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## THE SPECIAL COURT FOR SIERRA LEONE AND THE JUVENILE SOLDIER DILEMMA

Joshua A. Romero\*

### I. Introduction

¶ 1 In the aftermath of a ten-year civil war, the country of Sierra Leone is undergoing a lengthy process of recuperation and stabilization. During the decade-long war, thousands of innocent Sierra Leoneans endured extra-judicial killings, torture, rape, and abduction at the hands of two warring factions: the Sierra Leone Government and the Revolutionary United Front (“RUF”). Researchers estimate that at least five-thousand juvenile combatants actively participated in the war.<sup>1</sup> While many children were conscripted into combat, a significant segment of juvenile soldiers voluntarily participated in the brutalities.<sup>2</sup>

¶ 2 At the conclusion of the war in 2000, the Government of Sierra Leone and the United Nations jointly established the Special Court for Sierra Leone to prosecute those “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . .”<sup>3</sup> Despite this strict statutory directive, juveniles between the ages of fifteen and eighteen determined to be guilty of committing heinous war crimes are not subject to imprisonment.<sup>4</sup> Instead, juvenile criminals will be “sentenced” to a truth and reconciliation mechanism, where—regardless of culpability—they are ultimately released back into the very communities they once tortured.<sup>5</sup>

¶ 3 Punishment of juvenile soldiers challenges both the rehabilitative assumptions of truth and reconciliation mechanisms and the propriety of informal, nonpunitive, and relatively short-term social control.<sup>6</sup> In a time of widespread exploitation of children, the Special Court is in a unique position to establish a precedential framework for future ad

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<sup>1</sup> See Ismene Zarifis, *Sierra Leone’s Search for Justice and Accountability of Child Soldiers*, 9 No. 3 HUM. RTS. BRIEF 18 (2002) (also noting that some estimates conclude that as many as 10,000 child soldiers fought in the war).

<sup>2</sup> See AMNESTY INT’L U.K., *IN THE FIRING LINE—WAR AND CHILDREN’S RIGHTS* 60, 61 (1999) (stating that children’s negative experiences with governmental armed forces was the predominant factor in the children’s decision to volunteer to fight).

<sup>3</sup> S.C. Res. 1315, U.N. SCOR, 4186<sup>th</sup> mtg., art. 1(1), U.N. Doc. S/RES/1315 (2002), *available at* <http://specialcourt.org/documents/index1.html>. (“Court statute”).

<sup>4</sup> *Id.* at art. 7(2).

<sup>5</sup> *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, July 7, 1999, *available at* <http://www.sierra-leone.org/lomeaccord.html>. (“Lome Accords”) (establishing a Truth and Reconciliation Commission for Sierra Leone in which perpetrators voluntarily disclose their war crimes to the commission without facing punishment).

<sup>6</sup> See generally H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

hoc tribunals addressing juvenile combatant issues.<sup>7</sup> The Court's current policy towards juvenile punishment makes impossible the attainment of just results and neglects to effectuate fundamental notions of deterrence<sup>8</sup> and retribution.<sup>9</sup> The current rehabilitative approach is laudable, but from a real politik perspective, the Sierra Leoneans' demand for retributive punishment highlights the dire need for satisfactory sanctions vis-à-vis culpable combatants. In the absence of such punishments, Sierra Leone will remain unstable and the rule of law illusory.

¶ 4 The premise of this article is rather simple: The protection of human rights is a socially valuable and necessary good; as such, human rights violators must face adequate punishment when appropriate. Punishment must be rendered upon juvenile combatants who willingly desecrated human rights in Sierra Leone. The proposition that child soldiers were the first victims of human rights violations is a non-sequitor since this article advocates only that child soldiers who voluntarily joined a militia and voluntarily committed war crimes be susceptible to punishment. Ergo, in situations in which the child soldier was conscripted into warfare, punishment is proper only upon the conscriptor. When, however, the most culpable juveniles face no bona fide punishment, the decade-long war merely serves as a training ground to lead future rebellious revolts as skilled and undeterred leaders.

¶ 5 This article addresses the structural shortcomings of the current Court scheme and offers an alternative adjudicatory regime for juvenile soldier matters. Section I outlines the decade-long civil war and the futile peace agreements. Section II explores the nuances of the Court-enabling statute and the rationale underpinning the expansive statutory punishment-exclusion for juveniles. Section III evaluates contemporary proposals for adjudicating child soldier matters and discusses why these proposals insufficiently address the debacle. Section IV offers an alternative organizational framework for the tribunal which maximizes deterrence and retribution, and establishes, inter alia, stability and the rule of law. The conclusion is that in order to resolve the civil unrest in Sierra Leone, the Court must permit discretionary imprisonment of the most culpable juvenile combatants, while remaining cognizant of mitigating factors such as age and immaturity.

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<sup>7</sup> The subject of child soldiers is of global consequence; children have taken-up arms in war for centuries. See Dominique Marshall, *The Construction of Children as an Object of International Relations: The Declarations of Children's Rights and the Child Welfare Committee of League of Nations, 1900-1924*, 7 INT'L J. CHILDREN'S RTS. 103, 133-34, n. 149 (1999) (noting that historically the French viewed children as heroic soldiers). Vicious conflicts involving child combatants are on-going and widespread with over 300,000 children, girls and boys, taking part in hostilities in over thirty countries. Olara A. Otunnu, Special Representative to the Secretary-General for Children in Armed Conflict, at <http://www.un.org/special-rep/children-armed-conflict/ffaq.htm>.

<sup>8</sup> Under deterrence theory, "punishing criminals is morally permissible because it both deters the punished criminals from further offenses (special deterrence) and deters other people from committing crimes (general deterrence)." David Dolinko, *Three Mistakes of Retributivism*, 39 U.C.L.A. L. REV. 1623, 1626 (1992).

<sup>9</sup> Retributive theory posits that "punishment is just when it is deserved, and it is deserved by the commission of an offense. The offense committed is the sole ground of the state's right and duty to punish. [J]ustice in these matters is to treat offenders according to their deserts, to give them what they deserve, not more, not less." I. PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 147-48 (1989).

## II. Background

### A. The Civil War in Sierra Leone

¶ 6 The Sierra Leonean civil war began in March 1991 amidst political upheaval over a multi-party democratic system of governance. Revolutionary United Front forces, influenced by local discontent and regional instability, attempted to overthrow the Government and exercise control over the country and its supreme economic resource—the diamond mines.<sup>10</sup> Some commentators have intimated that the true motivation for RUF forces was continued profit from illegal diamond trade coupled with a perverse enjoyment of criminal activity.<sup>11</sup>

¶ 7 During the war, the Government was overtaken several times by intra-governmental factions.<sup>12</sup> Taking full advantage of the regime changes, RUF forces advanced on government forces, eventually gaining substantial control of the diamond mines.<sup>13</sup> The Government, in turn, engaged private security firms and the Nigerian-led Economic Community of West African States Monitoring Group (“ECOMOG”) to shield against the RUF coup d’etat.<sup>14</sup> Government forces were minimally successful in containing RUF forces.<sup>15</sup>

¶ 8 In 1996, pro-government forces successfully conducted a multi-party election and elected as president former U.N. official and leader of the Sierra Leone’s People’s Party, Ahmad Tejan Kabbah.<sup>16</sup> Kabbah subsequently entered into the Abidjan peace agreement<sup>17</sup> with the RUF in which the government granted amnesty to RUF combatants in exchange for an abrupt cease-fire, disarmament, and demobilization.<sup>18</sup> The Abidjan Accord went unenforced, however, and the atrocities continued.<sup>19</sup>

¶ 9 In 1997, the Government again underwent a regime change, being replaced this time by the Armed Forces Revolutionary Council (“ARFC”).<sup>20</sup> Mayhem ultimately erupted when ARFC endeavored to share command with the RUF, leading to near-

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<sup>10</sup> See James Traub, *The Worst Place on Earth*, N.Y. REV. BOOKS, June 29, 2000, available at <http://www.nybooks.com/articles/43>.

<sup>11</sup> See generally Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT’L & COMP. L. 237, 238 (2000).

<sup>12</sup> See Karen Gallagher, Note, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149, 156 (2000).

<sup>13</sup> *Id.* at 156.

<sup>14</sup> See David Pratt, *Sierra Leone: The Forgotten Crisis*, April 23, 1999, at <http://sierra-leone.org/pratt042399.html> (noting that “ECOMOG” entered into the war in 1994 by sending troops to defend the government against RUF attack); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT’L L.J. 391, 394 (noting that in 1995 the government turned to private security firms to defend, which was successful but very brutal).

<sup>15</sup> See Pratt, *supra* note 14.

<sup>16</sup> See Gallagher, *supra* note 12, at 157.

<sup>17</sup> Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), November 30, 1996, at <http://www.sierra-leone.org/abidjanaccord.html>.

<sup>18</sup> See Gallagher, *supra* note 12, at 157.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

anarchy in the country. Regional instability prompted the U.N. to intervene and reinstate the Kabbah administration.<sup>21</sup> The change did not alleviate the problem, however, since RUF forces maintained control of half the country and continued to launch attacks on the capital city of Freetown.<sup>22</sup> By the time Government forces regained control of the capital following the notorious 1999 raid by RUF forces, an estimated six-thousand innocent civilians were left dead and thousands more mutilated and limbless.<sup>23</sup>

¶ 10 RUF forces—comprised of thirty percent juvenile soldiers—implemented a brutal war operation referred to by RUF commanders as “Operation No Living Thing,” where rebel forces ripped through Freetown, raping thousands of women, killing innocent civilians, and destroying the capital city.<sup>24</sup> This and numerous other brutal operations conferred upon juvenile soldiers the reputation as the cruelest combatants of the war.<sup>25</sup>

¶ 11 Throughout the conflict, RUF forces utilized a terroristic approach stylistically similar to that of their chief ally Charles Taylor of Liberia.<sup>26</sup> This terror-based strategy included abducting children from their homes, forcing boys to engage in war and girls to perform sexual services, and raiding and killing entire villages.<sup>27</sup> Thousands of innocent Sierra Leoneans suffered amputation and mutilation at the hands of rebel forces.<sup>28</sup> The RUF’s most notorious act of terror was chopping off the hands of those said to have cast votes in 1996 for pro-government candidate Ahmed Tejan Kabah.<sup>29</sup> The Sierra Leonean Government, in response, adopted similarly gruesome war tactics.<sup>30</sup>

¶ 12 During the conflict, an estimated five-thousand juvenile soldiers committed widespread and systematic atrocities in defiance of international conventions.<sup>31</sup> Large numbers of children were coerced to participate in the war, often facing death for

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<sup>21</sup> See Fritz & Smith, *supra* note 14, at 396.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* at 393.

