CHAPTER SIX
The TRC and the
Special Court for Sierra Leone

Introduction

1. The Truth and Reconciliation Commission (“TRC” or “the Commission”) worked alongside an international criminal tribunal, the Special Court for Sierra Leone. In recent times, truth commissions have worked in tandem with national criminal justice processes and in one case a commission has functioned in parallel with a criminal tribunal established under UN regulations. However the Sierra Leonean case has brought into sharp focus the different roles of these institutions and the potential pitfalls in their relationship.

2. There has been great interest in the issues that arise when two such institutions operate contemporaneously.

3. Most truth commissions have operated as an alternative to criminal justice systems, because criminal prosecution was either unlikely or inappropriate in the circumstances, or because an amnesty was provided for perpetrators. Given the pardon and amnesty provisions of the Lomé Peace Agreement, the Commission was proposed as an alternative to criminal justice in order to establish accountability for the atrocities that had been committed during the conflict.

4. The transitional justice initiatives of the TRC and the Special Court have been viewed by some as a unique experiment, which advances reconciliation through justice combined with reconciliation through truth. In reality, the two institutions were not created as part of a grand design. When the Commission was agreed upon, the Special Court was not under contemplation. Steps to create the Court only occurred following disturbances in Sierra Leone in the year 2000.

5. This chapter will relate the experiences of the Commission in working alongside the Special Court. It examines the contexts that gave rise to both organisations and tracks the course of developments between the two bodies as they operated contemporaneously. It analyses the nature of the relationship that emerged between the TRC and the Special Court and assesses the impact of this relationship on the Commission’s operations and on the people of Sierra Leone. The chapter pays particular attention to the issue upon which the relationship ultimately faltered, namely the right of detainees held in the custody of the Special Court to appear before the Commission. It was around this issue that the differences in approach between the two post-conflict bodies crystallised. Finally, an attempt is made to evaluate the appropriateness of having two such bodies working simultaneously in the context of post-conflict Sierra Leone.

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1 The Commission for Reception, Truth and Reconciliation (CAVR) in Timor-Leste has functioned at the same time as the Serious Crimes Unit (SCU), which was mandated to prosecute perpetrators of the violence of the pre-independence referendum in 1999.

LOMÉ, AMNESTY AND THE TRC

5. The signatories to the 1999 Lomé Peace Agreement agreed to amnesty in order to secure the peace. It was accepted, at the time of the signing of the Lomé Peace Agreement, that the RUF would not have signed the agreement if there had been any prospect of legal action being taken against its members. A truth and reconciliation process was seen as an alternative mechanism for accountability. The Commission was viewed as a means to address impunity so that violations and abuses of human rights would not simply be forgotten. Through its creation of an “impartial historical record” and its holding of public hearings and ceremonies, the Commission would promote a sense of restorative justice in Sierra Leone.

6. Perpetrators would be identified and held accountable in the report of the TRC. The origins and causes of the conflict, together with the contextual story of the conflict in all its nuances, would be told in order that the full horror of the war might be acknowledged by the country as a whole. Recommendations would be made to prevent the repetition of conflict. Impetus would be given to the process of national healing and reconciliation. Violations suffered by victims would be redressed through reparations.

7. When the Lomé Peace Agreement was adopted on 7 July 1999, the Special Representative of the Secretary-General of the United Nations (SRSG) appended a handwritten statement to his signature on the document. The statement read as follows:

“The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”

This disclaimer may very well have had the effect of sending a message to combatants and leaders of the armed factions that the amnesty provided by the Lomé Peace Agreement was not a secure amnesty.

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3 See Solomon Berewa (former Attorney General, now Vice President of Sierra Leone); “Addressing Impunity using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court”, in Truth and Reconciliation in Sierra Leone: A compilation of Articles on the Sierra Leone Truth and Reconciliation Commission, UNAMSIL, Freetown, 2001 (hereinafter “Berewa, Addressing Impunity using Divergent Approaches”), at page 55. See also Alhaji Dr. Ahmad Tejan Kabbah, current President of the Republic of Sierra Leone; testimony before TRC Thematic Hearings held in Freetown, 5 August 2003, at paragraphs 34 and 35 of the transcript.

4 For a full account of the creation of the TRC see the relevant chapters of the present report: Volume One, Chapter One – “Historical Context”; and Chapter Two – “Setting up the Commission”.

5 The statement by the UN SRSG does not appear in the text of the Agreement as it was published by the United Nations (UN Doc. S/1999/777). The Commission was however given sight of a copy of the Lomé Peace Agreement to which the statement was appended in handwriting.
8. A little over two-and-a-half years earlier, when the Abidjan Agreement was signed, the United Nations did not make any similar declaration. Although it did not use the terminology of “amnesty” or “pardon”, Article 14 of the Abidjan Agreement of 30 November 1996 declared the following:

“To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF in respect of anything done by them in pursuit of their objectives as members of that organisation up to the time of the signing of this Agreement. In addition, legislative and other measures necessary to guarantee former RUF combatants, exiles and other persons currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.”

9. The Special Envoy of the Secretary-General at the time, Berhanu Dinka, signed the Abidjan Agreement and acknowledged that the United Nations was a “moral guarantor” of the peace. The United Nations again assumed the status of a “moral guarantor” at Lomé in July 1999.

The Commission’s View on Amnesty

10. It is not clear why unconditional amnesty was accepted by the United Nations in November 1996, only to be condemned as unacceptable in July 1999. This inconsistency in United Nations practice seems to underscore the complexity of the problems at hand. The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement. The explanations given by the Government negotiators, including in their testimonies before the Commission, are compelling in this respect. In all good faith, they believed that the RUF would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty.

11. Accordingly, those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict. Amnesties may be undesirable in many cases. Indeed, there are examples of abusive amnesties proclaimed by dictators in the dying days of tyrannical regimes. The Commission also recognises the principle that it is generally desirable to prosecute perpetrators of serious human rights abuses, particularly when they ascend to the level of gravity of crimes against humanity. However, amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict. Disallowing amnesty in all cases would be to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end.

12. The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later at the time of writing, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.
THE CREATION OF THE SPECIAL COURT

13. Following the taking hostage of some 500 UN peacekeepers by elements of the RUF and the outbreak of violence in May 2000, the political landscape in Sierra Leone changed dramatically when President Kabbah sent a letter of petition to the Secretary-General of the United Nations. Kabbah made the request that the United Nations Security Council establish a special court to bring prosecutions against members of the Revolutionary United Front (RUF).

14. President Kabbah’s letter to the United Nations, dated 12 June 2000, envisaged a court that would benefit from the strong enforcement powers of the Security Council. It noted the limitations of the national justice system and specifically requested that members of the RUF be tried in the proposed tribunal:

“...[W]ith regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes... [A special court is required] to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.”

One of the objectives of the Court was to break “the command structure of the criminal organisation responsible for the violence.”

15. On 14 August 2000, the United Nations Security Council responded favourably to the request from President Kabbah. It mandated the Secretary-General of the United Nations to prepare a report on the subject within thirty days. The preamble to the resolution noted:

"also the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process, as required by Article XXVI of the Lomé Peace Agreement (S/1999/777) to contribute to the promotion of the rule of law..."

16. The Secretary-General’s report was issued on 4 October 2000. The report called for the establishment of a court not by Security Council resolution, as had been implied in President Kabbah’s letter, but by agreement or treaty between the United Nations and the Government of Sierra Leone. The court was to be of mixed composition, with both Sierra Leonean and non-Sierra Leonean jurists making up its three organs: the Chambers (or Judges); the Office of the Prosecutor; and the Registry.

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6 The violence included the demonstration on 8 May 2000 outside the residence of the RUF leader, Foday Sankoh, which resulted in the deaths of more than 20 persons, as well as subsequent battles between the RUF and pro-Government forces around Masiaka. More detail can be found in the chapter on the Military and Political History of the Conflict in Volume Three A of this report.

7 Letter dated 12 June 2000 from President Alhaji Dr. Ahmad Tejan Kabbah to the United Nations, addressed to the Secretary-General Kofi Annan.


10 See the “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone”, UN Doc. S/2000/915.
17. Various jurisdictional and administrative aspects of the proposed court were to be similar to those of the International Criminal Tribunal for Rwanda (ICTR). However, because the proposed court would not be created by Security Council resolution, it would lack enforcement powers enabling it to compel other States to co-operate in the investigation of crimes and the apprehension of suspects.

18. The mission of the Special Court for Sierra Leone is essentially punitive, as set out in the Agreement that was eventually signed between the United Nations and the Government of Sierra Leone for its establishment:

"[To] prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996; including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

AMNESTY AND THE CREATION OF THE SPECIAL COURT

19. The Statute of the Special Court for Sierra Leone purports to withdraw the Lomé amnesty with respect to persons accused before it. Article 10 of the Statute says:

"An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."

20. In agreeing to the Statute, the Government of Sierra Leone had in effect declined to be bound by its undertaking in the Lomé Peace Agreement. Initially, it was not clear whether this was the intent of President Kabbah when he wrote to the United Nations in June 2000 seeking the establishment of an international tribunal. Nevertheless, the President made reference to the amnesty provision in the Lomé Agreement, describing it as "a prize" that was conceded by his government in exchange for peace. He said that the RUF had since "reneged" on the agreement. In a speech delivered a year later, the then Attorney General, Solomon Berewa, remarked that, in June 2000, the Government of Sierra Leone had "reassessed" its position with respect to the amnesty. Moreover, the October 2000 report of the Secretary-General of the United Nations on the establishment of the Special Court for Sierra Leone states:

"While recognising that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law..."

