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## The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone

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## ARTICLES

### **The Involvement and Protection of Children in Truth and Justice-Seeking Processes: The Special Court for Sierra Leone\***

*By Michael A. Corriero\*\**

Sierra Leone is at a critical point in its history as it emerges from a ten year civil war. The country is struggling to come to terms with its violent past while simultaneously grappling with the enormous social, political and economic upheaval which accompanied the civil strife.

One of the significant challenges confronting Sierra Leone in the aftermath of the war is the problem of reintegrating into society former child soldiers used by all sides in the civil war. It is estimated that over 5,000 children between the ages of 7 and 18 were conscripted into the warring armies during the ten year period since 1991.<sup>1</sup>

#### CONDITIONS IN SIERRA LEONE

Abass Bundu, Former Foreign Minister of Sierra Leone, in his book, *DEMOCRACY BY FORCE?*<sup>2</sup> states:

Sierra Leone has been at war with itself since March 1991. . . . Today, most of the country lies in ruins, a mere shadow of its former self. The physical destruction of life and property aside, the citizens were made to see their next door neighbors as their worst enemy, routinely tearing each other apart and making the en-

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\* For an excellent discussion on the Proposal for a Special Court, see Ilene Cohn, *The Protection of Children and the Quest for Truth and Justice in Sierra Leone*, 55 J. INT'L AFF., (Fall 2001).

\*\* Special thanks to my staff, Mollie Faber, Valerie Pels, and Ludwina Normil for their assistance in the preparation of this report.

<sup>1</sup> See Danna Harman, *Aid Agencies Help to Rid Child Soldiers of War's Scars*, CHRISTIAN SCI. MONITOR, Oct. 30, 2001, at 7.

<sup>2</sup> ABASS BUNDU, *DEMOCRACY BY FORCE?: A STUDY OF INTERNATIONAL MILITARY INTERVENTION IN THE CONFLICT IN SIERRA LEONE FROM 1991-2000* (2001).

vironment probably the worst place for children. In ways that are unprecedented in the history of the country, the conflict has fostered a culture of blame, not of accountability; of hate not of harmony; and of dependency not of self-esteem. A mosaic of thirteen different ethnic groups that once lived in harmony, interweaving with each other through marriage, has been rent apart, and it will take years to heal the wounds and mend the rifts. . . . ”<sup>3</sup>

Estimates vary, but it may not be an exaggeration to put the casualty figure at 50,000 dead, more than one half of the entire population displaced internally and more than half a million turned into refugees.<sup>4</sup>

Unashamedly, abuses of human rights and international humanitarian law were rampant bordering on the cruelest of conduct.<sup>5</sup> They ranged from extra-judicial killings to mutilations of civilians of all ages to torture, rape and hostage taking.<sup>6</sup> To a degree, they disconnected Sierra Leone from modern civilization and reconnected her to a dark age of anarchy.

No belligerent party is immune. Unarmed civilians became their targets, viewing their protection as less than sacred.<sup>7</sup> Accused of collaborating with the enemy, they almost routinely became soft targets for reprisals.<sup>8</sup> Women and children, in particular, fared worst. While the former were pressed into service as porters and sex slaves, the latter were almost invariably conscripted as fighters and forced to commit horrendous atrocities against even their own families. Not surprising that most of them ended up being severely traumatized.”<sup>9</sup>

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<sup>3</sup> *Id.* at xii.

<sup>4</sup> AMNESTY INTERNATIONAL, REPORT 1999: SIERRA LEONE, available at <http://www.amnesty.org/ailib/aireport/ar99/afr51.html> (last visited Mar. 11, 2002).

<sup>5</sup> See Press Release SC/6613, *United Nations, Security Council Meets In Open Session to Consider Situation in Sierra Leone* (Dec. 18, 1998).

<sup>6</sup> *Id.*

<sup>7</sup> See AMNESTY INTERNATIONAL, SIERRA LEONE: CIVILIANS CONTINUE TO BE MUTILATED AND KILLED DESPITE THE PEACE ACCORD, available at <http://web.amnesty.org/802568F7005C> (last visited Mar. 11, 2002).

<sup>8</sup> *Id.*

<sup>9</sup> See BUNDU, *supra* note 2, at 198.

## THE CHILDREN

Children have been the worst hit by this war. Deprived of childhood, thousands of them were recruited—many through abduction and conscription—as front-line combatants. In November 1998, UNICEF estimated that there were at least 4,000 child soldiers, some as young as seven years old. Other estimates have put the figure at over 5,000, divided between pro-Government forces and RUF rebels. They were used as porters, messengers and spies, but more alarmingly as combatants and sex slaves. Prized by commanders for their fearlessness and bloodlust, the warring parties found them to be more obedient, unquestioning and easier to manipulate than adults. Patrick Zangalaywah, a *kamajor* field commando, for example, admitted that: 'In Kailahun District alone, we have 3,000 child *kamajors*. These kids are very brave on the frontline.' They were also found to be "unadulterated" and extremely obedient to rules. 'We don't trust adults quite as much because many have breached the rules governing our militia and so they get killed by the enemy,' he added. In other words, child soldiers were cheap, less careful about their own safety and follow orders more readily than adults and children from poorer homes were by far the most vulnerable.<sup>10</sup>

Two other Sierra Leone authors described the involvement of children in this manner:

The insurgency against the Sierra Leone state, characterized by guerrilla warfare, has inevitably resulted in substantial civilian deaths and injuries, extensive damage to health and education systems, and substantial movement of refugees and displaced persons. Like child soldiers in other war-ravaged countries, those in Sierra Leone have personally experienced or witnessed extremes of violence including summary executions, torture, and the like. Some have been coerced into joining an armed group, or have volunteered to join

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<sup>10</sup> See BUNDU, *supra* note 2, at 235-36.