<sup>25</sup> *Id.* The RUF conducted other operations called “Operation Burn House” which was a series of arson attacks and “Operation Pay Yourself” which was a program of looting. See Matthew S. Barton, *ECOWAS and West African Security: The New Regionalism*, 4 DEPAUL INT’L L.J. 79, 80 (2000).

<sup>26</sup> *Id.* (noting that Taylor and his National Patriotic Front Party utilized gruesome war tactics when they overran Liberia and executed President Samuel Doe).

<sup>27</sup> *Id.*

<sup>28</sup> See U.S. Dep’t of State, 1999 Country Reports on Human Rights Practices: Sierra Leone, Feb. 25, 2000, § 1, available at <http://www.state.gov/g/drl/rls/hrrpt/1999/>.

<sup>29</sup> See generally Norimitsu Onishi, *In Looted Home In Sierra Leone*, N.Y. TIMES, May 10, 2000, at A1 (noting atrocities committed by rebel forces). Interestingly, this was the same practice utilized by Belgian colonizers who chopped off the hands of Congolese who resisted harsh plantation conditions. See BARBARA KINGSOLVER, *THE POISONWOOD BIBLE* 144, 432 (1998).

<sup>30</sup> See Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167, 177 (2001) (noting that the government also recruited child soldiers and committed crimes against humanity and other unspeakable acts).

<sup>31</sup> Zarifis, *supra* note 1, at 19. (noting child soldier’s violations of Common Article 3 of the Geneva Conventions and Additional Protocol II).

noncompliance.<sup>32</sup> Some juvenile soldiers, however, acted voluntarily, serving as commanders and foot soldiers during executions and mutilations.<sup>33</sup> These juvenile soldiers earned a reputation throughout the region as fearless and blood-thirsty killers.<sup>34</sup>

## B. The Lome Peace Accord

¶ 13 In July 1999, U.S. diplomats brokered the Lome Peace Accord,<sup>35</sup> which offered amnesty to all combatants and endowed the RUF regime with inclusion in the new government in exchange for disarmament and demobilization.<sup>36</sup> The U.N. Secretary-General's Special Representative caveated the accords, insisting that "international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law" would not be protected by the amnesty proviso.<sup>37</sup> The Lome Accords established various victims' and refugees' programs, educational institutions, a Human Rights Commission, a Truth and Reconciliation Commission ("TRC"), a National Election Commission, and a Constitutional Review Committee.<sup>38</sup> Despite the expansive amnesty provision, Sierra Leonean citizens staunchly supported the agreement, deeming the Accords a crucial stride towards peace and regional stability.<sup>39</sup> To implement the Accords, the U.N. pledged nearly six-thousand peacekeeping troops to the region.<sup>40</sup>

¶ 14 Global optimism notwithstanding, trouble promptly ensued when RUF forces refused to adhere to the Accords and continued its brutal attacks on civilians.<sup>41</sup> RUF forces failed to disarm and demobilize, and in May 2000, they took hostage five-hundred U.N. peacekeepers.<sup>42</sup> U.N. Secretary General Kofi Annan noted in mid-2000 that "the situation in Sierra Leone remained tense and volatile under conditions that resemble civil war."<sup>43</sup> In November 2000, Government and RUF forces attempted another cease-fire

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<sup>32</sup> See Jeana Webster, Note, *Sierra Leone—Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security*, 11 IND. INT'L & COMP. L. REV. 731, 755 (2001).

<sup>33</sup> *Id.* at 755; see The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915, paras. 31-38 (2000).

<sup>34</sup> See Michael A. Corriero, *The Involvement and Protection of Children in Truth and Justice Seeking Processes: The Special Court for Sierra Leone*, 18 N.Y.L. SCH. J. HUM. RTS. 337, 339 (2002).

<sup>35</sup> Lome Accords, *supra* note 5.

<sup>36</sup> Interestingly, the Lome Accords specifically granted RUF leader Foday Sankoh an absolute and free pardon despite his reputation as one of the most gruesome violators of human rights. The accords also named Sankoh as vice president of the new government and head of the diamond industry oversight board. See *id.* at art. IX(1). For negative reactions to the amnesty provisions see Norimitsu Onishi, *How U.S. Left Sierra Leone Tangled in a Curious Web*, N.Y. TIMES, June 4, 2000, at 6 (stating objections from Harold Hongju Koh, assistant Secretary of State for Human Rights; David Scheffer, ambassador at large for war crimes and; Julia Taft, assistant Secretary of State for refugees).

<sup>37</sup> See Gallagher, *supra* note 12, at 162.

<sup>38</sup> Lome Peace Accords, *supra* note 5.

<sup>39</sup> See Amann, *supra* note 11, at 241.

<sup>40</sup> See S.C. Res. 1270, U.N. SCOR, 4054<sup>th</sup> mtg., U.N. Doc. S/RES/1270 (1999).

<sup>41</sup> See Bruce Zagaris, *U.N. Security Council Votes to Establish War Crimes Tribunal for Sierra Leone*, 16 INT'L ENFORCEMENT L. REP. 10 (2000).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

agreement by way of the Abaju agreement, which recommitted the parties to the Lome Accords.<sup>44</sup> This effort was again futile. War continued to rage.

¶ 15 The conflict ultimately ceased when the U.N., Britain, and the United States dispatched to Sierra Leone the world's largest peacekeeping mission.<sup>45</sup> RUF leader Sankoh was subsequently apprehended and has remained incarcerated in an undisclosed area ever since.<sup>46</sup> Sierra Leone is currently recuperating from complete destruction and numerous efforts are underway to stabilize the country.

### III. Creation of the Special Court

¶ 16 Cognizant of the importance of regional stability, the U.N. and the Government of Sierra Leone jointly established the Special Court.<sup>47</sup> The Court is a hybrid judicial system administered concurrently by the U.N. and the Sierra Leone Government.<sup>48</sup> The Court is composed of a trial chamber, an appellate chamber, the prosecutor's office, and the registry.<sup>49</sup> The Court's express purpose is to prosecute those "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . ."<sup>50</sup> The U.N. Secretary General has cautioned that the term "persons who bear the greatest responsibility" does not limit the Court's personal jurisdiction to political and military leaders; it is meant to provide a prosecutorial strategy rather than an element of the crime.<sup>51</sup>

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<sup>44</sup> *Id.* at 10.

<sup>45</sup> See Douglas Farah, *A Separate Peacekeeping: In Sierra Leone, Britain, U.N. Clash over Ultimate Aim*, WASH. POST, Dec. 10, 2000, at A42; Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N.Doc. S/2002/857, para. 18 (stating that U.N. has committed 16,664 troops to Sierra Leone).

<sup>46</sup> See David Bamford, *Foday Sankoh: Rebel Leader*, BBC NEWS ONLINE (May 12, 2000), at [http://newsvote.bbc.co.uk/hi/english/world/africa/newsid\\_737000/737268.stm](http://newsvote.bbc.co.uk/hi/english/world/africa/newsid_737000/737268.stm).

<sup>47</sup> This agreement is different from U.N. Security Council's resolutions creating criminal tribunals for prosecution of war crimes in the former Yugoslavia and Rwanda because the Special Court for Sierra Leone is not vested with U.N. Charter Chapter VII powers which authorize the tribunal to obtain jurisdiction over criminals that are outside the boundaries of the country. Additionally, the Court will be funded "voluntarily" by U.N. member states as opposed to the tribunals created for the former Yugoslavia and Rwanda which are more stably funded by mandatory assessments. Unlike the ICTY, the Special Court statute contains no termination date. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 3217<sup>th</sup> mtg., Doc. S/RES/827 (1993) ("ICTY"); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Neighboring States, between January 1, 1994 and December 31, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 (1994) ("ICTR").

<sup>48</sup> See Michelle Sieff, *War Criminals: Watch Out*, WORLD TODAY (Feb. 1, 2001).

<sup>49</sup> Court Statute, *supra* note 3, at art. 11.

<sup>50</sup> *Id.* at art. 1(1).

<sup>51</sup> Letter from the Secretary General addressed to the President of the Security Council, U.N. Doc. S/2001/40, p. 2-3 (Jan. 12, 2001).

¶ 17 The Court is staffed with local and international judges and prosecutors.<sup>52</sup> The Chief Prosecutor, appointed by the U.N. Secretary General, is to make the final decision on indictments.<sup>53</sup> The Court adheres to the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”).<sup>54</sup> The Court is located in Sierra Leone<sup>55</sup> and imprisonment is to take place in Sierra Leone, provided that the prisons meet U.N. requirements, or in any third country that has signed an agreement with the ICTR or International Criminal Tribunal for the former Yugoslavia (“ICTY”).<sup>56</sup> U.N. member states will voluntarily fund the Court.<sup>57</sup>

¶ 18 Article 10 of the Court statute provides that, “[a]n Amnesty granted to any person falling within the jurisdiction of the Special Court in respect to the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”<sup>58</sup> This clause negates the broad amnesty granted combatants by way of Article XI of the Lome Accords.<sup>59</sup> Some commentators have argued that RUF’s material breach of the Lome Accords renders the amnesty clause void;<sup>60</sup> while others have argued that the amnesty clause never protected war crimes and crimes against humanity.<sup>61</sup> Whatever the case, the statute does not recognize amnesty as a bar to prosecution.