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11 In this respect, the Special Court differs from both the Rwanda (ICTR) and Former Yugoslavia (ICTY) tribunals. See the report of the International Crisis Group (ICG), The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model', ICG Africa Briefing, 4 August 2003.
13 See the letter dated 12 June 2000 from President Alhaji Dr. Ahmad Tejan Kabbah to the United Nations, addressed to the Secretary-General Kofi Annan.
14 See Berewa, Addressing Impunity using Divergent Approaches, at page 56.
With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.\textsuperscript{15}

21. At the time the Lomé Peace Agreement signed, the Special Representative of the Secretary-General for Sierra Leone was instructed to append a disclaimer to his signature on behalf of the United Nations, to the effect that the amnesty provision contained in Article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the UN Security Council in a preamble paragraph of Resolution 1315 (2000).

22. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause, which would read as follows:

"An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution."

23. In the view of the Commission, the argument whereby the amnesty provision in the Lomé Peace Agreement had lapsed because the RUF had not respected other terms of the treaty is not tenable. Article IX of the Lomé Agreement clearly applies to "all combatants and collaborators", not just those of the RUF. More specifically, it refers to fighters from the RUF, ex-AFRC, ex-SLA and CDF. It is wrong in principle and legally unsound to suggest that one party to the agreement could, by its subsequent actions, deprive individuals belonging to a number of other groups, some of them not even parties to the Lomé Agreement, of the benefit of amnesty. The resort to the argument that the amnesty had been forfeited for all parties by the actions of the RUF seriously undermined the legitimacy of national and international initiatives following the alleged breaches of the Lomé Agreement in the year 2000. It is noteworthy that the UN Secretary-General did not rely on the grounds put forward by President Kabbah. Instead the Secretary-General pronounced the position that the amnesty provision of the Lomé Agreement was illegal under international law.

24. The Truth and Reconciliation Commission is concerned at the consequences of the withdrawal of the Lomé amnesty. In repudiating the amnesty clause in the Lomé Peace Agreement, both the United Nations and the Government of Sierra Leone have sent a message to combatants in future wars that peace agreements containing amnesty clauses ought not to be trusted.

\textsuperscript{15} See the "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone", UN Doc. S/2000/915, at page 5.
25. Henceforth, combatant organisations will regard amnesty clauses with suspicion; they will hold them to be uncertain and unreliable. For those who consider that amnesty cannot be granted under any circumstances, this outcome is desirable. However the Commission has already stated that it cannot condemn the grant of amnesty in the Lomé Peace Agreement, taking into account all of the circumstances. Nor can the Commission rule out the more general proposition that there will be conflicts in future for whose resolution a trade of peace for amnesty represents the least bad of the available alternatives. By repudiating the amnesty in the Lomé Peace Agreement, the United Nations and the Government of Sierra Leone have inadvertently undermined future peace negotiations where amnesty is contemplated.

26. Nonetheless the Commission is mindful of the fact that parties to a peace agreement should not be permitted to breach its provisions with impunity. The Commission recommends that future peace agreements in which an amnesty is included should also contain an agreed "amnesty revocation" clause. Such a clause should, in the event of a breach of the agreement, specifically revoke the protection of amnesty in respect of the party or individuals responsible for that breach.

JURISDICTION OF THE SPECIAL COURT CONTRASTED WITH THE MANDATE OF THE TRC

Temporal Jurisdiction

27. The Special Court has a mandate that is defined as being “since 30 November 1996”. There is no end-point to its temporal jurisdiction, although the Statute can be amended by agreement between the two parties. The reference in Article 1 of the Statute of the Special Court to jurisdiction over those who have “threatened the establishment of and implementation of the peace process in Sierra Leone” is an indication that the Court may continue to exercise jurisdiction over events until the completion of the “peace process”.

28. The date at which the temporal jurisdiction of the Special Court begins – 30 November 1996 – coincides with the signature of the Abidjan Peace Agreement, reached between the Government of Sierra Leone and the Revolutionary United Front (RUF). The Secretary-General had recommended that this date be chosen so as not to impose a "heavy burden" on the Court, although the conflict is generally agreed to have begun in March 1991. In mid-2001, the Government of Sierra Leone unsuccessfully requested the United Nations to extend the temporal jurisdiction to the beginning of the conflict in 1991.

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17 In a recent report, the Secretary-General listed a number of benchmarks that need to be accomplished as part of the “peace process”. See the “Fifteenth report of the Secretary-General on the United Nations Mission in Sierra Leone”, UN Doc. S/2002/987, at paragraph 13. The issue of the end-point for the mandate of the Special Court is also discussed by the Secretary-General in the “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone”, UN Doc. S/2000/915, at paragraph 28.
18 See the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Abidjan, 30 November 1996.
29. In contrast the mandate of the Truth and Reconciliation Commission, set out in Section 6(1) of the Truth and Reconciliation Act 2000, is to prepare an impartial historical record of the conflict from 1991, when the war began, until the Lomé Peace Agreement of 7 July 1999. However, the Act also required the Commission to investigate and report on the “antecedents” of the conflict. Moreover, the Commission is also charged with addressing impunity, responding to the needs of victims, promoting healing and reconciliation and preventing a repetition of the violations and abuses suffered. This aspect of the mandate has no precise temporal framework. Accordingly, the Commission inquired into events both prior to 1991 and subsequent to 7 July 1999. The Commission took a broad view of its temporal framework, given the delay in its establishment and the clear relevance of events subsequent to signature of the Lomé Peace Agreement in the fulfilment of its mandate.

**Territorial Jurisdiction**

30. Article 1(1) of the *Statute of the Special Court* refers to violations “committed in the territory of Sierra Leone”. Article 6(1) of the Statute allows prosecution of any person who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime”. Such secondary participation or inchoate crime may well have taken place outside Sierra Leone. The ability of the Prosecutor or the Defence to gather evidence outside Sierra Leone depends upon the co-operation of foreign governments.

31. The mandate of the Commission refers to “violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone”. The Truth and Reconciliation Act of 2000 encouraged the Commission to look abroad. Section 6(2)(a) of the Act enjoined the Commission to investigate “the role of both internal and external factors in the conflict”. The Commission had to inquire into whether the conflict was “the result of deliberate planning, policy or authorisation by any government” (italics added).

**Personal Jurisdiction**

32. The Special Court’s jurisdiction is defined in Article 1 of its Statute as encompassing “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone”. The January 2002 Planning Mission for the Special Court speculated on prosecutorial strategy, but conceded that the selection of those bearing the greatest responsibility “necessarily entails a measure of discretion on the part of the Prosecutor, both as to the identification of individual indictments and to any priority that may be assigned to them”.

19 See the Truth and Reconciliation Commission Act 2000, at Section 6(2)(a)(1).
20 See the Truth and Reconciliation Commission Act 2000, at Section 6(2)(a)(1).
33. The jurisdiction of the Special Court is not limited by the nationality of the perpetrator.\textsuperscript{22} Unlike the Commission, which can also examine the responsibility of “groups”, the Special Court’s jurisdiction is confined to “persons”.\textsuperscript{23} The Special Court will make no determinations about the existence of “criminal organisations”.\textsuperscript{24}

34. The question of how to deal with child offenders has generated much debate. The Statute of the Special Court gives it jurisdiction over persons who were at least fifteen years old at the time of the crime.\textsuperscript{25} The issue was one of considerable controversy during the drafting of the Statute of the Special Court.\textsuperscript{26} Subsequently, Special Court Prosecutor David Crane indicated that he would not prosecute child offenders.\textsuperscript{27} The UN Security Council, the Secretary-General and the SRSG frequently expressed the view that the TRC was a better venue for dealing with child or juvenile offenders. The Statute of the Special Court itself refers to “alternative truth and reconciliation mechanisms” for these purposes.\textsuperscript{28}

35. The Truth and Reconciliation Act 2000 refers in several places to “victims and perpetrators”, suggesting that these two groups make up the Commission’s principal constituency. Special attention is focussed on children, including child combatants, as well as victims of sexual abuse.\textsuperscript{29} The Commission is also given a role in determining responsibilities, in identifying the “causes”\textsuperscript{30} and the “parties responsible”;\textsuperscript{31} and in assessing the parts played by “any government, group or individual”.\textsuperscript{32} At the core of the Commission’s mandate is the concept of “violations and abuses of human rights and international humanitarian law”.

\textsuperscript{22} In the case of foreign peacekeeping troops there is a rule of “complementarity” corresponding to the concept set out in Article 17 of the Rome Statute of the International Criminal Court. Only when the “sending State”, which is presumably the state of nationality of the peacekeeper suspected of criminal acts, is “unwilling or unable genuinely” to prosecute may the Special Court exercise jurisdiction. See the Statute of the Special Court for Sierra Leone, at Article 1(3).

\textsuperscript{23} The reference to “persons” in the Statute of the Special Court is not explicitly confined to physical persons, and the possibility of prosecution of corporate bodies cannot be ruled out.

\textsuperscript{24} In this regard the Sierra Leone court differs from the situation at Nuremberg. On the usefulness of the concept of “criminal organisation” for contemporary prosecutions of violations of international humanitarian law, see Nina Jorgensen, “A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda”, 12 Criminal Law Forum 371, 2001.

\textsuperscript{25} See the Statute of the Special Court for Sierra Leone, at Article 7. This jurisdiction contrasts with that of the International Criminal Court, which sets a minimum age of eighteen. See the Rome Statute of the International Criminal Court, UN Doc. A/CONF/183/9, at Article 26.


