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Complicating Obligations Arising from Past Injustice

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This paper argues there are complicating factors when determining our obligations to redress past injustice. With reference to the debate between political theorists Jeremy Waldron and Janna Thompson, a more nuanced view on historical obligations is argued. This paper concludes that in some cases our historical obligations can be transformed or even superseded by present day conditions.

The citizens of many modern nations must come to terms with some measure of historical injustice. In particular, nations formed by European colonialism have a legacy of genocide, cultural submission, and misappropriation of territory that continue to resonate. A very valuable, but straightforward, task is to use normative judgments to condemn as unjust these original instances of colonial intervention and their subsequent present-day resonances. A more difficult task is to determine what is to be done to address these injustices. While it may appear counterproductive to just ends, we cannot unconditionally accept all claims for reparation nor similar responses to historical injustice. We cannot allow guilt or anger to motivate decisions that are likely to produce their own far reaching resonances into the future. An obvious injustice is not the same as an obvious strategy of redress. I favour a ‘complicated’ view of our historical obligations that acknowledges that appropriate action is not always clear. In order to outline what I believe are the necessary complications, this paper responds to two essays that represent the prominent arguments on historical obligations.

In his article “Superseding Historic Injustice,” Jeremy Waldron investigates the grounds upon which past injustices can be ‘superseded’ by present injustice and demonstrates how entitlements to reparation are not always legitimate. Waldron’s arguments receive a direct rebuttal from Janna Thompson in her article: “Historical Obligations.” Both articles use the
example of the Maori, a New Zealand aboriginal group, in order to extrapolate their respective arguments to other cases of aboriginal land claims. The two articles argue a very different case for obligations that arise from past injustice and it is my view that both, in dialogue, produce a more complicated idea of these obligations and past injustices. Waldron presents a series of strong arguments, some of which are quite vulnerable to the criticisms of Thompson. Nonetheless, Thompson can never fully refute Waldron’s case for complicating our historical obligations and, in some rare cases, denying those obligations.

Before analyzing the arguments in full, it is important to outline what a view like Waldron’s is not doing. These arguments to deny historical obligations are not motivated by bigotry or a skewed view of justice. Rather, Waldron is concerned with present-day injustice and how this can at times “supersede” past injustice, which we can no longer correct.1 He acknowledges the “moral significance” of the past and does not discount it when he makes his case.2 In complicating historical obligations, his language is not strong. Obligations may become “less credible,”3 or “must be responsive,”4 or are “vulnerable.”5 That these obligations can be superseded is merely “a possibility” that he does not believe “always happens.”6 The types of reparations he critiques are ones that “carry us in a direction contrary to…justice.”7 As his concern is with the present, he believes his arguments only apply “if an honest attempt is being made” to respond to a wronged group’s present conditions.8 He does not advocate complacency

2 Ibid., 7.
3 Ibid., 20.
4 Ibid., 25.
5 Ibid., 20.
6 Ibid., 25.
7 Ibid., 27.
8 Ibid.
or inactivity vis-à-vis historical obligations. In fact, Thompson and Waldron both agree that historical obligations exist. The difference lies in how simple they think the obligations are.

The first argument Waldron employs for ‘complicating’ historical obligations is against so-called counterfactual approaches to calculating reparation. He opposes the view in favour of “full” recompense to “rectify past wrongs,” including transferring resources such as land. Waldron objects to the suggestion that recompense can reverse past wrongs or erase their effects, counter to the facts. He maintains it would be difficult to determine what the natural course of events would be if an unjust event did not occur. He admits that one is certainly able to make predictions about what would have happened, but questions whether these predictions have the “moral authority” to determine appropriate reparations. Furthermore, the entire enterprise of predicting behaviour in hypothetical situations means “there is no fact of the matter” that can be derived by any method. Therefore, there can be no truth established on something that is counterfactual and this creates problems for those seeking to simplify calculation of reparations.

But Waldron admits that a rational choice approach is quite common in other elements of justice and can be considered for this case. This approach ascribes rational choices—actions within self-interest, with respect to known preferences—to historical actors and counterfactually predicts how events would be altered. The implication for aboriginal land issues is that aboriginal groups historically were not able to act rationally, in their self-interest, for various reasons. This view suggests it would be more just if events today supposed those aboriginal

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11 Ibid., 8.
12 Ibid., 10.
13 Ibid., 11.
14 Ibid.
groups were acting rationally, within their self-interest. Waldron argues that no one acts in their best interest all the time, but yet everyone is held to the consequences of their actions. It would be unfair to hold only some groups responsible and other groups not. In effect, those Waldron critiques are giving “rational choice motivations to only some, and not all, of the parties who are affected.” It is his view that this uneven ascription of rational choice is unfair.

While I believe this first case is very sound up to this point, one difficulty I perceive is Waldron’s assertion that giving some historical actors rational choice and not others is unfair. Implicit in this view is that events were fair up until one unjust event or one counterfactual rational choice ascription. The perceived injustice at issue may not always be strictly in the result, or present conditions. Sometimes the issue in question is the freedom of choice of both actors. Examining the past we can come to conclusions about how constrained an individual or group’s choices were vis-à-vis someone else’s choices. In the example of aboriginal land appropriations, one group was being colonized and was at a severe disadvantage. There are more than just the present circumstances of aboriginals contributing to their case. Which is more unfair: past or present conditions? My objection is not without its own difficulties, but I think the issue of constraint (rather than result) is what leads people to ‘fairly’ employ counterfactual and rational choice approaches to moral judgments. But whatever inequities exist between two actors, Waldron is also concerned with third parties affected by this approach.

He brings up the “contagion of injustice”: whereby acts of reparation negatively impact neutral parties, via mechanisms like the market. When injustice is created by attempts to ‘right’ past injustice a dilemma exists. Does one injustice weigh more heavily than another? Add this to

16 Ibid., 13.
17 Ibid., 11-12.
the other questions Waldron has asked of the counterfactual approach: Who gets rational choice? What will rational choice make one do? How would these counterfactuals be impacted by other actors? These are all questions a simplistic view of reparations cannot answer.

Thompson refutes Waldron’s arguments about counterfactuals by asking: ‘who must prove what?’ She interprets Waldron’s view as requiring those with historical claims to land to “prove that they would have inherited their tribal land.”18 She believes this places a “burden of proof” on those with historical grievances when it should be placed on “those who deny the claims.”19 Furthermore, she thinks that if a group might have acted against their self-interest in these counterfactual scenarios we cannot necessarily “deny the duty of make recompense” to these groups.20 I would agree that obligations do not disappear because of the contingent nature of history and I think Waldron would agree.

Waldron’s criticism is that the standard position in favour of reparation, using a counterfactual approach, does not have the grounds to make demands for action. He is correct in suggesting these judgments are difficult to arrive at. It is also difficult to justify redistributing resources from one group to another based on predictions and conjecture. Thompson makes a good case for why his criticism cannot do away with historical obligations, but that is not his explicit purpose in his first objection. His arguments successfully complicate how we should arrive at reparation and Thompson does not adequately answer that objection.

The second way Waldron ‘complicates’ historical obligations is by suggesting entitlements fade with time. This is a response to the view that holds certain injustices are “persisting” and

18 Thompson, “Historical Obligations,” 342.
19 Ibid.
20 Ibid.
sometimes “remitting” a resource, like land, will rectify the injustice.\(^{21}\) There is no need to counterfactually reconstruct history; something simply needs to be remitted. On pragmatic grounds, Waldron suggests the principle of the “statute of limitations” may apply in cases where injustice “occurred decades or generations ago.”\(^{22}\) Additionally, the “structures of expectation” people may have around a resource, such as land, are greater for those who have used the resource for an established period of time.\(^{23}\) Over time, the claim that land is central to one’s way of life is not as convincing as the time spent away from the land increases. In some cases, the time period is so great that claimants are appealing to their ancestor’s claim. In this respect, it is sometimes not pragmatic to remit resources if too much time has passed. Waldron does note some exceptions to this. Religious or cultural considerations may remain “credible” over time and indeed might “have an edge” over opponents of aboriginal land claims.\(^{24}\)

Entitlements can also fade because the nature of rights (such as a right to land) can be shown to be prescriptive, rather than absolute. Waldron uses the example of two actors who appropriated the same piece of land.\(^{25}\) The first actor appropriated it when no one had a claim to it; the second appropriated it from out under the first actor. Despite the two actions being the same, one was wrong and one was not. Thus, the type of right to land we have in mind when discussing aboriginal land claims is “vulnerable to prescription.”\(^{26}\) Sometimes an individual or group has an entitlement, but this ‘prescriptive’ entitlement does not persist indefinitely if they are ‘dispossessed’ of the land for a long period of time.\(^{27}\)

\(^{22}\) Ibid., 16.
\(^{23}\) Ibid.
\(^{24}\) Ibid., 19.
\(^{25}\) Ibid., 18.
\(^{26}\) Ibid.
\(^{27}\) Ibid.
It is Waldron’s link between dispossession and injustice that leads me to the greatest conflict in his paper. Waldron casts the type of historical grievances he discusses here as “precisely” about the ‘dispossession’ of land.\textsuperscript{28} He ignores other, more intangible forms of injustice in this argument. Thompson finds a similar objection to Waldron here. She enumerates the other injustices associated with appropriation of aboriginal land as broken promises, slaughter, theft and not recognizing aboriginal’s entitlements or humanity.\textsuperscript{29} She lists injustices that are perpetual and “resist being superseded by time.”\textsuperscript{30} Thompson’s assessment of Waldron’s “weakness” is valid; he does seem to only be considering “possession.”\textsuperscript{31} More generally, Waldron concentrates on a ‘material’ view of justice.

By a material view I mean one focused on tangible conditions that can be transactional or economic in nature. Theft and murder are material forms of injustice. In contrast, the intangible forms of injustice are harder to enumerate and can impact emotions, cultures, or other social structures. Colonialism has intangible elements: cultural shifts, emotional trauma, and political destabilization. Waldron does not adequately address these types of intangible injustices when he suggests injustices fade with time. Waldron does note that past injustice carries into the present,\textsuperscript{32} but he is still considering a ‘material’ injustice. While his case is not rendered invalid because of this omission, it might be best to understand Waldron as engaging only ‘material’ injustice in his arguments. Nonetheless, it is likely that intangible forms of injustice are liable to have just as many difficulties being ‘righted.’

\textsuperscript{28} Ibid., 15.
\textsuperscript{29} Thompson, “Historical Obligations,” 343.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{32} Waldron, “Superseding Historic Injustice,” 7.
Waldron further complicates historical obligations by arguing that changes in circumstances can sometimes change what is unjust. The changes he has in mind are in population, resources, and “the occurrence of famine or ecological disaster,” among others.\[^{33}\] When circumstances such as these ‘fluctuate’ there are “variations in what we would take to be the appropriate level of concern,” and thus variations in reparation, for certain groups.\[^{34}\] Surveying different views, Waldron concludes that if a certain “acquisition” would negatively impact “the prospects and life chances of other people,” then the legitimacy of the acquisition is questioned.\[^{35}\] He also believes that a “spectrum of social circumstances” exists: some circumstances make something right, some circumstances make something wrong. When these circumstances change, actions once perfectly fine are no longer legitimate. Thus, certain entitlements “cannot be taken for granted,” in the face of changing circumstances.\[^{36}\] Additionally, the capacity for justice to become injustice over time parallels the capacity of injustice to become just over time. It is possible, in Waldron’s view, for an injustice to “be transformed…into a just situation if circumstances change.”\[^{37}\] This is what he calls superseding historical injustice.\[^{38}\]

Waldron employs an example to illustrate how something once wrong can become right. In the example, there are a number groups in one area, each with a corresponding water hole to which they have exclusive access.\[^{39}\] He then introduces an event that dries up all the water holes but one. This requires two groups to share a water hole, a fair arrangement under the

\[^{33}\] Ibid., 20.
\[^{34}\] Ibid.
\[^{35}\] Ibid., 21.
\[^{36}\] Ibid., 22.
\[^{37}\] Ibid., 24.
\[^{38}\] Ibid.
\[^{39}\] Ibid.
circumstances. He then asks what if, before the other holes dried up, a group ‘descended’ on another’s water hole and demanded it be shared.\textsuperscript{40} That action would be quite unjust, but once all other water holes dried up it would “no longer [count] as an injustice.”\textsuperscript{41} This example is rather lean, but I will defend it. We may be uncomfortable accepting that simply because circumstances changed an injustice disappears. Can injustice dry up like a waterhole? Keeping in mind Waldron’s analysis of injustice as primarily a material condition: Yes. A material injustice is contingent on material conditions only. When those conditions change to an arrangement that is no longer unjust, such as only one waterhole remaining in an area, the material injustice no longer exists. The injustice that remains is the intangible injustice that Waldron generally ignores in his paper. Despite this intangible injustice remaining, the material component of injustice is no longer in place. I believe Waldron’s suggestion that changing circumstances can transform or even negate obligations to right material injustice is a sound view.

Waldron does not use this view to negate “all claims of injustice”; rather, he uses it to criticize claims when the circumstances “that have changed are exactly the sort” that “make a difference” to the entitlements we are considering.\textsuperscript{42} He does note that many aboriginal land claim issues are impacted by changes in population, resources and the like.\textsuperscript{43} Indeed, the “occupation of some of their lands, which was previously wrongful, may become morally permissible,” according to his view.\textsuperscript{44} Again, supersession of injustice is not “always” the case,\textsuperscript{45} but it is a “possibility.”\textsuperscript{46} Thompson does not entertain that possibility.

\textsuperscript{40} Ibid., 25.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid., 25-6.
\textsuperscript{43} Ibid., 26.
\textsuperscript{44} Ibid., 25.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid., 26.
The changes in circumstances described by Waldron do not dispel any “obligation to make restitution for historical injustice,” according to Thompson. These changes do not mean “no entitlements” or “no historical obligations” exist. She admits changes in circumstances “affect historical duties and entitlements” and reparation “will sometimes have to be rejected in the interests of justice.” Indeed, sometimes they “may be a reason for re-negotiating” conditions. I agree with Thompson that you cannot do away with all historical obligations in this way. Similarly, so does Waldron. While he presents a necessarily hard line for how particular cases may be completely refuted, he does not seek to apply this to all or even most cases. His argument “is not that the passage of time…supersedes all claims of injustice. Rather…that claims about justice and injustice must be responsive to changes in circumstances.” He has Thompson’s same re-negotiation in mind when he writes circumstances “make a difference” to the “set of entitlements.” The entitlements are now different, not gone. For this reason, I do not evaluate Thompson’s critique of Waldron’s third argument as very strong. The areas she objects to are precisely the areas for which Waldron makes exceptions. She is not able to supersede his formula for superseding injustice.

Another difficulty I perceive involves the type of re-negotiations employed in reparation. Both Thompson and Waldron (in different degrees) seem to advocate for this re-assessment. It seems to me that the idea of re-negotiations supposes we can adequately compensate for the change of circumstances over time. In some ways, this goes back to Waldron’s argument against counterfactuals. If we hold that we cannot calculate reparations based on the contingent nature of

47 Thompson, “Historical Obligations,” 344.
48 Ibid.
49 Ibid.
50 Ibid.
52 Ibid., 26.
history, how can re-negotiation have the moral foundation to determine new reparations or new agreements? It would require great care, but some forms of re-negotiation based on observable, factual conditions may avoid this problem. Nevertheless, I suggest this problem will exist for many cases.

In principle, I agree with Jeremy Waldron’s arguments for superseding historical obligations. His arguments are not invulnerable to criticism, but they present the better case. First, we cannot base reparations on counterfactuals, no matter who this places the ‘burden of proof’ upon. Second, some entitlements can fade over time, but these are primarily material in nature. Waldron ignores many intangible forms of injustice that survive his arguments and this critique of Waldron is Thompson’s strongest. Third, changing circumstances can change the nature of material injustice and in some cases, quite conclusively. It is Waldron’s method of rendering at least some types of historical injustices undone and denying obligations based on them that is his strongest charge. With all of his exceptions and stipulations, I agree that this position is valid. Sometimes past injustice is no longer present today, and when it is present it has likely changed shape. I believe it is necessary to ‘complicate’ our view on what obligations arise from past injustices, whether they are superseded, transformed, or perpetual. Using well-reasoned and thoughtful approaches to these questions ensures that cycles of injustice can be stopped and that present-day justice is served fully. Citizens living with historical obligations today should not want to create new historical obligations for their successors.

**Bibliography**


SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO: MOVING FORWARD WITH DIMINISHED IMPUNITY FOR CRIMES AND INCREASED SUPPORT FOR VICTIMS

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The scope of this paper is far narrower than the scope of the conflict itself. What will be treated in these pages cannot even be said to constitute the tip of the iceberg of sexual violence in the Democratic Republic of Congo (DRC), which is only a part of a far greater conflict. In light of the recent release of the United Nations’ (UN) “Mapping Report,” this paper deals mainly with sexual violence perpetrated in the eastern DRC from 1993-2003. The instances that are addressed here have been chosen as representative of the nature of the conflict because they illustrate the specific challenges faced in bringing perpetrators to justice. Many of the proposed legal approaches to post-conflict rebuilding in the DRC take transitional justice mechanisms into account. Due to the severity and magnitude of social and psychological trauma suffered, transitional justice has an important role to play beyond the legal context in the DRC.

“In modern wars, the greatest casualties of the conflict are civilians. During these attacks, female civilians are subjected to the same violence to which male civilians are subjected. Both are murdered, tortured, displaced, imprisoned, starved and subjected to slave labour. Yet in addition to these crimes, women and girls are also singled out for additional violence – gendered violence – that is commonly manifested in the form of sexual violence.”

I. Introduction

In the Congolese context, the severity of the sexual violence problem is largely attributed to continued impunity and a lack of institutional independence of the judiciary. International opinion generally treats transitional justice methods, like special courts and tribunals, as being essential to the establishment of peace and the re-building of Congolese society. According to the UN Mapping Report, a mixed chamber is the most appropriate style of transitional justice court system for this particular context. Beyond overcoming the pervasive impunity associated


with sexual violence in the DRC, special resources must be developed to provide direct aid and assistance to the victims of sexual violence. Not only will this encourage victim-witnesses to come forward, it will also help victims and their communities to rebuild and reconcile. This paper examines viable legal and social remedies for victims of sexual violence in the context of widespread impunity in the DRC. The most essential of these are providing adequate medical, psychological and economic aid to victims of sexual violence. These resources are required to help ease trauma and, ideally, to facilitate their participation in the peace-building process. The increased visibility of women in the public sphere is also integral to post-conflict rebuilding in the DRC.

II. A Brief History of Conflict in the DRC

Mobutu’s reign as President of the Democratic Republic of Congo (then Zaire) came to a violent end during the First Congo War.³ There was decreased political stability in the DRC in the three years leading up to this clash. At the same time, the declining Zairian state was faced with the devastating aftermath of the Rwandan genocide.⁴ This particularly affected the eastern Congolese province of North Kivu, which shares a border with western Rwanda. The First Congo War and the commencement of President Laurent-Désiré Kabila’s violent regime occurred between July 1996 and July 1998. This period was characterized by extensive violations of international law, including the mass killing of Hutu refugees⁵ and of members of militia involved in the Rwandan genocide.⁶ Many different countries contributed to the instability and violence at this time, which showed a dramatic increase in serious attacks on civilians in all provinces. The attacks are particularly attributed to the retreating Forces Armées

³ The First Congo War took place from November 1996 to May 1997.
⁵ The UN Mapping Report documents 104 reported incidents.
⁶ Ibid., para 18.
Zaïroises, the ex-Forces Armées Rwandaises and the Mayi-Mayi. From the start of the Second Congo War in August 1998, and the death of Kabila, the Mapping Report documents 200 incidents of violence committed against civilians. The period is marked by regional intervention by forces from at least eight national armies and 21 irregular armed groups fighting either for or against the Forces Armées Congolaises. The 2002 signings of the Pretoria Agreement with Rwanda and the Luanda Agreement with Uganda began the withdrawal of foreign forces from the DRC. This by no means brought an end to the violence endured by Congolese civilians. Armed conflict and flagrant violations of human rights and international law have continued up to present day. Sexual violence rates have soared in this long period of instability and incredibly brutal violence. The extended conflict has led to the normalization of this type of crime to the extent that it now represents a large portion of the war crimes committed.