¶ 19 Arguably the most complex and contentious issue facing the Court is the mode of juvenile prosecution and the extent to which corporal punishment is proper. Punishment of juvenile soldiers challenges both the rehabilitative assumptions of the TRC and the

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<sup>52</sup> See Seiff, *supra* note 48.

<sup>53</sup> See Ilene Cohn, *The Protection of Children and the Quest for Truth and Justice in Sierra Leone*, 55 J. INT’L AFF. (2001).

<sup>54</sup> Court Statute, *supra* note 3, at art. 14(1).

<sup>55</sup> See Seiff, *supra* note 48. A new building must be constructed as no existing location is secure or large enough for the Court. The cost of building the Court and renovating a prison will be approximately \$3.5 million. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915, at paras. 60-62 (2000). Some commentators view the location of the Court in Sierra Leone as being a great benefit to the culture, surrounding institutions and rule of law in the region. See, e.g., Cohn, *supra* note 53. Others argue that the location of a criminal tribunal is of fundamental importance in allowing concerned victims to participate in the proceedings and seek redress. See Adama Dieng, *International Criminal Justice: From Paper to Practice—A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 FORDHAM INT’L L.J. 688, 698-99 (2002).

<sup>56</sup> Court Statute, *supra* note 3, at art. 22.

<sup>57</sup> U.N. SCOR, 4186<sup>th</sup> mtg., U.N. Doc. S/RES/1315, at art. 8 (2000) (stating that the Court will be funded by voluntary contributions). The Bush Administration has pledged \$5 million to the Court. See *Annan Will Meet Cash Target for War Crimes Court*, AFRICAN NEWS, July 25, 2001.

<sup>58</sup> Court Statute, *supra* note 3, at art. 10. Article 2 relates to crimes against humanity; Article 3 covers violations of the law of internal armed conflicts; and Article 4 deals with other serious violations of international humanitarian law. *Id.*

<sup>59</sup> Note also that the U.N. representative made a reservation to Article IX of the Lome Accords by noting that war crimes, genocide and crimes against humanity are not protected by the amnesty clause. See Gallagher, *supra* note 12, at 162.

<sup>60</sup> See, e.g., Daniel J. Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT’L L. 347, 376 (2001).

<sup>61</sup> See Gallagher, *supra* note 12, at 162.



propriety of informal, nonpunitive, and relatively short-term social control.<sup>62</sup> The debacle poses complex questions of culpability, justice and impunity, as well as individual and social healing. The Court statute mandates that child soldiers under the age of fifteen at the time of the crime may not face prosecution.<sup>63</sup> The Court statute does, however, permit prosecution of juveniles over the age of fifteen.<sup>64</sup> As Article 7 of the Court statute states:

*The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was, at the time of the alleged commission of the crime, between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.*<sup>65</sup>

¶ 20 The Sierra Leonean Government and its citizenry demand punishment of all culpable parties, including juvenile soldiers.<sup>66</sup> In sharp contrast, the Special Court statute aspires to rehabilitate and reintegrate juvenile soldiers back into their communities. Under the statute, a murderous combatant over the age of fifteen will face no real punishment.<sup>67</sup> Pursuant to Article 7(7) of the Court statute:

*In the Trial of a juvenile offender the Court shall, in the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools, as appropriate, and programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.*<sup>68</sup>

¶ 21 “Rehabilitative sentencing” via the TRC<sup>69</sup> is the most readily available alternative to corporal punishment.<sup>70</sup> The TRC permits perpetrators to divulge to the Commission

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<sup>62</sup> See generally HART, *supra* note 6.

<sup>63</sup> Letter from the Security-General addressed to the President of the Security Council, U.N. Doc. S/2001/40 (January 12, 2001).

<sup>64</sup> *Id.*

<sup>65</sup> Court Statute, *supra* note 3, at art. 7.

<sup>66</sup> See Brutal Child Army Grows Up, BBC NEWS ONLINE (June 1, 2000), at [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_743000/743684.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_743000/743684.stm). In fact, in negotiations to establish the Special Court, the Government of Sierra Leone demanded that suspects of all ages be subject to prosecution and that convictions carry the possibility of capital punishment. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 52d Sess., U.N. Doc. S/2000/915 (2000).

<sup>67</sup> See Letter from the Security-General, *supra* note 63; see also Amann, *supra* note 11, at 243.

<sup>68</sup> Court Statute, *supra* note 3, at art. 7(7).

<sup>69</sup> See Letter Dated 22 December 2000 from the President of the Security Council addressed to the Secretary General, U.N. Doc. S/2000/1234 (2000) (noting that the Truth and Reconciliation Commission will have a “major role to play” in sentencing child soldiers).

their individual roles in the war without facing punishment.<sup>71</sup> The TRC's paramount objective is to create a historical record of human rights violations committed during the civil war.<sup>72</sup> TRC proponents argue that it is the most effective accountability mechanism for juveniles because "it allows the victim and perpetrator to heal emotionally and psychologically."<sup>73</sup> The TRC will promulgate a final report discerning the causes, nature, and extent of the human rights violations in Sierra Leone. The Government will ultimately utilize these findings to help achieve improved insight into the causal factors of the war so to prevent future conflicts.<sup>74</sup>

¶ 22 The post-war landscape presents to the Court an anomalous situation: The victims demand severe punishment of the most culpable juvenile soldiers, while the Court statute seeks to rehabilitate and reintegrate the violent juveniles back into the very communities they once terrorized.<sup>75</sup> In the absence of corporal punishment, this situation is extremely difficult, if not impossible, to reconcile.

#### IV. Current Proposals

##### A. Creation of a Separate Juvenile Chamber

¶ 23 Recent proposals advocate the establishment of a separate juvenile division to adjudicate juvenile matters.<sup>76</sup> A separate juvenile division, the argument goes, would provide a more efficient and fairer means by which to adjudicate juvenile matters and maximize rehabilitative goals.<sup>77</sup> Although U.N Secretary-General Annan recommended a comparable children's chamber, the Security Council expressly rejected the proposal,<sup>78</sup> ostensibly regarding the idea as superfluous due to the Court's current capability of adequately addressing juvenile matters.<sup>79</sup>

##### 1. Problems with a Separate Juvenile Chamber

¶ 24 The major premise underlying a separate chamber is that juvenile soldiers should be treated disparately from adult offenders because they are somehow less culpable and

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<sup>70</sup> Lome Accords, *supra* note 5. The TRC became law in Sierra Leone in 2000 and the first commission is set up in Makeni, in Eastern Sierra Leone. See The Truth and Reconciliation Commission Act 2000, available at <http://www.sierra-leone.org/trccat2000.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Zarifis, *supra* note 1, at 20.

<sup>73</sup> *Id.* at 21.

<sup>74</sup> *Id.*

<sup>75</sup> See Human Rights Watch: Children's Rights Project, Children in Combat, 1996, at <http://www.hrw.org/press> (noting that child soldiers were made to commit atrocities against their own communities or families).

<sup>76</sup> See, e.g., Corriero, *supra* note 34; Amann, *supra* note 30. Although I agree with the conclusion proffered by Amann that adjudication of selected juvenile cases is appropriate, I disagree with the proposition that a separate juvenile chamber is the correct means to that end. See discussion below in section III A(1).

<sup>77</sup> See *id.*

<sup>78</sup> Letter Dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, *supra* note 69.

<sup>79</sup> See Amended Draft Statute, U.N. Doc. S/2000/1234 (2000).

more easily rehabilitated.<sup>80</sup> Advocates argue that this disparate treatment strictly adheres to fundamental principals of criminal justice.<sup>81</sup> The ultimate goal of the proposal, however, remains rehabilitation and reintegration of juvenile soldiers into the very communities that demands their punishment. One commentator hopes, perhaps over-idealistically, that the Special Court will “lay a foundation for an effective system of decriminalizing the conduct of child soldiers, and bring a sense of order, fairness and dignity to those aggrieved.”<sup>82</sup>

¶ 25 The argument that ignoring the horrendous behavior of juvenile soldiers will somehow bring “order, fairness and dignity”<sup>83</sup> employs faulty logic and is pragmatically troubling. How will decriminalizing systematic murder and rape bring any sense of fairness, order, or dignity to the victims? The supposition counterintuitive, but is blatantly counterfactual, ignoring Sierra Leoneans’ demand for punishment of all culpable combatants. Although child soldiers are chronologically juveniles, their criminal conduct is indistinguishable from that of their adult counterparts. In the absence of adequate punishment, mayhem and social disorder will result, since “decriminalizing” criminal behavior negates the deterrent and retributive hallmarks of criminal law, leaving the victim no remedy other than self-help.

¶ 26 Furthermore, the current proposal’s presupposition that rehabilitation and reintegration are attainable ends is erroneous. In Sierra Leonean society, where the average male life span is thirty-seven, significant responsibility is assumed at an early age.<sup>84</sup> A fifteen-year-old Sierra Leonean combatant is effectively middle-aged.<sup>85</sup> To seek rehabilitation at that age in the absence of punishment would at best be extremely difficult and often futile. Violent juvenile soldiers have forfeited the special place in life they enjoyed before their crimes, so that society’s benign attitude toward minors does not extend to embrace them.<sup>86</sup> It is a truism that “victims of criminal acts suffer the same injuries, regardless of the age of the perpetrators.”<sup>87</sup> Without an adequate deterrent, the statutory goal of rehabilitation of learned and experienced combatants is an unattainable illusion.<sup>88</sup> To be sure, the seminal report on child soldiers, conducted by child soldier

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<sup>80</sup> See, e.g., Corriero, *supra* note 34, at 348 (“[C]hildren deserve to be treated differently from adults, that because of their youth they are malleable, and therefore less committed to their misconduct and more susceptible to positive influence . . .”)