out of desperation. Orphans, the displaced, and young heads of households have been forced to join as a way of surviving. In other words, the young are susceptible to recruitment by rebel factions because of the promise of future rewards and the belief that "*those with guns can eat.*" Forcible conscription of the very poor and young, indoctrination, and drugging are the preferred strategies of Sankoh's RUF. Some argue that in the absence of formal state education, conscription offers the young an alternative 'bush education' which teaches many survival skills."<sup>11</sup>

Olara Otunnu, The Special Representative of the United Nations Secretary-General for Children and Armed Conflict, visited Sierra Leone from May 26 to 29, 1998; Abass Bundu quotes Otunnu, who said at that time: "that it was part of the objective of warfare (to target unarmed civilians), not just a lack of discipline on the part of fighters. Their aim was to humiliate, wreak suffering, teach them a lesson and to demoralize as a tool of war."<sup>12</sup>

#### RATIONALE FOR THE SPECIAL COURT

In a report prepared for the Security Council, 56<sup>th</sup> Session of the General Assembly, United Nations Secretary General, Kofi Anan presented the rationale for a Special Court to adjudicate cases of children involved as participants in war crimes:

Member States, the UN system, and many international NGOs now explicitly agree that, to help construct a foundation for post-conflict peace and stability, and to begin to redress the suffering of the victims, those responsible for war crimes and other grave abuses must be exposed, held individually accountable, and if possible or appropriate punished for their actions. Moreover, mechanisms intended to reveal truth and impart justice should contribute to the design of reparations programs for victims and structural reforms to ensure that such events do not recur. The international community and concerned States must

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<sup>11</sup> EARL CONTEH-MORGAN & MAC DIXON-FYLE, *SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY*, 133-134 (Peter Lang Pub., 1999).

<sup>12</sup> See BUNDU, *supra* note 2, at 198.

consider which processes or mechanisms might be best suited to achieve these outcomes. When children are involved as victims, witnesses or perpetrators of these terrible crimes, very special consideration must be given to the manner in which such experiences are documented and portrayed; whether the children themselves might be involved in truth and justice-seeking processes; and what redress these processes will bring for traumatised children, their families and societies.

The Security Council's commitment to combating impunity for egregious child rights abuse in the context of armed conflict has been most visible this past year in the case of Sierra Leone. At the request of the Security Council, a Special Court for Sierra Leone, which will seek to prosecute those bearing the greatest responsibility for crimes against humanity and war crimes, including those involving children, is being established by agreement between the UN and the Government of Sierra Leone. . . . A Truth and Reconciliation Commission (TRC), called for by the Lome peace agreement of 1999, is in the process of formation and will seek to establish a historical record of egregious human rights violations during the conflict, and pay particular attention to the experiences of children. Previous and existing truth commissions or war crimes tribunals have not directly addressed these experiences.

In August 2000, as drafting got underway on an agreement with the Government of Sierra Leone to create the Special Court, it became apparent that the way in which the Court's statute would address gross abuses perpetrated against and by children would be a matter of contention and international concern. The Security Council strongly endorsed the proposal that the Court be empowered to prosecute the war crime of child recruitment or use, under age fifteen, by armed forces or groups. Hence, the Special Court should help to consolidate consensus around the definition of the war crime of recruitment in international criminal law. Moreover, the prosecution of child recruiters should

highlight the complexities of the issues around the use of children as soldiers and, ideally, deter such criminal conduct in the future.

International organisations, child rights advocates and NGOs disagreed, however, on whether, and how, children who participated in the commission of war crimes while serving with armed groups should be dealt with in judicial proceedings. The possible prosecution of children, and young adults who were children at the time of the crime, brought the issues of culpability, justice and impunity, and individual and social healing, into focus for the national and international community and compelled an important debate.

The Security Council, after much deliberation and consultation, agreed that should any person who was between 15 and 18 years of age at the time of the alleged commission of the crime come before the Court, he or she shall be treated with dignity and a sense of worth, and in accordance with international human rights standards. In the disposition of his or her case, imprisonment shall not be an option, but rather the Court shall determine which alternative programme or service is most appropriate. The parameters of juvenile justice have thus been retained . . .

The TRC and the Special Court have distinct but mutually supporting functions and both should help to achieve accountability, and shed light on the context in which the most serious crimes have been perpetrated against, and sometimes by, children in Sierra Leone. Recent events have revealed, however, that little is known at the international level about the ways in which juvenile justice or truth-telling procedures can help heal children exposed to or involved in armed conflict. The Office of my Special Representative for Children and Armed Conflict, UNICEF, NGOs and individual experts are joining forces to address the outstanding questions in need of urgent attention if the positive potential of truth commissions and war crimes

tribunals is to be harnessed for the benefit of war-affected children in Sierra Leone and elsewhere.<sup>13</sup>

In May of 2001, I was invited by the Office of the Special Representative of the United Nations Secretary-General for Children and Armed conflict to participate in an informal discussion focusing on the role of truth and justice-seeking processes in the lives of young children who had committed very serious crimes in armed conflict settings.<sup>14</sup> The aim of the meeting was to explore the lessons learned at local and national levels regarding interventions intended to promote young offenders' rehabilitation and reintegration into society, and to examine similar unprecedented efforts taking shape at the international level.<sup>15</sup> Consideration was to be given to the proposed extension of personal jurisdiction over persons who were juveniles, under the age of 18 at the time of the commission of serious violent crimes, as part of a special International War Crimes Tribunal for Sierra Leone.<sup>16</sup> That meeting provided the genesis for this report. The invitation prompted me to learn more about Sierra Leone and the application of international law to child combatants. In preparation for the meeting, I thought about how my experience presiding in New York City's Youth Part—a special court for children accused of serious crimes—may be of value.

