'national' or 'ethnic' group include minorities (...). The group of victims may in fact be minority as well as a majority of the country; (...) the definition does not exclude a case in which victims belong to the same group as those who perpetrate the violation. The United Nations Rapporteur on the assassination in Kampuchea has termed this massacre "self-genocide", a term that implies a massive destruction within a group of a significant number of its members (E/CN.4/SR.1510)" (p. 20).

"During debate [on the 1948 Convention] the delegate from France predicted that if in the past crimes of genocide were racially or religiously motivated, it was evident that in the future, such crimes would be committed essentially for political reasons. This idea found broad acceptance among the other representatives [Chile United States, etc.].

Accorcing to Pieter Drost, in The Crime of State, II: Genocide, (Leyden, A.W. Sythoff, 1959), "the most serious form of the crime of genocide is destruction of the physical lives of human beings, taken individually because they form part of any kind of human group". (p. 22).

"For crimes committed against a certain number of individuals to be considered genocide, such crimes must be aimed at the group or factions of a group," (p. 23). Art. 8 of the Nuremberg Court Statutes clearly establishes that an accused may not evade prosecution for having followed orders from superiors, even if the court eventually views this obedience as reason to issue a lighter sentence." (p. 28). "Individual responsibility does not necessarily include, however, in certain cases collective responsibility of the State to its victims, even in the case of compensation or reparations." (p. 29) "The Special Rapporteur believes that States or at least States party to the Convention, must change their internal legislation to permit extradition of the guilty parties if these States fail to prosecute them. Genocide may also be construed to be an issue of universal jurisdiction: aut dedere aut punire, as is the case in the crime of piracy." (p. 38) (...) In the Report of 4.VII.1978, the Special Rapporteur had already concluded that the principle of universal jurisdiction allowed for the options of extradition or suppression of the crime by the State in which territory the guilty party has been located. (E/CN.4/Sub.2/416, parag. 627)."

Both recommendations are accepted in our Judicial Branch Procedural Law 6/1985, July 1, art. 23.4.a), as well as the Bilateral Extradition Treaty between Chile and Spain of 14.04.1992, art. 3.

Special Rapporteur Whitaker continues in his UN Report on genocide:

"Genocide may be considered an issue no less serious than torture, therefore we recommend assuming a position analogous to that established in art. 8 of the Convention against Torture, 10.XII.1984" (p. 39).
This recommendation was implemented by internal Spanish legislation, cited previously, which established universal jurisdiction in the case of genocide, and art. 3 of the Bilateral Extradition Convention between Chile and Spain.

Applicability of common law incrimination in the case of genocide.

Art. V of the 1948 Convention against Genocide asks States to adapt their internal legislation to assure application of the Convention (which was done in Spain). However, if incrimination on the basis of this Convention were not directly applicable (which it is, according to the International Court of Justice), this would not mean that incrimination for genocide could be founded on the rights of Nuremberg. The latter is directly applicable in the judicial order of States that have recognized it (all United Nations member States, resolution 95 (I) of 11.XII.1946 of the General Assembly of the UN). All the more so as the crime of genocide may be *"committed in times of peace"* as set forth in art. 1 of the same 1948 Convention. The rights of Nuremberg, and resolutions of the UN General Assembly, which have confirmed its existing effectiveness, have been invoked as precedent in both internal State jurisdiction as well as doctrine, by the following:

Supreme Tribunal of The Netherlands, J.K v. Public, Public Ministry, 27.X.1981, N.Y.I.L., 1983, p. 427,

Cour d'Appel of Paris, Touvier case, 27.X.1975, A.F.D.I. 1976, p. 924,

Cour de Cassation of France, Leguay case, 21.X.1982, A.F.D.I., 1983, p. 844,

Hans Kelsen in "Will the Judgment in the Nuremberg Trial become a Precedent in International Law?" I.C.L.Q., 1947, p. 153.

Upon creation of the International Criminal Court on the former Yugoslavia, no question arose on the direct applicability in that territory of crimes set forth in international humanitarian law and common law (Report of Secretary General prepared with parag. 2 of resolution 808 (1993) of the Security Council, Doc. GNU S/25704, 3.V.1993, p. 10.).

Universal Jurisdiction

Regarding independent jurisdiction to hear crimes of genocide

and terrorism committed by persons accused before the High Court of Spain (Audiencia Nacional), art. 23.4 of the LOPJ, applicable criminal internal and international norms and jurisprudence of our Supreme Court on universal jurisdiction in crimes listed in art. 23.4 of the LOPJ (in relation to art.3 of the bilateral extradition treaty with Chile) apply. We must add that universal jurisdiction is supported by the same Convention of 1948. Eric David, in " Principes de Droit des Conflits Armés" (Brussels, ULB Law School, 1994, p. 621) concludes that "Art VI of the Convention against genocide (1948) establishes as priority jurisdiction the Court of the place where the crime was committed, but in no way excludes the jurisdiction of other States,"

S. Glaser reaches the same conclusion in "*Droit international penal conventionnel*" (Brussels, Bruylant, 1970, p. 108). So does the commentary on the *"Eichmann case" in the* International Law Review, 36, pp. 303-304; and *"US Senate Report" on* ratification of the 1948 Convention by the United States, July 18, 1981, in I.L.M., 1991, p.9.