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 350 (emphasis added).

<sup>83</sup> *Id.*

<sup>84</sup> See U.N. Development Programme, Human Development Report 2000, 137 (2000) (noting that Sierra Leone’s life expectancy rate is 37.2 years and contrasting the life expectancy in Canada of seventy-nine years).

<sup>85</sup> This proposition is buttressed by the fact that age is an incomplete proxy for levels of maturity during the years from twelve to eighteen. See Franklin E. Zimring, *The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts*, 6 VA. J. SOC. POL’Y & L. 437, 462 (1999).

<sup>86</sup> See, e.g., Barry Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal,”* 65 MINN. L. REV. 167 (1981).

<sup>87</sup> Feld, *supra* note 86, at 169.

<sup>88</sup> *But see* Michael A. Corriero, *Sentencing Children Tried and Convicted as Adults*, 7 N.Y. ST. BAR ASSOC. CRIM. JUST. J. 49 (1999) (arguing that rehabilitation of minors is an attainable goal because the judge can positively influence the child and thus rehabilitate her and allow the child to “develop”

expert Graca Machel for the U.N., concluded that “[i]t is difficult if not impossible, to achieve reconciliation without justice.”<sup>89</sup> Unpunished criminals produce justice for no one; the victim’s grievances go unnoticed and unaddressed, and the criminal actor remains unattached to community norms and unscathed by disapproval. As a pragmatic matter, “[t]here can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance.”<sup>90</sup> A fundamental ingredient inherent in any notion of “justice” is punishment for a wrong.

¶ 27 Deterrence and retribution must be the Court’s primary objectives to realistically achieve stability in the country. Rehabilitation is a laudable goal, but given Sierra Leoneans’ demand for punishment, it must exist as a secondary objective.<sup>91</sup> In a country where juvenile soldiers deem human life worthless, the efficacy of rehabilitation is questionable, while the benefits of deterrence and retribution are more concrete. Criminal prosecution as a response to the mass atrocities will bring a measure of justice and recognition to the victims.<sup>92</sup> Regional stability and the rule of law—the hallmark of democracy—necessitate the imposition of penal sanctions that maximize the deterrent and retributive goals of criminal law.

¶ 28 Policymakers must also remain aware of the message that the Court conveys to Sierra Leoneans. That is, it is crucial that policymakers focus on the message that civilians ultimately understand from the Court’s policy rather than what policymakers intend.<sup>93</sup> Inherent in a policy of strict adherence to rehabilitative principals is the message that murderous criminals will go unpunished, and will instead be “counseled” on the government’s dime and then placed back into the very communities they tortured. Victim’s families will be left to grieve with nothing save unresolved loss, mourning, and want for justice. The victim’s family—by human nature—will resort to their own forms of retribution, usurping the Special Court’s role and taking justice into their own hands, thus continuing the vicious cycle of violence in Sierra Leone. Furthermore, the strictly rehabilitative approach will teach future rebels that at the conclusion of war, rehabilitative benefits will accrue and no real punishment will be rendered. Subtextually, the current approach conveys a message that a new era of accountability is unrealistic, and when criminal accountability appears unrealistic to society, there is little hope for

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character). I take issue with this conclusion based on the author’s heavy reliance on the judge as a role model and the judge’s essential place in making rehabilitation succeed. Deterrence and retribution are the key elements in correcting the criminal behavior of a juvenile. The judge’s role is that of an unbiased third party, rather than a “father figure.” Furthermore, the article seems to lose sight of the *real* victim and place emphasis on the culpable juvenile as the victim—which is not the case.

<sup>89</sup> Impact of Armed Conflict on Children: Report of the expert of the Secretary-General, Ms. Graca Machel, submitted pursuant to General Assembly resolution 48/157, P 34, U.N. Doc. A/51/306, 51<sup>st</sup> Sess., Item 108 of the provisional agenda (1996) (hereinafter “Machel Report”).

<sup>90</sup> BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 30, 31 (1980).

<sup>91</sup> *But see* Amann, *supra* note 30, at 182 (arguing that the primary goal of rehabilitation can be maximized through the use court trials).

<sup>92</sup> Fritz & Smith, *supra* note 14, at 391.

<sup>93</sup> For an interesting discussion of expressive theories of law see Amann, *supra* note 11, at 238.

stability, especially in a region recovering from a decade-long civil war. As one learned commentator has noted, “[p]unishing those responsible for the atrocities in Sierra Leone, by conveying a concrete message of accountability, may begin to break that cycle of violence.”<sup>94</sup>

## 2. Infeasibility of a Separate Juvenile Chamber

¶ 29 The Court’s scarce resources significantly hamper the potential for a separate juvenile’s chamber. The Court is funded through voluntarily contributions from U.N. member-states.<sup>95</sup> The U.N. originally planned to raise \$32.2 million for the initial start-up and first-year of the Court, and \$84.4 million for the next two years.<sup>96</sup> The United Nations, however, endured significant problems raising the capital and consequently drastically reduced the budget to \$16.8 million for the first year for a total of \$57 million over the Court’s first three years.<sup>97</sup> Juxtaposed to the ICTR and the ICTY, which respectively receive \$80 and \$96 million annually, the Special Court is on a tight-rope budget.<sup>98</sup> As a practical matter, “it will be very difficult for this Court to look productive given the [financial] constraints it will have operating in Sierra Leone.”<sup>99</sup> In light of the significant costs related to U.N. employees living in Freetown,<sup>100</sup> additional U.N. personnel to staff a separate juvenile court simply is not feasible. The costs of separate trials in a separate court, which would be held to international standards, would quickly deplete the Court’s minuscule budget.<sup>101</sup>

¶ 30 Moreover, prosecution of juveniles under the Court’s current structure would produce similar results without the excessive cost. The Court statute already delineates standards by which child combatants are to be adjudicated,<sup>102</sup> obviating the need for a separate chamber. A separate chamber would merely serve a semantically-oriented purpose, allowing proponents to postulate that children are being treated “fairly” because jurisdictional power is vested in a different court, where in fact the end-results would be the same. To be sure, when punishing juveniles, the Special Court can only prosecute the most culpable violators of human rights; inclusion of child combatants within the jurisdictional province of the Court will not increase its prosecutorial scope. A separate

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<sup>94</sup> *Id.* at 245.

<sup>95</sup> U.N. SCOR, 4186<sup>th</sup> mtg., U.N. Doc. S/RES/1315, at art. 8 (2000) (stating that Court will be funded by voluntary contributions). Some commentators argue that the Court’s voluntary funding scheme evinces U.N. reluctance to add another court to its mandatory funding structure and that the U.N. is trying to keep an arms-length relationship with the Court. *See, e.g.,* Celina Schocken, Note, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436, 453 (2002).

<sup>96</sup> Letter Dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2001/693 (2001).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Schocken, *supra* note 95, at 453.

<sup>100</sup> *Id.* at 454 (the high costs include transportation, health, and safety costs associated with living in a city like Freetown).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

chamber would thus cause severe inefficiencies, hamper judicial economy, and impede justice in an area in dire need of swift and adequate justice.

#### B. Truth and Reconciliation Commission as the Sole Punishment

¶ 31 Various non-governmental organizations (“NGO’s”) argue that the TRC is sufficient “punishment” for juvenile soldiers because prosecution would weaken rehabilitative efforts.<sup>103</sup> The argument is based on the idea that prosecution stigmatizes defendants and adversely affects rehabilitation and reintegration. Some NGO’s presume that every juvenile offender was forced into warfare. From this they deduce that holding juveniles accountable for their vicious crimes would endanger the efficacy of rehabilitation.<sup>104</sup> According to Human Rights Watch:

*Although we believe that children should be accountable for their offenses, in light of their inherent immaturity as well as the subjection of many child combatants to forcible abduction, brutalization and other forms of coercion, we recommend that the Special Court’s limited resources would be far better used in pursuit of justice for adult offenders, rather than children.*<sup>105</sup>

¶ 32 The statement fails, however, to articulate why the Court’s limited resources would be better utilized prosecuting adult combatants while granting absolute immunity to juveniles. More importantly is the omission of any empirical evidence—or any other form of evidence—that justifies complete immunity for all juvenile soldiers under the age of eighteen.

##### 1. Problem with the TRC as the Sole Punishment

¶ 33 The Court’s scarce resources should indeed be utilized to prosecute the most culpable parties, but it does not follow that a fortiori violent juveniles should go unpunished. The Court is directed to “prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law . . . .”<sup>106</sup> This clause textually confines the Court’s prosecutorial scope, making it rather contradictory and arbitrary to postulate that violent juveniles should be categorically immune from prosecution because of their status as minors to assure that only the most culpable parties are prosecuted.

¶ 34 Juvenile soldiers were among the most violent actors in the war, and certain juvenile combatants voluntarily assumed key leadership roles.<sup>107</sup> The unambiguous text of the statute should be effectuated irrespective of the artificial adult/minor dichotomy.<sup>108</sup>

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<sup>103</sup> See Amann, *supra* note 30, at 167.

<sup>104</sup> *Id.* (noting objections to child prosecutions by United Nations Children’s Fund (UNICEF), Amnesty International, and Human Rights Watch who actively campaigned against the inclusion of juveniles under the Court).

<sup>105</sup> Human Rights Watch, Justice and the Special Court for Sierra Leone: Letter to United Nations Security Council, Nov. 1, 2000, at <http://www.hrw.org/press/2000/11/sl-ltr.htm>.

<sup>106</sup> Court Statute, *supra* note 3, at art. 2.

<sup>107</sup> See Webster, *supra* note 32, at 755.