#### THE YOUTH PART

New York State is a jurisdiction that prosecutes children as young as 13, 14 and 15 years of age for their participation in serious crimes in the adult Criminal and Supreme Court.<sup>17</sup> Since 1992, I have presided over the "Youth Part" in the borough of Manhattan in New York City. The Youth Part is a court within the Criminal Term of the New York State Supreme Court. The Part was created to adjudicate all cases involving 13, 14 and 15 years old charged as

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<sup>13</sup> *Promotion and Protection of the Rights of Children, Report of the Secretary-General*, U.N. GASC, 56<sup>th</sup> Sess., Agenda Item 127, at 14-15 (2001).

<sup>14</sup> See Ilene Cohn, *The Protection of Children and the Quest for Truth and Justice in Sierra Leone*, 55 J. INT'L AFF., (Fall 2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Alison Marie Grinnell, Note, *Searching for a Solution: The Future of New York's Juvenile Offender Law*, 16 N.Y.L. SCH. J. HUM. RTS. 635, 636 (Spring 2000).



adults pursuant to New York's "Juvenile Offender" law,<sup>18</sup> due to the serious violent nature of the charges.

For the past nine years, I have had the opportunity to grapple with many issues affecting children accused of violent crimes. Many of these children come from the poorest neighborhoods in New York City. These are children born into dysfunctional families and into neighborhoods saturated with drugs and guns.

Professor Jeffrey Fagen, a professor of criminology at Columbia University, has interviewed many children from New York's toughest neighborhoods. He states that these children often describe their existence in terms of living in "war zones," where life and death confrontations occur daily with "strangers," who most children assume are armed.

A significant number of cases I see involve acts of calculated, random and even ritual violence; for example, children accused of murdering a homeless man by dousing him with gasoline and setting him on fire while he was sleeping on a park bench<sup>19</sup>; two fifteen year old children accused of murdering their fourteen year old mentally handicapped friend by torturing and mutilating him and then throwing him down an elevator shaft<sup>20</sup>; a 14 year old slashing another youth with a razor from ear to chin as part of a gang initiation.<sup>21</sup> However, the vast majority of cases are robberies involving multiple defendants, multiple levels of maturity and multiple levels of involvement.<sup>22</sup>

Children accused of a "Juvenile Offender" offense, such as murder, rape, robbery, kidnapping, assault and other serious crimes, are automatically prosecuted in the adult court in the identical fashion as adults.<sup>23</sup> They are accorded the same due process rights of adult criminal defendants, including the right to a jury trial.<sup>24</sup> Upon conviction of a juvenile offender offense, a child is

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<sup>18</sup> *Id.*

<sup>19</sup> See Rob Polner, *Death Plunge: Homeless Man Flees 4 Kids, Jumps off Coney Island Pier*, NEWSDAY, Sept. 7, 1995, at A-5.

<sup>20</sup> See Craig Wolff, *Two Teen-agers Charged in Elevator-Shaft Death*, N.Y. TIMES, Oct. 28, 1992, at B-1.

<sup>21</sup> See Samuel Bruchley, *She Needed a Victim: Girl, 16, Pleads to Knifing That was Part of Gang Initiation*, NEWSDAY, Apr. 20, 2001, at A-5.

<sup>22</sup> See generally Franklin E. Zimring, *The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts*, 6 VA. J. SOC. POL'Y & L. 437 (Spring 1999).

<sup>23</sup> See Grinnell, *supra* note 17.

<sup>24</sup> See, e.g., *Kent v. United States*, 383 U.S. 541 (1966).

subject to mandatory imprisonment and a criminal record as a felon.<sup>25</sup> A judge does have circumscribed discretion to adjudicate a child a “youthful offender.”<sup>26</sup> A youthful offender adjudication is a special classification.<sup>27</sup> It permits the court to impose a sentence of probation instead of mandatory imprisonment and it does not constitute a criminal conviction.<sup>28</sup> Furthermore, all records of a youthful offender adjudication are deemed confidential.<sup>29</sup> Therefore, the determination of whether an eligible youth is to be granted youthful offender status as opposed to letting the conviction stand as a felony conviction has serious, lifelong implications. For example, a convicted felon loses specific civil rights such as the right to vote and hold public office.<sup>30</sup> A felony conviction can also severely restrict employment opportunities.<sup>31</sup>

If a youth is not otherwise precluded from youthful offender eligibility by statutory criteria such as age or a prior record, the court has an *affirmative* duty to exercise its discretion, that is, to proceed to a consideration of whether youthful offender adjudication is appropriate in a given case, and to announce that determination at the time of sentence.<sup>32</sup> While there is no specific statutory formula which a judge must follow in exercising that discretion, factors to be considered include the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant’s prior involvement with the law, *defendant’s attitude toward society and respect for the law, and the prospect for rehabilitation and a future constructive life.*<sup>33</sup>

Consequently, in order to determine whether or not youthful offender treatment is appropriate in any given case, a judge is required to carefully analyze the nature of the crime and the offender,

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<sup>25</sup> See N.Y. CRIM. PROC. LAW § 720.10 (2001); see also Grinnell, *supra* note 17.

<sup>26</sup> See N.Y. CRIM. PROC. LAW § 720.10 (2001).

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., Richardson v. Ramirez, 418 U.S. 24 (1974).

<sup>31</sup> See, e.g., Michael A. Corriero & Molly Faber, *The Youth Part and Juvenile Justice*, N.Y.L.J., Feb. 4, 1997, at 1.

<sup>32</sup> See N.Y. CRIM. PROC. LAW § 720.10 (2001).