\textsuperscript{27} For example: ‘Sierra Leone: Special Court will not indict children – Prosecutor’, UN Integrated Regional Information Network, Abidjan, 4 November 2002. The categorical undertaking by Prosecutor Crane not to indict persons of less than 18 years of age was based on his assertion that juveniles were not among those who bear the greatest responsibility.

\textsuperscript{28} See the Statute of the Special Court for Sierra Leone, at Article 15(5). On this subject, see also: Amann, D.M.; “Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court”, 29 Pepp. L. Rev. 167, 2002; and Bald, S.; “Searching for a Lost Childhood: Will the Special Court for Sierra Leone Find Justice for its Children?”, 18 Am. U. Int’l L. Rev. 537, 2002.

\textsuperscript{29} See the Truth and Reconciliation Commission Act 2000, at Section 7(4).

\textsuperscript{30} See the Truth and Reconciliation Commission Act 2000, at Section 6(2)(a).

\textsuperscript{31} See the Truth and Reconciliation Commission Act 2000, at Section 7(1)(a).

\textsuperscript{32} See the Truth and Reconciliation Commission Act 2000, at Section 6.
Subject-matter jurisdiction

36. The reference to "international humanitarian law" is common to both the Truth and Reconciliation Commission Act and the Statute of the Special Court. The Commission is to examine "violations and abuses" of international humanitarian law, while the Special Court is to proseute "serious violations" of international humanitarian law. The somewhat more limited subject-matter jurisdiction of the Special Court is further restrained by the specific enumeration of the crimes it may prosecute. Borrowing the wording used by the Security Council in Article 3 of the Statute of the International Criminal Tribunal for Rwanda, the Statute of the Special Court contemplates "serious violations" of Common Article 3 to the Geneva Conventions and of Additional Protocol II. Furthermore, the Statute lists three additional "serious violations": intentionally directing attacks against the civilian population; intentionally directing attacks against peacekeepers; and recruiting child soldiers. These three crimes are drawn from Article 8(2)(f) of the Rome Statute of the International Criminal Court. Yet a comparison with the Rome Statute indicates clearly that the list of war crimes in the Statute of the Special Court is confined in its scope: it does not permit prosecution of all offences in non-international armed conflict that are punishable elsewhere under international law.

37. Moreover, it would appear that the Special Court has no jurisdiction over war crimes to the extent that these were committed in an international rather than a non-international armed conflict. The Sierra Leone conflict was essentially an internal armed conflict, so the issue may only be of theoretical interest. Nevertheless, there were significant international dimensions to the conflict. For example, considerable attention has been paid to the role of mercenaries in the Sierra Leone conflict. The issue of mercenaries only arises in international humanitarian law with respect to international armed conflict. Accordingly, such matters fell within the remit of the TRC but appeared to be outside the scope of the Special Court.

38. The Special Court also has jurisdiction over crimes against humanity and certain specified violations of the laws of Sierra Leone. The latter category encompasses specific crimes of sexual abuse of girls and destruction of property, which are not normally defined as serious violations of international humanitarian law.

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34 With some adjustment, due to what the Secretary-General describes as the "doubtful customary nature" of the provision in the Rome Statute that prohibits recruitment of child soldiers during non-international armed conflict. See the "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone", UN Doc. S/2000/915, at paragraph 18.
35 The international dimensions to the Sierra Leone conflict included the participation of diverse external actors and the occurrence of crucial military and political events outside Sierra Leone. More detail and analysis on these dimensions can be found in the chapter on the Military and Political History of the Conflict in Volume Three A and the chapter on External Actors in Volume Three B of this report. On the role of foreign forces in Sierra Leone see, for example: "Guinean Forces Kill, Wound Civilians in Sierra Leone", Human Rights Watch Press release, 28 February 2001.
36 See the Protocol Additional to the 1949 Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 1979, at Article 47.
39. The Commission was charged with examining “violations and abuses of human rights and international humanitarian law”. It was mandated to “create an impartial historical record” of such violations and abuses\(^{37}\) and to “investigate and report on the causes, nature and extent” of the violations and abuses.\(^{38}\) The Truth and Reconciliation Commission Act 2000 provides no further guidance on the scope of the terms “human rights” and “international humanitarian law”.

THE RELATIONSHIP BETWEEN THE TRC AND THE SPECIAL COURT

40. The Secretary-General’s report of October 2000\(^{39}\) noted that “relationship and cooperation arrangements would be required between the Prosecutor [of the Special Court] and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.”\(^{40}\) Special attention was thereby given to the question of whether or not to prosecute suspects aged between 15 and 18 years of age. The Secretary-General further noted that one of the options was to have “children between 15 and 18 years of age, both victims and perpetrators, recount their stor[ies] before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional.”\(^{41}\)

41. The Security Council welcomed the Secretary-General’s report, making a number of suggestions about the specific features of the proposed court. It insisted that the court should focus on those in leadership roles and sought to discourage the prospect of prosecution of offenders aged less than 18 when the crime took place. The Security Council said: “It is the view of the members of the Council that the [Truth and Reconciliation] Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end.”\(^{42}\) The Secretary-General responded to the Council, noting:

“As pointed out by the Security Council, the Truth and Reconciliation Commission will have an important role to play in the case of juvenile offenders and I will endeavour, in co-operation with the Government of Sierra Leone and other relevant actors, to develop suitable institutions including specific provisions related to children to that end.

I am also of the view that care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.”\(^{43}\)

\(^{37}\) See the Truth and Reconciliation Commission Act 2000, at Section 6(1).
\(^{38}\) See the Truth and Reconciliation Commission Act 2000, at Section 6(2).
\(^{40}\) See UN Doc. S/2000/915, at paragraph 8.
\(^{41}\) See UN Doc. S/2000/915, at paragraph 33.
\(^{43}\) See UN Doc. S/2001/40, at paragraph 9.
42. The Planning Mission, sent by United Nations headquarters in early 2002 to make preparations for the work of the Special Court, recalled that the two institutions were to “perform complementary roles” that would be “mutually supportive” and “in full respect for each other’s mandates”.44

43. In November 2000, an international workshop held in Freetown and organised by the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Assistance Mission in Sierra Leone (UNAMSIL) had proposed the establishment of a consultative process “to work out the relationship between the TRC and the Special Court”.45 During 2001, the Secretary-General reported that UNAMSIL and the OHCHR would be preparing “general guidelines” for the relationship between the Commission and the Special Court.46 In December 2001, as part of its activities to prepare for the establishment of the TRC, the OHCHR and the Office for Legal Affairs convened an expert meeting in New York. The meeting was described as follows in the report of the OHCHR:

“The expert meeting on the relationship between the TRC and the Special Court was organised by OHCHR and the Office for Legal Affairs (OLA) of the United Nations in New York on 20 and 21 December 2001. The participants discussed the important issue of an amicable relationship between the two institutions that would reflect their roles, and the difficult issue of whether information could and should be shared between them. The pros and cons of a wide range of possibilities regarding co-operation between the Commission and the Court were examined. Based on those discussions, the participants agreed on a number of basic principles that should guide the TRC and the Special Court in determining modalities of cooperation. These principles include the following:

• The TRC and the Special Court were established at different times, under different legal bases and with different mandates. Yet they perform complementary roles in ensuring accountability, deterrence, a story-telling mechanism for victims and perpetrators, national reconciliation, reparation and restorative justice for the people of Sierra Leone.

• While the Special Court has primacy over the national courts of Sierra Leone, the TRC does not fall within this mould. In any event, the relationship between the two bodies should not be discussed on the basis of primacy or lack of it. The ultimate operational goal of the TRC and the Court should be guided by the request of the Security Council and the Secretary-General to “operate in a complementary and mutually supportive manner fully respectful of their distinct but related functions” (S/2001/40, paragraph 9; see also S/2000/1234).

• The modalities of co-operation should be institutionalised in an agreement between the TRC and the Special Court and, where appropriate, also in their respective rules of procedure. They should respect fully the independence of the two institutions and their respective mandates.”47

44. In addition to these United Nations-sponsored meetings, some international NGOs, including Human Rights Watch and the International Centre for Transitional Justice, developed proposals on the underlying principles and the type of provisions that might merit consideration in a relationship agreement.\(^{48}\) While there was some rumination in these proposals over the possibilities of joint or common efforts in the areas of witness protection, translation and public awareness, most of the reflection on how the two bodies might co-operate tended to dwell on what was called “information sharing”. From the outset, information sharing was seen as a “difficult issue”. Interestingly, none of the expert meetings or discussion papers appears to have anticipated what would eventually become the main difficulty in the relationship between the two bodies, namely a request by a person accused and detained by the Special Court to testify before the Truth and Reconciliation Commission.

A Failure to Define the Relationship

45. Notwithstanding all the above-mentioned deliberations, the relationship between the two bodies was never actually set out or defined. Indeed, there is not a single reference\(^{49}\) to the TRC in any of the enabling instruments\(^{50}\) that established the Special Court. This omission was surprising given the UN Secretary General’s statement to the United Nations Security Council that:

“care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.”\(^{51}\)

46. The Commission finds that it might have been helpful for the United Nations and the Government of Sierra Leone to lay down guidelines for the simultaneous conduct of the two organisations.\(^{52}\) The Commission finds further that the two institutions themselves, the TRC and the Special Court, might have given more consideration to an arrangement or memorandum of understanding to regulate their relationship.


\(^{49}\) There was only a passing reference in the Statute of the Special Court for Sierra Leone to the use of unnamed “truth and reconciliation mechanisms” to assist with cases of juvenile offenders; there was no specific mention of the TRC.