Regarding the obligation established in the first part of Art. VI, analysis by the 1948 Convention itself confirms this interpretation. The Report on the Sixth Commission of the UN General Assembly stated:

"Thus [the first part of art. VI] does not affect the right of any State to bring any of its own citizens before its own courts for actions committed outside its territory."

The International Court of Justice of The Hague has not taken an explicit position on this point. However, it has declared that "all States party to the Convention have accepted the obligation to prevent and punish the crime of genocide" ("Application of the Convention against genocide, precautionary measures, resolution 8.IV.1993." C.I.J., *Recueil des Arrêts* , 1993, p. 22, pár. 45). In 1970 it acknowledged that genocide was outside legality, and norms related to fundamental personal rights, including slavery, and racial discrimination, are *erga omnes* obligations . In other words, "all States may be considered as having judicial interest in protecting these rights." (C.I.J., Recueil des Arrêts, 1978, p. 32).

Genocide is a crime against humanity and also a crime of terrorism magnified. Numerous conventions establish universal jurisdiction against terrorism (eg, the European Convention of 27.1.1977, and the UN General Assembly 9.XII.1985, A/Res. 40/61) therefore, it is coherent that there should exist universal jurisdiction to repress genocide.

The destruction of a group for political or ideological beliefs is a crime against humanity.

This is established in arts 6.c) of the Nuremberg Statutes, art. 5.c) of the Tokyo International Military Court Charter, art. 2.1. c) of Law N. 10 enacted by the Allied Control Council in Germany in 1945, art. 5 of the Statutes of the Court for the former Yugoslavia, art. 21 of the proposal for a Code on Crimes against the security of humanity, drafted by the UN

International Law Commission. These treaties incriminate "politically, racially or religiously motivated persecution. "

Double incrimination and retroactivity in extradition proceedings.

The Audiencia Nacional sought the opinion of magistrate D. Jose Luis Manzanares Samaniego as to the extradition of individuals who bear maximum responsibility for genocide committed in Chile from 1973 to 1990. It is interesting to note that he confirms the doctrine in Spain on the application of a basic concept of extradition procedure. This basic concept is that the extraditable crime must be codified both in legislation of the State seeking the extradition and in the laws of the country in which the defendant is located. The magistrate stated:

"Burgstaler [3] poses an interesting issue. A case complies with requisites for double incrimination at the time the decision that is made on the extradition petition, but not when the crimes were committed. Supported by Schultz and Linke, the author believes that the lack of punishability weakens the extradition from the standpoint of the State that requests extradition, but not when it is only a part of the law of the State which is requested to extradite the individual. The solution appears correct if we consider that this is not an example of the ius puniendi of the State to which the extradition petition is directed, but a form of judicial support." (La Ley, 1986-2, p. 981).

Civil action for reparation

The right to reparations in crimes against humanity is founded on the International Pact of Civil and Political Rights 19.XII.1966 (BOE 30.04.1977), in which art. 9.5 states: "All persons who have been illegally arrested or imprisoned shall have the right to obtain reparation." This is also stated in the Penal Code (arts. 109, 116), the Criminal Trial Law (arts. 112, 113) and the y bilateral extradition treaty between Spain and Chile.

A case involving crimes against humanity may be filed by family members of the disappeared and murdered persons, survivors of detention or concentration camps, or torture centers, internal exiles, persons expelled from the country, and persons whose property was confiscated, regardless of nationality or place of residency. Finally, we must mention that the Convention on dual citizenship between Spain and Chile of May 24, 1958 (BOE, Novernber 14), in art. 7 establishes that "Spaniards residing in Chile and Chileans residing in Spain who are not included in the benefits granted this Convention, shall continue to enjoy the rights and benefits granted by Chilean and Spanish law, respectively. Consequently, they shall have access to government authorities and courts of justice under the same conditions as citizens. The exercise of these rights shall be subject to law of the country in which

these rights are exercised."

Final Notes.

1. Article in The New York Times and the International Herald Tribune, October 25, 1996.
2. For example, the article printed in January 1997 in the ACLU Int'l Civil Liberties Report, entitled "Spanish Criminal Prosecutions Use International Human Rights Law to Battle Impunity in Chile and Argentina", by Prof. Richard J. Wilson, Director of International Law Consultation on Human Rights, American University, Washington D.C.
3. *Burgstallerr (Manfred): "Das europäische Auslieferungsübereinkommen und seine Anwendung in Österreich"* , in Zeitschrift für Rechtsvergleichung, 1970, p. 11. *Schultz (Hans): Das Schweizerische Auslieferungsrecht* , Basel, 1953, vol. 7 of Schweizerischen Criminalistischen Studien, p. 100.

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