<sup>33</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 (Fall 1999).

to evaluate the potential of the child and the appropriate effective judicial response.<sup>34</sup>

In the Youth Part we developed a process to assist us in making that decision. The process is carried out in stages: When the case first appears in the Part, we gather as much information as possible about the youth.<sup>35</sup> A pre-pleading report as well as a mental health evaluation is usually ordered from the Probation Department. These reports document a youth's family, school and social history, and any history of psychiatric or emotional problems.<sup>36</sup> The youth's background and support network are carefully evaluated. An assessment is made concerning the extent of the youth's involvement in the underlying crime.<sup>37</sup> When a juvenile's background and involvement in the crime permit the court to consider an alternative to incarceration, a plan is developed to test the willingness of the youth to modify his behavior.<sup>38</sup> For example, a child will be permitted to plead guilty to the charges with certain conditions, such as compliance with a curfew and participation in an Alternative to Incarceration program.<sup>39</sup> The ultimate sentence will be deferred while the youth participates in the program.<sup>40</sup> Successful completion of the program will result in a sentence of youthful offender treatment and probation.<sup>41</sup> Failure to comply may mean a sentence of imprisonment and denial of youthful offender status, resulting in a felony record.<sup>42</sup>

Validation of the youth's compliance with the terms of his plea agreement is an important part of the process. In the Youth Part, the child's performance is carefully monitored.<sup>43</sup> Youth Part staff (the Judge's Law Clerks and private secretary) are in weekly contact with the child's program counselor, and every three weeks the child must appear in the Part for a formal program report.<sup>44</sup>

Since 1991, we have resolved the cases of approximately 1,200 juvenile offenders.<sup>45</sup> Approximately sixty percent of the children

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<sup>34</sup> *Id.*

<sup>35</sup> See Corriero & Faber, *supra* note 31.

<sup>36</sup> See Corriero & Faber, *supra* note 31.

<sup>37</sup> See Corriero & Faber, *supra* note 31.

<sup>38</sup> See Corriero & Faber, *supra* note 31.

<sup>39</sup> See Corriero & Faber, *supra* note 31.

<sup>40</sup> See Corriero & Faber, *supra* note 31.

<sup>41</sup> See Corriero & Faber, *supra* note 31.

<sup>42</sup> See Corriero & Faber, *supra* note 31.

<sup>43</sup> See Corriero & Faber, *supra* note 31.

<sup>44</sup> See Corriero & Faber, *supra* note 31.

<sup>45</sup> See, e.g., Grinnell, *supra* note 17, at 662.

have been placed in Alternative to Incarceration programs.<sup>46</sup> The overwhelming majority of those placed have successfully completed the program and received youthful offender treatment.<sup>47</sup>

The decision to give a child an opportunity to earn youthful offender treatment is a difficult one. The reports submitted to document a child's background are, of course, helpful, but in the final analysis, the decision rests on the judge's impression of the child and the nature of the offense.

I have sought guidance in making these decisions from the example of an American judge who lived at the turn of the century and who presided over one of the first juvenile courts in America—Judge Ben Lindsey of Colorado. He set the quintessential style for judges dealing with children. He behaved and acted in such a manner as to create a rapport and intimacy with the children who came before him, so that he could act as a catalyst for change in their behavior. He stated: "This should be accomplished as a wise and loving parent would accomplish it, not with leniency on the one hand or brutality on the other, but with charity, patience, interest and what is most important of all; a firmness that commands respect, love and obedience, and does not produce hate or ill-will."<sup>48</sup>

One hundred years later, these words and the sentiments they represent may seem out of place when the brutality of juvenile crime and the extent of atrocities allegedly committed by children as combatants has shocked the international community. On the other hand, the concept of the judge as a formidable force in shaping the lives of the children appearing before him is perhaps even more compelling now than it was a century ago.

While the issues confronting us in the Youth Part do not precisely parallel those facing the proposed Special Court for Sierra Leone, the community of Sierra Leone has sought to bring its adolescent soldiers to the courts.<sup>49</sup> The community thus expects that

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<sup>46</sup> See, e.g., Grinnell, *supra* note 17, at 662.

<sup>47</sup> See, e.g., Grinnell, *supra* note 17, at 662.

<sup>48</sup> See CHARLES LARSEN, *THE GOOD FIGHT: THE REMARKABLE LIFE AND TIMES OF JUDGE BEN LINDSEY* (Quadrangle Books 1972); see also Robert E. Shepherd, Jr., *A Brief History of the Juvenile Court in America Centennial Celebration: Doing Justice to Juvenile Justice*, National Council of Juvenile and Family Court Judges, at <http://www.ncjfcj.uinr.edu/homepage/CentCel.htm> (Mar. 11, 2002).

<sup>49</sup> See *UN Says Sierra Leone War Crimes Court Should Be Able to Try Children*, at <http://www.globalpolicy.org/security/issues/sierra/court/001005af.htm> (Mar. 11, 2002); see also *A Call for an End to the Armed Conflict in Sierra Leone*

the court will deal with these children swiftly, effectively and constructively.<sup>50</sup> I believe that certain aspects of the approach we take in the Youth Part can be adapted to the administration of the Special Court. If we agree that children 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, then a judge can act as a formidable force in their lives, provided that the judge functions in a system that is designed to provide him with the tools necessary to craft a sentence that will aid in the development of a child's character and rehabilitation.

Looking at the proposal for the establishment of the Special Court from my perspective, I must confess to a certain ambivalence. On the one hand, the concept of a quasi-international juvenile justice tribunal, whose goal is rehabilitation of child soldiers rather than punishment, is intriguing. On the other hand, the idea of prosecuting children under 18 as war criminals seems repugnant to principles of justice that require children to be treated differently from adults. Moreover, the citizens of Sierra Leone, if possible, should be primarily responsible for "judging" the behaviour of its children. Childhood and adolescence are essentially stages of cultural assimilation and reaction by children.<sup>51</sup> Evaluation of a child's culpability and maturity are matters best left to those familiar with a child's social context. Only those who grew up in Sierra Leone could know first hand the effect of such an experience. Outside jurists would be at a great disadvantage in evaluating the culpability of children born into a society torn apart by civil and political strife.