<sup>108</sup> Although those under the age of fifteen should not be prosecuted. See discussion *infra*.

One must recognize that “[t]he continuation of the artificial juvenile/adult dichotomization has [historically] resulted in a disservice to the public safety.”<sup>109</sup> It is the proper role of the Court to determine who is “most responsible” for the mutilations, rapes, and extra-judicial killings. If a juvenile soldier is one of the most culpable parties then appropriate punishment is necessary.<sup>110</sup>

¶ 35 The TRC permits juveniles to disclose their violent crimes to the Commission without facing any form of punishment.<sup>111</sup> If rehabilitation is the main concern, one should consider the rehabilitative theory of criminal law: Imprisonment benefits the criminals themselves by reforming their characters so they are no longer motivated to engage in crime.<sup>112</sup> Concededly, the TRC plays a valuable role in documenting the atrocities, but it is an idealistic fantasy to intimate that the Commission suffices as punishment for violent criminals. Moreover, sufficient documentation of war crimes can be accomplished through trial mechanisms.<sup>113</sup>

¶ 36 While one may justifiably seek emotional repair and rehabilitation for criminals via the TRC, the Court’s paramount objectives must be deterrence and retribution. The only juveniles potentially facing punishment are those who voluntarily and intentionally committed war crimes.<sup>114</sup> The true victims in this situation are not the murderers, but the grieving families and innocent civilians on the receiving end of the crime. Encouraging dangerous criminals to disclose their crimes without punishment will not prevent another war; it will merely serve as an opportunity to “reintegrate” until the next coup d’etat presents itself. The then-child soldier now becomes an experienced and undeterred leader of a lawless faction.

¶ 37 More subtly, what happens when a violent juvenile soldier is “reintegrated” into society and upon minimal provocation reverts to learned and unpunished war-like tactics? This scenario is sure to come to fruition if undeterred criminals are merely interviewed and released back into the very society they tortured. Will the criminal actor continue to avoid punishment? Or is punishment permissible at this point? The answer must be that punishment should occur at the time of the original crime to prevent subsequent crimes.

¶ 38 Admittedly, rehabilitation, when properly executed, negates some of the expected draconian reactions of juvenile soldiers, but not all of the adverse affects of non-punishment are alleviated. Withstanding complete rehabilitation, the fact still remains that victims’ wrongs will not be righted absent putative sanctions vis-à-vis those

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<sup>109</sup> See P. STRASBURG, TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 5 (1978).

<sup>110</sup> Note that most expert believe that under the current statute most child soldiers will not face prosecution because of their subordinate roles. See Barbara Crossette, *Sierra Leone to Try Juveniles Separately in U.N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

<sup>111</sup> See Lome Peace Accords, *supra* note 5.

<sup>112</sup> Dolinko, *supra* note 7, at 1626.

<sup>113</sup> Documenting war crimes that are determined to have taken place by the Court will lead to even more accurate documentation. The Court will assure that the crimes documented did in fact take place as alleged rather than depending on the “unchecked” word of the perpetrator. Furthermore, the facts behind the crime will better reflect what actually occurred if the Court is the source of the information.

<sup>114</sup> See Corriero, *supra* note 34, at 339.

responsible. The practical result of unredressed wrongs is regional instability as victims seek vindication by any means. If the Court is unable to prosecute the most culpable criminals, including juveniles, the goals sought by the Court—accountability, regional stability, and the rule of law—will remain unattainable.

## 2. Juvenile Punishment is Consistent with International Norms

¶ 39 As a basis for blanket immunity for juvenile soldiers, proponents postulate that putative punishment of juveniles runs counter to international norms.<sup>115</sup> If, however, one looks at the enabling statute for the International Criminal Court (“ICC”)—the epitome of international norms—punishment of juvenile criminals for crimes against humanity, genocide, and other horrific crimes is permissible.<sup>116</sup> Moreover, many nation-states have implemented adjudicatory procedures for juveniles charged with conduct that would be criminal if committed by an adult.<sup>117</sup> In determining punishment, Western nations have for some time treated violent juveniles as adults.<sup>118</sup> More compelling, however, is non-Western acceptance of juvenile punishment.<sup>119</sup> The fact is that prosecuting juvenile soldiers for their gruesome war crimes is in conformity with international norms and necessitated by the delicate post-war situation in Sierra Leone.

## V. The Appropriate Solution

¶ 40 The Court must promote the integrity of the criminal law and assure accountability. To this end, the most effective solution is to treat juvenile soldiers (at least fifteen years old) similar to their adult counterparts upon a finding that they voluntarily joined a warring faction and voluntarily committed heinous crimes. The gravamen of the two-prong requirement is that the soldier possessed the requisite mens rea to join a warring faction and the mens rea to commit the crime. This high standard of criminal liability normatively corresponds with international criminal law jurisprudence, which requires one to possess an undiminished capacity to exercise free will in choosing between right and wrong.<sup>120</sup> The second essential element is the age constraint: The child soldier must have been at least fifteen years old at the time of the crime’s commission.<sup>121</sup>

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<sup>115</sup> See Crossette, *supra* note 110, at A7.

<sup>116</sup> Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, arts. 1, 17, reprinted in 37 I.L.M. 999.

<sup>117</sup> See United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985) (establishing standards for U.N. members states to follow in implementing juvenile justice systems).

<sup>118</sup> See, e.g., Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783 (2000); Cecile Prieur, *La protection judiciaire de la jeunesse defend ses missions educatives*, Le Monde, Nov. 21, 2000.

<sup>119</sup> See Beresford, *supra* note 118.

<sup>120</sup> See Thomas Critiques the ‘Rights Revolution,’ LEGAL TIMES, May 23, 1994 (discussing the underlying principals of justice and fairness).

<sup>121</sup> This article argues that the Court should look at the combatant’s age at the time of commission of the crime rather than the age at the time of voluntarily joining the faction. This is because the crime (as opposed to indoctrination into the faction) is the *actus reus* with which we are primarily concerned.



Although “line-drawing” with regard to age and punishment is intrinsically arbitrary, it is necessary to effectuate the rule of law.<sup>122</sup> Fifteen years of age is the minimum age under the current Court statute for prosecution<sup>123</sup> and it was until recently the minimum age for recruitment into armies pursuant to the most widely ratified international convention.<sup>124</sup> Furthermore, fifteen years of age has been deemed an appropriate age for prosecution by Western and non-Western nations alike.<sup>125</sup>

#### A. The Proper Framework

*[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.*<sup>126</sup>

¶ 41 The Special Court’s primary purpose is to punish those most responsible for grave human rights violations.<sup>127</sup> The most culpable parties for the summary executions, rapes, mutilations, and other horrific crimes must face severe punishment for their actions.

¶ 42 While great significance should not be placed on rehabilitation and reintegration absent a punitive response, it is nonetheless a worthwhile ancillary goal. Despite skepticism surrounding the efficacy of rehabilitation and reintegration without “justice,”<sup>128</sup> it nonetheless may be an attainable goal where the juvenile’s culpability is minimal. Furthermore, given the Court’s limited resources, rehabilitative measures will have to suffice as “punishment” for minimally culpable parties. Paramount attention and resources must be expended prosecuting the most culpable parties.<sup>129</sup>

¶ 43 To that end, proposed below is a procedural design for an ad hoc criminal tribunal in Sierra Leone that maximizes judicial economy and efficacy. The adjudicatory process consists of an initial fact-finding phase conducted by the prosecutor, followed by a trial when appropriate, and concludes with a sentencing phase, at which time the Court considers mitigating factors including age and immaturity. The adjudicatory process is

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<sup>122</sup> See Amman, *supra* note 30, at 180.

<sup>123</sup> Court Statute, *supra* note 3, at art. 7(2).

<sup>124</sup> See Letter from the Security-General addressed to the President of the Security Council, *supra* note 63. Fifteen years of age was until recently the permissible age for recruitment and participation under Article 38 of the Convention on the Rights of the Child. G.A. Res. 44/25, U.N. GAOR, 44<sup>th</sup> Sess., at art. 38, U.N. Doc. A/Res/44/25 (1989). The Convention is the most widely ratified human rights treaty in history, with 191 participatory nations. Jisha S. Vachachira, *Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 18 N.Y.L. SCH. J. HUM. RTS. 543, 544 (2002). Note, however, that a recent optional protocol increased the age for voluntary recruitment to sixteen for recruiting national armed forces. Optional Protocol to the Convention on the Rights of the Child in the Involvement of Children in Armed Conflict, G.A. Res. 54-263, U.N. GAOR, 54<sup>th</sup> Sess., Agenda Item 116(a), U.N. Doc. No A/RES/54/263 (2001).

<sup>125</sup> See, e.g., Beresford, *supra* note 118, at 783.

<sup>126</sup> *Gregg v. Georgia*, 428 U.S. 153, 226 (1976).

<sup>127</sup> This follows the Court’s current policy approach. See Court Statute, *supra* note 3, at art. 1(1).

<sup>128</sup> See Machel Report, *Impact of Armed Conflict on Children: Report of the expert of the Secretary-General*, Ms. Graca Machel, submitted pursuant to General Assembly resolution 48/157, *supra* note 88 (noting that rehabilitation may be impossible without “justice”).

<sup>129</sup> See Court Statute, *supra* note 3, at art. 1(1).

the same for both adult and juvenile offenders, although the Court will formulate additional inquiries in juvenile cases. The macro-level focal point is on regional stabilization and the establishment of the rule of law by way of deterrence and retribution. To this end, the Special Court should follow the lead of the ICTY and impose “imprisonment to protect society from the hostile, predatory conduct of the guilty accused.”<sup>130</sup>

### 1. The Fact-Finding Phase

¶ 44 The adjudicatory process for adult and juvenile soldiers should initially consist of a thorough fact-finding phase comprised of a preliminary investigation, legal analysis of the discovered facts, and a determination of prosecutorial success. The prosecutor should consider the culpability of the offender to determine whether punishment is warranted. The prosecutor must meticulously explore the nature of the crime and the suspected perpetrator to settle on the correct response. At the forefront of the prosecutorial decision-making process must be the Court’s express statutory purpose of prosecuting only the most culpable combatants.<sup>131</sup> This statutory limit necessarily fixes the prosecutor’s outer-boundary in the fact-finding phase and serves to check unfettered discretion.<sup>132</sup> The prosecutor should consider mitigating factors established by the Court.<sup>133</sup> Only if there is clear and convincing admissible evidence to prove that the combatant voluntarily participated in the conflict should the investigative phase proceed.