\(^{50}\) See the following documents: Agreement between the United Nations and the Government of Sierra Leone for the establishment of a Special Court for Sierra Leone, 16 January 2002; Statute of the Special Court for Sierra Leone; and The Special Court Agreement (Ratification) Act 2002.

\(^{51}\) See UN Doc. S/2001/40, at paragraph 9.

\(^{52}\) The provisions governing the conduct of the post-conflict institutions in Timor-Leste, the Commission for Reception, Truth and Reconciliation (CAVR) and the Serious Crimes Unit (SCU), regulated the appearance of perpetrators before the two bodies. The two bodies operate simultaneously at the time of writing and were established under UN Regulations, which outlined certain aspects of the working relationship between the two bodies, including which perpetrators may appear in CAVR events and which are liable for prosecution by the SCU. The Timor-Leste Commission began operations in January 2002. See the International Centre for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months*, March 2004, at page 11.
THE COMMENCEMENT OF OPERATIONS

47. At the early stages of their operations, the two institutions approached one another with respect and deference. There was mutual recognition that the two bodies both had an important contribution to make in dealing with the truth, with accountability and with impunity. Senior officials from both organisations made public statements in support of the other’s mandate and objectives. On 2 December 2002, The Prosecutor of the Special Court and Bishop Humper, the Chairperson of the TRC, made a joint public appearance in Freetown, where each expressed support for the role of the other institution. Nevertheless, neither institution demonstrated any particular interest in attempting to establish areas of co-operation nor anything resembling a “relationship”, as had previously been proposed. Both seemed to feel, implicitly at least, that it was important that they should retain clear boundaries between the two institutions.

48. When the two bodies began to operate contemporaneously, in mid-2002, neither appeared particularly eager to establish a “relationship agreement” with the other. From the outset, suggestions of “information sharing” between the Commission and the Special Court threatened to have a chilling effect upon the willingness of perpetrators to testify before the Commission. It appeared that many perpetrators would only participate meaningfully in the activities of the Commission if they could be reassured that the information they provided would not be channelled to the Special Court.

“Information Sharing” and Public Perception

49. Section 7(3) of the Truth and Reconciliation Commission Act 2000 states that “[a]t the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis and the Commission shall not be compelled to disclose any information given to it in confidence”. In addition to Section 7(3) of the Act, Section 7(4) suggests that the Commission has a positive duty to prevent disclosure of certain information, requiring it to “take into account the interests of victims and witnesses when inviting them to give statements, including the security and other concerns of those who may wish to recount their stories in public”.

50. The TRC sought to reassure all its potential witnesses that if they were to provide evidence to the Commission pursuant to an undertaking by the Commission that they were doing so on a confidential basis, then their identities and other sensitive information would never be disclosed. The TRC considered that it had such a prerogative as a result of the applicable provisions of the Truth and Reconciliation Commission Act 2000. The Commission further believed it necessary to exercise its prerogative rather broadly, especially given the numerous indications that perpetrators were fearful that evidence they might give to the Commission would subsequently be communicated to the Special Court.
51. The Commission was ostensibly given some sense of security in this regard by the public undertakings of various members of the Special Court’s Office of the Prosecutor (OTP). The Prosecutor, David Crane, was among those who asserted that the Court would not make use of any evidence presented to the Commission. In an interview in November 2002, OTP Chief Investigator Allan White made the following remarks:

“We strongly support the TRC. We are on record saying that we do not plan to use any information at all from the TRC. We do want to encourage people to come and tell their story so the nation can begin the healing process...

[...] We will not concern ourselves if you come before the TRC. Nor do we necessarily want to know who comes before the TRC. It is a separate and distinct operation, and it should be. We do not plan on asking the TRC for any information whatsoever.”

52. Notwithstanding the efforts of the Commission and the undertakings of the Prosecutor to distance themselves, a perception developed throughout the country that information provided to the Commission would make its way to the Special Court. A rumour even started circulating that there was an underground tunnel that ran between the two institutions. It did not help in elucidating public perception that both bodies were situated on Jomo Kenyatta Road in Freetown, in close proximity to one another. It is not surprising that many people in Sierra Leone were not able to distinguish between the roles of the two bodies: they both dealt with impunity; they addressed accountability for atrocities committed during the war; and they focussed on violations of international humanitarian law.

53. The fact that an investigator worked in both institutions served to fuel the perceptions of collaborative work. The example in question entailed the recruiting by the Special Court of a member of the Commission’s investigations team. This recruitment was apparently done on the basis that the investigator would not be employed to work on any cases he had dealt with in the Commission. In particular he was not to be used to locate witnesses he had previously identified for the Commission.

54. A Commission research team working in the vicinity of Magburaka Township (Tonkolili District) during August 2003 came across the investigator in question while proceeding to a follow-up interview with a Commission witness. It turned out that the investigator had led a Special Court investigation team to the same witness, known as “Base Marine”. Only a few weeks earlier he had been in the area under the auspices of the Commission, working with the local community to arrange witnesses for hearings and interviews. At this time, he was introduced to Base Marine and was known to the witness as a TRC investigator. The investigator’s return to the Magburaka area to visit the witness on a second occasion, this time wearing a Special Court cap, served to deepen suspicion in the minds of residents.

53 See All Africa News Service, www.allafrica.com; Sierra Leone’s Special Court: Will it Hinder or Help? – Interview with Special Court Chief Investigator Allan White, 21 November 2002.
55. As a follow-up, the Commission Research Team counselled Base Marine. He was in the company of Mohamed Muxon Sesay, Director of the organisation "Peace, Reconciliation and Development" based in Mile 91 (Tonkolili District). Sesay had the following to say in relation to Base Marine’s predicament:

"After making the statement with the TRC, then later the Special Court seems to have got some clip of that information. So to me, it is confusing; maybe it's just a trick between the TRC and the Special Court. Even the idea of not sharing information between the TRC and Special Court – it is today a big doubt... Because it's the TRC that we know... and we have confidence in the TRC operation. There are so many things, sensitisation [about the TRC] done before this time and we have seen their activities and we feel satisfied with the TRC... But the Special Court, we are yet in the line of process..."

56. It would have been desirable if staff, particularly those holding sensitive posts, had not moved from one organisation to the other. The Special Court, for its part, might have refrained from employing the investigator in question.

57. The Commission often detected a climate of deep-seated suspicion among people it interacted with in the course of sensitive research and investigations. Disturbing allegations were put to the Commission, often as a means of explaining why a particular community was tense or uncooperative. By way of example, it was alleged that there had been improper conduct by a policeman investigating on behalf of the Special Court in the Kenema District. The man in question, apparently connected to the Criminal Investigation Department (CID) of the Sierra Leone Police, had masqueraded as a TRC statement-taker in order to obtain evidence from witnesses for Special Court investigations.

58. TRC investigators and researchers were sometimes accorded somewhat frosty receptions in the course of their enquiries in the field. Staff members had to make continual assurances about personal independence and impartiality, as well as advocating the merits of the truth and reconciliation process in general.

59. The Commission finds that there is evidence to support the conclusion that some people were reluctant to participate in the truth-telling process out of fear of prosecution by the Special Court for Sierra Leone. This was one of the unfortunate costs of the parallel and simultaneous existence of the two bodies. There were certainly other reasons why some perpetrators did not come forward to tell their stories. Some presumably feared reprisal or simply saw no personal advantage to themselves in speaking publicly about their own actions. In the light of the two initiatives many perpetrators living in the bush, particularly the young combatants, felt much uncertainty and confusion surrounding their future. What can be said is that the threat of prosecution by the Special Court was one factor in the decision-making process of some of those who refused to testify. The Commission’s ability to create a forum of exchange between victims and perpetrators was unfortunately retarded by the presence of the Special Court.

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54 Mohamed Muxon Sesay, Director of Peace, Reconciliation and Development, Mile 91, TRC interview conducted at private residence near Magburaka, Tonkolili District, 13 August 2003.

55 Formal complaints made to TRC research and investigation staff while on field missions in the Kenema District, July to August 2003.
The Question of Primacy

60. A view was expressed in some public settings that the confidentiality provisions in the Truth and Reconciliation Commission Act 2000 would not shelter the Commission from a request by the Special Court to provide it with information obtained in confidence. Several arguments were invoked to justify this position. Some relied on the Statute of the Special Court for Sierra Leone, which indicates that the Court has “primacy”. \(^{56}\) Some mistakenly concluded that this clause subordinated the Commission to the Special Court.

61. The principle of “primacy” exists to govern conflicts between courts with concurrent jurisdiction. It pertains to the preferring of charges and the taking over of trials. “Primacy” was included in the Statute of the Special Court because the Special Court’s jurisdiction would at least partially overlap with that of the national courts of Sierra Leone. Any suggestion that there was a hierarchy between the Court and the TRC would have been alarming, given the prior statements from various United Nations sources to the effect that the two bodies were mutually supportive and complementary.

62. Nevertheless, a January 2002 discussion paper prepared by the Office of the Attorney General and Ministry of Justice of Sierra Leone, with the technical co-operation of the NGO ‘No Peace Without Justice’, erroneously concluded that the Commission was subordinate to the Special Court:

“The legal relationship between the Special Court and the Truth and Reconciliation Commission is clear. The Special Court is an international judicial body whose requests and orders require no less than full compliance by the Truth and Reconciliation Commission, as by all Sierra Leonean national institutions, in accordance to [sic] the international obligations agreed to by Sierra Leone.” \(^{57}\)

63. The basis of these obligations, according to the discussion paper, was Article 17 of the Agreement between Sierra Leone and the United Nations with respect to establishment of the Special Court. Article 17 refers to obligations of the “Government”, requiring it to co-operate with the Court and to comply with its requests. It mentions nothing of the TRC, which is a body independent of the Government of Sierra Leone. In any event, the Agreement between Sierra Leone and the United Nations could in no case prevail over the legislation establishing the TRC. The Truth and Reconciliation Commission Act 2000 was adopted by Parliament and could only be overridden by the Constitution, or by another subsequent Act of Parliament.