The proposal also raises other questions. Why implement a judicial mechanism for "prosecuting" children in the first place, if the goal is to identify, heal and reintegrate these children into society? What is the value of assigning "legal culpability," if such assignment would lead only to educational and rehabilitative measures, which the government of Sierra Leone and NGO's seem already willing to

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*and for Steps to be taken to Bring Lasting Peace*, at <http://www.un.org/Depts/eca/news/serralon.htm> (Mar. 7, 2002); see also, *Security Council Sets up Observer Mission to Monitor Military and Security Situation in Sierra Leone*, UN Security Council Press Release SC/6544, 3902<sup>nd</sup> mtg. (1998).

<sup>50</sup> *Id.*

<sup>51</sup> See Barbara Gash, *Book Explores Sewing With African Fabrics*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, June 22, 2001.

provide? Wouldn't a less formal "civil" process designed to "identify" children in need of services be more productive?<sup>52</sup> Why risk stigmatizing these children with prosecution in a War Crimes Tribunal?<sup>53</sup> Furthermore, wouldn't the creation of a Truth and Reconciliation Commission (TRC) suffice to address the needs of the society to heal?<sup>54</sup>

Shouldn't the full weight of the resources of the War Crimes Tribunal, however limited, be brought to bear on those adults most responsible for recruiting and leading these children? Wouldn't this position send a clear and powerful message that the very act of recruiting children for war is a greater threat to international standards of humanity than the acts of those children who were used as "tools" to commit atrocities?

Olara Otunnu, in an informal briefing note submitted to the Security Council, acknowledged the dilemma posed by the Special Court's treatment of child combatants:

Moral dilemmas instinctively attach to the idea of prosecuting young people for egregious acts that they were often forced, or compelled by circumstances, to commit. But upon closer examination of the particular circumstances of Sierra Leone and the role of young people in the armed conflict there. These dilemmas appear less acute. *The court's statute very appropriately promotes rehabilitation and rejects punishment as an objective for young offenders.* Former child combatants will not be imprisoned or rounded up from rehabilitation centers or demobilization sites. *The rehabilitation and reintegration of the youngsters is the first priority and will not be jeopardized.* While some young people—still children as defined by the Convention on the Rights of the Child—were among those

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<sup>52</sup> See *West Africa: IRIN-WA Update of Events in West Africa*, AFRICA NEWS, September 10, 1999.

<sup>53</sup> See *UN Says Sierra Leone Child Soldiers Should Not Face Trial*, AGENCE FRANCE PRESSE, December 27, 2000.

<sup>54</sup> See *UN Launches Reconciliation Commission in S. Leone's Northern Town*, XINHUA GENERAL NEWS SERVICE, August 5, 2001; see also Rodolfo Mattarollo, *What to Expect of a Truth Commission*, at <http://www.sierra-leone.org/trcbook-rodolfomattarollo.html> (accessed 3/21/2002).

who committed the worst crimes, they are first and foremost victims.<sup>55</sup>

In support of the establishment of the Special Court Otunnu posits three arguments:

- First: It is reasonable to presume that some young people failed to exercise their evolving capacity to determine right from wrong, and were among those individually responsible for the worst acts of brutality in Sierra Leone;
- Second: The special court will help to 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 that will result in guided, supervised access to rehabilitation and ensure opportunities for reinsertion into productive civilian life;
- Third: Public opinion in Sierra Leone supports a process of judicial accountability for child combatants.<sup>56</sup>

Consequently, accepting the establishment of the court as a *fait accompli*, I submit this report in the hope of calling attention to issues raised concerning the legal culpability and responsibility of child soldiers, and to suggest techniques that the Court can employ to achieve its goal. Perhaps if the Court is properly structured, staffed and implemented, it can serve as a model for future tribunals, setting international standards and codes of conduct with respect to children in conflict. The experiences gained from the work of the Special Court could 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. The existence of the Court could also represent an explicit acknowledgement that “trying” children accused of serious atrocities is a better option than “vengeance.”

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<sup>55</sup> U.N. SCOR at 11, U.N. Doc. S/2000/992 (2000); see also Security Council to Decide on Trial of Child Soldiers in Sierra Leone, XINHUA GENERAL NEWS SERVICE, October 6, 2000 (illustrating Olara Otunnu’s approval to prosecute youngsters).

<sup>56</sup> See *Rights: U.N., Sierra Leone Agree on War Crimes Court*, INTER PRESS SERVICE, October 5, 2000.

## THE TASK OF ASSESSING CULPABILITY

The proposal for the Sierra Leone Juvenile War Crimes Tribunal raises some significant questions of culpability. Specifically, how should one assign, or, for that matter assess responsibility for acts committed by children, not of their own initiative, but under the direction of adults?

The purpose of the Special Court, as stated in the Secretary General's Report to the Security Council, *supra*, is to prosecute those bearing "the greatest responsibility for crimes against humanity."<sup>57</sup>

Who bears the greatest responsibility? The adult leaders who gave orders, or the child soldiers who followed the orders? Perhaps recognition of children's diminished capacity to understand the full import of their behavior, especially under combat situations, provides the key to understanding why rehabilitation should be the overriding rationale in addressing the problems created by a child's involvement in the atrocities of war.

In determining a child's culpability, we must also inquire as to precisely what we can expect of children, who have been used as combatants, subjected to psychological and physical abuse, that has literally transformed them from victims into perpetrators. How can we, in the true sense of justice, hold them accountable, blameworthy under these circumstances? The principle of justice presupposes that the party to be punished has an undiminished capacity to exercise his free will to choose between right and wrong.<sup>58</sup> This, in turn, presupposes that the party to be punished has a fair opportunity to learn and be exposed to accepted standards of behavior and the morality of his culture.<sup>59</sup> Putting aside issues of criminal responsibility for a moment, addressing a larger issue that emphasizes moral questions over empirical ones: How do you exact conformity with a specific moral code of a society, when children may be unaware of its existence, such as in Sierra Leone, where the fabric of a society has broken down? Sierra Leone was at war for ten years. During that time, very young children were conscripted into warring armies. It can be reasonably argued they never had an oppor-

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<sup>57</sup> U.N. SCOR, Res. 1315, *Situation of Sierra Leone Special Court*, U.N. Doc. S/RES/1315 (2000).