The UN has named the DRC the “rape capital of the world” with an estimated 15,000 women raped in eastern Congo in the last year alone. The Rwandan genocide exodus in 1994 led to the mass migration of more than 1,000,000 Rwandans into the Congo, mostly Hutus. Prior to this population change, and prior to the brutal Congolese civil wars in 1996 and 1998,
the eastern provinces already had a high rape rate; however, rape was not attributed to military activity as it now is. Formerly, rape in the DRC was linked to women’s low legal status in traditional and civil realms. The rapes during the pre-conflict period are described as having occurred when a male “admirer” raped a girl who had gone off to gather resources or farm. It was customary in these cases for the matter to be settled privately between the families. This normally meant the two would be married or the perpetrator would pay restitution to the girl’s family in the form of one or two goats. This so-called solution to rape is completely unacceptable. It binds victims to their aggressor, which creates further opportunities for sexual violence, and in the Congolese context the marriage contract provides social validation for future attacks as a private issue. Since 1993, there have been extraordinarily high levels of violent rape being perpetrated by military aggressors. As a result, rape and sexual violence have reached the community level. These crimes are now so normalized in the DRC that civilians often rape in order to settle minor transgressions or old personal scores. Such a harmful value shift toward the violent commoditization of women is likely to take generations to reverse and will severely inhibit civilian progress in the region.

III. Range of Attitudes toward Rape

During armed conflict, “women are often killed in a gender-related manner”; rather than simply being murdered, their murder is sexualized. The international community has been slow to recognize this practice as an element of warfare. The prosecution of perpetrators of sexual

15 There was one instance where a girl was raped by the owner of a mango tree for taking a fruit without asking. Ibid., 9-10
violence and adequate accountability to their victims has been even slower and is still unacceptably rare. Rape has traditionally been treated as a crime motivated by sexuality, rather than by violence and abusive exercise of power. Nevertheless, sexual violence is finally being acknowledged internationally as a violation of human rights and humanitarian law worth devoting resources to addressing. A milestone in this progress was the 1998 codification of the Rome Statute of the International Criminal Court (ICC). The Rome Statute recognizes the use of sexual violence as a war crime and a crime against humanity.\textsuperscript{18} This change reflects the inclusion of women’s rights into the structures of international humanitarian law, which addresses these crimes in the mainstream, rather than marginalizing them as a side effect of war.\textsuperscript{19} According to the Rome Statute, depending on the context in which crimes are committed, “crime against humanity” and “war crime” may be applied to “rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence of a comparable severity.”\textsuperscript{20} While this expanded definition of “war crime” is able to better address the widespread use of sexual violence in the DRC, its application may not be possible due to restrictive temporal jurisdiction rules. Despite official legislative attempts to protect women and children from sexual violence,\textsuperscript{21} and despite the frequent presence of the issue on the agenda of the UN Security Council, this does not translate into actual protection, especially during times of

\textsuperscript{18}International Criminal Court, \textit{Rome Statute of the International Criminal Court}, 1998, UN Doc A/CONF.183/9, http://untreaty.un.org/cod/icc/statute/romefra.htm. Another groundbreaking advance made by the Rome Statute is the broadening of the definition of war crimes beyond war to include internal armed conflict. This extension of the definition is particularly important because the armed conflict in the DRC involves many different factions who are not always affiliated with an official military movement.


\textsuperscript{20}International Criminal Court, \textit{Rome Statute of the International Criminal Court}, 1998, UN Doc A/CONF.183/9, Article 7 g, para 1 b xxii) and e vi), and Article 8, para 2.

\textsuperscript{21}Violence against women and children, including sexual violence, was explicitly incorporated into the new Congolese Constitution, which was approved in December 2005. \textit{Constitution de la République démocratique du Congo}, Kinshasa, Feb 18, 2006, Articles 14, 15, and 41, http://democratie.francophonie.org/IMG/pdf/Constitution_de_la_RDC.pdf.
conflict. In addition, resources specifically allocated to medical assistance for those who have been subjected to sexual violence remains extremely scarce and there is little in place to address the long-term, psychological trauma suffered by many women.

i. Effect of Rape on the Community

Often, in other African conflicts, military actors carry out rapes when women go off in search of water or food, when farming in the fields, or when their village is attacked. In the DRC the rapes are not limited to this scenario. They usually occur in victims’ homes, during daylight hours and with no apparent provocation. Armed militants have introduced gang rape, rape with foreign objects, genital mutilation, and the taking of women as sexual slaves. These attacks effectively destroy future generations by killing men and children and by injuring the women so badly they are left infertile. Another result of these attacks is a rape birth rate, since abortion is illegal in the DRC. In some cases, rapes have been apparently committed in an attempt to force pregnancies to alter the ethnic makeup of the targeted communities. Additionally, homes are frequently burnt in this severely impoverished region, which traumatizes survivors further and makes it even more difficult for the targeted communities to rebuild.

Sexual violence and military rape have been established as a part of a broad attempt to destabilize civilian life. These brutal acts are often deliberately committed in the presence of the community in order to humiliate, objectify and terrorize civilians into submission. The struggle over rich natural resources in the DRC is largely responsible for the regional conflicts and

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23 Ibid.
27 Ibid.
instability makes it easier for military aggressors to pillage the villages and exploit the land. Loss
of life is not a concern to military groups and civilians have become the target of brutal attacks.28
These attacks often lead inhabitants to abandon their homes and flee their villages.29 Since many
of the armed groups are operating with extremely limited supplies, rape is offered as a reward for
military victories and the looting of victims’ homes is treated as payment for their service.30
Beyond these tangible harms, these communities also suffer unspeakable psychological and
emotional trauma as a result of sexual violence.31

ii. Women and Children as a Military Target

Rape has a staggering effect on communities because women are integral to subsistence
agriculture in the DRC.32 They generally “account for 73% of those economically active in
agriculture and produce more than 80% of the food crops.”33 For safety reasons, many women do
not go to work in the fields during times of conflict and instability. Injuries sustained during rape
and sexual violence also frequently leave women physically unable to work. For this reason,
sexual violence has a tremendous economic impact on these communities and often results in
poverty and malnourishment. Communities in the DRC rely on women to raise children and
produce food; this perpetuates an especially vicious cycle. The problem is compounded by the
interruption of children’s education, as they must stay home from school to remain safe from

28 Ibid., 41, 44.
29 Harvard Humanitarian Initiative, Characterizing Sexual Violence in the Democratic Republic of the
Congo: Profiles of Violence, Community Responses, and Implications for the Protection of Women,
Harvard Humanitarian Initiative Final Report for the Open Society (2009),
30 Ibid.
31 Ibid.
32 Pratt et al., Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, 7.
33 Food and Agriculture Organization of the United Nations, Women, agriculture and rural development: a
attacks. This disruption has a severely negative impact on productivity and it further jeopardizes the communities’ survival.

Traditional patriarchal views on gender are prevalent in the DRC, where husbands and fathers treat women as lesser members of society. Due to customary belief in the value of a woman’s purity and the importance of a pure bloodline, Congolese culture views the victim as defiled after rape. This attitude is exacerbated by general fear surrounding the transmission of HIV/AIDS, which is prevalent in the region. Due to this predominant mentality, husbands frequently abandon their wives after these types of attacks. Adding to the problem of abandonment, women are not customarily permitted to own property. This means that, following rape, when families cast out women or girls, it leaves them in dire economic conditions. Often they are faced with the additional burden of having to provide for their children, whether conceived with the abandoning husband or as a result of the rape.

Abortion is illegal in the DRC and, traditionally, Congolese families are either unable or unwilling to adopt orphans and unwanted children. This is linked to extreme poverty and the perceived importance of a pure patriarchal bloodline. Due to the extraordinarily frequent occurrences of sexual violence, there is a now a generation of children resulting from the rape of their mothers. According to a 2001 report, Human Rights Watch estimates that at least 5000 children resulted from the Rwandan genocide, but it is unknown how many such children were born in the DRC, where the conflict has lasted almost 20 years. These children are often rejected or abandoned by their mothers who themselves have frequently been abandoned by their husbands and families. Beyond the unimaginable difficulty for a mother to have a child born out of such a traumatic event, the United States Agency for International Development (USAID)

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35 Ibid., 12.
discovered, not surprisingly, that the children themselves suffer as well. There is no infrastructure in place to protect or to raise these children, who have been labeled ‘children of hate’ or ‘unwanted children’ by their communities. Children who are suspected or known to be rape children are excluded from their communities and are likely severely traumatized by their origins. The reality of the rape birth rate is almost without mention in many studies on the conflict, which is a grave oversight. These children are members of the generation who will hopefully bring peace to the region. As such, their sense of equality must be established now, rather than corrected later on. Further, these women and children will be profoundly traumatized and will need special, long-term psychological care.

In Resolution 61/143 of 19 December 2006, the General Assembly acknowledged that women and girls are specifically targeted and victimized by sexual violence. This targeting will significantly exacerbate the peace-building process in situations of armed conflict, post-armed conflict, and refugee and internally displaced person settings. The connection between these crimes and the aggravation of conflicts is clear in the DRC, where sexual violence is openly used as a retaliation tactic between communities or militias. It is also used to punish communities for allegedly supporting another political party or armed faction. The logic behind this use of violence is inherently flawed. Retaliatory rape assumes that villages support the militias who terrorize their community. In reality, it is far more likely that these villagers fear their aggressors. Thus, the so-called retaliation is punishment for an allegiance they do not bear. In repeatedly-targeted communities, the brutality escalates from one attack to the next, as each military group

36 Ibid.
37 USAID reported that Congolese children born of rape are teased and called “Hutus,” referring to the suspected nationality of the rapist-father. Ibid.
tries to outdo the other.\textsuperscript{39} In the rebel-controlled zone, for example, during the conflict between the Mayi-Mayi and the Armée Nationale Congolaise\textsuperscript{40} / Armée Patriotique Rwandaise,\textsuperscript{41} and also in some regions controlled by the Centre National pour la Défense de la Démocratie\textsuperscript{42} / Front pour la Défense de la Démocratie,\textsuperscript{43} each militia attempted to establish and sustain power by being the most fearsome group. Women, who were specifically targeted, paid the dearest price.

iii. The Under-Reporting of Sexual Violence in Conflict

The belief that rape is an inevitable by-product of armed conflict is profoundly damaging to all efforts to bring perpetrators to justice. It manifests itself in different ways. For example, the end of the First Congo War brought an end to the FAZ / Mobutu regime. When they retreated, the Alliances Forces Démocratiques pour la Libération du Congo\textsuperscript{44} / Armée Patriotique Rwandaise\textsuperscript{45} seized control of government and began a reign of terror. There was so much violence and such a great deal of life lost that published reports covering the conflict in this period do not bother to distinguish sexual violence from the other crimes committed.\textsuperscript{46} This is indicative of the general attitude toward these types of offences. By under-reporting sexual violence, sources reinforce the treatment of these crimes as separate from armed conflict, which they are not. It also upholds the view that instances of sexual violence are somehow secondary or less atrocious than the violence of war, which they certainly are not. The UN Secretary General’s Investigative Team was tasked


\textsuperscript{40} ANC, armed wing of Rassemblement Congolais pour la Démocratie-Goma. Here, the ANC is grouped with the APR because, due to similarities in the clothing and regional presence of the two groups, it was difficult for victims to distinguish which group perpetrators belonged to. For the same reason, other military groups are often mentioned together, separated by a “/”.

\textsuperscript{41} APR, national army of Rwanda from 1994-2002.

\textsuperscript{42} CNDD, Burundian Hutu Movement.

\textsuperscript{43} FDD, armed wing of CNDD.

\textsuperscript{44} AFDL, Alliance des Forces Démocratiques pour la Libération du Congo.

\textsuperscript{45} APR, national army of Rwanda from 1994-2002.

with investigating serious human rights and international humanitarian law violations in the DRC. They reported that rapes were likely to have been committed by the AFDL/APR during the reported attacks on the five large refugee camps in North Kivu in October/November of 1996.\textsuperscript{47} Even with this acknowledgement, the Investigative Team does not give any details. They treat the sexual violence as outside the human rights and international humanitarian law violations that were actually included in the report.\textsuperscript{48} The exclusion of sexual violence from reports and criminal charges is inexplicable, given that it has been on the UN’s agenda since the Economic and Social Council (ECOSOC) asked the UN General Assembly to adopt the Declaration on the Protection of Women and Children in Emergency and Armed Conflict in 1974.\textsuperscript{49} This area of law has developed an enormous deal since 1974, making it all the more remarkable that sexual violence is still being treated as peripheral in conflict reporting, peace-building and conflict resolution.

“The impressive struggle of local NGOs, human rights advocates, health personnel, religious groups, and survivors to deal with and address sexual violence in eastern Congo is unfortunately being undermined by attitudes toward rape encountered by the assessment team in different sites in the eastern DRC.”\textsuperscript{50} Rape was formerly a taboo issue, but the events of the last few decades have brought it abruptly into the open and into the international media. This has caused embarrassment among the Congolese people. Due to their deeply ingrained patriarchal attitudes toward women, many Congolese men describe feelings of humiliation after the women in their families have fallen victim to sexual violence. When these men claim the harm suffered as their own, rather than acknowledging the suffering of their wives and daughters, it objectifies

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
the victims even further. Due to strict gender roles, this reaction poses a significant risk factor for further violence in the form of male attempts to reassert control. Humiliation also leads sexual violence to be dismissed as a mere side effect of war and armed conflict. Unfortunately, this attitude is prevalent among those in positions of power, which weakens prevention efforts and reinforces or encourages judicial impunity. USAID has reported that in North Kivu, one commander of a sub-office in the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo\textsuperscript{52} told several members of the team that rape was “normal” and predictable behaviour from soldiers who were deprived of contact with women.\textsuperscript{53} Another USAID assessment team was told that one representative at the highest levels of transitional government was overheard referring to rape as a “women’s” issue that should be dealt with by women.\textsuperscript{54} This is an unacceptable view for MONUSCO officials to hold privately, much less to speak of in public. It strongly suggests that reports of rape by survivors or by particularly hard-hit communities will not be taken seriously, and they frequently are not. A dismissive attitude toward sexual violence among individuals in power affects more than the opinions of others in office. It is reflected in the fact that charges are never actually brought forward in the vast majority of rape cases.

The DRC has very strong customary laws that favour men over women. Sexual violence is not treated as of equal importance as general conflict violence because the primary victims are women. These crimes have a decidedly gendered aspect where, normally, men assert their power over women by dehumanizing and commoditizing them. This is not a primarily sexual act, as some people mistakenly believe. It is a decidedly political act. Nevertheless, the gendered aspect

\textsuperscript{52} MONUSCO as of July 1, 2010.
\textsuperscript{53} Pratt et al., \textit{Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo}, 13.
\textsuperscript{54} Ibid.
of these crimes results in its marginalization and its dismissal as either a “women’s issue,” as a matter that is secondary to the military conflict, or worse, as “natural” behaviour that is to be expected of soldiers who are isolated from women for long periods of time.


In October 2010, the UN issued a Mapping Report, which documented human rights violations committed in the Congo from 1993 to 2003. Congolese diplomat Ileka Atoko responded to the report, calling it “detailed, credible and heartbreaking.”55 The Mapping Report is the first of its kind to deal with human rights offences during the conflict in the DRC. It notes the involvement of at least 21 armed Congolese groups in the violations and it also recognizes military operations by eight foreign states inside the DRC.56 The report addresses more than 600 offences and claims and “the majority of the incidents of sexual violence reported, could if judicially proven, constitute offences and violations under domestic law, international human rights law, and international humanitarian law.”57 The Report does not, however, claim to meet the evidentiary standard required to try these offences in court.58 Upon their eventual prosecution, thorough investigations of these crimes will still need to be conducted. The report is not designed to be trial-ready. It is designed to find ways “to deal with the legacy of these violations, in terms of truth, justice, reparation and reform, taking into account ongoing efforts by the DRC authorities, as well as the support of the international community.”59 The Mapping Report attempts to establish factual accounts of the crimes being committed so that healing and reform can take place. In this way, it resembles the goal of some transitional justice mechanisms,

55 Ibid.
such as truth commissions. The Report devotes specific and focused attention to sexual violence against women and children as part of military tactics employed by all combatant forces involved in the conflict.

There are multiple forms of sexual violence in the DRC. The Mapping Report breaks them down into somewhat superficial categories, but they help to give a sense of the trauma and long-term psychological damage these attacks will have on the individual victims and their communities. Sexual violence as an instrument of terror includes torture and humiliation, forced rape between victims (including incest), a deliberate policy of spreading HIV/AIDS, and acts of sexual violence during military victories or defeats. Sexual violence committed on the basis of ethnicity and sexual violence committed in the name of ritual purposes are sometimes connected, as it is believed by some Mayi-Mayi that Pygmy women have healing powers. Sexual slavery has also been prevalent, where individuals are held for sexual purposes for more than 24 hours, and often for months. Within the category of sexual slavery falls the particular case of child soldiers. It was common practice that female Children Associated with Armed Forces and Armed Groups would be forced to serve as sex slaves or “wives” for the commanding officers. In addition to this practice was the inculcation of male child soldiers into the practice of rape. Male CAAFAGs, known as Kadogo, were forced to commit rape or other brutal acts, supposedly in order to toughen them up. If they refused, they would be executed. Due to the uniqueness of

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60 For protection, some of these soldiers are known to have worn amulets made from the body parts of Pygmy women. UN Office of the High Commissioner for Human Rights, Report of the Mapping Exercise, para 648.
61 Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court 01/04-01/06, Transcription of hearings from Trial Chamber I (February 3, February 27, and March 6, 2009). CAAFAG, Children Associated with Armed Forces and Armed Groups.
62 “Little ones” in DRC colloquial Swahili.
this particular form of sexual violence, special measures will have to be taken at the trial stage to treat these crimes with the appropriate sensitivity.64

IV. Climate of Impunity in the DRC

“There is absolutely no doubt that the scale and gravity of acts of sexual violence are directly proportional to the victims’ lack of access to justice and that the impunity that has reigned in recent decades has made women even more vulnerable than they were before.”65 During the severe political transition at the national level in 2003, cases of rape and violence diminished noticeably as there were high expectations that law and order would be restored. When this new stability failed to materialize, perpetrators resumed their attacks on the population.66 This trend illustrates the nature of the relationship between impunity and sexual violence. As UN Special Representative on Sexual Violence in Conflict, Margo Wallström, has rightly said, “zero tolerance has been underpinned by zero consequences.”67

Section III of the Mapping Report focuses on the Congolese justice system.68 Since 1993, ongoing civil war and armed conflict in the DRC has eroded many government institutions, including a breakdown of the justice system. This dysfunction remains a problem today. A lack of institutional independence and widespread corruption has made the system untrustworthy and inefficient. In addition, many of the individuals suspected of responsibility for serious human

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rights violations are now in senior government and military positions. The government has demonstrated an unwillingness to exclude these individuals from the benefits of peace agreements. Some of them were promoted in the military ranks in 2002 when their groups were integrated into the national army. The promotion of these culprits into institutions that have official control over the nationwide use of force has left millions of victims, who are now legitimately under the power of their aggressors, with nowhere to safely report the crimes committed against their communities. Wallström has urged that perpetrators of rape and sexual violence should be excluded from benefits of disarmament or amnesty provisions, prevented from returning to civilian life, and barred from any role in politics or government. So far, no action has been taken to this end.