\(^{56}\) See the Statute of the Special Court for Sierra Leone, at Article 8(1).

64. The only legislation enacted by Parliament with regard to the introduction of the Special Court came on 25 April 2002 in the form of the Special Court Agreement (Ratification) Act 2002. This legislation did no more than give effect to certain provisions of the Agreement between Sierra Leone and the United Nations and the Statute of the Special Court in national law. The very enactment of this legislation proves the error in the Attorney General’s discussion paper, for it demonstrates that potential areas of disagreement between international treaties and national statutes must be resolved by the passing of further national legislation. For the discussion paper to have had any basis for its claim that the international Agreement took precedence over the powers of the TRC, further legislation specifically on that point would have had to enacted. No legislation was ever passed to require “full compliance” of the TRC with the “requests and orders” of the Special Court.

65. Some observers attempted to suggest that the Special Court for Sierra Leone was empowered to compel the Commission to handover confidential evidence. They relied upon a rather ambiguous provision in the Special Court Agreement (Ratification) Act 2002. Section 21(2) of the Act said: “Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court.” This provision was construed in some quarters to mean that the Court had been given an overriding power, to which all existing legislation in Sierra Leone would have to give way.

66. Such an interpretation of Section 21(2) would have had as its consequence the effective elimination of all forms of privilege and confidentiality governed by the laws of Sierra Leone. In effect, it would have cancelled all diplomatic immunities, as well as the privileges that exist in well-recognised relationships of confidence, such as those between doctor and patient, solicitor and client or priest and confessor. It would have rendered meaningless one of the most important prerogatives of the TRC, namely the power to withhold confidential evidence from any party. The annulment of all forms of confidentiality in Sierra Leone could not have been the intention of Parliament when it passed the Special Court Agreement (Ratification) Act.

67. The potential legal conflict surrounding a request by the Special Court for evidence taken by the Commission on a confidential basis never materialised in practice. The Prosecutor, David Crane, made public declarations during September 2002 indicating that he would not seek evidence from the Commission.59

58 See the Supplement to the Sierra Leone Gazette, Vol. CXXXIII, No. 22.
59 See the International Centre for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months*, March 2004, at page 12. However, the Registrar of the Special Court, Robin Vincent, indicated to TRC staff in a meeting held on 4 September 2003 that the Prosecutor would contemplate a change in his public position depending on certain circumstances. The meeting was held to discuss possible TRC access to Special Court detainees. Mr. Vincent told the TRC delegates that he had been advised by the Prosecutor that “all bets are off” if one of the detainees should admit his guilt or implicate someone else in his testimony to the TRC. The Registrar again reminded TRC staff of this comment in a follow-up meeting held on 11 September 2003.
68. The Commission cannot rule out the possibility that, at some time in the future, the Special Court for Sierra Leone, or for that matter any other court, national or international, will seek to obtain information from its archives held under condition of confidentiality. The Commission is confident that, under the current state of the laws of Sierra Leone, the Truth and Reconciliation Commission Act 2000 fully prohibits any such disclosure. Any attempt to change the legislation so as to enable access to such confidential information would have disastrous consequences. In the case of vulnerable witnesses, it would seriously breach their right to privacy and possibly expose them to reprisal or persecution. In the case of perpetrators, it would set a dangerous precedent. The Commission recommends that Parliament should never authorise access by criminal justice mechanisms, either directly or indirectly, to information in the archives of the Commission that was provided on a confidential basis.

“Use Immunity” of Information Provided to the Commission

69. It was of course desirable that perpetrators who were considering providing information to the Commission should do so in public and, ideally, in the presence of their victims, where possible. The concern expressed by perpetrators – that evidence they gave in TRC public hearings might be used by the Special Court in subsequent prosecutions – could have been addressed by a rule establishing that such evidence would be inadmissible in a subsequent prosecution. The legislation establishing the South African Truth and Reconciliation Commission specified that self-incriminating evidence given before the Commission could not be used in criminal prosecutions before the courts of South Africa. There was a similar provision in Ghana’s truth commission statute.

70. Although the Commission had the power to compel perpetrators to testify under oath, subject to prosecution for perjury in the case of dishonest testimony and for contempt of court in the case of refusal to testify, it did not exercise these powers. To do so might have created an extremely unfair situation for a witness who might subsequently have been exposed to prosecution before the Special Court for Sierra Leone.

71. The Commission recommends that future international criminal tribunals make provision for the “use immunity” of testimony provided to a truth and reconciliation commission, even when the information is provided in a public hearing.
THE SOURING OF RELATIONS: ACCESS TO DETAINEES

72. Persons who played a central role in the conflict, including Government Ministers, faction leaders, high-level commanders and persons accused of grave criminal conduct, appeared in both public and in closed hearings of the TRC. These individuals either sought an appearance of their own accord or were requested by the Commission to make an appearance. The testimonies generated by the appearances of these key players contributed to a rich and multi-sided discourse in society. Viewpoints and versions of events were exchanged and debated.

73. Absent from the Commission’s list of witnesses were the men indicted by the Special Court on charges that they “bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”. For most of the duration of the Commission’s period of operations, there were nine indictees in the custody of the Court, each of them charged with multiple-count indictments alleging their responsibilities in the conflict. The nine men were: Issa Hassan Sesay, Augustine Ato Bao and Morris Kallon (members of the RUFP, formerly the RUF); Chief Samuel Hinga Norman JP, Allieu Kondewah and Moinina Fofana (members of the CDF); and Alex Tamba Brima, Ibrahim ‘Bazzy’ Kamara and Santigie Borbor Kanu (members of the former AFRC). Four of these men had been detained since 10 March 2003; the other five were arrested and detained on diverse dates between April and August 2003. It was only a matter of time before these role players in the custody of the Special Court would seek to tell their versions in the forum provided by the Commission.

74. The names of the indictees emerged in multiple testimonies of witnesses before the TRC. The investigative arm of the Commission had made approaches to the Special Court during the months of May and June 2003 in order to access some of the men among the first set of detainees and engage them in the TRC’s information-gathering activities, including its public hearings. At that time, the Commission was advised by the Registrar of the Special Court, Robin Vincent, that the requests had been transmitted to the detainees, via their legal representatives, and that none of them wished to speak with the Commission while their trials before the Special Court were pending. The Commission received correspondence directly from some of the legal representatives in which co-operation was welcomed; but the consensus was that any interview or hearing would have to be at the instigation of the defendants themselves.

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60 More detail on the various indictments, arrest warrants and transfer orders relevant to the nine indictees can be found on the website of the Special Court for Sierra Leone, at: www.sc-sl.org.
61 The four men indicted and taken in to the custody of the Special Court on 10 March 2003 were Sesay, Kallon, Tamba Brima and Hinga Norman.
62 Bao was formally indicted on 16 April 2003; Kamara on 24 May 2003; Kondewah and Fofana on 26 June 2003; and Kanu on 15 September 2003. Some of them were detained in the custody of the court for a period up to 30 days before being formally indicted.
63 See for example the letter of 17 June 2003 from Mr. J. B. Jenkins-Johnston, legal representative of Chief Hinga Norman, to the Registrar, notifying the Special Court that he considers it inappropriate for his client to appear before TRC while he remains an indictee of the Special Court.
64 See for example the letter of 11 June 2003 from William Hartzog, legal representative of Issa Hassan Sesay, notifying the Commission of his mandate to represent Sesay in negotiations with the Commission but cautioning that no appearance before the TRC would be possible without first being sure of his client’s willingness to participate.
75. It was only in August 2003 that indicted defendants in the custody of the Special Court formally began to give notice of their desire to appear before the Commission. On 26 August 2003 Chief Samuel Hinga Norman, the former National Co-ordinator of the CDF, wrote a letter requesting his legal counsel to facilitate an appearance before the TRC:

“I have long been in receipt of copy of your letter referenced JBJJ/ZYS dated 17 June 2003, expressing the inappropriateness for me (your client) to appear before the Truth and Reconciliation Commission while I remain an indictee before the Special Court.

Well, I was arrested, charged and detained on the 10th March 2003, thinking that by now, 25th August 2003, my trial would have started long ago; but I thought wrongly. Since there is no news about the start of the trial and there are signs that the TRC may soon close its sittings, I would prefer to be heard by the people of Sierra Leone and also be recorded for posterity especially where my boss, The President of Sierra Leone, who appointed me and under whom I served as the Deputy Minister of Defence and National Coordinator of the Civil Defence Force (CDF/SL), has already testified before the Commission.

As my SOLICITOR, I am applying through you and requesting you as a matter of urgency to please inform the necessary parties of my willingness to appear and testify before the TRC without any further delay.”

76. Norman’s application to testify to the TRC was followed by those of Augustine Bao and Issa Sesay, both members of the RUF, formerly the RUF.

77. Given that the defendants had regular contact with their own counsel and that they had been provided with mobile telephones enabling them to communicate with persons outside the Special Court prison, the defendants faced no difficulty in passing information to the TRC. There was certainly nothing to prevent them recording their full testimonies in writing and submitting them through their lawyers. What these detainees were seeking, however, was a hearing; an opportunity to present testimony in person to the Commission and to answer questions posed by staff of the TRC. They were asserting their rights to be heard in a manner like that accorded to all other Sierra Leoneans who had so requested and so desired.