<sup>58</sup> See *Thomas Critiques the 'Rights Revolution'*, LEGAL TIMES, May 23, 1994 (describing the underlying principles of justice).

<sup>59</sup> See *Id.*



tunity to learn a positive moral code; the code with which they were indoctrinated was that of a combatant, a soldier whose responsibility was to follow orders. Disobedience was often at the risk of death. How can you rehabilitate children who have never been “habilitated”? How can you reintegrate children into a society who were never “integrated” into that society to begin with? In this context, what is the viability of a standard suggested by Olara Otunnu, that purports to hold children accountable for their failure “to exercise their evolving capacity to determine right from wrong”?<sup>60</sup>

Notwithstanding the above concerns, the arguments for establishment of the court represent a pragmatic solution to a difficult problem; in that sense they are persuasive. Assuming Sierra Leone public opinion is as it is represented, the very existence of the court might promote a sense of healing.<sup>61</sup> Certainly it is in the interest of promoting civil order that those children who are resisting efforts to give up the life style of a child combatant be brought under the jurisdiction of the Court. The issue of culpability, however, remains complex and problematic.

#### THE CHALLENGE

Sierra Leone’s efforts to socialize its children were interrupted by a brutal ten-year civil war.<sup>62</sup> The challenge facing Sierra Leone today is that of absorbing back into the community a large number of children who have witnessed or caused death, destruction and despair. How can the United Nations and Sierra Leone, through a Special Court, develop a system of juvenile accountability that would meet that challenge?

I believe that the answer lies with education, and with the development of a process of accountability that nurtures a sense of humanity. The French philosopher Andre Compte-Sponville, in his book, *A SMALL TREATISE ON THE GREAT VIRTUES*,<sup>63</sup> reexam-

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<sup>60</sup> U.N. GAOR, 57th Sess. At 8, U.N. Doc. E/CN.4/2001/76 (2001).

<sup>61</sup> See *Britain Hails the End of Disarmament in Sierra Leone*, GLOBAL NEWS WIRE, January 18, 2002.

<sup>62</sup> See *Sierra Leone: Human Rights Urges Quick Establishment of Special Court*, AFRICA NEWS, March 20, 2002.

<sup>63</sup> ANDRE COMPTE-SPONVILLE, *A SMALL TREATISE ON GREAT VIRTUES* (Catherine Temerson trans., Henry Holt & Co.) (2000).

ines the classical human values to help us understand “what we should do, who we should be, and how we should live.” He states:

Now a principle of Kantian ethics is that one cannot deduce what one should do from what is done. Yet the child in his early years is obliged to do just that, and it is only in this way that he becomes human. Kant himself concedes as much. “Man can only become man by education,” he writes. “He is merely what education makes him, and that process begins with discipline, which changes animal nature into human nature.”<sup>64</sup>

However, before one can “educate” children involved in atrocities, one must “identify” the children, the conduct, and the extent of culpability.<sup>65</sup> This must be done by a fair process; the adjudication process itself must incorporate the theses of rehabilitation and reconciliation.

#### THE COMPOSITION OF THE SPECIAL COURT

The Special Court for Sierra Leone will be created by treaty between the United Nations and the Sierra Leone government.<sup>66</sup> It will be under joint UN-Sierra Leone jurisdiction.<sup>67</sup> The Special Court will neither be a UN body along the lines of the International Criminal Tribunals established for the former Yugoslavia and Rwanda, nor a Domestic Tribunal.<sup>68</sup> Rather, it will be a hybrid court jointly administered by the United Nations and the Sierra Leone government.<sup>69</sup> Significantly, it will apply local and international justice. As such, it represents an entirely new model for bringing war criminals to justice.<sup>70</sup>

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

<sup>65</sup> See, e.g., *Establishment of a Special Court for Sierra Leone, Report by the Security-General*, U.N. Doc. S/200/915 (2001) (discussing the inclusion of children between fifteen and eighteen years who may be punished as persons “most responsible”).

<sup>66</sup> See Michelle Sieff, *War Criminals: Watch Out*, *WORLD TODAY*, Feb. 1, 2001.

<sup>67</sup> See Press Release, UNAMIL, *Head of U.N. Planning Team Mr. Ralph Zacklin Briefs Media on Special Court for Sierra Leone* (Jan. 9, 2001) available at <http://www.un.org/Depts/dpko/unamsil/DB/090102.htm> (last visited Mar. 20, 2002).

<sup>68</sup> See Sieff, *supra* note 66.

<sup>69</sup> See Sieff, *supra* note 66.

<sup>70</sup> See Jim Wurst, *Rights: U.N., Sierra Leone Agree on War Crimes Court*, *INT’L PRESS SERVICE*, Oct. 5, 2000.

Security Council Resolution 1315 sets forth the essential characteristics of the Special Court that the Secretary General was asked to negotiate into existence with the government of Sierra Leone.<sup>71</sup>

The text of Article 7 of the proposed statute for the creation of the court reads as follows:

- (1) 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.
- (2) 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 and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.<sup>72</sup>

The Special Court will be staffed with both local and international judges and prosecutors.<sup>73</sup> The Secretary-General will appoint a Chief Prosecutor, while the Sierra Leone government, in

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<sup>71</sup> S.C. Res. 1315, U.N. 4186<sup>th</sup> Sess., U.N. Doc. S/Res/1315 (2000); *see also Establishment of a Special Court for Sierra Leone, Report by the Security-General*, U.N. Doc. S/200/915 (2001) (discussing resolution 1315 and the agreement with the Government of Sierra Leone to create an independent Special Court).