The serious violations of human rights and international humanitarian law that were committed between 1993 and 2003 (and since) have generally been met with an attitude of near total impunity. At the time it was written, the Mapping Report noted that, “the exclusive competence of military courts over crimes under international law has resulted in growing impunity, as demonstrated by the very small number of investigations and prosecutions of war crimes and crimes against humanity, despite the outrageous number of crimes committed.” Under current Congolese domestic law, military courts have exclusive jurisdiction to try these crimes. Meanwhile, it is openly acknowledged that the DRC’s military courts lack the requisite political independence from the executive, legislative and administrative powers of the State.

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69 Ibid., para 1138.
70 Ibid., para 977. This is one reason why the protection of victims, witnesses and main actors in the judicial system is vital to the effective prosecution of perpetrators holding positions of authority.
73 Ibid., para 829. This refers to war crimes, crimes against humanity and genocide.
Both the Congolese public and the international community openly acknowledge political and military interference in the justice system.\textsuperscript{74} This means that the most serious crimes are simply not being tried in accordance with the principles of justice. The UN has condemned the Congolese judicial process as a serious problem, questioning “the capacity of the Congolese military authorities and judiciary – particularly in view of interference from political actors and the military command structure – to decisively address impunity and hold trials for serious human rights violations.”\textsuperscript{75}

Despite the DRC’s obligation under the Geneva Convention to curb serious breaches of human rights, the mapping team reports that, according to Congolese judicial authorities, “no judgment for war crimes or crimes against humanity had ever been issued under the Military Justice Code of 1972, which remained in force until 2003.”\textsuperscript{76} The military law was reformed in 2003, after the 2002 signing of the Pretoria Agreement and the Luanda Agreement began the official withdrawal of Rwandan and Ugandan national forces. Since then, very few cases handling crimes against international law have been dealt with by the military jurisdiction currently in place. A near total impunity for these crimes has proven that offenders will not be held accountable and has served to encourage the perpetration of new and serious violations of human rights and international humanitarian law.

The Congolese public does not view the military courts as capable or reliable enough to fight the overwhelming impunity for the atrocious violations of their fundamental human rights.\textsuperscript{77} A preliminary report states that between 30 July and 2 August 2010, at least 303

\begin{thebibliography}{9}
  \bibitem{74} Ibid., para 929.
  \bibitem{75} Ibid., para 961.
  \bibitem{76} Ibid., paras 893-94. Of the multitude of violations of international law listed in the Mapping Report to have been committed from March 1993 to June 2003, military tribunals have only addressed two crimes that can be classified as war crimes, one of which resulted in the acquittal of all accused. Ibid. para 890.
  \bibitem{77} Ibid., para 979.
\end{thebibliography}
civilians were raped during an attack on villages in the Walikale region in North Kivu. After these attacks, the government placed a moratorium on mining in the region and sent in national military to secure peace. There were soon reports that the military had perpetrated rapes on the same community they were sent to protect. In response to these horrendous events, Wallström declared, “When commanders can no longer rest easy in the certainty of impunity; when it begins to cross their mind that they may be turned in by their own for commissioning or condoning rape; this is the moment when we open a new front in the battle to end impunity.”

Congoese armed forces should be thoroughly vetted in order to remove soldiers and officers suspected of having committed atrocities against civilians.

V. Legal Frameworks Applicable to Sexual Violence

Article 15 of the Congolese Constitution includes sexual violence as a crime against humanity, and a 2006 revision includes rape with objects to criminal legislation. “Law No06/019 of 20 July 2006 on sexual violence provides that the victim is entitled to the assistance of legal counsel during all phases of the judicial procedure. It is not specified who will provide the victim with this counsel, but the State obviously has a key responsibility, at least to guarantee the rights to a fair trial and an effective remedy.”

The DRC Sexualized and Gender-Based Violence (SGBV) delegation of the Swedish Foundation for Human Rights found no examples where the Congolese state used its resources to undertake this responsibility; once again, legislative

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80 Plett, “Interview of Margot Wallström by BBC UN correspondent, Barbara Plett.”
attempts exist on the page, rather than in the field.\textsuperscript{83} Regardless, this law does not apply to the period from 1993-2003.\textsuperscript{84} During that period, rape is defined under the narrow provisions of the 1940 Congolese Criminal Code, which does not even remotely cover the full range of sex crimes perpetrated in the DRC. The Rome Statute definitions of these crimes are far more inclusive. The DRC has not yet adopted the Rome Statute into its domestic law, but this does not diminish the country’s ratification of the statute. Therefore, the DRC is still bound by the statute, but cannot try the crimes in their domestic courts until the appropriate legislative changes are made. The Rome Statute was not codified until 1998, which technically places a restriction on the start-date of the statutory temporal jurisdiction. By arguing that the offences listed in the Rome Statute were already customary international law in 1996, the Special Court for Sierra Leone was able to overcome this temporal restriction. Professor Valerie Oosterveld of the Faculty of Law, University of Western Ontario, suggests this same standpoint can be argued in the case of the DRC. This would enable the use of crimes listed in the Rome Statute to prosecute offences committed from the beginning of the conflict in 1993.\textsuperscript{85}

i. Transitional Justice – Congolese Mixed Chamber

The concept of transitional justice has developed as a response to instances where human rights are violated systematically or on a widespread scale. Its initiatives are developed in order to facilitate “recognition for victims and to promote possibilities for peace, reconciliation and democracy.”\textsuperscript{86} At present, transitional justice has been used as an approach to post-conflict rebuilding in countries emerging from a period when human rights offences were overwhelmingly pervasive. The general consensus in the international community is that

\textsuperscript{83} Ibid., para 26.
\textsuperscript{84} UN Office of the High Commissioner for Human Rights, Report of the Mapping Exercise, para 540.
\textsuperscript{85} Personal email from Professor Valerie Oosterveld, November 30, 2010.
transitional justice is appropriate in the Congolese context, but still at issue is which types of transitional justice mechanisms should be implemented. The UN declared in Resolution 1820 (2008) of the Security Council, dated 19 June 2008, that “sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security.”

The high prevalence of sexual violence in the DRC calls for transitional justice mechanisms to be established. These mechanisms must be designed to take prevalence into account, while remaining sensitive to the needs of the victims of sexual violence and their communities. This is a fundamental step toward rebuilding a Congolese society that will value women and in which women will be able to actively participate; it will require the correction of traditional political and structural inequalities between men and women. The small number of women in the judiciary also contributes to the overall impunity for crimes of sexual violence and will need to be increased over time. There must be major reforms of the justice and security sectors in order to combat the near total impunity for these crimes.

There is currently draft legislation that will implement the Rome Statute of the ICC into Congolese domestic law. Once it is approved, the Rome Statute jurisdiction to try war crimes, crimes against humanity and genocide will no longer be vested solely in the military courts. These crimes will move to the civilian courts. When this has been achieved, the DRC will need a court with the expertise and the judicial independence to try these crimes. The Congolese civil law system lacks adequate funding, personnel, transportation, training, professional

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88 Ibid.
development, witness protection, expertise, and judicial independence.\textsuperscript{89} To overcome these shortcomings, the Mapping Report indicates a strong preference for the creation of a hybrid court model called a “Mixed Chamber” that is made up of national and international staff.\textsuperscript{90} The involvement of international personnel will bring procedural expertise and will help to minimize the proven lack of capacity of the Congolese domestic justice system to function independently. Meanwhile, the inclusion of national personnel will facilitate a Congolese sense of ownership of the process, which is a key to renewing public faith in the justice system. Congolese staff would also provide crucial knowledge of the historical roots of the conflict. They will be able to inform the interaction of the chamber with their unique cultural context and will also bring expert knowledge of Congolese criminal law and legal procedure.\textsuperscript{91} Surprisingly, in the many reports calling for the establishment of a mixed chamber, there is practically no mention of gender parity on the chamber bench. While there may be a current shortage of female judges in the DRC, women could and certainly should be appointed from the international community. Given the gendered nature of many of the crimes that will be tried, gender composition on the bench is of central importance to the chamber’s success and it should be adequately addressed in the planning stage. The fact that it has not been emphasized thus far is cause for great concern and international political powers should take it upon themselves to urge the DRC government to address the issue head on.

In its initial written comments on the Mapping Report, the DRC government responded to the possibility of creating a mixed chamber. They proposed it be situated within the Congolese judicial system but that it should have jurisdiction over the most serious crimes committed in the

\textsuperscript{89} Ibid., para 904.
\textsuperscript{90} Ibid., para 61.
DRC.\textsuperscript{92} This means that the special chamber would be vested with the jurisdictional power to investigate and prosecute crimes of the nature of those documented in the Mapping Report. The burden of proof is a particularly onerous evidentiary standard in sexual violence cases. Beyond that, these crimes are difficult to prosecute. The perpetrators are often difficult to identify, and they may be powerful figures in rebel armies or holders of senior positions in national armed forces.\textsuperscript{93} Even more complex is proving guilt for a crime as a matter of command responsibility, rather than proving the guilt of those who committed a crime directly. Establishing links between acts on the ground and orders or acquiescence from above requires extensive experience on the part of the prosecution.\textsuperscript{94} However, proving command responsibility has been successful in other international tribunals, like the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and therefore it should be treated as a realistic goal that should be undertaken in the Congolese context.

Additional expertise is needed to ensure procedural fairness and the protection of witnesses and judicial staff from political interference. The presence and participation of international staff will also legitimize potential attempts to prosecute crimes allegedly committed by non-Congolese perpetrators.\textsuperscript{95} Human Rights Watch urges that temporarily having international staff will give such a chamber the maximum credibility, judicial independence and

\textsuperscript{94} Ibid., 975.
\textsuperscript{95} Ibid., 978. “Cooperation on extradition from certain States remains unlikely, given the few guarantees offered by the Congolese military courts in respect of fair and equitable trials and respect for the fundamental rights of defendants, particularly as the death penalty is still provided for under Congolese law.”
expertise required to handle crimes that are very complex and difficult to prosecute. The long-term hope is that the nationals represented in the chamber will gain the necessary expertise and that international participants will be gradually phased out.

ii. Legal Foundation of the Mixed Chamber

The mixed chamber can be enacted either by domestic law, as was done for the Bosnian War Crimes Chamber, or by a formal treaty between the DRC government and the UN. Article 149 of the Congolese Constitution allows for the creation of a specialized jurisdiction. For this reason, the enactment of a domestic law would be a good way to integrate the mixed chamber into the DRC judicial system. It is possible to create a mixed chamber in the DRC with the enactment of only one law. If the law were integrated into the current ICC/Rome Statute implementing legislation mentioned above, Parliament’s passing of this legislation would also mean the passing of the mixed chamber creation law. A less efficient yet still effective alternative would be to enact a separate law that would create the mixed chamber. If it were set up under Congolese law, this would still emphasize domestic ownership of the court and would not require formal UN involvement. If neither of these options is chosen, memoranda of understanding could be signed by partners who will assist with the chamber’s establishment, funding and support of its functioning. This method would not emphasize domestic ownership, but it would still succeed in creating the mixed chamber. Alternatively, a mixed chamber could also be created by a formal agreement between the UN and the DRC government.

97 “La loi peut créer des juridictions spécialisées.” Constitution de la République démocratique du Congo, Kinshasa, Feb 18, 2006, Article 149.
98 The Swedish Foundation for Human Rights, Justice, Impunity, and Sexual Violence in Eastern Democratic Republic of Congo, para 25. The UN, the African Union or the European Union would be potential partners under this method.
According to both internationally accepted standards and the Congolese constitution, a mixed chamber of this nature should be based in the civilian justice system, rather than outside of it. It is not yet clear where in the civilian court system the mixed chamber would actually be located. Human Rights Watch believes it could, and probably should, have what is referred to as a “mobile” function.99 This would provide the court with one permanent location, but would enable it to hold some proceedings closer to where the crimes were committed. Where a specific region suffered particularly brutal or numerous attacks, use of the mixed chamber’s mobile function could emphasize Congolese ownership of the process. It may also enable victim-witnesses to testify in court who otherwise would not be able to travel to the permanent location. Victim-witness testimony is fundamental to the post-conflict judicial process and should be encouraged as much as possible.

Ideally, the policy-makers for the chamber should consult civil society regarding the temporal jurisdiction vested in the chamber.100 An ideal, though broad, jurisdiction would allow prosecution for crimes from March 1993 onward, which includes the period covered by the Mapping Report. This overcomes the temporal jurisdiction restraints on the ICC, which was created in 2002. It is essential that the temporal jurisdiction be left open-ended because serious international offences that would fall under the mixed chambers legal jurisdiction continue today. The mixed chamber should be given primary, but not sole, jurisdiction over cases that involve war crimes, crimes against humanity and genocide.

iii. Mandate, Targets and Composition of the Mixed Chamber

The primary focus of the mixed chamber should be those “persons most responsible” for committing war crimes, crimes against humanity and genocide. Depending on the severity of the

99 Ibid.
100 Ibid.
crime or its scale, this refers particularly to those in political or military leadership and those down the chain of command who may be found “most responsible.” 101 As an overall prosecutorial method, this would also facilitate the trying of lower-ranking officials who are suspected of committing particularly heinous crimes like GBSV crimes, especially those committed against a large number of victims. It is essential that the mixed chamber be set up to best prevent political interference and to promote efficiency. There are three key ingredients to ensuring this: it will need its own mixed bench of judges, its own investigation and prosecution teams and its own administrative structure or “registry.” 102 The registry deserves special attention. It would handle administrative functions that relate to the chambers operation, like the recruitment of staff, finances, security, management of evidence, documentation for trial, translations, and detention facilities. More importantly, the registry would also serve to promote procedural fairness for those being tried, as well as the wellbeing and protection of victims and witnesses. This would include facilitating the role of the defense, victims’ lawyers, managing witness protection, and the essential outreach to local population about trials.

Outreach is instrumental to both Congolese ownership of the process and to ensuring that victim-witnesses come forward to testify. An outreach to the local population is especially important for victims of sexual violence. The heavy stigma placed on survivors of those crimes has acted in the past as a strong deterrent against reporting. In the Bosnian War Crimes Chamber, a weak outreach program called the Court Support Network has made little progress in promoting the work of the court to those in the communities most affected by the crimes being tried. This area will need to be dramatically improved upon in the Congo. Much of the violence,

including the brutal sexual violence, was carried out as retaliation or punishment for supporting opposing political groups or military factions. Therefore, in order to encourage victim-witnesses to come forward to report the crimes and testify against their aggressors, they must trust that the system will prosecute the perpetrators effectively and efficiently and that they will be protected from further violence carried out as a result of their testimony. Sexual violence crimes are particularly complicated to prosecute, especially since they are so numerous in the DRC. The mixed chamber will have to actively promote accountability for these types of crimes, which will likely mean the inclusion of additional expertise in the mixed chamber in this area of law.  

For this purpose, Human Rights Watch has proposed the creation of a “specialized sexual violence unit” in the mixed chamber that will attempt to assign responsibility for these crimes and provide expertise in their prosecution. This unit should also provide advice and training to other chamber staff to prepare them to interview victims appropriately and to handle sensitively the victims of sexual violence. Additionally, creating an option for closed sessions is likely to be a useful function of the mixed chamber. The Bosnia War Crimes Chamber uses this option, notably to protect a witness testifying under unusually dangerous circumstances. This should be written into the creation legislation in order to accommodate witnesses or witness-victims who may be risking their safety in order to testify against individuals in powerful positions.

VI. Essential Aid for Victims of Sexual Violence

103 Ibid.  
104 Ibid.  
105 This interview training will also be essential to addressing the special case of former child soldiers.  
“In the post-war transition period, the promotion of women’s human rights and gender equality is not seen as a priority, in particular in efforts to address the consequences of the armed conflict and in the peace building and reconstruction processes.”108 The Mapping Report makes it clear that the special traumas suffered by women and children must be explicitly addressed in the peace-building process. The gendered aspect of these crimes needs to be adequately addressed in the Congolese public. “Sexual violence in armed conflicts in the DRC is fuelled by gender-based discrimination in the society at large.”109 Customary laws regulate 75% of the law for the 60% of the Congolese population living in rural areas.110 This means that the law protects traditions governing the interaction between men and women and thus it enforces the rights of women as less than those of men. The rights of Congolese women and girls are generally subordinated to the honour of their husband, family and community. This attaches additional significance to their coming forward and denouncing rape, for which they may be abandoned or re-victimized by their community. Tragically, when a Congolese woman reports a rape, she may be putting her marriage at risk or seriously jeopardize her chances of ever getting married. Women are often cast out after falling victim to sexual violence and, as shelter and refuge options for these women and children are insufficient to meet the vast demand, they are exposed to the serious risks of violence in the street.111 This is one reason why many Congolese women and children end up working in prostitution. There is a serious lack of resources in aid for sexual violence victims. There have been many grassroots attempts to help women recover from the trauma of rape, such

109 Ibid., para 533.
as centers set up by Congolese women to help one another. However, on a broader scale, providing some initial assistance tends to come at the expense of an almost total lack of long-term follow-up care for the victims, their family and their community. Frequently, programs for victims of GBSV stop once they are able to return to their home, despite the difficulties they will face upon rejoining their community. It is rarely acknowledged that, “problems of cohabiting with the family and the community may arise only after some months, or even after some years, as the effects of the trauma start to emerge.”

Bringing perpetrators to justice is crucial to Congolese ownership of the judicial process and of moving forward. The creation of a mixed chamber can help to address the complex post-conflict problems faced by many Congolese civilians. There is now a generation of Congolese children who have only known conflict and who have been raised in an environment where the violent and senseless rape of women was a perverse reality. Comprehensive social work is needed to combat subsequent views of rape as normal. More than that, something needs to be done to help the estimated tens of thousands of Congolese people who have fallen victim to these types of attacks. Validating these crimes as war crimes, rather than as a side effect of war, is essential to this process. Also fundamental to peace-building is the improvement of the situation of women, which can be encouraged by increasing their visibility in the prosecution and peace-building processes.

“Preventing rape and sexual violence not only includes fighting impunity, but also includes eliminating socio-cultural barriers that enhance the ‘acceptability’ of sexual violence perpetrated by non-combatants.” If changes to the structure of the DRC judicial process are to be expected to end the impunity toward these crimes, there must also be a change in the beliefs

112 Ibid.
113 Ibid.
and opinions of many Congolese, especially those in the judiciary. Culture and tradition are frequently invoked to protect the practice of rape, coerced sex and the sexual abuse of minors.\footnote{\textsuperscript{114} Ibid.} Given the general political and social devastation of the DRC over the past few decades, international financial aid will be required for there to be a meaningful rebuilding process. It is essential that the interests of the aid programs, whether they are national, international, governmental or NGOs, not be treated as paramount to the interests of those they are seeking to help. A non-comprehensive approach to sexual violence, whereby attention is given to only one or two aspects of aid and prevention, will inevitably mean that the rights of the rape victims are not fully respected, and may even increase the risk of other forms of sexual violence. Limited resources will require extremely efficient and effective use. In the Essex Human Rights Review, Marleen Bosmans recommends that coordinating mechanisms be set up to improve and enhance the use of resources in these interventions. “Building a national and local capacity to respond properly to the needs of rape victims and to support advocacy on the broader issue of sexual and gender-based violence will be paramount for the promotion and realization of gender equality in the post-conflict Democratic Republic of Congo.”\footnote{\textsuperscript{115} Ibid.} This type of program will be very useful in building a durable Congolese infrastructure and should be given extensive consideration.