78. The Commission considered it desirable to attempt to facilitate any request from a detainee of the Special Court to testify before it. The detainees in question had already been identified and indicted by the Prosecutors of the Special Court as individuals belonging to the category of “persons who bear the greatest responsibility” within the terms of the Court’s jurisdiction. Their indictments had been reviewed and approved by a judge of the Court, who had necessarily determined “that the allegations in the Prosecution’s case summary would, if proven, amount to the crime or crimes as particularised in the indictment”.

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66 See the letter of 17 June 2003 from Chief Samuel Hinga Norman, detainee of the Special Court, to Mr. J. B. Jenkins-Johnston, legal representative of Chief Hinga Norman.
67 See the letter of 16 September 2003 from Augustine Ato Bao, detainee of the Special Court, to the Truth and Reconciliation Commission.
68 See the letter of 19 September 2003 from Issa Hassan Sesay, detainee of the Special Court, to the Truth and Reconciliation Commission.
69 See the Statute of the Special Court, at Article 1 and the earlier section on issues of jurisdiction.
70 See the Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 47(E)(ii).
79. There is nothing unusual about a prisoner, either awaiting trial or convicted, testifying in proceedings in other cases and even in proceedings between other bodies. Such an occurrence happens regularly in national judicial systems and procedures exist in Sierra Leone and elsewhere to facilitate it. Indeed, the Special Court apparently gave its approval for certain detainees in its custody to give evidence in ongoing proceedings in the Sierra Leonean courts pertaining to charges of treason against other individuals.\(^{70}\)

80. More specifically, there is considerable precedent to be drawn from other truth and reconciliation commissions. In the South African Commission, both “awaiting-trial” and convicted prisoners appeared before hearings of the Human Rights Violations Committee in order to supply their versions of events. Prisoners and detainees also appeared before the Amnesty Committee of the South African Commission for purposes of having their amnesty applications heard. Indeed some prisoners and detainees appeared before both Committees. The Sierra Leone TRC was entrusted by the Parliament of Sierra Leone with the responsibility of hearing all relevant evidence and information concerning its mandate. Had Chief Hinga Norman or the other detainees been in prison in Sierra Leone awaiting trial before a national court, there can be no doubt that arrangements would have been made to have enabled them to be heard by the Commission. The TRC succeeded in gaining access to several persons held in Freetown Central Prison in exactly this situation.

81. As a first step towards realising Chief Hinga Norman’s request, the Commission addressed a letter to the Registrar of the Special Court ("the Registrar"), Mr. Robin Vincent, requesting him to facilitate an interview with Chief Hinga Norman on 4 September 2003. On that day, a delegation of Commission staff members attempted to interview Chief Hinga Norman but was denied access to him by the Registrar. The Registrar advised the Commission delegation that no mechanism was in place to facilitate interaction between detainees and the Commission.\(^{71}\) Such a mechanism was said to be under contemplation by the Special Court. According to the Registrar, once key members of the Special Court, including its President, its Judges and its Prosecutor, had agreed upon a mechanism to regulate such contact, the Special Court’s intention was to have the terms of the agreement set out by the Registrar in the form of a “Practice Direction”.\(^{72}\) The Commission was advised that the production of this Practice Direction was imminent.

\(^{70}\) At the time of writing, there remained some ambiguity as to whether detainees in the custody of the Special Court would in fact be permitted to testify in ongoing proceedings before the national courts. Specifically, a letter to the Special Court from the Director of Public Prosecutions (DPP), Mr. Brima Kebbie, asked for the release of two RUF indictees, Issa Hassan Sesay and Morris Kallon, to testify before the Freetown High Court No. 2 in the case of The State v. Corporal Daniel Sandy and 16 Others. According to the local press, the Court had “formally approved” the DPP’s request, but the “defence teams for both indictees [were] reluctant to give [their] consent for the release of [their] clients” to participate in this high-profile treason trial. See, for example: The African Champion, ‘Issa Sesay, Morris Kallon in Hot Waters’, Freetown, 21 January 2004, at page 1.

\(^{71}\) See the minutes of the meeting held in the Office of the Registrar between a TRC delegation and representatives of the Special Court, 4 September 2003.

\(^{72}\) Rule 33(D) of the Special Court’s Rules of Procedure and Evidence authorises the Registrar “in consultation with the President of the Special Court, [to] issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Special Court and in respect of other matters within the powers of the Registrar”.

Vol Three B  Chapter Six  The TRC and the Special Court  Page 384
82. So began the efforts of the TRC to secure the appearance of the Special Court detainees. It was an episode that would draw to an end barely four weeks before the formal closure of the Commission’s operations. On 28 November 2003 – three months after Hinga Norman’s original request for a hearing was made known to the Special Court – the President of the Court, Judge Geoffrey Robertson, ruled that the detainees could only engage with the Commission by way of written statements.

THE SPECIAL COURT’S PRACTICE DIRECTION

83. The Practice Direction was adopted by the Special Court for Sierra Leone on 9 September 2003. It was framed as a set of procedures to be followed by either the TRC or a “National Authority” who might request access to persons in the custody of the Special Court (“the Practice Direction”). No consultations or discussions were held with the TRC Commissioners or staff members in advance of the issuance of the Practice Direction. No effort was made to solicit the views of the Commission on what the Commission would consider to be acceptable and reasonable terms of access to the detainees.

84. Notwithstanding the provisions of the TRC Act of 2000, the Practice Direction required the Commission to make a substantive application before a Special Court Judge who would decide on the merits of the application. Such an application had to include a list of all the specific questions the Commission wished to pose to the detainee. The Practice Direction provided for any Commission interview to be “supervised” by a legal officer who had the power to intervene to stop questions and even to stop the interview. All interviews were required to be recorded and transcribed. The transcripts would be handed over to the Prosecutor for use at trial.

85. In requiring the Commission to make a substantive application to a Special Court Judge for permission to interview a detainee, the Practice Direction was inconsistent with the mandate and powers granted to the Commission under its founding statute. The Commission was granted the power to interview any individual within Sierra Leone at any place in the fulfilment of its mandate. There were no limitations, exceptions or qualifications on this power contained in the Truth and Reconciliation Commission Act 2000.

86. The Commission recognised the Special Court had the power to regulate access to accused persons in its custody. In particular, the Special Court had a legitimate interest in regulating contact in order to prevent the escape of the detainee, to prevent harm being done to the detainee and to maintain good and orderly conduct in the detention facility.

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73 See the “Practice Direction on the procedure following a request by a National Authority or Truth & Reconciliation Commission to take a statement from a person in the custody of the Special Court for Sierra Leone”; signed by the Registrar Robin Vincent, adopted 9 September 2003, (hereinafter “Practice Direction of 9 September 2003”).
74 See the Practice Direction of 9 September 2003, at paragraph 5.
75 See the Practice Direction of 9 September 2003, at paragraph 2(g).
76 See the Practice Direction of 9 September 2003, at paragraph 6.
77 See the Practice Direction of 9 September 2003, at paragraph 8(b).
78 See the Practice Direction of 9 September 2003, at paragraph 8(c).
THE RESPONSE OF THE TRC TO THE PRACTICE DIRECTION

87. The Commission responded to the issuance of the Practice Direction by way of a letter addressed to the Registrar, dated 9 September 2003. Extracts from this letter are reproduced below:

"Witnesses who appear before the TRC are expected to contribute towards truth telling which in turn forms the basis of national healing and reconciliation. In this process a witness may incriminate himself. Where the interview is conducted on the basis of confidentiality (as provided by the Act) the TRC will naturally not disclose any information to another body for purposes of criminal prosecution. This principle has been established and respected in other jurisdictions and indeed it is established in this country.

The TRC routinely interviews awaiting trial prisoners before the criminal courts of Sierra Leone and there has been absolutely no question of monitoring our interviews or for that matter forwarding information to prosecutors. Indeed to do so would be regarded as an outrage. Our hope is that the Special Court, a body established through international co-operation and which subscribes to international human right standards, will not conduct itself in this way.

The Direction is in the circumstances a denial of the Accused's right not to incriminate himself. This right is enshrined in your own Statute for the Special Court of Sierra Leone by virtue of Article 17, subparagraph (4)(g).

The burden of proof in a criminal trial rests with the prosecution. The Direction in our view constitutes an improper attempt to procure evidence from the Accused. In effect the Accused who wishes to appear before the TRC is penalised and his right to a fair trial undermined for no other reason than his desire to exercise his rights under the Act. The Practice Direction then has a “chilling effect” on those detainees who may wish to appear before the TRC. Many will in the circumstances decide not to exercise their rights in this regard and those that do are effectively punished for doing so…

We are of course respectful of the important role the Special Court plays in Sierra Leone in addressing impunity. The TRC would not engage in any activity that would undermine the objectives of the Special Court…

The Direction is dismissive of the spirit and purpose behind the Truth and Reconciliation Commission. It would be a highly regrettable development between our two important institutions."

76 See the letter of 9 September 2003 from the Truth and Reconciliation Commission to the Registrar of the Special Court, Robin Vincent.
88. TRC staff members met again with the Registrar on 11 September 2003.\textsuperscript{80} The Registrar undertook to place the Commission’s concerns and its suggestions for revisions to the Practice Direction before the President of the Court and the Prosecutor. One of the Special Court representatives present, Mr. Sylvain Roy, Acting Head of the Special Court’s Defence Office, raised what he described as a “very practical concern”. He stated that:

“Some of the detainees might want to avail themselves of the opportunity to testify before the TRC in order to take a public platform.”\textsuperscript{81}

Mr. Roy suggested that the detainees were "looking for publicity" and that the “TRC [was] a conduit to the population.”