¶ 45 Despite the pragmatic attractiveness of this approach, some commentators have argued that the judge in the case should serve as the prosecutorial decision-maker.<sup>134</sup> This proposal, however, is extremely problematic in terms of procedural and substantive due process. To be sure, if a judge is permitted to evaluate a crime and determine the validity of the charge prior to hearing the case, the judge is no longer an unbiased adjudicator; the judge will have inevitably made a premature determination that the defendant is (or is not) culpable to some degree and should (or should not) face prosecution. Inherent in the prosecutorial decision-making process is the determination that the defendant is (in)sufficiently guilty to even face trial. The intermingling of the judicial and prosecutorial roles in the fact-finding phase permits the judge to take undue consideration of inadmissible evidence at trial. This approach directly contradicts rudimentary principals of fairness and due process—essential elements of any fair trial.<sup>135</sup> The

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<sup>130</sup> Prosecutor v. Delalic, Case No. IT-96-21-T, P1232, Trial Chamber, Nov. 16, 1998, *available at* <http://www.un.org/icty/celebici/trialc2/judgment/index.htm>.

<sup>131</sup> See Court Statute, *supra* note 3, at art. 2.

<sup>132</sup> Note that prior to appointment as a prosecutor, a thorough investigation should be conducted to alleviate the problem of conflicts of interest or bias in decision making. This, in conjunction with the statutory limit, will substantially negate abuse of discretion by prosecutors in determining who to prosecute.

<sup>133</sup> For a discussion of the mitigating factors that the Court should consider in adjudicating child combatant cases see discussion *infra* in section 3.

<sup>134</sup> See, e.g., Corriero, *supra* note 34, at 346.

<sup>135</sup> See United Nations Convention on the Rights of the Child. G.A. Res. 44/25, U.N. GAOR 61<sup>st</sup> mtg. (1989) (noting fundamental Due Process rights of children); see, e.g., *Kent v. United States*, 383 U.S. 541, 5XX (1966) (noting critical role of fair procedure and full investigation in satisfying the basic requirements of due process and fairness in juvenile offender cases).

prosecutor must retain broad prosecutorial discretion pursuant to the current Court statute.<sup>136</sup> Prosecutorial decision-making allows a fair determination of the legal sufficiency of a charge while liberating the judge from pretrial bias.<sup>137</sup>

¶ 46 When the accused is a juvenile, the prosecutor should first determine the manner in which the combatant became involved in the warring faction, namely whether association was voluntary or involuntary. This inquiry is critical since many juveniles were conscripted into battle.<sup>138</sup> Cases involving conscription should not be prosecuted due to the actor's diminished capacity to exercise free will. Prosecution in these cases would not effectuate the statutory purpose.

¶ 47 Concededly, a determination of the voluntary nature of inculcation may be complicated in situations where child soldiers joined a faction out of economic desperation.<sup>139</sup> Illustrative of this complexity are the remarks of an eight-year-old orphan who fought in Sierra Leone and Liberia:

*There, there was tribal war. There, street children like me became child soldiers . . . Small soldiers had it all. They had Kalashnikovs. Kalashnikovs, those are rifles invented by a Russian that shoot without stopping. With Kalashnikovs, child soldiers had it all. They had money, even American dollars. They had shoes, military stripes, radios, caps, and even cars, called 4 by 4's. I cried, 'Walahe! Walahe!' I wanted to go to Liberia. Quickly.*<sup>140</sup>

¶ 48 The determination of volition must be made on a case-by-case basis, rather than a through a bright-line rule effectively allowing juveniles to avoid prosecution upon concocting a claim of “constructive coercion” via impoverishment. The prosecutor should consider the extent of poverty suffered and the causal connection between poverty and association with the faction. Prima facie the factual undertaking seems daunting, but recall that only those parties most responsible for the atrocities will be prosecuted, which necessarily limits the scope of inquiry.<sup>141</sup> Although contemporary thought dictates that the intentional taking of a life without justification requires a punitive response when the offender has even minimal appreciation for the nature of her acts and their

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<sup>136</sup> See Cohn, *supra* note 53.

<sup>137</sup> Although one may argue that the prosecutor has too much discretion, “absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the [imprisonment] if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape [penalty] through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.” *Gregg v. Georgia*, 428 U.S. 153, 225 (1976).

<sup>138</sup> See generally Webster, *supra* note 32, at 755; Amann, *supra* note 11, at 237.

<sup>139</sup> Some child soldiers joined armed factions out of despair and poverty. Webster, *supra* note 32.

<sup>140</sup> AHMADOU KOUROUMA, ALLAH N'EST PAS OBLIGE 45 (2002). Translated by Amann, *supra* note 30, at 168.

<sup>141</sup> See Court Statute, *supra* note 3, at art. 1(1).

consequences,<sup>142</sup> this is unachievable given the Court’s limited scope and resources.<sup>143</sup> As a protection to defendants, a determination of volition by the prosecutor is not a per se preclusion from raising the issue at trial as an affirmative defense.

¶ 49 If the juvenile was abducted and forced to engage in battle, culpability is minimal and the investigation should cease. If, however, clear and convincing evidence indicates that the juvenile voluntarily joined the faction—uninfluenced by coercive measures—the investigative phase should continue.

¶ 50 The prosecutor’s next consideration is the volitional nature of the commission of the alleged crime. Investigation should halt when a child voluntarily joined a faction but was forced to commit a crime, since the actor lacked the requisite mens rea. Although the combatant is culpable of the actus reus of joining the faction, culpability is minimal because this actus reus was coerced.<sup>144</sup>

¶ 51 If the combatant intentionally committed the crime, the prosecutor should conduct a severity determination. If the alleged crime is of overall de minimus significance and prosecution would not further the Court’s statutory purpose,<sup>145</sup> the investigation should cease. Determinative factors may include: the gravity and severity of the crime, the effects of the crime on civilians, the violent nature of the crime, and the extent to which the crime violated international humanitarian law and Sierra Leonean law. The excuse that “some young people failed to exercise their evolving capacity to determine right from wrong in Sierra Leone”<sup>146</sup> should not preclude prosecution when the above-mentioned factors exist. If a thorough investigation reveals that a juvenile bears the greatest responsibility and that all acts were committed voluntarily, the Court should conduct a full trial.

## 2. The Trial Phase

¶ 52 The trial should resolve the factual determinations made during the investigative phase. The defendant is presumed innocent until proven guilty “beyond a reasonable doubt.”<sup>147</sup> The soldier should receive the assistance of competent counsel throughout the proceedings.<sup>148</sup> The burden of proof and production remains on the prosecution except where the defendant is attempting to prove an affirmative defense, such as coercive indoctrination or insanity. The Rules of Evidence adopted from the ICTR will govern the

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<sup>142</sup> See Zimring, *supra* note 85, at 438.

<sup>143</sup> Court Statute, *supra* note 3, at art. 7(7).

<sup>144</sup> This scenario appears to fall under the rubric of an excusable crime due to fear of death for noncompliance.

<sup>145</sup> To prosecute those parties most responsible of the atrocities. Court Statute, *supra* note 3, at art. 7.

<sup>146</sup> U.N. SCOR, Res. 1315, Situation of Sierra Leone Special Court, U.N. Doc. S/RES/1315 (2000); See Olara Otunnu, *Rights: U.N., Sierra Leone Agree on War Crimes Court*, INTER PRESS SERVICE, Oct. 5, 2000.

<sup>147</sup> See JOSHUA DRESSLER, CRIMINAL LAW (2d ed.).

<sup>148</sup> For a discussion of counsel’s responsibilities during the course of a criminal trial and at sentencing see generally Institute of Judicial Administration, American Bar Ass’n, Standards Relating to the Prosecution Function and the Defense Function (1971); Institute of Judicial Administration, American Bar Ass’n, Standards Relating to Sentencing Alternatives and Procedures (1968).

admissibility of evidence.<sup>149</sup> When the defendant is a juvenile, the Court must follow the prescribed statutory standards and treat all child soldiers “with dignity and a sense of worth . . . in accordance with international human rights standards . . .”<sup>150</sup> The adjudicatory phase should “ensure that the most recalcitrant and feared young offenders, those perhaps least likely to seek programmatic and therapeutic support, are brought into a credible system of justice . . .”<sup>151</sup> and tried before an impartial tribunal. The Court must “examine each offender’s personal responsibility for the harm done, not only the degree of harm to the victims.”<sup>152</sup>

¶ 53 Upon a finding of guilt, the adjudicatory process should continue to the sentencing phase. When a defendant is found not guilty, the Court should issue a memorandum opinion stating that the defendant underwent a full and fair trial and was found not guilty. The opinion could be published in a local paper to shred the clouds of public doubt and make reintegration more plausible.

### 3. Sentencing Phase

¶ 54 The sentencing phase embodied in the current Court statute is the most noteworthy flaw in the Court’s institutional design. Currently, it is impermissible to imprison a guilty juvenile between the ages of fifteen and eighteen.<sup>153</sup> A culpable juvenile may only be assigned to a rehabilitative mechanism—typically the TRC—where the only “punishment” rendered is voluntary disclosure of the crimes.<sup>154</sup> Upon “rehabilitative punishment” the convicted criminal is placed back into the very community she terrorized and the very community that demands her punishment.<sup>155</sup>

¶ 55 In determining the proper sentence, deterrence should guide the Court. The Court must send a message through the prospect of imprisonment that violent behavior in contravention of international social norms<sup>156</sup> will be adequately punished. Imprisonment will signal to potential murderers that society will assuredly respond—and harshly so—to their actions.<sup>157</sup>

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<sup>149</sup> Court Statute, *supra* note 3, at art. 14(1).