It is not under dispute that in accordance with human rights and humanitarian law standards, women and children should be given special protection from rape and sexual violence. Additionally, most experts agree that access to adequate aid is as essential as protection. Prevention plays an invaluable role in this process because a rights-based approach for women and children should not only treat victims, but should work to prevent the future victimization of

\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
women and children. In the DRC, victims of sexual violence are in serious need of medical and clinical aid, psychological and psychosocial support, legal aid, economic assistance, protection, and security. To fulfill their medical needs, there must be adequate quality treatment of their physical injuries, including specialized surgical interventions for physical trauma such as fistulas. Since abortion is illegal in the DRC, victims are also in serious need of emergency contraceptives and pregnancy care. High rates of sexually transmitted infections, including HIV/AIDS, means victims must have access to antibiotics, post-exposure prophylaxis, and voluntary counseling. As well, HIV testing and anti-retroviral treatments must be accessible to victims. These types of post-rape measures are not normally offered in the DRC, which puts victims at a greater risk of unwanted pregnancy and debilitating or life-threatening illness. In terms of psychosocial resources, the serious traumas suffered by victims create the additional need for long-term, accessible psychosocial support. Counselors and group therapy should be made available to victims in order to help them cope with their trauma. This type of treatment will also play a role in preparing victims for life outside the shelter or hospital where they are being treated. Further, since victims of sexual violence often face abandonment by their husbands and family, they will need economic support to enable them to survive without family and to provide for their children. Shelter is essential to this process, as women and children will need protection from the reprisals frequently endured by survivors of previous sexual assaults, especially those who report their attack. Ideally, economic aid will also be available to help victims travel to court and testify against their aggressors. These programs are desperately needed, but they are a great deal to demand of a country with such limited resources, which is precisely why international support is essential.

116 Ibid., 11.
117 Ibid.
118 Ibid., 12.
i. Increased Presence of Women in the Public Sphere

Currently, there is an obvious shortage of judges and prosecutors in the DRC. “The DRC, with its population of some 60 million, has around 1500 civil and military magistrates.”\textsuperscript{119} There are not nearly enough trained professionals to carry out the legal work that needs to be done.\textsuperscript{120} In addition to the inadequate number of legal professionals, there is a severe gender imbalance in the field, which results in a scarcity of women at all levels of the administration of justice.\textsuperscript{121} Gender disparity in this particular profession is not in any way isolated to the region, but the nature of sexual violence suggests that victims are likely to be more reluctant to speak of their experiences before male policemen, prosecutors and magistrates. The gender parity project \textit{l’Observatoire de la parité} surveyed 929 military and civil judges and prosecutors across all ten Congolese provinces, except Kinshasa. They found 34, or around 3.5\% of these professionals were women.\textsuperscript{122} The DRC GBSV delegation of the Swedish Foundation for Human Rights reports that regional NGOs were of the opinion that “this male predominance in the judiciary contributed to the ‘banalisation’ of sexual violence and sexual offences generally as a ‘woman’s affair’ or again as a matter for the international community, if it wanted to interest itself in it.”\textsuperscript{123} As a result of this attitude, evidence of sexual violence is not being treated seriously.

The status of Congolese women can be improved in part by increasing their visibility in

\begin{footnotesize}
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\item \textsuperscript{119} The Swedish Foundation for Human Rights, \textit{Justice, Impunity, and Sexual Violence in Eastern Democratic Republic of Congo}, para 35.
\item \textsuperscript{120} Ibid.
\item \textsuperscript{121} Ibid., para 36.
\item \textsuperscript{122} Global Rights, \textit{S.O.S. Justice – What justice is there for vulnerable groups in Eastern DRC?} August 2005, 7, http://www.globalrights.org/site/DocServer/SOS_ExecutiveSummary_ENG_FIN.pdf?docID=4123. According to a survey conducted by L’Observatoire de la Parité (www.observatoiredelaparite.org) of the provincial judiciaries, there are 929 civil and military prosecutors and judges outside the province of Kinshasa. In contrast, according to the government’s own figures, there were in 2005 a total of 2,053 judges (1,678 civil court judges and 375 military courts judges).
\end{itemize}
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the transitional justice and peace-building processes. While training Congolese women to be prosecutors and judges should remain a long-term goal, the process of increased visibility can begin with basic training and education. This will enable them to secure positions at the administrative level of the justice system. For instance, upon the establishment of the mixed chamber, there will be many job positions to fill and potential employees will need training in the procedures of that court. Congolese women are viable candidates for this type of work and the chamber should take great pains to ensure that 50% of mixed chamber registry employees are women (whether the work is administrative, investigative, procedural or otherwise). Given that these are not decision-making positions, institutional bias due to their experience of the conflict is unlikely to be an issue.

VII. CONCLUSION

The conflict is ongoing in the DRC. Recent events have demonstrated that women and children are suffering the same terrors of sexual violence as they were 14 years ago when the First Congo War began. While the peace-building process must end the fighting, particularly in the eastern provinces, aid and assistance are desperately needed for civilians who have no justice system to protect them. The widespread impunity for violations of human rights and international humanitarian law has led to the normalization of sexual violence in conflict. This epidemic of GBSV has made life in the DRC very difficult, especially for women and children. The UN Mapping Report recommends the creation of a mixed chamber domestic court to try cases of war crimes, crimes against humanity and genocide in accordance with the definition of these crimes and crimes of sexual violence found in the Rome Statute. This is highly significant, as years of impunity have eroded both the justice system and public faith in its ability to serve Congolese citizens. As an important starting point, there must be an end to impunity and a disposal of
arcane, yet predominant ideas of rape as a women’s issue that is secondary to armed conflict. This is an essential step toward peace in the DRC, but the problems faced by civilian populations are too diverse and complex for a court to address adequately. Victims of sexual violence need access to medical and psychosocial care. This requires an organization like a “specialized sexual violence unit,” which can facilitate expertise in prosecution. 124 Conceivably, a unit of this nature could also provide emergency contraceptives, pregnancy care, HIV/AIDS testing, antibiotics, post-exposure prophylaxis and surgical attention for serious injuries like fistulas. In terms of the psychological aid, the programs have to be long-term, as the trauma of these attacks can often only surface after several months or even years. There must also be shelter for women and children who are abandoned by their families after rape. Economic aid is badly needed. Each of these programs will improve the judicial goals set by the mixed chamber by helping women to come forward and travel to courts to testify. Beyond all aid, there must be social work to change Congolese traditional views of women as subordinate to men. This can be improved on through the increased visibility of women in the public sphere. The process will not be easy, but by placing women in public positions, such as the mixed chamber registry, and by helping them to be healthy and to feel safe, there is a chance that the DRC of the future will see a peaceful end to widespread sexual violence and the perpetrators of these crimes brought to justice.

KEY ACRONYMS USED

- **ADF/NALU**  Allied Democratic Forces/National Army for the Liberation of Uganda (made up of former Ugandan rebel groups, the ADF/NALU appeared in the second half of the 80s after Yoweri Museveni seized power in Uganda)
- **AFDL**  Alliance des Forces Démocratiques pour la Libération du Congo
- **ALC**  Armée de Libération du Congo (armed wing of the MLC)
- **ALiR**  Armée de Libération du Rwanda (movement formed in 1998 comprising

the ex-FAR/Interahamwe and armed Hutu elements)

- **ANC** Armée Nationale Congolaise (armed wing of the RCD-Goma)
- **ANR** Agence Nationale de Renseignements
- **APC** Armée du Peuple Congolais (armed wing of the RCD-ML)
- **APR** Armée Patriotique Rwandaise (national army of Rwanda from 1994 to 2002)
- **CAAFAG** Children Associated with Armed Forces and Armed Groups (male CAAFAGs are commonly referred to as *Kadogo*, “little ones” in DRC colloquial Swahili.)
- **CNDD** Burundian Hutu Movement
- **FAC** Forces Armées Congolaises (national army of the DRC from June 1997)
- **FAR** National army of Rwanda before July 1994.
- **FAZ** Forces Armées Zaïroises (national army of Zaire)
- **FDD** Armed wing of CNDD

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THE LEGACY OF INEQUITY:
AN ANALYSIS OF JOHANNESBURG AND CAPE TOWN IN POST-APARTHEID SOUTH AFRICA

Jory Hennick

Academics of urban studies have questioned what legacies linger from the South African Apartheid system, what reforms were introduced and whether or not they were effective in overcoming those resulting challenges. This analysis will contend that the goal of adopting a democratic, non-racial state in post-Apartheid South Africa was challenged predominantly by the legacy of inequity, which affected all aspects of society - economic, political and social. By comparing the two most prominent cities in South Africa, Johannesburg and Cape Town, it will become evident that while similar political reforms were introduced in both cities, each implemented distinct economic development reforms and initiatives to address the issue of widespread disparities in the transition towards a democratic, non-discriminatory state. Finally, this examination will offer suggestions on how South African cities can overcome further political and economic inequities to ensure a democratic, non-racial state in the future.

In the mid-20th century, the election of the National Party resulted in the segregation of South African cities and the beginning of Apartheid. Apartheid refers to the structure of legal racial segregation imposed by the national government of South Africa from 1948 to 1994. During this period, the majority non-whites held no rights while the minority whites maintained control within South African cities. Apartheid in South Africa was declared officially over with the 1994 elections and the national government’s aim to establish a democratic, non-racial state. Academics of urban studies have questioned what legacies linger from the Apartheid system, what reforms were introduced and whether or not they were effective in overcoming those resulting challenges. The following analysis will contend that the goal of adopting a democratic, non-racial state in post-Apartheid South Africa was challenged predominantly by the legacy of inequity, which affected all aspects of society - economic, political and social. By comparing the two most prominent cities in South Africa, Johannesburg and Cape Town, it will become evident that while similar political reforms were introduced in both cities, each implemented distinct
economic development reforms and initiatives to address the issue of widespread disparities in the transition towards a democratic, non-discriminatory state. Finally, this examination will offer suggestions on how South African cities can overcome further political and economic inequities to ensure a democratic, non-racial state in the future.

Prior to examining how local governments in South African cities sought to resolve the Apartheid legacy of inequity, one must first review and understand the historical circumstances and conditions during Apartheid in South Africa. From 1980 until the official end of Apartheid in 1994, the circumstances in South Africa were adverse. Low-density, high-income white neighbourhoods were established near and within the urban centres, whereas large and impoverished, high-density suburbs were established in the urban periphery for non-whites. As a result of physical and social segregation in South African cities, African townships were poorly serviced and were primarily informal settlements. These informal settlements were located just outside urban centres and consisted primarily of dwellings made of scrap metal, wood, and plastic. Until the 1980s, the non-white majority was only permitted entrance to the city to service the mines and industries owned by the white population. Furthermore, many restrictions were placed on non-white businesses in those segregated townships. Consequently, the growth rate of South Africa’s gross domestic product (GDP) was very low at a mere 1.6 percent per annum. Employment in South African’s primary industries was declining. In the mining industry, for example, employment decreased from 24 percent to 16 percent. Along with the slow economic

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2 Ibid.
3 Ibid.
5 Ibid., 4.
growth and increasing unemployment rate, population growth was increasingly rapidly. As a result, unemployment in the South African Gauteng province alone reached roughly 30 percent. Population growth of 1.7 percent surpassed employment growth of 1.5 percent, resulting in widespread unemployment and poverty. In the early 1990s, 50 percent of the South African population held 11 percent of the national income. The equity division between whites and non-whites during Apartheid was rapidly becoming the most prevalent issue in the municipalities.

The beginning of the end of Apartheid started in the 1980s with the introduction of the Black Local Authorities (BLAs), responsible for governing black townships in the urban areas. The BLAs received no funding from provincial or national governments and thus were required to collect rent and service payments to financially manage their respective townships. However, the BLAs’ revenue collection was never adequate to effectively govern the townships. This resulted in the Soweto Rent Boycotts, when 80 percent of the population from the black township of Soweto responded through riots and protests to the deteriorating living and economic conditions. This social movement is a prime example of the ‘Political Opportunity Structure’ theory, which claims that peoples’ social behavior depends primarily on their opportunities for political participation. In the Soweto Township case, possibilities for the poor to participate were limited, which led them to rise up to retain political opportunities.

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6 Ibid.
7 Ibid.
8 Ibid.
11 Ibid.
12 Ibid.
13 Ibid., 8.
15 Ibid.
These boycotts sparked nation-wide opposition to the Apartheid structure and, consequently, “One City, One Tax Base” became an eminent motto across all South African cities. The national government soon discovered that the existing structure in South Africa was unstable and that remedies to Apartheid were necessary. This marked a turning point in South African history as the national government in South Africa promised to transform the Apartheid system. It committed itself to a “non-racial and democratic structure of local government and improved quality of life by establishing a common tax base and upgrading services.” The Apartheid system was officially renounced in 1994 with the election of new local governments.

Nevertheless, declaring the end of the Apartheid system in 1994 was not in itself the major challenge for South Africa. Rather, while the national government had promised to put an end to the Apartheid structure, South African cities faced major challenges that needed to be addressed in order to completely eliminate it. The Apartheid structure left the key legacy of inequity, defined as a lack of fairness or impartiality. This legacy of Apartheid left the citizens of South Africa disproportionately represented in all facets of society, primarily politically and economically. Addressing the issue of civic inequity in South African cities represented the major impediment to achieving a non-racial, democratic system throughout the country.

Resolving this issue became the driving force behind the transformation of local government in the post-Apartheid system.21

For local government transformation to take place, certain political and economic reforms were introduced and adopted in South African municipalities to resolve the issue of inequity. It is important to note that local governments were by no means functioning alone in this process of re-structuring after Apartheid. The national government was also involved in these processes and the two levels of government worked in consort with one another. While political and economic reforms were set forth at the national level to resolve inequity, local governments were the primary force responsible for implementing and enforcing these reforms. This analysis will first examine these local political reforms, focusing primarily on the cases of Johannesburg and Cape Town.

During Apartheid, the majority non-whites’ political rights were heavily restricted and thus not effectively represented in local government. As a result, re-conceptualizing the municipal government politically by reallocating resources and political powers towards the poor was crucial to resolving issues of inequity in South African cities. Since white local authorities lacked the motivation to establish integration and a non-racial government in an attempt to maintain the status quo, the national government was responsible for outlining the mandatory changes in political structures of local government to help overcome political inequity. Political reforms were introduced to ensure a democratic system whereby all citizens were equally represented in government. Many political reforms were introduced by the national government in the early 1990s to pave the way for the official end of Apartheid in the 1994 elections. All municipal-level

21 Ibid.
governments throughout South Africa, including Johannesburg and Cape Town, implemented the same political reforms across the board.\textsuperscript{22}

In 1993, the national government mapped out the Local Government Transition Act (LGTA).\textsuperscript{23} The LGTA aimed to create a guided transition towards a democratic structure of local government and provide measures for overcoming racially based local government structures and inequalities.\textsuperscript{24} The LGTA outlined several phases of local government structural transformations that were implemented from the early 1990s (prior to the official declaration of the end of Apartheid) until a fully democratic system was installed in local governments. Beginning with the ‘negotiations and forums’ phase, local governments were required to put in place forums that would negotiate and drive the transition from the Apartheid system in South Africa.\textsuperscript{25} Second, during the ‘pre-interim’ stage, legislation and local councils were appointed through the use of a 50/50 formula.\textsuperscript{26} During the third, ‘interim’ phase, which occurred after the first democratic elections in 1994, the local constitution would be written.\textsuperscript{27} The ‘final phase’ proclaimed the beginning of a fully democratic council with a newly negotiated constitution.\textsuperscript{28} This process sought to gradually transition local governments towards democratic structures of government and the resolution of inequities.

The cities of Johannesburg and Cape Town were prime examples of how every local government in South Africa adopted the same political reforms introduced by the national

\textsuperscript{23} Ibid., 2.
\textsuperscript{26} Ibid.
\textsuperscript{28} Ibid., 9.
governments. Both Cape Town and Johannesburg introduced Local Government Negotiating Forums in 1993, as part of the ‘negotiations and forums’ phase. These forums could be found in every urban centre in South Africa in the early 1990s. The Cape Town Metropolitan Negotiation Forum (CMNF) and the Greater Johannesburg Metropolitan Negotiating Forum (GJMNHF) were responsible for governing their respective cities until local government elections in 1994. The forums managed the ‘interim’ transition towards a democratic system in South Africa. They negotiated the dissolution of racially based authorities in cities; discussed boundaries and appointed non-racial councils with political control over administrative and financial resources; and further sought to address the backlog of the provision of services to citizens. Essentially, these forums, through the adoption of the 50/50 formula explained below, were necessary to ensure that issues of inequity would be overcome and that the interests of all South African citizens would be taken into account.

In order to resolve inequity and create a non-racial democratic state, the third ‘interim’ phase involved reorganizing the political structures in Johannesburg and Cape Town. The national government enforced what has become known as the 50/50 formula. Half of the interim council was comprised of existing statutory groups, while the other half contained non-statutory bodies such as the African National Congress (primarily a non-white political party), the BLAs, and other organizations. Forums were organized using the 50/50 formula for two reasons: as an attempt to unite the majority non-whites and minority whites, and also to divide

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29 Ibid., 7.
33 Ibid., 274.
34 Ibid.
power so as to equally represent all citizens. Through this formula and the negotiating forums, all South African citizens were guaranteed equal rights and representation. These structural reforms were not only introduced in Cape Town and Johannesburg, but throughout all South African cities.

After the national elections of December 1, 1994, the forums evolved into metropolitan councils as part of both the ‘interim’ and ‘final’ stages of the LGTA. These councils, such as the Greater Johannesburg Metropolitan Council (GJMC) and the Cape Town Metropolitan Council (CMC) were vested with the responsibility of governing South African cities. This government restructuring and the reforms that were introduced created city councils that no longer discriminated based on race and ensured that all South African citizens maintained equal rights. The mandatory negotiations, forums and the 50/50 formula initiated by the national government in the LGTA helped South Africa overcome political inequity. Applying identical political reforms in Cape Town and Johannesburg, as well as in all other South African cities, was crucial to ensuring equal representation of all South African citizens and providing legitimacy to the democratic system through political consistency. Essentially, this marked the transition to a fully democratic, non-racial system in post-Apartheid South Africa.

Resolving the legacy of political inequity was clearly a fundamental challenge for South African cities in the post-Apartheid transition. As with the political reforms, the national government was also responsible for introducing economic development reforms to help resolve economic inequity in the post-Apartheid system. Once again, local governments were responsible for driving the process of economic development through the implementation of these reforms. Yet, while Johannesburg and Cape Town undertook identical political reforms to

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35 Ibid.
36 Ibid.
reform their municipal governments, these two cities adopted different economic development strategies and reforms.