89. The Commission supplied its suggestions for a revised Practice Direction in a letter to the Registrar dated 12 September 2003.\textsuperscript{82} Among its detailed suggestions for revision, the Commission proposed that the following paragraphs be inserted into the preamble of the Practice Direction:

“ACKNOWLEDGING the unique role of the Truth and Reconciliation Commission (TRC) in promoting healing and reconciliation in Sierra Leone; and

NOTING that the Truth and Reconciliation Commission Act 2000 accords the TRC certain powers and functions to create an impartial historical record for Sierra Leone.”

The Special Court declined to insert any such text in the preamble of its revised Practice Direction acknowledging the unique role of the TRC or its powers and functions under the Act.

90. The Registrar was advised that the Commission had to wind up its activities before the end of the year 2003. This meant that the Commission had to act expeditiously. In its letter of 12 September 2003, the Commission requested the Registrar to provide the Court’s feedback by 16 September 2003. As it turned out the Commission would only receive the revised Practice Direction on 6 October 2003.\textsuperscript{83}

\textsuperscript{80} See the minutes of the meeting held in the Office of the Registrar between a TRC delegation and representatives of the Special Court, 11 September 2003.

\textsuperscript{81} Sylvain Roy, Acting Head of Special Court Defence Office; meeting held in the Office of the Registrar between a TRC delegation and representatives of the Special Court, 11 September 2003.

\textsuperscript{82} See the letter of 12 September 2003 from the Truth and Reconciliation Commission to the Registrar of the Special Court, Robin Vincent.

\textsuperscript{83} See the Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone; signed by the Registrar Robin Vincent, adopted 9 September 2003, amended 4 October 2003. While the revised Practice Direction was adopted on Saturday 4 October 2003, it was not received by the Commission until Monday 6 October 2003.
91. By the end of business on 16 September 2003, the Special Court had not responded as requested. The Commission was anxious to resolve the impasse and sought the intervention of the Acting Special Representative of the UN Secretary-General (SRSG), Mr. Alan Doss, to mediate between the Commission and the Court. Mr. Doss participated in a meeting with two Commissioners (including the TRC Chairman, Bishop Joseph Humper) and TRC staff members on 18 September 2003. A detailed dossier was handed to the SRSG with the specific request that he should attempt to secure the participation of the Special Court in the mediation. Mr. Doss undertook to take the matter further and to revert back to the Commission.

92. The Commission never heard from the office of Mr. Doss again, notwithstanding telephone calls to his office. Informally, the Commission was advised that the request had been referred to the UN Office of Legal Affairs at its Secretariat in New York. This office apparently supplied an opinion in which two propositions were made: that the Special Court held “primacy” over the Commission; and that no mediation could take place without the involvement of the Special Court. The point on primacy represented a misreading of the Special Court statute. With regard to the second point the writer of the opinion appeared to overlook the fact that the Commission had requested the SRSG to secure the participation of the Special Court in the mediation. While the Commission was generally disappointed with the failure of the UN structure to act expeditiously, the Commission wishes to recognise the constructive support provided on this issue by individual staff members of the Human Rights Section at UNAMSIL.

REQUESTS TO THE TRC FROM AUGUSTINE BAO AND ISSA SESAY

93. Another Special Court detainee, Augustine Ato Bao of the RUFP, wrote to the TRC on 16 September 2003 requesting a public appearance before the Commission. Mr. Bao wrote:

“It has been my ardent desire to appear and testify before the TRC, which is the only legitimate body that the Lomé Accord, The Pivotal for the successful conclusion of the conflict, empowered to look into the cause or causes that warranted the conflict and its effect or effects.

My arrest and Detention by a body that never took part in the negotiation that brokered the peace impeded my efforts to appear before the TRC, and [I have] been held for six (6) months without seeing the shadow of a trial emerging.

The Lomé Accord and ECOWAS put into being the TRC for all Sierra Leoneans to speak nothing but the truth, as the truth is the only vehicle that can accommodate us as people of a nation.

[...] It is in this spirit that I write to request that I want to appear before the TRC as a Sierra Leonean and a member of the former RUF now RUFP to contribute my own quota to this historic document for posterity.”

84 See the record of the meeting held at UNAMSIL Headquarters between a TRC delegation and representatives of UNAMSIL, including the Acting Special Representative of the Secretary-General, Mr. Alan Doss; meeting held at UNAMSIL Headquarters, Freetown, 18 September 2003.

85 See the letter of 16 September 2003 from Augustine Ato Bao, detainee of the Special Court, to the Truth and Reconciliation Commission.
94. Another RUFP detainee, Issa Hassan Sesay, wrote a letter to the TRC dated 19 September 2003, although it was only received by the Commission on 16 October 2003. 86 Mr. Sesay wrote:

"… I have been in detention for six months now and trial is nowhere to be seen. I have therefore decided to renew my commitment for peace by fulfilling my obligation as a Sierra Leonean and as a RUF now RUFP member to appear and testify before the TRC, which the absolute Lomé Accord set up to investigate the causes of the conflict and the effects of the conflict.

[...] The absolute Lomé Accord authorised the TRC to recommend solutions that will avert future conflict and solutions that will create a nation void of callousness and hatred; a nation where love will be discovered once again, where deceptions and other awful tactics for political power and wealth can no longer be part of our lives again; where respect for the Constitution and for one another is restored and where the truth will take us from the darkness to the light of God.

It is therefore my burning desire to appear and speak nothing but the truth as the truth is the hinge for permanent peace and reconciliation."

95. Legal counsel for Mr. Sesay, Mr. William Hartzog, indicated to the Commission that his client was potentially interested in both a confidential interview and a public hearing before the Commission. Detailed questions for Mr. Sesay were prepared and passed on to Mr. Hartzog. Counsel and the Commission agreed to prepare a joint challenge to the provisions of the Practice Direction preventing confidential interviews. A legal opinion was prepared87 and the Commission awaited instructions to emerge from Mr. Issa Sesay through his legal counsel. Sadly this joint challenge never materialised as the events to be described below overtook this initiative.

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86 See the letter of 19 September 2003 from Issa Hassan Sesay, detainee of the Special Court, to the Truth and Reconciliation Commission; letter entitled: "Request to Appear and Testify before the TRC".

87 A comprehensive legal opinion was prepared by Mr. Peter Rosenblum of Columbia Law School. The TRC wishes to express its appreciation to Mr. Rosenblum and his research team for the legal advice they supplied. Legal advice on other aspects was supplied by Neil Boister of Christchurch University, Jeremy Sarkin of Western Cape University, Clare da Silva, Anne-Marie Corominas, Megan Carpenter and Vivienne O'Connor.
DEVELOPMENTS IN SEPTEMBER AND OCTOBER 2003

96. The month of September passed without further word from the Special Court. Chief Hinga Norman was becoming increasingly impatient with the delays. He addressed a letter dated 2 October 2003 to the Commission entitled “Reminder to Testify before the TRC”.88 He wrote:

“While still looking forward to hearing from you on the issue of testifying before the TRC, I have come by a copy of an interesting document (PRACTICE DIRECTION) copy attached, compiled and signed by the Registrar–SCSL, with a series of illegal conditions, all intending to obstruct my appearing before the TRC. I am not sure who the Practice Direction is struggling to protect – the prosecution, Accused, or who?

I am sure the reason for the establishment of the TRC was to encourage the speaking of the TRUTH. In demonstration, but not limited to the attached document ("I HAVE A DREAM etc."), I intend to reveal a lot more so this Country and the entire World could know the truths that are being presently concealed. In the efforts to bring out the facts, I am not in the least afraid of any of the conditions indicated in the illegal document, which the Registrar has now produced as hindsight.

Since I do not know the reason for the obstruction and the long delay in testifying and also the denial of a speedy trial, I have by letter authorised my daughter to organise a Media conference and to release all relevant documents that have trans-crosse between the SCSL, TRC and myself, to the attention of the National and International public for justice and fair play.”

Hinga Norman’s letter was copied to several embassies, as well as to media institutions in Sierra Leone and abroad. The attachment to the letter revealed Hinga Norman’s account of events leading up to the coup by renegade soldiers in May 1997. Hinga Norman claimed that he had presented evidence of the impending coup to President Kabbah, who chose to ignore the warning. This information was subsequently reported widely in the local press.89

97. As the weeks slipped away without the production of the Special Court’s revised Practice Direction, the Commission seriously considered its options. One option was an urgent application to the Supreme Court of Sierra Leone for a declaratory order.90 The Commission commenced with the drafting of legal papers for such an application. These legal papers sought a declaration on two key issues: first, whether the TRC had the right, by virtue of the provisions of the Truth and Reconciliation Act 2000, to interview detainees held in the custody of the Special Court and, at its discretion, to conduct such interviews on a confidential basis; and second, whether awaiting trial prisoners held at the detention facility of the Special Court had the right, by virtue of the provisions of the Act, to appear before the TRC. Both of these rights would be sought subject only to reasonable security and administrative conditions as imposed by the Special Court.91

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88 See the letter of 2 October 2003 from Chief Samuel Hinga Norman, detainee of the Special Court, to the Truth and Reconciliation Commission; letter entitled: “Reminder to Testify before the TRC”.
89 See, for example: New People, “If permitted to testify… Hinga Norman to expose Kabbah at TRC”, Friday 9 October 2003, at page 1; and The Democrat, “Uncomfortable Reality! Hinga Norman Speaks from Jail”, Wednesday 7 October 2003, at page 1.
90 A declaratory order (also known as a “declarator”) is essentially a declaration of rights by a court.
91 See the draft Notice of Motion for a Declaratory Order and accompanying legal papers prepared internally by the TRC, 19 September 2003.
The Commission decided in principle to proceed with its application for a declaratory order. However, the Commission was also advised to exhaust all its remedies before the Special Court prior to approaching the Supreme Court. Accordingly, Commission staff began simultaneously to prepare legal papers to challenge the validity of the Practice Direction before the Special Court. While this process was underway, the revised Practice Direction was issued by the Special Court. Subsequent time constraints prevented the Commission from proceeding any further with its proposed application to the Supreme Court.