<sup>150</sup> *Id.*

<sup>151</sup> Otunnu, *supra* note 6, at 129.

<sup>152</sup> Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 764 (1986).

<sup>153</sup> Court Statute, *supra* note 3, at art. 7(2).

<sup>154</sup> See Letter from the Security-General, *supra* note 63.

<sup>155</sup> *Id.*

<sup>156</sup> I refer to international social norms because the current war-intensive social norms established in Sierra Leone during the decade long conflict are the very evil sought to be abolished by the Special Court. As I mentioned above, during the civil war it was socially normal for a child to take up arms and fight, whether voluntarily or involuntarily. See Corriero, *supra* note 34, at 351-52. International norms must be imposed because for participants in mass atrocities, “criminal conduct that is normally characterized as ‘deviance’ is transformed into acceptable, even desirable, behavior.” Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 11 (2001).

<sup>157</sup> Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 950-51 (1966).

¶ 56 The deterrent effect of imprisonment will benefit all Sierra Leonean citizens. Imprisonment will specifically deter the perpetrator from taking up arms against her fellow citizens and convey the message that violence is an unacceptable means of dispute resolution. As the Machel Report stated, “[u]nless those at every level of political and military command fear that they will be held accountable for crimes and subject to prosecution, there is little prospect of restraining their behaviour . . . .”<sup>158</sup> Furthermore, the stigma of indictment attached to juvenile combatants will incapacitate them by discrediting their leadership potential and undermining their future political influence.<sup>159</sup> Imprisonment will also deter Sierra Leoneans from perpetrating crimes. Such punishment disincentivizes citizens from criminal behavior as a means of ameliorating grievances.

¶ 57 Retributive goals should supply the second guiding principal for the Court. As the United States Supreme Court has stated:

*[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.*<sup>160</sup>

¶ 58 The establishment of social stability necessitates the need for citizens to feel that true justice was served.<sup>161</sup> The only civilized alternative to victims’ desire for revenge is official rendering of justice.<sup>162</sup> It is a truism that adequate “[p]unishment must be one of the appropriate responses of any legal authority . . . .”<sup>163</sup> especially for a legal authority seeking to establish governmental legitimacy and the rule of law.

¶ 59 Victims are particularly unlikely to believe that “justice” was fulfilled when convicted killers are “sentenced” to merely disclose the killings and subsequently released. The notion underlying retribution is that collective societal retribution vis-à-vis combatants will render the victims less likely to pursue self-help measures that would in and of themselves violate international humanitarian law.<sup>164</sup> In the absence of official

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<sup>158</sup> Machel Report, *supra* note 88, at 248 (emphasis added).

<sup>159</sup> Harvard Law Review Association, *The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1962 (2001) (noting argument that criminal indictments may incapacitate fugitives by discrediting their leadership and influence); see U.N. SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg. at 13, U.N. Doc. S/PV. 3217 (1993) (stating that ad hoc tribunal indictees “will become international pariahs”); see also Akhavan, *supra* note 156, at 7 (noting that individual leaders have been undermined by prosecution by ad hoc courts).

<sup>160</sup> *Furman v. Georgia*, 408 U.S. 238, 308 (Stewart, J., concurring).

<sup>161</sup> See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 26 (1999) (noting that a trail in the aftermath of mass atrocities could mark an effort between vengeance and forgiveness); Amann, *supra* note 30, at 184 (“Victims could attain a sense of redress and vindication, could even turn away from revenge, upon learning that the worst perpetrators have been brought to justice.”)

<sup>162</sup> See Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6 (1998) (“[W]hen the Court metes out to the perpetrator his just deserts, then the victims’ calls for retribution are met.”)

<sup>163</sup> Zimring, *supra* note 85, at 438.

<sup>164</sup> See Harvard Law Review Association, *supra* note 159, at 1968.

retributivism, regional stability will remain an unattainable fiction. If rehabilitative measures are the only “punishment” rendered then retributive goals cannot be met.<sup>165</sup>

¶ 60 The judge must have broad discretion in determining the appropriate punishment of juveniles. To minimize the risk that imprisonment will be imposed on a capriciously selected group, however, generalized standards should be formulated to focus the judge on the particularized circumstances of the crime and the defendant.<sup>166</sup> The judge should consider the gravity of the crime, the manner in which it was committed, mitigating circumstances such as age and immaturity, the minor’s attitude toward society and respect for the rule of law, and the prospect for a future constructive life in light of the circumstances.<sup>167</sup>

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<sup>165</sup> See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2070 (1998) (arguing that some penalties may be too light to meet retributive goals).

<sup>166</sup> Gregg, 428 U.S. at 199 (“in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.”)

<sup>167</sup> See Randi-Lynn Smallheer, Note, *Sentence Blending and the promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259 (1999). Additional relevant considerations, as proposed by the American Law Institute, may include:

(3) Aggravating Circumstances:

- (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- (c) At the time the murder was committed the defendant also committed another murder.
- (d) The defendant knowingly created a great risk of death to many persons.
- (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
- (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
- (g) The murder was committed for pecuniary gain.
- (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

- (a) The defendant has no significant history of prior criminal activity.
- (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) [omitted]
- (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- (f) The defendant acted under duress or under the domination of another person.
- (g) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- (h) The youth of the defendant at the time of the crime. A.L.I., Model Penal Code § 210.6 (Proposed Official Draft 1962).

¶ 61 The Court should recognize as mitigating factors age and immaturity.<sup>168</sup> Acknowledgement of age and immaturity as mitigating factors is quite distinct from granting juveniles blanket immunity. Under the mitigating-factor regime, one's prison term is discounted by age and immaturity. The most conceptually solid approach to mitigation is what criminal law scholars have termed the "discounting strategy."<sup>169</sup> The initial inquiry of the discounting approach is the punishment of an adult offender for the same crime.<sup>170</sup> The punishment of the hypothetical adult offender is then "discounted" by a predetermined percentage reduction for the youthful offender.<sup>171</sup> In a nutshell, the discounting strategy operates as follows:

*If adult burglars with particular criminal histories typically get four years of penal confinement at sentencing, the way to calculate the appropriate penalty for a fifteen-year-old burglar is to determine a discount from the secure confinement sentence of an adult that is appropriate for fifteen-year-olds and then apply it. If, on average, conditions of diminished responsibility for fifteen-year-olds should produce a fifty-percent punishment reduction, one calculates the punishment of the fifteen-year-old by multiplying the adult sentence times 1.0 minus the discount, or in this case: 4 years  $\times$  (1.0-.5)= 2 years.*<sup>172</sup>

¶ 62 Discounting is directly dependent on the adult penalty for the type of punishment and its duration.<sup>173</sup> One method of calculation is to discount certain types of crimes by predetermined percentages, e.g., all juvenile murderers are entitled to a thirty percent punishment reduction. Alternatively, a general rule could require all sentences rendered upon juvenile combatants be discounted by "x" percent irrespective of the crime. The discounting approach is attractive because the greatest benefits are reaped by the youngest offenders. For example:

*A fourteen-year-old offender would receive . . . 25 percent of the adult penalty; a sixteen-year-old defendant, 50 percent; and an eighteen-year-old, the adult penalty, as is presently the case. The*

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<sup>168</sup> The approach of mitigating circumstances based on age has gained international respect. In fact, the ITCY considers youth as a mitigating factor. *See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber, Judgment, PP 284, 291 (ITCY 1998), reprinted in 38 I.L.M. 317, 373 (1999).*

<sup>169</sup> Zimring, *supra* note 85, at 459-63 (in-depth discussion of the discounting strategy for sentencing juvenile offenders); *see* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, in 24 YOUTH VIOLENCE 189, 246-47 (Michael Tonry & Mark H. Moore, eds., 1998) (suggesting discounting method for juveniles in criminal court); *see also* BARBARA DANZIGER FLICKER, INSTITUTE OF JUD. ADMIN. & AMERICAN BAR ASS'N, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 2 (1977) (suggesting discountive methodology for juveniles in a juvenile court).

<sup>170</sup> Zimring, *supra* note 85, at 459-63.

<sup>171</sup> *Id.* The proper percentage reduction must be determined the legislature, or in this case, the Sierra Leonean Government and the United Nations.

<sup>172</sup> *Id.* at 460.

<sup>173</sup> *Id.*



*“deeper discounts” for younger offenders correspond to the developmental continuum of responsibility.*<sup>174</sup>

The traditional discounting approach uses the same age-based discounts for all categories of offenses and liability.<sup>175</sup>

¶ 63 In recognition of normative international standards, juveniles should not face the death penalty.<sup>176</sup> Although the Government of Sierra Leone initially demanded the death penalty for juveniles,<sup>177</sup> the additional protocol to the Geneva Conventions states that “[t]he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offense.”<sup>178</sup> Western nations have imposed a somewhat similar ban on the juvenile death penalty.<sup>179</sup> Without squarely addressing the issue, suffice it to say that external justifications (if nothing else) necessitate rejection of the death penalty in juvenile cases. The Special Court should adhere to international norms regarding juvenile death penalty policy in order to maintain international and domestic legitimacy. Great divergence from international norms would harvest unnecessary criticism for the Court.