Improving economic conditions in the post-Apartheid period faced several challenges as a result of extensive disparities. Widespread poverty remained a predominant issue in the mid-1990s. For further perspective, Randburg, the wealthiest white township of Johannesburg, boasted an average yearly income of R 52,927 in 1994. Soweto, on the other hand, the wealthiest black township, had an average income of only R 8,358. During this time, approximately 40 percent of households in South Africa earned less than R 1,500 per month. Unemployment, which reached approximately 34 percent, continued to remain an issue. African townships were threatened by service backlogs: 20 percent of all urban households were without electricity and 25 percent had no access to water. Clearly, poverty alleviation and economic development needed to be addressed in order to resolve the legacy of inequity in the post-Apartheid system.

In 1998, the South African national government, through the Ministry of Provisional Affairs and Constitutional Development, introduced the White Paper on Local Government. The White Paper focused on economic and social development through participation and partnership. Its main emphasis was on the concept of developmental local government. This

39 Ibid.
40 Ibid., 160.
41 Ibid., 161.
42 Ibid., 160.
45 Ibid.
concept, also known as the ‘networked governance’ approach\textsuperscript{46}, emerged in the 1990s to address the limitations of the state and challenges facing society during the transition in South Africa. It sought to integrate the divided cities by aligning relationships and creating networks of planning, viewing development as an essential process that takes place through engaging citizens and groups.\textsuperscript{47} Under this approach, partnership with civil society, co-innovation and civic leadership became vehicles for change.\textsuperscript{48} This analysis will show that while Johannesburg and Cape Town agreed with the national government’s White Paper on economic development, they adopted their own distinct approaches to meet the distinct economic development needs of their cities.

Cape Town adopted what has become known as the ‘tiers’ approach, a top-down hierarchical strategy of economic development.\textsuperscript{49} For the most part, Cape Town’s municipal government remained suspicious of partnerships with local stakeholders. As a result, their ‘tiers’ approach focused on centralized organization of economic development.\textsuperscript{50} The Cape Town local government maintained a strong infrastructural emphasis on delivery and provision of services to the poor to achieve equity.\textsuperscript{51} Essentially, the Cape Town municipal government adopted the strategy of redistributing equity and services by directly targeting South African citizens. For instance, the most significant local government project in Cape Town was known as the N2 Gateway Housing Pilot Project.\textsuperscript{52} This project was the primary focus of the Cape Town municipal government and sought to deliver affordable and sustainable housing to eliminate

\begin{footnotesize}
\begin{enumerate}
\item Schmidt, “From Spheres to Tiers - Conceptions of Local Government in South Africa in the Period of 1994-2006,” 112.
\item Ibid.
\item Ibid.
\item Ibid., 124.
\item Ibid.
\item Ibid.
\item Ibid.
\end{enumerate}
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informal settlements by 2014.\textsuperscript{53} Hence, “This City Works for You” became Cape Town’s maxim as the government directly targeted the citizens, rather than working alongside stakeholders to co-deliver equity.\textsuperscript{54}

On the other hand, Johannesburg attempted to move beyond the ‘tiers’ strategy towards what became known as the ‘spheres’ approach to resolving economic inequity.\textsuperscript{55} This was a more decentralized approach to developmental local government.\textsuperscript{56} The Johannesburg local government emphasized the use of partnerships and entities, such as the Johannesburg Development Agency (JDA), to drive the development agenda.\textsuperscript{57} By doing so, the Johannesburg Metropolitan Council believed that regenerating the city through interventions and social participation, rather than directly targeting citizens, would resolve the issue of inequity and lead to economic growth.\textsuperscript{58} Inner City Regeneration Strategies became the focal point of the Johannesburg local government’s development initiatives.

One of the entities introduced by the Johannesburg municipal government was the Johannesburg Inner City Business Coalition (JICBC).\textsuperscript{59} This was a large group of businesses, corporations and property owners, working in consort with local government, which were committed to urban renewal.\textsuperscript{60} City Improvement Districts (CIDS) were created, whereby businesses within decaying districts could contribute to the rehabilitation of these troubled

\begin{itemize}
  \item \textsuperscript{53} Ibid.
  \item \textsuperscript{55} Ibid.
  \item \textsuperscript{56} Ibid.
  \item \textsuperscript{57} Ibid.
  \item \textsuperscript{58} Ibid.
  \item \textsuperscript{60} Ibid.
\end{itemize}
Since 2006, the JICBC has contributed approximately 4 billion Rand in development and rehabilitation funds for the inner city. These contributions were applied to developing reasonably priced residential and commercial projects, funding local schools and improving entertainment and retail areas. In fact, the GJMC created the Urban Renewal Tax Credit to motivate businesses to become involved in urban regeneration. This tax credit offers opportunities for corporations to invest in refurbishing residential and commercial buildings in designated decaying inner city areas. The government has even offered to write-off bad debts incurred by property owners to encourage reconstruction of these decaying buildings.

Academics of urban studies have questioned why Johannesburg and Cape Town adopted divergent economic development strategies to address economic inequity. Municipal governments felt they had to implement an economic strategy that would best succeed and complement their city’s desires. In Cape Town, the city council utilized the ‘tiers’ paradigm because it was suspicious of local participation and stakeholders’ lack of political stability. They were concerned that teaming up with social groups and organizations to contribute to development could result in corruption. Thus, the CMC believed that directly targeting citizens was the most effective approach to development. The Johannesburg Metropolitan Council, in contrast, believed that the decentralized ‘spheres’ approach satisfied their main agenda for

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62 Ibid.
economic growth. This approach fulfilled the Council’s desire to establish itself as the economic hub of Africa and become a “World Class City”.

Statistics have illustrated that both the Johannesburg and Cape Town strategies succeeded, but in different ways. Cape Town was more successful in delivering services to the poor than Johannesburg due to its direct targeting of residents. Sanitation in Cape Town had improved by 92 percent by 2004, while Johannesburg’s improved by only 40 percent in the same period. By this time, only 2 percent of Cape Town households lacked electricity, whereas 6 percent of Johannesburg households had no electricity. Finally, statistics showed that households’ access to water was 85 percent in Cape Town and only 62 percent in Johannesburg. However, while Cape Town surpassed Johannesburg in delivering basic services to its citizens, Johannesburg outperformed Cape Town in economic growth. For instance, in Johannesburg, employment growth reached 2.5 percent per annum whereas Cape Town’s reached only 1.6 percent. Moreover, Johannesburg’s GDP per capita was 5.3 percent higher than any other South African city, while Cape Town’s GDP per capita was the lowest of any South African city.

Evidently, the national government White Paper of 1998 forced municipal governments to adopt economic development initiatives to resolve economic inequity in South African cities. But this analysis has demonstrated that, while local municipalities handled political reforms similarly, economic reforms diverged. Both Johannesburg and Cape Town succeeded in fostering degrees of economic equality, but did so in ways that complemented their cities desired goals; this resulted in somewhat different development outcomes. One may suggest that despite

65 Ibid.
66 Ibid., 125.
67 Ibid.
68 Ibid.
69 Ibid., 126.
70 Ibid.
Johannesburg’s success in becoming the economic hub of South Africa, it has failed to resolve the economic disparities in ways that Cape Town has. The GJMC may wish to consider the Cape Town experience and adopt strategies that directly deliver services to its most impoverished residents.

The study of the legacy of inequity in post-Apartheid South Africa is warranted as it permits academics of urban studies to offer suggestions to further reduce inequities. Formally, all citizens in South Africa have been granted equal representation in politics. The political reforms introduced in the early 1990s guaranteed a democratic, non-racial state in South Africa. Nevertheless, the ‘Political Opportunity Structure’ theory suggests that certain groups may still lack access to political opportunities in cities that claim to have a democratic system of government. For instance, for over two decades the GJMC promised to provide the Diepsloot township, the largest informal settlement in Johannesburg, with adequate housing, electricity, waste management systems, and schools. However, the local government failed to fulfill their promises. Furthermore, the local leadership has not been effectively relaying the residents’ grievances to the local government. Consequently, the residents began to mobilize and violent protests broke out throughout the region.

In order to ensure that all groups have an equal chance to access the government, municipal governments should introduce organizations whose primary focus is to relay the grievances of economically and socially marginalized groups to local government. These organizations would certainly help to reinforce equal political rights and representation for all citizens at the local level.

In order to improve economic disparities, South African cities focus on the decentralization of economic activity. In essence, South African cities should shift economic gravity away from the
urban centers towards the urban periphery. City councils should motivate businesses and corporations to migrate activity to the urban peripheries through subsidies and grants. As a consequence, more income, wealth and job opportunities would travel to these areas, thereby redistributing wealth and prosperity. Furthermore, city councils could offer subsidized housing to reintegrate the poor and wealthy groups and merge whites and non-whites. Doing so would further balance citizens’ access to employment opportunities and thus improve inequities throughout South Africa. Finally, the South African national government could attempt to resolve economic inequities in its cities by calling upon the help of global organizations such as the International Monetary Fund (IMF) or World Bank. The purpose of these organizations has been to foster and promote economic cooperation, growth and financial stability around the world as well as combating poverty.\(^7\) Thus, the national government could ask for aid from these international organizations to fund economic and developmental initiatives in urban centres.

The Apartheid legacy of inequity and the lack of fairness in political and economic aspects of life represented a major challenge for South African cities in the post-Apartheid period. This examination has discussed how Johannesburg and Cape Town undertook comparable political modifications yet contrasting economic development reforms. The political reforms implemented in South African cities clearly resolved political inequities and created a non-racial democratic state. However, cities such as Johannesburg and Cape Town, which adopted two distinct economic development reforms, experienced very different economic outcomes.

These conclusions generate new questions and implications for future post-Apartheid studies. For example, have South African citizens become fully represented in politics in relation

\(^7\) International Monetary Fund, "About the IMF," http://www.imf.org/external/about.htm (accessed November 9, 2010).
to the theory of the ‘Political Opportunity Structure’, and has the private sector benefitted from economic development initiatives in these cities? Post-Apartheid South Africa has clearly demonstrated its ability to resolve the key legacy of political and economic inequities. As long as South African municipal governments continue to redistribute equity through current strategies and by adopting new ones, such as those outlined above, South Africa will continue to be a democratic, non-racial country that promotes similar opportunities for all of its citizens in every area of life.

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This paper focuses on the necessary involvement of women within peace-building processes. It asserts that a comprehensive and inclusive approach to peace and security is needed between men and women for successful post-conflict resolution to take place in divided societies. The paper begins with a discussion of the absence and exclusion of women in traditional peace processes. By exploring the role that women’s peace activism had upon conflicts in Liberia, Sierra Leone and Guinea, the paper then examines how the work of particular women’s groups have stopped armed violence and attained post-conflict transformations. Illustrating the achievements of the Women in Peacebuilding Network (WIPNET) and the Mano River Union Women's Peace Network (MARWOPNET), the paper examines why women are integral to peace-building processes and prescribes particular methods to enable and empower women as advocates for peace.

Peacemaking is a necessary force as long as violent conflicts continue to rage between peoples and states. Peace-building has become a ‘buzzword’ in international policy discourse as a way to characterize post-Cold War approaches to global security.1 Although the concept of peace-building has spread widely in international rhetoric, the way it is defined, interpreted and executed is different from place to place. What is agreed upon, however, is the fact that peace-building must address the underlying causes of violent conflicts in order to either prevent the initiation of conflict or prevent its reoccurrence.2 To build successful peace in a divided society, a comprehensive and inclusive approach to peace and security is needed across nationalities, ethnicities, cultures, and particularly between men and women.3 This paper will focus

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2 Ibid.
specifically on this latter concept, the need to establish equality in the roles of men and women in peace-building.

It has increasingly been recognized that men and women do not experience conflict in the same way. Each has differing needs during the conflict and is afflicted by the violence and unrest in different ways. Thus, men and women require different treatment in the aftermath of conflict. Regardless of this fact, women have traditionally been and are continually excluded from peace processes. In this paper, I will argue that female participation in conflict resolution is essential to the successful restoration of peace. The stereotype that women are generally more inclined to collaboration, consensus and compromise than men is in fact supported by social science research. As these are vital features to the peace process, it is essential that women are considered, empowered and enabled to play a leading role in the peace process. There is urgent need for the inclusion of women in peace-building processes in conflict-ridden areas, in order to consolidate their role as effective advocates for peace.

It is clear that an integrated approach to preventing conflicts and rebuilding war-torn societies is the only way to achieve success. This process must be inclusive, accountable and ensure the equal participation of women and men. Such an approach has been successful in nations spanning from Papua New Guinea to Rwanda. My case study, however, will be based on the experiences of women in the West African nations of Liberia, Sierra Leone and Guinea.

Throughout this paper, I will illustrate the necessary involvement of women within the peace-building process. To do this, I will first consider the reasons for the absence and exclusion of women in peace processes. Next, by exploring the role that women’s peace activism played in

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5 Pungong and Onubogu, “Gender and Conflict Transformation in the Commonwealth,” 12.
6 Ibid.
conflicts in Liberia, Sierra Leone and Guinea, I will describe how the work of particular
women’s groups have stopped armed violence and attained post-conflict transformations. I will
concentrate on the achievements of the Women in Peacebuilding Network (WIPNET) and the
Mano River Union Women's Peace Network (MARWOPNET). Following this, I will explain
why women are integral to the peacemaking process. Finally, I will prescribe methods to enable
and empower women in peace processes.

The absence of women in international meetings of conflict resolution is well
documented. The traditional discourse on war and peace has either ignored women or regarded
them solely as victims. This lack of inclusion has been caused by a variety of factors. While
young men have tended to fill the roles of ‘protectors’ by engaging in combat, women and girls
have traditionally acted as ‘providers’ of household needs while violence rages elsewhere. Such
gender-based differences require different and specific responses.

Elsie Onubogu and Linda Etchart suggest seven reasons for the absence of women in the
peace process, all of which are supported by women’s experiences in diverse locations and
contexts. Firstly, they suggest that because few women have wielded guns, the allocation of
power in peace agreements has been limited to those who have been fighting for it. In peace
processes, most attention is given to the demands of those who committed the violence and far
less to citizens affected by the conflict (whom could offer alternative perspectives for peace-
building). As men have been the dominant instigators and perpetuators of violent conflict, they
have also been the sole planners of post-conflict reconstruction. However, some assert that

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7 Elsie Onubogu and Linda Etchart, “Achieving Gender Equality and Equity in Peace Processes,” in
Gender Mainstreaming in Conflict Transformation: Building Sustainable Peace, ed. Rawwida Bakah et
al. (The Commonwealth Secretariat, 2005), 34.
8 Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 34.
10 Ibid., 39.
11 Ibid., 34.
“Allowing men who plan wars to plan peace is a bad habit.”\textsuperscript{12} For the task of re-establishing peace to fall to the same individuals who initiated and perpetuated the conflict seems counterintuitive. Not surprisingly, this method has begun to be reinterpreted due to its ineffectiveness.

Secondly, Onubogu and Etchart suggest that there is an assumption which claims that what men from a community want is what women want also;\textsuperscript{13} this presupposes that men represent the interests of the community as a whole, including the women. As stated earlier, men and women experience conflict in very different ways; therefore, when men determine how reconstruction should occur, the needs of women are undermined. This issue ties into their next argument: women have been excluded from public life because of tradition, customs or culture.\textsuperscript{14} Participation in public life is essential for inclusion in processes of post-conflict reconstruction. Considering the fact that women are largely absent from national power structures, such as government, diplomatic or military relations, they are scarcely considered to be participants of the negotiating parties in peace talks.\textsuperscript{15}

Additionally, the absence of women in peace processes is explained on account of logistical and security issues.\textsuperscript{16} Because post-conflict reconstruction meetings and peace negotiations are often held in distant locations, security concerns arise for many women. In areas where sexual and gender-based violence has occurred, some may fear coming into contact with the very group or individual who abused them. Limited finances, lack of transportation or family commitments are other such issues that may prevent women from attending.

\textsuperscript{13} Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 34.
\textsuperscript{14} Ibid., 39.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
In light of these reasons, the involvement of women in the peace process has been and could further be effortlessly set aside. The complications that accompany the involvement of women are certainly complex; some would even deem this unworkable. However, women can also be the “most powerful voices for moderation in times of conflict.”\footnote{Hunt and Posa, "Women Waging Peace," 38.} While most men arrive at the first round peace talks straight from the battlefield, women most often come out of civil activism or family care.\footnote{Ibid.} Therefore, Onubogu and Etchart conclude that those “responsible for the organisation of peace talks should ensure that women leaders and peace-builders are identified, that visible and effective security arrangements for women are put in place and that provision is made for their needs.”\footnote{Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 39.} If these few but essential accommodations were made, the invaluable participation of women in the peace process would invariably increase.

More recently, there has been greater international recognition of the need for gender mainstreaming* in all levels of the peace process.\footnote{Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 34.} Such recognition is in part due to the UN’s Second World Conference on Women in 1985, the Platform for Action adopted at the Fourth World Conference on Women in Beijing in 1995, as well as the United Nations Security Council Resolution (UNSCR) 1325, which puts women’s rights at the forefront of determining their needs in post-conflict areas.\footnote{Ibid.} Such steps have proven vital to the recognition of women’s necessary involvement in conflict resolution and post-conflict reconstruction.

**African Women’s Groups Lead the Way in Peace Processes**

\footnote{Hunt and Posa, "Women Waging Peace," 38.}
\footnote{Ibid.}
\footnote{Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 39.}
\footnote{According to the UNDP, gender mainstreaming serves to ensure gender equality and empowerment in mainstream policies and resource allocations. In practice, gender mainstreaming means identifying gaps in gender equality. A more extensive definition can be found at http://www.undp.org/women/mainstream/.}
\footnote{Onubogu and Etchart, “Achieving Gender Equality and Equity in Peace Processes,” 34.}
\footnote{Ibid.}
Though women have been largely absent from official peace processes and peace-building initiatives, African women’s groups have “continued to use their numerical strength, sisterhood, and shared experiences to bring about change.” Unfortunately, since the mid-1980s, these needed changes have been largely ignored by the spread of armed conflict that emerged in regions of West Africa. Most notably was the fourteen years of war that plagued Liberia, and crossed the borders into Sierra Leone and Guinea. These associated conflicts caused tremendous suffering throughout each of the regions. Under these circumstances, development of gender equality and empowerment came to a halt.

The Mano River Basin comprises mass regions of Liberia, Sierra Leone and Guinea. At various times in the twenty-first century, these areas have been regarded as the most violent in the world. According to the UNDP 2003 study, all three nations were classified as Heavily Indebted Poor Countries (HIPC).

The Mano River Union (MRU) was first established in October of 1973 between Liberia and Sierra Leone, with Guinea later joining in 1980. This union was designed to allow free movement of peoples and products through the regions in the hope of fostering economic

23 Ibid., 133.
24 Ibid.
25 Ibid.
27 Ibid., 172.
28 Ibid.
cooperation and social integration. Later, in 1986, a Non-Aggression Treaty was also signed between the three regions to again enhance the union.

Despite these efforts, neither economic cooperation nor social integration between the regions could stop the outbreak of armed conflict. A series of violent chain reactions occurred in Liberia after an invasion by dissident forces from nearby Cote d’Ivoire in 1989. This conflict caused a mass ‘spill over’ effect in Sierra Leone in 1991, then cross-border warfare into Guinea in 2000. The collective conflicts have been characterized by “unparalleled human rights violations, blatant disregard for international norms and law pertaining to the conduct of war, and heinous war crimes.”