<sup>72</sup> *See Letter from the Security-General addressed to the President of the Security Council*, U.N. Doc. S/2001/40 (Jan. 12, 2001); *See also Cohn, supra* note 14 (discussing the Secretary-General's proposed statute of the Special Court).

<sup>73</sup> *See Sieff, supra* note 66.

consultation with the UN, will appoint a Deputy.<sup>74</sup> Although the Deputy will have some input in deciding whether to indict in a particular case, the Chief Prosecutor will make the final decision.<sup>75</sup> Security permitting, the Court will be located in Sierra Leone.<sup>76</sup>

#### A SUGGESTED MODEL FOR THE SPECIAL COURT

The Special Court should strike a balance between the community's sense of justice, the child's culpability, and the best interests of the child.

There are three broad steps in this effort:

*First*, the enabling statute should develop and implement a prosecution strategy that accurately and precisely identifies those children who engaged in the most egregious atrocities and who are most resistant to rehabilitative measures, as opposed to those who have been exploited by war and are solely in need of social services and rehabilitation. This strategy can be accomplished by way of a hearing, preliminary to a determination as to whether a child is to be prosecuted by the Special Tribunal. A judge at such preliminary hearing should determine whether a child combatant is: (a) suitable for further prosecution in the Special Court; or (b) suitable for referral to the Truth and Reconciliation Commission; or (c) suitable for court direction to receive *continued* outside educational and rehabilitation services *without* judicial intervention.

The court as presently constructed grants the prosecutor wide discretion in determining which cases should be brought before the Special Juvenile Tribunal and which referred to the Special Commission on Truth and Reconciliation.<sup>77</sup> Theoretically, only the most egregious cases of brutality would be referred to the Special Court; the remainder would be referred to the Truth and Reconciliation Commission.

In my view, the question of referral should fall within the judicial, not prosecutorial realm. That is, it should not be a unilateral decision of a prosecutor. The decision regarding referral should be a judicial decision, made after a hearing where the child is afforded the full panoply of due process rights, including the right to counsel. This would be a fair and precise way of identifying children most in

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<sup>74</sup> See Sieff, *supra* note 66.

<sup>75</sup> See Cohn, *supra* note 14.

<sup>76</sup> See Sieff, *supra* note 66.

<sup>77</sup> See Cohn, *supra* note 14.

need of formal prosecution in the court.<sup>78</sup> If it is ultimately determined that such a child should be prosecuted in a more formal setting because the child is considered a danger to the community or because the allegations concerning the conduct are so serious that a decision not to prosecute the child in the formal court would undermine public confidence in the Tribunal, then formal prosecution should proceed. The process of determining suitability for formal prosecution should be flexible enough to recognize and accommodate those juveniles who have the capacity to change their behavior without formal prosecution by entering or continuing to participate with a rehabilitative agency. The Court should be invested with wide discretion in determining who is to be formally prosecuted. The rehabilitation of the child soldier is the paramount consideration, and the court should be a body independent of any political agenda, recognizing, of course, that the community must believe and observe that justice is served.

*Second*, an infrastructure of high quality, adequately staffed rehabilitation and reintegration programs must be in place. The development of an effective court is an important goal for Sierra Leone. To accomplish this, the Special Court must have the capacity to educate and rehabilitate the children coming before it.<sup>79</sup> The provision of adequate resources for such programming is crucial and should be in place before the Court convenes.<sup>80</sup> One of the advantages of locating this quasi-international court in Sierra Leone is that it enhances the capacity of the court to work with the local community. Its proximity to societal and cultural institutions, although considerably destabilized by the civil war, will provide an opportunity to rebuild such institutions around the work of the court.<sup>81</sup> The court can become a focal point for cohesion and coordination of the social services needed to reintegrate these children into society. The court can play a supervisory role in insuring that social services agencies provide the child with education and the necessary skills and services to become a contributing member of society. An additional advantage of locating the Court in Sierra Leone is that citizens will have access to proceedings, where appro-

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<sup>78</sup> See Cohn, *supra* note 14.

<sup>79</sup> See Cohn, *supra* note 14.

<sup>80</sup> See Cohn, *supra* note 14.

<sup>81</sup> See Cohn, *supra* note 14.

priate.<sup>82</sup> The Court's location will also facilitate the exchange of legal knowledge between international and local judicial officials, which will assist in rebuilding the country's judicial system.

*Third*, for those child combatants who are ultimately prosecuted in the court, there must be a mechanism to remove the stigma that will attach to such prosecutions.<sup>83</sup> One way in which this can be accomplished is to use participation in the Truth and Reconciliation Commission as the final stage of a child's rehabilitation plan. For such youth, reconciliation with his community can be facilitated by voluntarily appearing before the Commission. In this way the TRC can serve as a mechanism to publicly permit the child to express remorse for his conduct and seek reconciliation with those harmed by his acts. An appearance before the TRC can constitute the final phase in a child's rehabilitation program.<sup>84</sup> Caution, however, should be exercised to emphasize that such an appearance by the child would be strictly voluntary. Truth telling experiences for children who witnessed, suffered as victims, or participated in acts of brutality should be a very delicate undertaking. Children should not be cavalierly required to divulge the identities of others with whom they may have acted. Such requirement could further traumatize an otherwise willing participant prepared to divulge his own conduct, but not that of others.<sup>85</sup> In many cultures, the role of the informer causes as much shame as adheres to one who has himself performed brutal acts.<sup>86</sup>

In addition to appearance before the TRC, there should be other ways of absolving and welcoming children back into the society. Perhaps there should be a formal declaration by the court upon the child's successful completion of a rehabilitation program, that he is restored to full status as a member of society and that no impediment to his success will flow from his appearance before the Special Court.

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<sup>82</sup> See Michelle Sieff, *A Special Court for Sierra Leone*, THE TRIBUNALS at [http://www.crimesofwar.org/sierra\\_print.html](http://www.crimesofwar.org/sierra_print.html) (visited Mar. 11, 2002).