## B. Benefits of the Proposed Adjudicatory Framework

### 1. Economic and Judicial Efficiency

¶ 64 The adjudicatory framework proposed in this article is more economically efficient than the creation of a separate child’s court. The Special Court’s restricted resources must be utilized for the solitary purpose of prosecuting those who bear the greatest responsibility, not on additional personnel and administrative expenditures that would flow from a separate child’s chamber. There is no legitimate rationale for creating a separate chamber which would inevitably produce identical results.<sup>180</sup> Instead of creating a children’s court antithetical to the Court’s purpose, the TRC should remain the primary forum for soldiers not among those most responsible for the atrocities.

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<sup>174</sup> *Id.* For a structured table based on these standards see Franklin E. Zimring, *Two Views of the Project*, 91 HARV. L. REV. 1934, 1938 (1978) (reviewing *Juvenile Justice Standards Project* (1977)).

<sup>175</sup> Zimring, *supra* note 85, at 460.

<sup>176</sup> *See, e.g.*, International Covenant on Civil and political Rights, 6 I.L.M. 368, at art. 6 (1967) (prohibiting the use of the death penalty).

<sup>177</sup> *See* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 52d Sess., U.N. Doc. S/2000/915 (2000), at 7, P. 34.

<sup>178</sup> Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature December 12, 1977, 16 I.L.M. 1442 (1977).

<sup>179</sup> *See, e.g.*, *Thompson v. Oklahoma*, 455 U.S. 104 (1982) (holding the 8th Amendment to U.S. Constitution precludes imposition of death penalty on anyone below the age of sixteen years of age).

<sup>180</sup> Both courts would treat child soldiers with “a sense of dignity and a sense of worth, taking into account his or her young age . . . in accordance with international human rights standards, in particular the rights of the child.” Court Statute, *supra* note 3, at art. 7(2).

Functionally, the TRC renders the proposed child's court inapposite and would be a complete misuse of very limited funds.<sup>181</sup>

¶ 65 Furthermore, empowering the Court to imprison the most culpable juveniles will avoid expenditures on rehabilitative measures via a child's court, which are already provided for by the TRC. With the establishment of the TRC, there is no acceptable rationale for using the Court's resources to adjudicate all juvenile case when the statute dictates that "rehabilitative measures" must be rendered upon guilty juveniles regardless of the crime.<sup>182</sup> By allowing the Court to imprison the most culpable combatants and using the TRC to "rehabilitate" the less culpable, the Court's limited resources can be used for essential investigations and adequate fact-finding procedures. These available resources will help assure prosecution of only the most culpable combatants and provide a fair and thorough trial.

## 2. Comparative Institutional Advantage

¶ 66 The Special Court is the best-equipped institution to address the most violent juvenile soldiers. The proposed institutional design gives the Court a comparative advantage over other alternatives, with legally trained professionals and staff to determine the culpability of an individual on a case-by-case basis and determine proper punishment.

¶ 67 The Special Court is institutionally designed to treat all parties—both victims and perpetrators—fairly and justly. Each soldier brought before the Court is afforded fundamental due process rights including the opportunity to have a full, fair, and unbiased trial. A fair trial by a competent court gives Sierra Leoneans assurance that justice was rendered. Victims and defendants can trust that the Court has rendered fair results. Victim belief that adjudication is fair is essential to regional stability and the rule of law. In the absence of judicially-administered punishment, mayhem and conflict will prevail and a true democracy will remain impossibility.

¶ 68 Arbitrarily assigning violent juveniles to rehabilitative programs—such as the TRC—provides fairness and justice to no one. Under the current paradigm, the victims definitively know that a convicted juvenile will not receive the deserved punishment.<sup>183</sup> Where the Special Court does not defer to the citizen's basic demands for fairness and justice, the entire legal system will fail.

¶ 69 The current regime is also unfair to juvenile perpetrators who are arbitrarily assigned to rehabilitative programs. Child combatants are entitled to a full and fair trial. It is fundamentally unfair to force a juvenile to come before the TRC and appear guilty in

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<sup>181</sup> This is especially true because the penultimate goal of the two forums purports to be "rehabilitation" and "reintegration." In light of these goals, TRC has a comparative advantage over the proposed special court because rehabilitation and reintegration will be easier in the absence of a public trial and the public shaming resulting from a trial.

<sup>182</sup> See Court Statute, *supra* note 3, at art. 7(2) (no child between the ages of fifteen and eighteen can be sentenced to imprisonment).

<sup>183</sup> This is because the current Court statute states that convicted child soldiers may not face imprisonment and can only be "sentenced" to rehabilitative programs. See Court Statute, *supra* note 3, at art. 7(2).

the public's eyes when in-fact she may not be. The proposed solution permits a tribunal to determine guilt and the proper sentence if required, rather than following an arbitrarily predetermined sanction, such as is the case with the TRC. A sentencing restriction is inherently unfair to the soldier in whose interest it may in be to develop a customized sentence which encompasses multi-faceted punishment mechanisms. All parties suffer where justice is unnecessarily restricted.

### 3. Establishment of the Rule of Law

*There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance. The process of codification, adjudication and enforcement is as vital to a tranquil international community as it is to any independent national state.*<sup>184</sup>

¶ 70 The most fundamental element of a stable and prosperous nation is the rule of law. The essential premise underlying the rule of law is that “respect for the rule of law will create respect for legal processes and an internal moral barrier against conduct that legal institutions have condemned.”<sup>185</sup> Establishing respect for the law in Sierra Leone is the quintessential step to halting violence and fostering stability. Juvenile offender cases are “difficult but important tests of the general principals that are supposed to be in play throughout the [legal] system.”<sup>186</sup> The Special Court must, therefore, remain cognizant of the macro-level concerns such as stability and the rule of law in adjudicating juvenile soldier matters.

¶ 71 Imprisoning culpable juvenile combatants will solidify the role of the legal system in Sierra Leone and broadcast the message that the law must be followed or punitive sanctions will be imposed. Punishment encompassing imprisonment must be one of the appropriate responses of any legal authority responsible for addressing juvenile crimes.<sup>187</sup>

¶ 72 Prosecution of juvenile soldiers will also develop Sierra Leonean juvenile law jurisprudence.<sup>188</sup> Domestic courts can learn much from the Special Court and implement progressive domestic changes. Sierra Leonean substantive law will evolve and develop as it is utilized in Special Court prosecutions.<sup>189</sup>

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<sup>184</sup> BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 30-31 (1980).

<sup>185</sup> Harvard Law Review Association, *supra* note 159, at 1966.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 438.

<sup>188</sup> See U.N. SCOR, 54<sup>th</sup> Sess., 4063d mtg. at 12, U.N. Doc. S/PV. 4063 (1999) (noting that through criminal tribunals one learns “important lessons for later use.”) Prosecution will also increase the long-term, global visibility of international humanitarian law as a field. See Djiena Wembou, *The International Criminal Tribunal for Rwanda: Its Role in the African Context*, INT’L REV. RED CROSS, November-December 1997, at 685, 691 (noting that ICTR has lead to many discussions about humanitarian law among scholars and politicians).

<sup>189</sup> See Court Statute, *supra* note 3, at art. 1(1) (stating that the Special Court in adjudicating cases will apply both international humanitarian law and Sierra Leonean law).

¶ 73 Prosecution and sufficient punishment will also establish the moral background upon which future generations will be taught right from wrong.<sup>190</sup> Because positive ingrained societal norms are lacking in Sierra Leone, the Special Court will set a new moral code for future generations. It is very important in sentencing that the Court considers the “moral-education message to the present and the next generation of children in Sierra Leone.”<sup>191</sup>

¶ 74 Furthermore, a legitimate legal system in Sierra Leone will directly affect the operation of a market economy.<sup>192</sup> By establishing a legal system, market participants are more likely to invest in the region because they can enlist the help of the law in settling grievances.<sup>193</sup> A solid legal system will help legitimize the diamond trade in Sierra Leone and provide investors incentive to further explore the region. Market growth in Sierra Leone will correspondingly provide citizens with jobs, making criminal behavior less attractive and assuring an improved quality of life. Regional stability necessarily follows from a legitimate and vibrant market economy.

## VI. Conclusion

¶ 75 Sierra Leone is currently juggling myriad grim and perplexing problems of global significance. The establishment of the Special Court is a momentous step towards reconciliation and regional stability, but officials must proceed cautiously, as the Court can either stabilize the region and the rule of law or it can further aggrieve the victims. Pursuant to its statutory directive to prosecute the most culpable criminals, the Court must utilize all available punitive mechanisms to seek truth-based justice and construct broad-based respect for the rule of law.

¶ 76 In a war involving scores of violent juvenile combatants, it is critical to the future of Sierra Leone that the Court is vested with jurisdictional authority to fully adjudicate these matters. The strict-rehabilitative approach is an insufficient response to the complex problems facing Sierra Leone.

¶ 77 The Court’s primary focus in determining punishments must be both on the micro and societal impacts of the punishment, including the benefits of deterrence, retribution, regional stability, and the rule of law. Imprisoning the most culpable juveniles serves the macro-goals most beneficial to Sierra Leone. In the absence of regional stability, Sierra Leone will remain in its decade-long state of mayhem—the ultimate problem the Special Court is designed to remedy.

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<sup>190</sup> For a general description of the theory of moral education see Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212-17 (1984).

<sup>191</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, *supra* note 159, at 34.

<sup>192</sup> See Paul Sergius Koku, *Market Forces and the Rule of Law as a Means of Improving the Quality of Life in Sub-Saharan Africa: Ghana, A Case of Critical Analysis*, 10 U. MIAMI INT’L & COMP. L. REV. 23, 24 (2001) (“legal and educational systems directly affect the operations of market economies.”)

<sup>193</sup> *Id.* at 24.

¶ 78 The organizational framework for the Special Court offered in this article will allow Sierra Leone to emerge from the decade-long conflict holding the key elements to a prosperous and stable nation. The U.N. and the Sierra Leonean Government must, however, proceed with caution in these volatile times; it must find the correct balance between effectuating its citizens' demands and legitimizing the region's institutional bodies.