These conflicts have been extremely complex due to the shifting of military and political alliances which has occurred between the three governments. Consequently, the conflicts have been “intertwined and have shown a ready potential to spill over and destabilise neighbouring countries.” Explanations for the initial outbreak of the wars have been debated. Though some scholars suppose it was principally related to ethnic or resource-based disparity, other suggestions have been made. For example, Christiana Solomon sees that the “conflicts were rooted in the nature and type of state formation, the nature of domestic politics and increasing economic, social and political polarisation.” She further suggests that the simulated “rhetoric of social justice and greater equity developed by the warring factions” appealed to recruits enough

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29 Ibid.  
30 Ibid.  
31 Ibid., 173.  
32 Ibid.  
33 Ibid.  
34 Ibid.  
35 Ibid.
to “mobilise them to stage an armed social protest.”\textsuperscript{36} It was these protests that soon erupted into armed conflict across three national borders.

The years of bloody war that raged throughout Liberia, Sierra Leone and Guinea have left the MRU severely fractured. The original goals of economic cooperation and social integration have been forgotten in the wake of mass violence against civilians in all three nations. The consequences of the wars are seen in the large-scale suffering, unnumbered deaths, forced migration of hundreds of thousands of people and gender-based violence.\textsuperscript{37} Peace and stability in the region seemed an impossible task. However, starting in 2001, women again began to play a central role in shaping processes of disarmament, negotiation and conflict resolution. Two women’s groups instrumental in these actions were the Women in Peacebuilding Network (WIPNET) and the Mano River Women's Peace Network (MARWOPNET).

WIPNET was initially an alliance formed between Christian and Muslim women. Their foremost goal was to use ‘women’s peace activism’ to promote social justice.\textsuperscript{38} Ekiyor and Gbowee (two women directly involved in WIPNET’s movement) explain women’s peace activism not just as antiwar activism, but as “the deconstruction of structural forms of violence existing in everyday society.”\textsuperscript{39} The particular ideology that this action was built on is as follows: “that systematic violence against women such as rape, forced prostitution, mutilation, etc., was an expression of a deeper systematic disregard for women existing in West African societies.”\textsuperscript{40}

\textsuperscript{36} Ibid.  
\textsuperscript{37} Ibid.  
\textsuperscript{38} Ekiyor and Gbowee, “Women's Peace Activism in West Africa: The WIPNET Experience,” 134.  
\textsuperscript{39} Ibid.  
\textsuperscript{40} Ibid.
Led by this ideology, these women were convinced that it was possible to ensure that women play a central role in peace processes and decision-making in the Mano River region.41

Following its creation in 2001, WIPNET enacted substantial change on behalf of women in the MRU region, particularly in Liberia. In this time, the movement:

- developed a training manual on peacebuilding; helped organize training workshops, conferences, and other meetings; conducted research; published stories on women’s peacebuilding activities; engaged in peacebuilding and democracy-building activities in Nigeria, Guinea-Bissau, Senegal, Gambia, and Mali; and undertook a range of other activities to build regional peace and mobilize women.42

Thus, it is evident that their achievements for women in the region were vast and wide-ranging in scope.

Also, among WIPNET’s greatest achievements was their campaign to force the Liberian President, Charles Taylor, and the rebel warlords of the Liberians United for Reconciliation and Democracy (LURD) to attend peace talks in June of 2003. These talks were carried out to convince the warring factions to reach an agreement and to end the war and suffering in Liberia. The campaign slogan they chose was simple: “We Want Peace; No More War.”43 The success of this single movement brought extraordinary change. They were able to pressure President Taylor into meeting with them, and at this meeting they “spelled out a clear program calling for an immediate unconditional cease-fire, dialogue for a negotiated settlement, and an intervention force.”44 WIPNET maintained their presence nearby the peace conference to ensure their demands were met and on 17 June 2003, a cease-fire agreement was signed.45

41 Ibid.
42 Ibid.
43 Ibid., 135.
44 Ibid.
Also significant was the international media attention that WIPNET gained during this campaign. As a result, the International Criminal Court (ICC) issued an arrest warrant for President Taylor and labelled him a war criminal. It was not until 11 August 2003 that Taylor agreed to resign, enabling a comprehensive peace agreement to finally be reached.\textsuperscript{46} The rebuilding of Liberia continues with the inclusion and participation of women at every stage.\textsuperscript{47} This mass movement for peace undertaken by the women of WIPNET exemplifies how women can contribute significantly both during the peace-building process and in post-conflict social reconstruction.

MARWOPNET is an alliance that also partners women in Liberia, Sierra Leone and Guinea. It is a network that finds common cause “despite tensions, cultural divides and different nationalities,” and aims to promote peace by connecting women from the Mano River regions.\textsuperscript{48} Their central purpose is to emphasize the importance of the inclusion of women in the peace process and to pursue a common agenda for peace and sustainable development.\textsuperscript{49} The network comprises thirty umbrella organizations which work to promote the same goals.\textsuperscript{50} In a short amount of time, MARWOPNET’s network base spread to include other national, regional and international organizations.\textsuperscript{51}

The breakthrough that MARWOPNET achieved in the political decision-making process was parallel to the events that WIPNET was involved in. With civil wars raging in Liberia, Sierra Leone and Guinea, the women of MARWOPNET began a campaign in 2001 to persuade leaders

\textsuperscript{46} Ibid., 137.  
\textsuperscript{47} Ibid., 133.  
\textsuperscript{49} Ibid.  
\textsuperscript{51} Ibid.
to engage in talks.\textsuperscript{52} This campaign proved successful as they persuaded President Taylor of Liberia, President Lansana Conte of Guinea and President Tejan Kabba of Sierra Leone to come together for peace talks.\textsuperscript{53} This was the first time that these three Heads of State would meet to discuss peacekeeping along their borders and the problems that spilled over from one country into the next.\textsuperscript{54} Just as the women of WIPNET were to pressure President Taylor and LURD to peace talks two years later, these women held peace talks between MARWOPNET delegations and the presidents in June and August of 2001.\textsuperscript{55} The network’s success in collaborating with leaders of the MRU enabled women to “secure access to decision making structures – especially in regard to peace and development processes.”\textsuperscript{56}

In addition, MARWOPNET made many other significant achievements. Some of which included programs to return and reintegrate refugees and internally displaced people to their homes, the destruction of small arms held by rebel groups, the rehabilitation of child soldiers and the increased cooperation of Mano River states.\textsuperscript{57} Notably, MARWOPNET’s capacity building continued to expand by hosting workshops that focused on equipping women to take part in peace-building.\textsuperscript{58} The contributions of both WIPNET and MARWOPNET demonstrate that the inclusion of women in the peace-building process is invaluable to conflict resolution and sustainable development in conflicted and post-conflict societies.

\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid., 589.
\textsuperscript{54} Solomon, “The Mano River Union Sub-region: The Role of Women in Building Peace,” 177.
\textsuperscript{56} Ibid., 590.
\textsuperscript{57} Ibid., 591.
\textsuperscript{58} Ibid.
Consideration, Enablement and Empowerment of Women in Peace Processes

The face of global security threats has changed significantly in the post-Cold war period. Armed conflicts have decreased on the battlefield and increased in communities bringing the consequences of conflict into peoples’ homes.  

As a result, women and children are much more likely to be the casualties of war. Whereas only 50 per cent of casualties were civilians in the Second World War, the figure is close to 90 per cent in more recent wars. On account of this change, it is imperative that women are empowered in peace processes so immediate action can be taken to prevent further gender-based violence and to dispel of the notion that women are helpless in times of conflict.

Scholars have suggested that a feminist analysis identifies women’s specific concerns about “peacebuilding, approaches peacebuilding from women's perspectives, [and] welcomes pluralistic voices and diverse methods.” Each of these is important to peacemaking and peace-building processes, therefore it is essential that women are considered, enabled and empowered to participate in the peace process. Although groups such as WIPNET and MARWOPNET have achieved great success in their struggle for women’s inclusion, if further considerations were made and methods for inclusion were implemented, a larger collection of women could have further advanced the work of advocating for peace.

Returning to Onubogu and Etchart, they suggest three reasons for why women should be included in peace processes. Firstly, they explore the fact that human rights standards of equality and fairness require women’s participation in public life, yet there have been few attempts to

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60 Ibid.
61 McKay and Mazurana, “Gendering Peacebuilding,” 342.
apply their participation to peace processes. Most states have adopted the Convention on the Elimination of All Forms of Discrimination Against Women, but failure to include women in affairs of the state (such as policy and decision-making) has legitimized their exclusion from any aspect of post-conflict reconstruction. Next, they state that because conflict is highly gendered, women’s varied experiences are central to their determination of post-conflict needs. They explain that an effective peace process should be “built on the widest base of experience and therefore must take account of local women’s lived experiences during the conflict and their enormous responsibilities post-conflict.” Lastly, the importance for women to progress from being perceived solely as victims to agents of conflict is illustrated. This move would promote transformation and empowerment of women. Women have already developed and operated networks, movements and initiatives in conflict zones, their further involvement in post-conflict peace-building is essential for its success.

In order to provide a comprehensive prescription of methods of promoting women’s inclusion in the peace process, specifics of how this ought to be fostered must be suggested. The implementation of the UNSCR 1325 on Women, Peace and Security would be a powerful tool for all women’s rights activists. This motion calls for women’s involvement in peace talks and in decision-making groups who formulate peace agreements. This would create opportunities for gender equality in post-conflict reconstruction. Nevertheless, this opportunity has been lost in numerous instances of nation-building in the twentieth century. It has been suggested that in

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63 Ibid.
64 Ibid.
65 Ibid., 41.
66 Ibid., 42.
order for this tool to be used effectively, African women must “advocate for its implementation at the national level”, then the “international community must support them, both politically and financially.” Such committed international support in this endeavour could increase the implementation of these ideas in conflicted areas of the world.

Gender balance and mainstreaming is also essential to increasing the involvement of women in peace-building. Access to education is essential to attaining either of these. Etchart and Baksh explain that “Sustainable peace is only attainable if all citizens, women and men, regardless of class or ethnicity, are able to vote in all elections and public referenda and be eligible for election in public posts.” Without advanced education (let alone primary school) women are not even eligible for such roles. When interviewed about this issue, one African woman said this: "The basic need of women is education … I think education will help everything else." Funds and effort must be directed towards increasing and enhancing educational systems as well as ensuring access to education worldwide, in order to ensure greater opportunity for the inclusion of women in public processes such as peace-building initiatives.

A crucial element of an effective conflict transformation process, and especially characteristic of the approaches of female advocates for peace, is a creative-conflict approach. This enables parties involved in violent conflict to be “respected, to be enabled to speak out, to be listened to and to become involved in decision-making.” As women’s “full participation is

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70 Etchart and Baksh, “Applying a Gender Lens to Armed Conflict, Violence and Conflict Transformation,” 32.
stressed in all these processes … it is frequently personal, interpersonal, creative and political.”

This may include imaginative activities to protest against violence such as the use of street theatre, vigils, patterned or coloured clothing, or peace walks. The women of WIPNET, for example, employed creative approaches to peace advocacy such as wearing white clothing and supporting a campaign of “No peace, no sex.”

In view of each of the above considerations, it is evident that there is urgent need for the empowerment of women as advocates for peace. There must be progress beyond the rhetoric of “peace-building” in international conflict resolution. One of the most pivotal areas of this progress is to establish an inclusive, accountable and equal vision of the roles of women and men in peace-building.

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73 McKay and Mazurana, “Gendering Peacebuilding,” 343.
AN IMPERFECT BODY?
AN OVERVIEW AND ANALYSIS OF THE SPECIAL COURT OF SIERRA LEONE

Danielle Koehn

It is estimated that between 20,000 to 50,000 people died during the Sierra Leone civil war. 30,000 people had a limb removed by the rebel forces and up to 257,000 acts of sexual violence occurred. The Special Court for Sierra Leone was set up to bring those most responsible for the conflict to justice. This paper will assess the effectiveness and legacy of the court and seeks to show that while the Special Court is not perfect, the positives far outweigh the negatives.

“I want to prosecute the people who forced thousands of children to commit unspeakable acts.”
– Special Court of Sierra Leone Prosecutor David Crane

Introduction

For a decade Sierra Leone was caught up in a horrific civil war that featured mass atrocities. In order to try and heal the wounds caused, achieve justice for the victims and come to terms with what had happened, both the Special Court of Sierra Leone and a Truth and Reconciliation Commission were set up through UN Security Council Resolution 1315 at the request of President Kabbah. This paper will focus on the Special Court of Sierra Leone and assess whether it will have a positive or negative legacy. Due to the limitations of this paper and the breadth of this topic, this paper will give only a brief overview of the conflict, the creation of the Special Court for Sierra Leone, the Truth and Reconciliation Commission, and the relationship between the two bodies. In the second part of this paper the Special Court will be analyzed by considering the arguments for and against the court and its work. This paper seeks to show that while the Special Court is not perfect, the positives far outweigh the negatives. This paper will

hold that the Special Court for Sierra Leone has brought much needed justice to the atrocities committed against the Sierra Leonean people.

Overview

The Conflict

Sierra Leone is a former British colony located on the west coast of Africa. The conflict began on March 23, 1991, when the Revolutionary United Front (RUF) first invaded Sierra Leone from Liberia. Throughout the war, the RUF and the Armed Forces Revolutionary Council (AFRC) rebel groups fought against the government (Sierra Leonean Army) and a government-backed militia group, the Civil Defence Forces (CDF). During the conflict horrific crimes were committed, including the use of child soldiers and forced marriages of girls and women to combatants. By 1999 the rebel groups had descended upon Freetown, the capital, prompting the government to request peace. It is estimated that between 20,000 to 50,000 people died during the conflict, 30,000 people had a limb removed by the rebels and up to 257,000 acts of sexual violence were committed during the civil war.

On July 7, 1999, the Lomé Peace Agreement was created through negotiations between the RUF and the Government of Sierra Leone to end the war. The Togolese Government, Economic Community of West African States (ECOWAS), the Commonwealth, the Organization of

4 Ibid., 21.
7 Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, 34.
African Unity (now the African Union), and the UN signed on to the deal as “moral guarantors.”\textsuperscript{10} Within the deal there was agreement for an immediate ceasefire, a general amnesty for combatants who committed crimes between the start of the conflict and the date of the agreement, and the creation of a national Human Rights Commission and a Truth and Reconciliation Commission.\textsuperscript{11} A qualification was added at the last minute to disassociate the UN from the pardon and amnesty given to combatants to prepare for the establishment of the Special Court for Sierra Leone.\textsuperscript{12} The treaty proved to be more of a ceasefire than a transition plan for stability in Sierra Leone.\textsuperscript{13} The plan was that the agreement would address human rights violations since the beginning of the conflict in 1991.\textsuperscript{14} However, there was an outbreak of fighting in Sierra Leone for a few weeks in May 2000 that was quickly dealt with by the government, which arrested many RUF supporters. Subsequently, a reassessment was made of the amnesty that was granted in the Peace Agreement, resulting in the removal of some signers’ amnesty.\textsuperscript{15}

\textit{The Creation of the Special Court for Sierra Leone}

Sierra Leone’s President Kabbah wrote to the Security Council on August 9, 2000, requesting the establishment of an international tribunal to prosecute members of the RUF and its accomplices who were responsible for committing the crimes against the people of Sierra Leone and UN

\textsuperscript{10} Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 34.
\textsuperscript{11} Dugal, “‘Witness to Truth’: The TRC for Sierra-Leone – An Overview,” 29.
\textsuperscript{13} Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 15.
\textsuperscript{14} Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 55.
\textsuperscript{15} Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 35.
peacekeepers. Kabbah’s letter stated that the RUF had “since reneged on [the Lomé] Agreement.” On August 14, 2000, the UN Security Council passed Resolution 1315 requesting that the Secretary General “negotiate an agreement with the Government of Sierra Leone to create an independent special court.” A UN delegation led by Ralph Zacklin (Assistant Secretary General for Legal Affairs) went to Freetown to negotiate terms for the establishment of a court that would try those who bore the greatest responsibility for the war crimes and crimes against humanity during the Sierra Leone Civil War. The Special Court was not confined to prosecuting only those of Sierra Leonean nationality; however, as per the \textit{Rome Statute}, prosecution of foreign nationals was limited to circumstances in which the accused’s national state was “unwilling or unable genuinely” to prosecute. Due to criticisms over how other international courts had been set up outside of the country whose conflict it was investigating, it was agreed that the Court’s hearings should take place in Freetown, where some of the worst atrocities took place. The Court was set up to incorporate a combination of international and Sierra Leonean law. While the Special Court is similar to a hybrid tribunal

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Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 36.
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That being said, while Sierra Leone allows capital punishment, the maximum punishment the Special Court allows is life in prison, which favours international law. On the other hand, international law was not adhered to in regards to not trying children, as the Special Court will try those 15 and over (it has not tried any children yet). Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 56.
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(which brings an international component to essentially national prosecutions), it is in fact more of an ad hoc tribunal because it is a creature of international law, not domestic law.

The final agreement to establish the Special Court of Sierra Leone was signed on January 16, 2002, by the Government of Sierra Leone and the United Nations. The Parliament of Sierra Leone ratified the agreement in March 2002 when the Statute of the Special Court for Sierra Leone was passed, providing the legal framework of the Court. Under the terms of the Statute the Court would cover crimes “committed in the territory of Sierra Leone since November 30, 1996,” the date of the Abidjan Peace Accord. In order to be able to prosecute those who should be held accountable, the Statute repudiated amnesties from the Lomé Peace Agreement (and the Abidjan Peace Accord that had previously been signed) which involved crimes against humanity, violated Article 3 of the Geneva Convention and Additional Protocol II, or committed other serious violations of international humanitarian law (crimes from Articles 2 to 4 of the statute). However, the Statute excluded “any transgressions by peacekeepers and related personnel.”

There are three main bodies that make up the Special Court: the Chambers, made up of a Trial Chambers and an Appeals Chambers; the Office of the Prosecutor; and the Registry.

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24 Ibid., 6.
25 Ibid., 5.
26 Ibid., 39.
28 Ibid., 60.
31 Ibid., 57.
July 26, 2002, the Special Court\textsuperscript{32} appointed Pierre Boutet (Canada), Benjamin Ite (Cameroon), and Bankole Thompson (Sierra Leone) as trial judges. Emmanuel Ayoola (Nigeria), Hassan Jalloh (The Gambia), Renate Winter (Austria), Geoffrey Robertson (UK), and George Gelaga King (Sierra Leone) were appointed as appeal judges.\textsuperscript{33} Alternative judgeships were appointed to Isaac Abagye (Ghana) and Elizabeth Muyovwe (Zambia).\textsuperscript{34} The Special Court judges were sworn into office in December 2002.\textsuperscript{35} Robin Vincent (UK) was appointed to act as the Registrar due to her experience.\textsuperscript{36} David Crane was made prosecutor due to his previous work in human rights law and the inability to find an individual from Africa with the necessary experience (which would have been preferred). Originally the statute setting up the Special Court stated that the Deputy Prosecutor was to be Sierra Leonian; however, this was amended to allow for Desmond de Silva (British QC), who had been previously admitted to the Bar in Sierra Leone.\textsuperscript{37}

Beginning on March 7, 2003, and continuing for the next month, indictments were announced for: Foday Sankoh (leader of the RUF), Sam Bockarie (RUF henchman “Mosquito”), Issa Sesay (senior RUF Commander), Morris Kallon (senior RUF Commander), Augustine Gfbao (senior RUF Commander), Johnny Paul Koroma (AFRC Chairman), Alexa Tamba Brima (AFRC member), Brima Bazzy Kamara (AFRC member), Santigie Borbor Kanu (AFRC member), Chief Sam Hinga Norman (CDF member), Moinana Fofana (CDF member), and Alieu Kondeqa (CDF member).\textsuperscript{38} Many of the most important indictees and actors, however, had died

\textsuperscript{32} Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 20.
\textsuperscript{33} Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 57.
\textsuperscript{34} Ibid., 58.
\textsuperscript{35} Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 39.
\textsuperscript{36} Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 58.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid., 60.
\textsuperscript{39} Ibid., 61.
or were unaccounted for. For example, by the time the Court was ready to begin trials in July of 2002, Sankoh, Bockarie and Koroma had passed away and Johnny Paul Koroma was missing.