<sup>83</sup> See AMNESTY INTERNATIONAL, SIERRA LEONE—THE STATUTE OF THE SPECIAL COURT MUST MAKE ALL RECRUITMENT OF CHILDREN UNDER 15 A CRIME at <http://www.presswire.net> (visited Oct. 3, 2000).

<sup>84</sup> See *Sierra Leone: UN Special Court on Sierra Leone To Start Seating Soon*, AFRICA NEWS, Nov. 24, 2000.

<sup>85</sup> See Cohn, *supra* note 14.

<sup>86</sup> See Billy Simpson, *The Time has Come to Stand Up for Informers*, BELFAST TELEGRAPH, Aug. 31, 1999.

## THE FORMAL ADJUDICATION PROCESS

The formal adjudication process that I envision will be composed of two phases: a fact finding phase before an impartial panel and a dispositional phase.

In the fact finding phase, the prosecutor will present evidence of conduct that violates humane standards of behavior. The prosecutor should be prepared to specifically identify the child alleged to have participated in that conduct.<sup>87</sup> Once the identification of the specific child and the conduct has been established by *due process* standards, guidelines for which can be found in the United Nations Convention on the Rights of the Child,<sup>88</sup> the Court should then proceed to a dispositional hearing.

## THE DISPOSITIONAL HEARING

Not long ago, I wrote an article entitled *Sentencing Children Tried and Convicted as Adults*. Some of my comments are relevant to this discussion:

All judicial sentences are based on cultural and individual assumptions about the nature of life and the values of our society. Even though retribution has gained favor as the dominant sentencing rationale for adults in recent years, and "accountability" is a familiar refrain for youthful miscreants, the pragmatic realization that children convicted of serious crimes will return to society as still relatively young men and women, lends critical support to the goal of *rehabilitation* as the underlying rationale for juvenile sentences. There are many critics of the "rehabilitative ideal", however, who argue that it is an unattainable illusion, given the present state of our knowledge about criminal behavior. I do not agree that rehabilitation is unattainable. The idea that the ultimate goal of sentencing juveniles ought to be rehabilitation is surely a value preference. The law speaks of rehabilitation of children because it is desirable to proceed as if it were possible. The rehabilitative approach, however, is not *merely* a theoretical preference. Rather, it is based on the common

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<sup>87</sup> See Cohn, *supra* note 14.

<sup>88</sup> See G.A. Res. 44/25, U.N. GAOR 61<sup>st</sup> mtg. (1989).

sense belief that children are developmentally different than adults. Children are malleable and less committed to their misconduct and more susceptible to the impact of positive influence than are adults. Consequently, in my view, it is possible for a judge to influence a child's behavior. If we consider rehabilitation, therefore, not as "curing" an illness, or "changing" character but instead, as a process that enables a child to "develop" character, then we will be able to craft a juvenile sentence in a constructive way. It is, therefore, appropriate for a judge to maximize his interaction with the youths who appear before him as a means of deterrence and rehabilitation. For this reason, the juvenile sentencing proceeding, as an interactive process, may acquire greater emotional and dramatic overtones than an adult sentence proceeding.<sup>89</sup>

If we analyze the process of creating a special court from the perspective of rehabilitation—*i.e.*, establishing a process that helps a child "develop" character and fosters reintegration into society—then I envision such a dispositional proceeding as a dynamic, interactive process which serves as a guide for the child's rehabilitation. It should be educational and motivational.

The judge's role, in addition to presiding over a process that identifies the conduct of the child with precision and accuracy, should be to help the child understand the behavior that brought him to this moment in his life, and to give him the opportunity to explain any mitigating circumstances regarding his behavior.<sup>90</sup> It should be used as an opportunity to advise the youth of his responsibilities to society. The hearing should reflect the judge's attempt to initiate change in the child's behavior by assisting that child to recognize and understand the claims of society. A youth should be told what is expected of him to regain his status in the community at the moment of sentence, or in the future.<sup>91</sup> The proceeding

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<sup>89</sup> See Michael A. Corriero, *Sentencing Children Tried and Convicted as Adults*, 7 N.Y. ST. BAR ASSOC. CRIM. JUST. J., 49 (Summer 1999).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*



should be designed to give the youth encouragement and strength to begin his maturity.<sup>92</sup>

In sum, the dispositional phase should be a restorative process—a process of reconciliation of the child with society, a process of soul awakening instead of soul debasing. It should be consciously designed to create an atmosphere that permits an assessment of the child's moral character, demonstrating the values of truth and integrity within the justice system.

For those children who are ultimately tried and convicted, or admit their involvement, the court must be able to monitor their progress toward rehabilitation and reintegration, such as by periodic appearances before the court for the purpose of validating their progress. In the absence of the threat of imprisonment, this will be a difficult undertaking. What leverage would the Court have to insure compliance with a rehabilitative program?

I suggest that the only leverage available in the context of the dispositional phase is the influence of the court (judge) over the child. This influence will be contingent upon the ability of the judge to develop a rapport with the child which fosters a relationship such that the child will want to please the court and by doing so, conform his behavior to law and society's expectations.

This involves a willingness on the part of the judiciary to engage in a proactive problem solving approach to the resolution of these cases. The ideal judge for such a court would be one raised in the culture of Sierra Leone. If this is not feasible, then the court should be permitted to consult with lay advisors, who would perform a role similar to that of South African Lay Advisors. These individuals sit with the court as representatives of the community, advising the court on local tribal customs, norms and sanctions. These lay advisors, in appropriate cases, can play a unique role in the development and administration of imaginative, productive, non-incarceratory sanctions for child misconduct, that promote the healing process and social reintegration. They can serve as a valuable link to the community, a link that provides insight into the pulse of life beneath the official version of events. Indeed, they can help answer the question of how can we heal these children and welcome them back into society.

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<sup>92</sup> *Id.*