This was naturally a very frustrating situation for those involved in the Court, as these men were believed to bear the greatest responsibilities for the atrocities in Sierra Leone’s war. This had such a large impact that some even called for the Court to be disbanded. There were concerns over the length of the proceedings, so in March 2004 the Special Court re-issued joint indictments for the CDF, RUF and AFRC trials. Many witnesses were called throughout the trials, a number of whom gave evidence anonymously behind screens.

**The Truth and Reconciliation Commission**

One cannot discuss justice in Sierra Leone without looking at the Truth and Reconciliation Commission as well. The Truth and Reconciliation Commission (TRC), formally established July 5, 2002, had an ambitious mandate “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone”; to address impunity in the country; to address the causes of the conflict with a view to prevent reoccurrence; to address the needs of victims (especially those of children and those who had been sexually abused); and, to promote reconciliation. The Commission was headed by Bishop Joseph Humper as Chairman and Sierra Leonean lawyer, Yasmin Jusu-Sherriff as Executive Secretary. Overall, the TRC was comprised of a mix of local and

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41 Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 19.
42 Ibid.
43 Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 64.
44 Ibid.
45 Ojielo, “Beyond TRC: Governance in Sierra Leone,” 43.
47 Ibid., 30.
international commissioners.\textsuperscript{48} The TRC was given independent status, some financial support for investigations and was granted subpoena powers.\textsuperscript{49}

At first, it was thought that people would not want to talk about abuses suffered or admit to crimes. However, once the TRC began its work it was clear that there was a great need for people to be heard, have their stories recorded and have their perpetrators known.\textsuperscript{50} Originally, the presence of the Special Court deterred many perpetrators from coming forward as they were afraid that the evidence would be used at the Special Court against them or their former commanders.\textsuperscript{51} As it became evident that only those at the top of command would be prosecuted under the Special Court, more perpetrators came to the TRC.\textsuperscript{52}

The TRC gathered information, had public and camera hearings (for children, victims of sexual abuse and certain perpetrators), and allowed perpetrators to respond to victim allegations when possible. However, this was rare as the accused were difficult to locate due to relocations and fear of retaliation.\textsuperscript{53} Special arrangements were made for the children’s hearings to protect their identities and ensure their well-being with psychological workers present.\textsuperscript{54}

Although the government created the TRC it has failed to give much attention to its activities, final report and recommendations.\textsuperscript{55} Many people utilized the TRC, and the popular experiences and airing of grievances created expectations for the future. Yet, not much has been done by the government with these recommendations.\textsuperscript{56} While there may have been some

\textsuperscript{48} Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 62.
\textsuperscript{50} Ibid., 30.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid., 31.
\textsuperscript{54} Ibid., 32.
\textsuperscript{55} Ibid., 29.
\textsuperscript{56} Ibid., 30.
mistaken identities because of the flexibility of the TRC, information was gathered that would not normally come to light because of the creativity and protection of the TRC.\footnote{Ibid., 32.}

The TRC found that “those in leadership in government, public life and civil society failed the people of Sierra Leone.”\footnote{Truth and Reconciliation Commission of Sierra Leone, “Chapter 2- Findings,” in \textit{Witness to Truth-Volume 2}, (2004): 32. Accessible online at http://www.sierra-leone.org/TRCDocuments.html.} The TRC also found that many were eager to blame the causes of the war on foreign elements and the search for diamonds as it took away blame for political failure from the elites of Sierra Leone.\footnote{Dugal, “‘Witness to Truth’: The TRC for Sierra-Leone – An Overview,” 33.} However, the Commission ruled that:

“the central cause of the war was endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people to a state of poverty. The Commission [held] the political elite of successive regimes in the post-independence period responsible for creating the conditions for conflict.”\footnote{Truth and Reconciliation Commission of Sierra Leone, “Chapter 2 - Findings,” 27.}

Finally, and perhaps most disturbingly, the TRC held that many of the causes of the conflict still exist in post-war Sierra Leone, and are potential causes of future conflict if not addressed soon.\footnote{Ibid., 107.}

In terms of accounting for the atrocities that took place, the TRC found that 60.5\% of the violations reported to the Commission were committed by the RUF, 9.8\% by the AFRC, 6.8\% by the SLA, 6\% by the CDF, and 1.5\% by the ECOMOG force.\footnote{Ibid., 27.} The TRC foresaw the reconciliation of Sierra Leone occurring in stages. First was the establishment of the Lomé Peace Agreement, creating a viable environment for reconciliation. Second was the moment when communities began to create activities in which trust could be restored. Truth telling was an important stage of this process as were reparations, which served as a symbolic acknowledgement of the wrongs suffered. The third phase would occur when Sierra Leonean
citizens would forgive one another for the atrocities committed during the war, a process which may take decades.\(^6^3\)

*The Relationship between the TRC and Special Court*

While both the TRC and the Special Court attempted to investigate and understand the complex Sierra Leonean conflict, they did so from different perspectives. Both explained to the people of Sierra Leone that the bodies were not working as a single unit, but valued each other’s work towards post-conflict justice.\(^6^4\) In terms of how the TRC and Special Court interacted, there was confusion and disagreement about each body’s role.\(^6^5\) It was initially recommended by some that the two bodies share resources. However, once operational it wasn’t clear how this would be feasible given their distinct mandates and important independent tasks.\(^6^6\) While both organizations utilized public education campaigns\(^6^7\) throughout the country to promote their functions, the TRC received more widespread support.\(^6^8\) The only significant dispute between the two bodies was over testimony by indicted prisoners.\(^6^9\)

Geoffrey Robertson, the first president of the Appeals Chamber of the Special Court, argues that the tribunal had a special role to play in achieving reconciliation, stating:

> “Within the fallible parameter of human justice, with its fundamentals of due process, transparency and defence of rights, we are charted to do our best to end the impunity that powerful perpetrators would otherwise enjoy. This much is owed to the memory of murdered victims, to maimed survivors and to those who grieve for them. It is a duty we share with another body, the Truth and Reconciliation Commission set up by the Sierra

\(^6^3\) Ojielo, “Beyond TRC: Governance in Sierra Leone,” 51.
\(^6^4\) Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 5.
\(^6^7\) Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 62.
\(^6^8\) Ibid., 63.
\(^6^9\) Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 5.
Leone government. We shall work together to uncover the truth, although the Court alone has the power to deliver the justice that is a prerequisite for reconciliation.”

Analysis

Criticism of the Court

Creation of the Court

As previously mentioned, under the terms of the Statute, the Court would cover crimes from November 30, 1996, onwards (date of the Abidjan Peace Accord). Utilizing this date, however, led many Sierra Leoneans to believe that the Court only cared about the people living in Freetown and the Western Area, as much of the impact of the war was not felt for these people until after November 1996. This further entrenched the divide between the capital and the rest of Sierra Leone, which dates back to the colonial era. Article 8 of this Statute enabled the Special Court to have primacy over the Sierra Leone national courts, which had a significant impact when Defence Counsel appearing before the Court said the Special Court was unconstitutional, since the Sierra Leone constitution states that no court can have higher judicial authority than the Sierra Leone Supreme Court.

Foreign Staff

There have been a number of criticisms regarding the court appointments, namely that all “senior staff at the Special Court were expatriates.” This has been viewed as an indication of a lack of respect and recognition of qualified Sierra Leoneans. Some felt that “[t]he Special Court

70 Ojielo, “Beyond TRC: Governance in Sierra Leone,” 50.
72 Ibid., 60.
73 Ibid.
74 Ibid., 56.
does not trust Sierra Leone to administer justice. If they are not trusted to administer justice, how can they be expected to accept it?”

Further, Prosecutor Crane brought in many ex-military personnel as investigators, which gave the Office of the Prosecutor an American military feel. Crane also made controversial statements, such as that those indicted “would never see a free day again.” These statements were made before their trials even occurred.

**Finances of the Court**

When the Court initially began the Office of the Prosecution spent ten times more than the Office of the Defence and employed three times more staff. The Special Court was also criticised for the particularly expensive cost of the Court itself, as it has spent 150 million dollars. This money comes from over thirty countries with the US, UK, Netherlands, and Scandinavian countries as top donors. However, for the second poorest country in the world (according to the UNDP ranking), with people dying of malnutrition, preventable medical diseases and the aftermath of war, it would be quite difficult to see so much money being poured into this Special Court when the most horrible of people are being treated better than the country’s citizens. On average the indictments have so far cost 23 million dollars each.

**Length of the Operation**

There have been criticisms regarding the length of time the Special Court has been in operation, as it was only meant to last for three years and is still running today. The initial three

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76 Ibid.
78 Ibid., 61.
79 Ibid., 68.
80 Ibid., 67.
81 Ibid., 68.
82 For example, those imprisoned by the Special Court get 3 meals and 2 snacks a day, while victims of the perpetrators likely have far less. Ibid., 67.
83 Ibid., 68.
year plan was unrealistic in part because of the time it took to set up the Court.  

While the plan was to have the Special Court complete all trials and appeals by 2010, it has not done so; an expert panel has predicted that the Tribunal will be “unable to fulfil its mission before 2016.”

**Legal Ramifications**

Some saw criminal prosecution, and thereby the Special Court, as a threat to peace and security “and a Western intrusion in African accountability mechanisms.” As previously mentioned, three of the perpetrators who were considered the “worst” were unable to be tried, which was a great disappointment and almost cause for dismantling the Special Court.

Many also saw the Truth and Reconciliation Commission as the more appropriate institution to bring peace and healing to the community. This was supported by pointing to the fact that the TRC was met with more widespread support by Sierra Leoneans themselves. The Special Court promotes reconciliation through punishment, while the Truth and Reconciliation Commission does not punish anyone, but promotes healing. Or, as the TRC put it “[a] criminal justice body will have largely punitive and retributive aims, whereas a truth and reconciliation body will have largely restorative and healing objectives.” In addition, the TRC also had a direct impact on, and contact with, people’s day-to-day lives. Finally, it did not help

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84 Ibid.
87 Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 64.
88 Ibid., 63.
89 Ibid.
the Special Court that the TRC was critical of how the Special Court allowed exceptions to the amnesty some thought they would be granted when signing peace treaties.91

Arguments for the Court

Creation of the Court

Fortunately for the integrity of the Special Court, the defence claims that the Special Court was unconstitutional were rejected.92 Also, the choice by the Court to try crimes from after November 1996 was not meant to be a political statement or to value the security of the capital over rural Sierra Leone; rather, it was a strategic decision intended to target crimes committed after the Abidjan Peace Accord.93

Foreign Staff

With an international court, regardless of the location of the country it is hosted in, it is inevitable that the court staff will be mostly foreign to that country. When dealing with issues such as human rights and international criminal law it is best to employ the leaders in the field, rather than take on local citizens for the sake of placating the host country. Further, the situation in Sierra Leone was such that the prolonged conflict inevitably killed and drove away many of the people who would be most qualified to participate in the Court. It is important to note that Sierra Leoneans were not excluded from the makeup of the Court, as Bankole Thompson was appointed as a trial judge and George Gelaga King was made an appeal judge.94 Although the prosecutor ended up being American it was clear that the original intent was to have this role

92 Ibid., 56.
93 Ibid., 60.
94 Ibid., 57.
filled by an African. The deputy prosecutor was Desmond de Silva (British QC) who had been previously admitted to the Bar in Sierra Leone.

Local Impact

Because the Special Court was held within the country that experienced the atrocities of the perpetrators, the community could feel more included in the justice process than in previous ad hoc tribunals. The Court made outreach very important in its operations with even Prosecutor Crane travelling to rural communities of Sierra Leone that are not easily accessible. The outreach by the Court was so extensive that there was a person designed for outreach in each of the provinces. Every Tuesday and Wednesday school children would be educated about the history of the conflict and the work that the Court was doing. The Court would reach out to the general population in a variety of means including setting up booths at local markets. NGOs such as No Peace Without Justice became involved in community outreach to facilitate public information and sensitisation on the Special Court. The outreach program worked through other local organizations to formulate the issues in a way that was easily understandable for the general public, fostering the role of civil society in promoting accountability within Sierra Leone. By having the local population able to understand and get updates on the trials, the Special Court could bring justice to those who needed it most: the victims. Because of this outreach, the citizens of Sierra Leone understand that those most responsible for the atrocities must be brought to justice so that the society can heal and look to the future. The outreach done

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95 Ibid., 58.
96 Ibid.
98 Anna Matas, “The International Criminal Court,” A lecture presented to the Canadian Center for International Justice’s Continuing Legal Education on Criminal and Civil Liability for Crimes Against Humanity, Genocide and Torture, March 5, 2011.
by the Court and NGOs is the single most effective way of reaching the Court’s underlying goals of encouraging peace and justice in this fragile post conflict region.

**Finances**

While initially there was uneven funding between the offices of the prosecutor and defence, it has since evened out. A possible explanation for this is that the prosecutor’s office needed the finances initially to begin investigations before the indictments could be announced. Once it was made public who would be charged it was then time for the defence office to use its resources to defend the accused; to do so before hand would have been impossible. While the expense of the Court overall may seem substantial, it is significantly cheaper than others such as the Rwanda Tribunal, which costs 120 million dollars per year or 10 % of the UN’s overall budget for the ICTY and ICTR combined. Further, the infrastructure that the Court has set up will be able to be utilized by Sierra Leone once the Court has completed its work.

**Length of the Operation**

When it was necessary to build a new facility, hire staff, investigate allegations, and allow time for defence, initial trials and appeals, it should be of little surprise that the Special Court is running longer then intended. It is better to have more thorough trials when the issues at hand are of such national and international importance rather than rushing through them for the sake of staying on schedule. The Court is currently in the midst of the complex case of Charles Taylor at The Hague; however, on the whole the Court is in the process of wrapping up its operations, as evidenced by the handing over of security responsibilities from UN Peacekeepers to the Sierra

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100 Penfold, “The Special Court for Sierra Leone: A Critical Analysis,” 68.
101 Ibid., 67.
Leone Police. This step is significant as “the Special Court is set to become the first international tribunal to complete its mandate and transition to a Residual Mechanism.”

**Legal Ramifications**

Looking at the Special Court from a legal perspective, the Court has left, and will continue to leave, a positive and significant legacy on the development of law both nationally and internationally.

On the national level, Antonio Cassese, UN commissioned independent expert, reported that the Court’s legacy includes “(a) use of the Special Court’s infrastructures; (b) trials by Sierra Leonean courts of international crimes committed by middle-level alleged perpetrators; (c) impact on the Sierra Leone legal professional and (d) training and redeployment of Sierra Leonean personnel that have worked for the Court.” By empowering and involving Sierra Leoneans in the international and local justice systems, the Court has brought real justice to the people the people of Sierra Leone. The legacy of bringing to justice those most responsible for atrocities, building up the nation’s justice system, and empowering the local citizens will help to prevent future atrocities. At a meeting of the UN Security Council in June 2007, the President of the Council (and agreeing speakers) described the Special Court as contributing to “strengthening stability in Sierra Leone and the sub-region and [to] bringing an end to impunity.” Furthermore, the indictments and arrest of Charles Taylor illustrated that even the most powerful leaders can be subject to international law.

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On an international level, the Special Court has helped to create a “highly developed and sophisticated body of law, in which the definitions and scope of war crimes, crimes against humanity and genocide have been explored, along with the various forms of participation and liability, the available excuses, justifications and defences, procedural matters, issues concerning the rights of the accused and the relevant considerations in determining appropriate penalties.”\textsuperscript{107} Notably, the Special Court was the first to try cases about the war crime of forced marriage,\textsuperscript{108} conscription, enlistment or use of child soldiers on an international level\textsuperscript{109} with the AFRC and CDF trial judgements.\textsuperscript{110} The RUF sentencing judgement (in April 2009) was “the first ever [conviction] within an international or internationalized criminal tribunal for the war crime of attacking personnel involved in a humanitarian assistance or peacekeeping mission, and for the crimes against humanity of sexual slavery and forced marriage (as an inhumane act).”\textsuperscript{111} Additionally, international criminal tribunals such as the Special Court provide a great deal of guidance to the International Criminal Court.\textsuperscript{112}

These significant additions to international criminal law are important not only on an international level, but on the domestic as well; there is evidence that international tribunal law is influencing national courts’ case law.\textsuperscript{113} By building on international law and creating precedents in emerging areas of law, such as child soldiers, the Court achieved significance not only for the

\begin{thebibliography}{9}
\bibitem{107} Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 44.
\bibitem{108} Oosterveld, “The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?” 132.
\bibitem{109} Ibid., 131.
\bibitem{110} Ibid., 137.
\bibitem{112} Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone}, 44.
\end{thebibliography}
people of Sierra Leone, whose worst criminals had to be brought to justice in order for the society to be able to move on, but also for an international community that requires guidance in trying future perpetrators of these crimes. Most importantly, the Special Court of Sierra Leone provided a mechanism for the carrying out of international legal obligations that were required by the “prosecution and punishment of perpetrators of serious violations of human rights.”¹¹⁴ No one is above the law, and the international community has contributed to the furthering of this principle by creating the Court. This illustrated to Sierra Leoneans and the world that what happened in Sierra Leone was recognized as unacceptable and that assistance is always available to help rid the world of impunity.

Conclusion

It is undeniable that, in a perfect world, the Court would cost less and every person possible would be held accountable for their actions. Indeed, it is easy to criticize and find flaws, especially when there are such great expectations. However, the case of the Special Court of Sierra Leone demonstrates that it is important to be realistic and carefully weigh the positive and negative consequences. What is most important about the Court is its overall positive legacy, not just for international law (although clearly it is immense) but for the people themselves whom the Court was able to reach. It is because the positives far outweigh the negatives that ad-hoc tribunals, international courts, and truth and reconciliation commissions must continue to exist and be used as mechanisms to engender justice in post-conflict societies.

Bibliography


ENGAGING THE TAMIL DIASPORA IN PEACE-BUILDING EFFORTS

IN SRI LANKA

Michael Potters

Refugees who have fled the conflict in Sri Lanka have formed large diaspora communities across the globe, forming one of the largest in Toronto, Canada. Members of the Liberation Tigers of Tamil Eelam (LTTE) have infiltrated these communities and elicited funding from its members, through both coercion and consent, to continue the fight in their home country. This paper outlines the importance of including these diaspora communities in peace-building efforts, and proposes a three-tier solution to enable these contributions.

On the morning of October 17, 2009, Canadian authorities seized the vessel Ocean Lady off the coast of British Columbia, Canada. The ship had entered Canadian waters with 76 Tamil refugees on board, fleeing persecution and violence in the aftermath of Sri Lanka’s long and violent civil war. This was the first group of refugees to arrive in Canada by boat in more than 20 years, but more importantly, it was the first large group of people to arrive in Canada since the end of the war in Sri Lanka in May 2009.435

Since the beginning of the war in 1983, Canada has accepted thousands of Tamil refugees from Sri Lanka. From a population of fewer than 2,000 Tamils in 1983, Canada’s Tamil population has grown to between 110,000 to 200,000 persons,436 90 percent of whom live in Toronto.437 The arrival of the Ocean Lady was significant. It not only brought attention to the humanitarian crisis in Sri Lanka, but also to the significance

of Canada’s Tamil diaspora – the largest in the world – and their role in the affairs of their homeland.438

The purpose of this paper is to examine the role and significance of the transnational Tamil diaspora in relation to the ongoing conflict in Sri Lanka, with emphasis on the Canadian diaspora, particularly in Toronto, and support of the Liberation Tigers of Tamil Eelam (LTTE). First, it will examine the role of the Tamil diaspora in the perpetuation or prevention of conflict in Sri Lanka. This section will begin with an explanation of the history of the civil war in Sri Lanka. Second, it will explain the continually evolving role of the diaspora in relation to the conflict. The paper will conclude with a three-tier prescription for diaspora involvement in peace-building efforts.

In order to understand the role of the transnational diaspora network in the civil conflict of Sri Lanka, it is important to understand its history. Sri Lanka is an island state in the Indian Ocean, south of India. Its population is divided into four ethno-religious groups. The Sinhalese majority compromise approximately 74 percent of the population and control the government. They are primarily Theravada Buddhist, speak the Sinhala language, and populate the southern and central parts of the country.439 Sri Lankan Tamils make up 11 percent of the population. They are mostly Hindus, and most of them settled in the northern part of the island around the city Jaffna. The two other groups are the ‘up-country’ Tamils, as well as the Sri Lankan Moors.440 The conflict, however, is largely between the Sinhalese Majority, and the Sri Lankan Tamil minority.

Since Sri Lanka gained independence in 1948, the Tamils have demanded more power and better representation in government in order to protect their interests and

438 Ibid., 418.
439 Ibid., 412.
440 International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
autonomy from the Sinhalese majority. The Tamil demand for representational power in government, however, was not accommodated. Eventually, disillusioned by conventional politics, many Tamils began to argue for the creation of a separate Tamil state called Eelam. A secessionist agenda was born as an ethnic consciousness and sense of nationalism developed within the Tamil population. In 1975, The LTTE became the guerilla organization at the forefront of the secessionist struggle, harnessing the frustrations of the Tamil minority and becoming the ‘sole spokesman’ of the Tamil quest for sovereign statehood. As frustrations mounted, violence escalated, and Tamil youth in particular began to participate in the insurgency movement. A civil war erupted in the northeastern part of the country in 1983, between the LTTE and the Sri Lankan government, and continued until the official military defeat of the LTTE in May 2009.

Since 1983, the conflict between the Tamil separatists and Sinhalese government forces in Sri Lanka has claimed over 65,000 lives and displaced over a million persons. The tragic loss of life cannot be understated. According to scholars however, the displacement and upheaval of Sri Lanka’s Tamil population, both internally and through migration abroad, is one of the most significant consequences of the war. Formed by several migration waves since independence in 1948, the Tamil diaspora is estimated at one million as of 2010, or approximately one quarter of the entire Sri Lankan Tamil

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441 For further discussion and a brief history on the issue of political accommodation for the Tamil minority, see the section in Wayland entitled “Overview of Ethnicity and Conflict in Sri Lanka” (pg. 411-415).
443 For further discussion on the importance of radicalization of Tamil youth, see Bose, pg. 114.
444 Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 414.
445 International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
population. Tamils abroad, despite their diversity – including date of arrival, length of stay, and legal status in their host countries, gender, caste, region, socio-economic standing and political orientation – usually continue see themselves as belonging to the diaspora.447

Sarah Wayland, research associate at the Centre for Excellence on Immigration and Settlement - Toronto, defines the modern diaspora in her piece, “Ethnonational Networks and Transnational Opportunities: The Sri Lankan Tamil Diaspora.” She states, “A diaspora is a type of transnational community that has been dispersed from its homeland, whose members permanently reside in one or more ‘host countries,’ and possess a collective, sometimes idealized, myth of the homeland and will to return.”448 Gabriel Sheffer, Professor of Political Science at the Hebrew University of Jerusalem, adds more to this definition by describing fundamental characteristics of the modern diaspora:

They maintain their ethno-national identities, which are strongly and directly derived from their homelands and related to them ... display communal solidarity, which gives rise to social cohesion ... They are engaged in a variety of cultural, social, political and economic exchanges with their homelands, which might be states or territories within states ... often create trans-state networks that permit and encourage exchanges of significant resources, such as money, manpower, political support, and cultural influence, with their homelands as well as with other parts of the same diaspora. 449

Further, Wayland focuses on and describes the Tamil diaspora in particular. She states,

Diasporas such as the Tamil one exist largely because of ethno-nationalist conflict and persecution in the homeland. The Tamil diaspora in particular is comprised of refugees and exiles who are forced to leave their home country

446 Ibid.
447 Ibid.
448 Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 408.
because of conflict rather than because of economic need or the wish to forge a new life abroad.\textsuperscript{450}

Once accepted into liberal democratic host countries with refugee status, it becomes possible for the diaspora to express Tamil linguistic, cultural, and religious identity as never before. Tamils who migrate from a closed society to one that is open capitalize on the country’s freedoms to publish, organize, and accumulate financial resources to an extent that was not possible in their homeland.\textsuperscript{451} This collective sense of empowerment in combination with a shared vision of an independent state of Eelam in their home country provides an opportunity structure whereby social, political, and financial support is mobilized. In the case of the Sri Lankan Tamils, this was consolidated in the LTTE.

The LTTE claims to represent the political interests of the Tamils. Before its defeat, it consistently propagated a three-fold message through its political and diplomatic activities in an effort to condemn the Sri Lankan government and strengthen political support for the insurgency, both within the diaspora and outside of it.\textsuperscript{452} Christine Fair, assistant professor at the Centre for Peace and Security Studies at Georgetown University, explains this three-fold message propagated by the LTTE,

That Tamils in Sri Lanka are innocent victims of military repression by Sri Lanka’s security forces and of Sinhalese anti-Tamil discrimination; That the LTTE is the only legitimate voice of the Tamils and is the only vehicle capable of defending and promoting Tamil interests in Sri Lanka; There can be no peace until Tamil’s achieve their own independent state under the LTTE’s leadership.\textsuperscript{453}

\textsuperscript{450} Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 418.
\textsuperscript{451} Ibid., 417.
\textsuperscript{453} Ibid.
It would appear from this message that the Tamil community is united under the banner of the LTTE. However, this may not be the case. The diaspora community is divided in this respect. Not every diaspora Tamil donates funds to the LTTE or supports them politically, and countless Tamils have fallen victim to LTTE violence.454 Throughout the 1980s, the LTTE waged war and conducted a campaign of assassinations and bombings against rival militants and moderate Tamils in an effort to silence dissent and consolidate support in Sri Lanka.455 This intolerance and violence forced many Tamils to seek refuge abroad. As a result of their exile, some Tamils feel a sense of victimization and injustice by the LTTE and do not support them.456 Others support the LTTE to satisfy feelings of guilt for leaving their homeland behind.457 In this sense, it is very difficult to determine the true level of diaspora support for the LTTE insurgency.

The fact remains, however, that the diaspora community plays a major role in the conflict through varying degrees of support for the LTTE. As Fair explains, “The diaspora has been a fundamental component of the Tamil insurgency and the backbone of the LTTE’s global operations.”458 Since 1980, the LTTE has established a global network of offices and cells that spans at least 40 countries and is unrivaled by any other insurgent organization.459 This network, or what Fair describes as a “global
infrastructure,” is based to a great extent on the support and participation of the diaspora.460

Wayland describes three fundamental activities Tamil elites used to mobilize diaspora activity, ultimately impacting the conflict in Sri Lanka. These activities were: “information exchange within the Tamil community via Tamil language newspapers, radio, the Internet and ethnic organizations; spreading awareness of the Tamil struggle through marches, conferences, and the lobbying of government officials; and lawful as well as illegal fundraising.461 All three types of activities, namely Intra-Tamil communication, outreach from the community and political lobbying and fundraising, reinforce a proud, independent Tamil identity.462 The impact of these activities played a crucial role in the civil war in Sri Lanka and may continue to play a role in the future.

Tamil diaspora networks and communications are a rich and fundamental element of Tamil identity formation and group cohesion. This is evident in the rise of the Tamil society in Toronto over the past two decades.463 In 2004, there were ten weekly Tamil language newspapers, four Tamil language radio stations broadcast seven days a week, three cinemas showing Tamil language films, and many other outlets of Tamil expression and information exchange in Toronto.464

The internet has also provided a very important means of communication among Tamils. Tamil websites provide access to news about Sri Lanka, often analyzing current events with a Tamil perspective and providing an up-to-date chronology of the conflict in the homeland. The internet has also been extensively used to establish cyber

460 Ibid.
461 Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 418
462 Ibid.
463 Ibid., 419.
464 Ibid.
communities, chat rooms and user groups.\textsuperscript{465} These networks and forms of technological communication are crucial to reinforcing the Tamil ethnonational identity and affiliation with their homeland. Moreover, they are used by elements of the LTTE to consolidate support for their efforts.\textsuperscript{466} Through these networks, the LTTE, or supporters of the LTTE, distribute propaganda and manage the perception of the conflict in the homeland, further legitimizing their image as protectors of the interests of Tamils.\textsuperscript{467}

Tamil identity networks are reinforced by political mobilization in the form of conferences, marches, and various types of advocacy or lobbying.\textsuperscript{468} This is a major activity of the diaspora in the host countries.\textsuperscript{469} The increasing number of refugees and their transition from refugee claimants to citizens or permanent residents has empowered and enabled the diaspora to become influential players in the politics of their host countries, capable of bringing attention to the Tamil issue and impacting policy.

Before being labeled a terrorist organization in 2001 by the United Nations, the LTTE lobbied host governments through umbrella organizations, openly espousing its secessionist agenda and ‘three-fold message.’\textsuperscript{470} In Canada, lobbying was primarily conducted by the Federation of Association of Canadian Tamils (FACT), an LTTE umbrella organization of ten Tamil associations with a pro-secessionist stance.\textsuperscript{471} Since 2001, political participation has evolved. Supporters of the LTTE in the diaspora now focus on working within the system by getting Tamils elected to office and using

\begin{itemize}
\item Fair, "Diaspora Involvement in Insurgencies," 139.
\item Ibid., 143.
\item Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 418.
\item Ibid., 420.
\item Fair, “Diaspora Involvement in Insurgencies,” 142-144.
\item Ibid.
\end{itemize}
electoral clout and money to influence policy makers.\textsuperscript{472} Even those pro-LTTE diaspora initiatives carrying forward the struggle for an independent state in democratic and transparent ways remain committed to the LTTE’s agenda.\textsuperscript{473}

The LTTE have been very effective at mobilizing the massive Sri Lankan Tamil diaspora. This mobilization is described by Fair as the “economic backbone of the militant campaign,” and is carried out through both coerced and consensual contributions.\textsuperscript{474} Sometimes this money is given willingly out of belief that the efforts of the LTTE are the only way to achieve autonomy and security for the Sri Lankan Tamils. In other cases, ‘donations’ are collected like a tax by force, by the threat of force, or through the exploitation of individuals who may be in a given country illegally and are seeking protection or assistance from the LTTE.\textsuperscript{475} This ‘tax’ system is used to ensure a regular flow of income to the LTTE. In Canada, the minimum tax was roughly $30 per person or family per month depending on the individual’s income,\textsuperscript{476} and other sources allege that Tamil businesses abroad are forced to pay Tigers a portion of their earnings.\textsuperscript{477} Significant funds also come from individual contributions through community temples, cultural and political events, as well as other activities held in support of the Tamil population.\textsuperscript{478}

\begin{footnotesize}
\begin{enumerate}
\item International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
\item Ibid., 23.
\item Fair, “Diaspora Involvement in Insurgencies,” 140.
\item Ibid., 141.
\item International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
\item Fair, “Diaspora Involvement in Insurgencies,” 141.
\item This is described by Fair as “proxy lending” by the LTTE. The LTTE puts up an initial investment in Tamil-run small businesses abroad. The profits made are then split between the LTTE and the owner. Fair claims that if the figures still remain valid from the mid 1990’s, this proxy lending in Canada generates roughly $1 million per month.
\item International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
\end{enumerate}
\end{footnotesize}
It is important to note that Tamils in Canada are not alone in supporting the LTTE from abroad. Yet, the Canadian connection is very significant. As a police spokesman in the largest city and commercial capital of Sri Lanka, Colombo, stated, “Canada has been a hotbed of the Tigers. That is where the biggest contributions come from.”\textsuperscript{479} In Toronto, in particular, police claim that LTTE supporters sent as much as $1 million Canadian a month to finance the war in Sri Lanka.\textsuperscript{480}

The Sri Lankan government estimates that the LTTE’s overseas fundraising reached $80 million per year.\textsuperscript{481} During the conflict, funds raised from abroad were used for destruction and reconstruction alike. Initially, most of the money was used for sustaining Tamil societies in war affected areas. However, as the war continued, increasing amounts shifted away from humanitarian aid towards sustaining the insurgency.\textsuperscript{482} Despite the military defeat of the LTTE in May 2009, pro-LTTE elements of the diaspora continue to raise funds in order to carry forward the struggle.\textsuperscript{483}

The defeat of the LTTE in Sri Lanka has left much of the diaspora in a state of shock and denial, and has caused a reevaluation of the role that the diaspora plays in the affairs of the homeland. There is a general acceptance amongst some Tamils across the globe and political spectrum that the LTTE is a spent military force with little chance of

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\item \textsuperscript{479} Wayland, “Ethnonationalist Networks and Transnational Opportunities,” 422.
\item \textsuperscript{480} Ibid., 421
\item \textsuperscript{481} Ibid., 421.
\item \textsuperscript{482} This figure is disputed by Tamil leaders, claiming it is much less than $80 million. Tamil leaders claim it is impossible for such a newly formed diaspora to raise such a large sum, a sum that would require average annual contributions of more than $100 from every Tamil individual living overseas.
\item \textsuperscript{483} International Crisis Group, “The Sri Lankan Diaspora after the LTTE.”
\item \textsuperscript{483} Ibid.
\end{itemize}
returning. Most of the pro-LTTE elements of the diaspora have acknowledged, albeit reluctantly, that militancy has failed and the struggle for an independent Tamil state should proceed non-violently. However, the more hardline elements of the diaspora would still prefer the LTTE to be fighting for Tamil Eelam, choosing militancy over peaceful politics and ignoring its failure. Some leaders who have been considered radical in their politics have been frustrated by what they perceive as a lack of attention being paid to the Tamil situation. These leaders choose unconventional and sometimes illegal means to convey their message.

It is clear that as the diaspora struggles with new political realities, and as new strategies emerge, so too will divergent opinions on a way forward. Yossi Shain, professor of comparative government and diaspora politics at Georgetown University, explains this in his article entitled “The Role of Diasporas in Conflict Perpetuation and Resolution.” He states, “When the conflict is hot and the homeland is under severe threat, diaspora concerns about the homeland’s existential survival are paramount, and divergent opinions may be subsumed under a broader show of support. But when the possibility of peace arises, homeland-diaspora debates and power struggles emerge.”

484 Ibid.
485 Ibid.
486 Ibid.

*Divergent opinions exist within the diaspora community, but also exist between the diaspora and the Tamil community that remains in Sri Lanka - between homeland and diaspora. There is considerable difference in the opinions of these two groups, although they may share a common goal. However, for the purpose of this essay, the difference in opinion between these two groups will not be discussed in detail. For more information on these differences, see the section “Divergent Opinions,” in “The Sri Lankan Diaspora after the LTTE” by the International Crisis Group.

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In the case of Sri Lanka, the possibility of peace has arrived. These internal struggles should be carefully negotiated in order to prevent a return to the violent LTTE agenda.

In the field of conflict resolution, the current stage of this particular conflict might be referred to as the conflict de-escalation and negotiation stage. This stage is crucial for the creation and maintenance of peace. As this article has explained, the diaspora have played a critical role in the conflict through the support of the LTTE insurgency. With the defeat of the LTTE, there is room to reconstruct a peaceful agreement between the Tamil community and the Sri Lankan government, with the support of the well-established Tamil diaspora. In order to avoid a reemergence of conflict, all elements of the diaspora community must be considered as important factors in the negotiation process.

I suggest a three-tier prescription for engaging the Tamil diaspora in peace-building efforts in Sri Lanka. The first tier of this prescription focuses on the role of host governments. Host governments should acknowledge the significance of diaspora communities in relation to homeland conflict and engage them. Governments have the necessary task and responsibility of ensuring public safety and security, as well as promoting peace abroad. Therefore, it is important that host governments better understand the nature of all diaspora within their borders, and their connection to conflict in their homelands. Governments, including the Canadian government, should acknowledge the possibilities and benefits of engagement of diaspora communities and incorporate them in policy-making decisions.

The second tier focuses on the relationship between the host government and the diaspora community. This relationship should be built by encouraging the diaspora community to commit to peaceful engagement with the Sri Lankan government.
Governments may be reluctant to engage with a non-state group that engages in, or supports, the use of violence. For many host governments, however, a simple rejection of violence by diaspora groups, although a major first step in working towards peace, is insufficient for them to completely support diaspora efforts. In order for the host government to commit to the diaspora, diaspora leaders would not only have to reject violence, but also reconsider the separatist and illiberal policies of the LTTE, as well as recognize the damage that the LTTE has done to communities in Sri Lanka and to the Tamil struggle in general. Consensus within the diaspora in this regard is a goal to work towards. This major shift in strategy can be facilitated with the help of the host governments.

The third tier will, in effect, determine the attractiveness of the second tier. It focuses on the host government and the international community. By encouraging consensus on the need for non-violence within the diaspora, the host government and the international community can increase pressure on the Sri Lankan government to address Tamil grievances. This could take the form of a reconciliation process or institutional reforms at the state and local level. Most importantly, reforms should be made in Sri Lanka which empower and support minority political forces and promote a more democratic Tamil community. The Sri Lankan government will also need to address the longstanding sense of marginalization, disrespect, and insecurity amongst the Tamil minority which essentially gave rise to the LTTE.

This paper has explained the significance of the Sri Lankan Tamil diaspora in relation to the conflict in Sri Lanka through support of the LTTE insurgency. It has described, in turn, three very important activities which diaspora leaders use to
consolidate support for the LTTE, namely intra-Tamil communication, political lobbying and outreach from the community, and fundraising. Through varying degrees of support and participation in these activities, the diaspora sustained the LTTE and thus played a role in the perpetuation of conflict in Sri Lanka. This paper has argued that diaspora communities also have the potential to play a significant role in peace-building and conflict resolution processes in their homeland.

The defeat of the LTTE in May 2009 has created an opening whereby efforts can be undertaken to utilize the well-established Tamil diaspora for post-conflict peace-building. This article provides a three-tier prescription as one possible way forward. First, host governments should acknowledge the significance of diaspora communities in relation to homeland conflict and seek to engage them. Second, this relationship can be built by encouraging the diaspora community to reconsider the violent LTTE separatist agenda and strive for peaceful solutions. Third, in order for the latter to be successful, legitimate Tamil grievances must be addressed by the Sri Lankan government through pressure from the international community.

After decades of civil war in Sri Lanka, the opportunity for peace-building has arrived. As responsible citizens of Canada, a country which hosts the largest Tamil diaspora in the world, there is an obligation to move forward proactively, engage with the generally respected government, and find a suitable, sustainable, and peaceful solution to the Sri Lankan conflict and Tamil struggle. Members of the Tamil diaspora are members of Canada’s immediate community, but are also intimately connected to another community in another part of the world. Thus, Canada plays a unique role in post-conflict
reconstruction in Sri Lanka, a role that Canada should embrace carefully, but without hesitation.
Bibliography