THE SPECIAL COURT’S REVISED PRACTICE DIRECTION

On 6 October 2003, the Registrar forwarded a copy of the Special Court’s Revised Practice Direction, which had been adopted two days previously. While the Revised Practice Direction altered the earlier Practice Direction in some respects, it did not take matters much further. The main change was that the record of the interview with a detainee would no longer automatically be transmitted to the Prosecutor. The transcript would instead be lodged with the Court Management Section (the Registrar) and could be made available to any party to the criminal proceedings, including the Prosecutor, upon order by the Presiding Judge. Even in the event that the Commission were to exercise its prerogative to classify the interview as confidential, there was to be no genuine “use immunity” for the contents of such an interview. Instead, any party, again including the Prosecutor, could apply to the Court for an order that the “confidential” information be disclosed in the interests of justice.

The Revised Practice Direction provided something of a presumption in favour of granting permission for access:

“The Presiding Judge shall grant approval (conditional or otherwise) if the said Judge is satisfied that the detainee agrees to the questioning and has been fully advised…

[…] In such circumstances, the request for questioning will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court.”

On the question of the jurisdiction of the Supreme Court of Sierra Leone to deal with the matter, the founding affidavit of the legal papers prepared by the TRC asserted that the TRC Act, which governed appearances by persons before the Commission, was of application to all Sierra Leoneans and all persons in Sierra Leone. The jurisdiction of the Supreme Court of Sierra Leone to determine these rights in relation to Chief Samuel Hinga Norman was not excluded by the fact that he was held in the physical custody of the Special Court, a quasi or hybrid national and international body.

See the Practice Direction on the procedure following a request by a State, the Truth and Reconciliation Commission, or other legitimate authority to take a statement from a person in the custody of the Special Court for Sierra Leone; signed by the Registrar Robin Vincent, amended 4 October 2003. (hereinafter “Revised Practice Direction of 4 October 2003”).

See the Revised Practice Direction of 4 October 2003, at paragraphs 4(b) and 4(c).

See the Revised Practice Direction of 4 October 2003, at paragraph 4(c).

See the Revised Practice Direction of 4 October 2003, at paragraph 5.
101. The balance of the Revised Practice Direction remained largely the same as the original Practice Direction. The Commission recorded its objections in a letter to the Registrar dated 8 October 2003. In this letter the Special Court was advised that it was impossible for the Commission to interview detainees on a confidential basis under the conditions set out in the Practice Direction:

“The Practice Direction constitutes an effective denial of the right of detainees under the Truth and Reconciliation Commission Act 2000 ("the Act") to be interviewed on a confidential basis.

The TRC will not place in jeopardy the rights of the detainees under the Act, nor will it be party to the potential undermining of their rights to a fair trial by engaging in a process in which the Commission is not permitted to guarantee strict confidentiality. Accordingly, the TRC hereby gives notice that it will not make use of the Practice Direction, as it is presently formulated, for the purposes of conducting confidential interviews or closed hearings.”

102. The Commission notified the Court that it would make use of the Practice Direction only to apply for and arrange public hearings with the detainees. As it turned out the first of the detainees to write to the Commission had asked to give his testimony in the form of a public hearing. Hence the Practice Direction would be used to apply for a TRC public hearing with this detainee, namely Chief Samuel Hinga Norman.

103. The Registrar, corresponding from New York City, stated on 17 October 2003 that he was:

“... deeply disappointed at [the TRC's] refusal to make use of the revised Practice Direction, in so far as it relates to the conduct of confidential or closed hearings...”;

and

“also disappointed that so much of the correspondence with the Commission on this issue has been couched in somewhat aggressive language which could be seen to be both inappropriate and counter productive, given that both institutions have difficult tasks to perform and expectations to meet.”

97 See the letter of 8 October 2003 from the Truth and Reconciliation Commission to Robin Vincent, Registrar of the Special Court; letter entitled: 'Objections of the TRC to the Revised Practice Direction'.

98 See the letter of 17 October 2003 from Robin Vincent, Registrar of the Special Court, to the Truth and Reconciliation Commission; letter entitled: 'Objections of the TRC to the Revised Practice Direction'.

Vol Three B  Chapter Six  The TRC and the Special Court  Page 392
REQUEST FOR CHIEF SAMUEL HINGA NORMAN JP TO APPEAR BEFORE THE COMMISSION IN A PUBLIC HEARING

104. On 7 October 2003, the Commission submitted its application to hold a public hearing with Chief Hinga Norman. The Commission made the following statements in setting out the purpose for its request:

“The TRC perceives Chief Samuel Hinga Norman JP to have played a central role in the conflict in Sierra Leone. The Commission’s report – insofar as it purports to present an impartial historical record – would not be complete without hearing from Chief Hinga Norman the particular details of his role in the conflict and his insights and views into its causes, course and character.

On 26 August 2003 Chief Hinga Norman stated in a letter to the TRC that he wishes to appear before the Commission in order to give testimony pertaining to the conflict in Sierra Leone. Since Chief Hinga Norman’s letter, the TRC has sought to arrange such testimony under conditions satisfactory to all parties. The present request represents the Commission’s unerring effort to secure such testimony.”

105. With time running out, the Commission also put forward the strongest possible case for the matter to be treated with special urgency:

“The Commission is operating under considerable time pressures. Section 5(1) of the Act provides for the operation of the TRC for a period of one year. The period of one year expired on 4 October 2003, although agreement has been secured from the President of Sierra Leone to extend the period by virtue of the aforesaid section until the end of December 2003.

Funding for the TRC is provided only until the end of December 2003. In practice this means that the report of the Commission must be finalised and sent to the printers during November. This in turn means that the report itself should be completed towards the end of October or early November. All interviews and hearings should thus be concluded without delay.

Every day that passes without the commencement of interviews or hearings with the detainees held by the Special Court constitutes a potential denial of their rights under the Act. Moreover, any further delay in resolving this matter will severely undermine the ability of the TRC to complete its mandate under the Act…

In the circumstances the TRC has outlined a clear case to have this request expedited with the utmost urgency. The Commission requests respectfully that the Special Court make the necessary arrangements to hold a hearing of Chief Hinga Norman on Monday 13 October 2003 or as soon thereafter as is conveniently possible.”

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99 See Request SHN 001 of 7 October 2003; Request by the Truth and Reconciliation Commission for Sierra Leone to Conduct a Public Hearing with Chief Samuel Hinga Norman JP, submitted on 7 October 2003 (hereinafter “Request SHN 001 of 7 October 2003”).
100 See Request SHN 001 of 7 October 2003, at paragraphs 8 and 9.
101 See Request SHN 001 of 7 October 2003, at paragraphs 12 to 15.
106. The Special Court did not respond to the Commission’s request for the hearing of Chief Hinga Norman to proceed on 13 October 2003. The Deputy Prosecutor, acting on behalf of the Prosecutor, only filed his objections to the application in an inter-office memorandum dated 21 October 2003, a copy of which was received by the TRC late on 22 October 2003.

107. Meanwhile, following consultations with a member of the Bao legal defence team, the Commission submitted an application on 10 October 2003 to conduct a public hearing with Augustine Ato Bao. The Bao legal defence team, surprisingly and without reference to the Commission, filed their own response to the Commission request on 17 October 2003 in which they stipulated a number of conditions to the proposed hearing. This action on the part of the lawyers was to provide the Court with sufficient grounds to form the view that Mr. Bao “was uncertain as to whether to testify before the Commission.”

**Objections of the Prosecutor to a Public Hearing with Chief Samuel Hinga Norman**

108. In his two-page memorandum of 21 October 2003, the Prosecutor divided his objections to a public hearing with Chief Hinga Norman into three sub-headings, namely: the interests of justice; the integrity of the proceedings; and other concerns relating to possible civil unrest.

109. Under the heading of “The interests of justice”, the Prosecutor submitted that a hearing before the Commission:

   a. could be considered “sub judice”;  
   b. could be “contrary to public policy” in that it could defeat the interests of justice to allow an accused to litigate or plead his case in the public when he would be entitled to a fair and public trial in due course; and  
   c. could weaken the “institution of justice” as guaranteed by the Statute of the Special Court by “a defendant exploiting the occasion”.

102 See the Inter-Office Memorandum of 21 October 2003 from Desmond de Silva QC, Deputy Prosecutor (on behalf of the Prosecutor), to Judge Bankole Thompson, Presiding Judge of the Trial Chamber; memorandum entitled: “Samuel Hinga Norman and the TRC”.

103 See Request AAB 002 of 10 October 2003; Request by the Truth and Reconciliation Commission for Sierra Leone to Conduct a Public Hearing with Augustine Ato Bao, submitted on 10 October 2003 (hereinafter “Request AAB 002 of 10 October 2003”).

104 See the document entitled “Defence Agreement and Response to the Request by the Truth and Reconciliation Commission for Sierra Leone to Conduct a Public Hearing with Augustine Ato Bao”, filed with the Registry on 17 October 2003.

105 See the Decision on the Request by the Truth and Reconciliation Commission for Sierra Leone to Conduct a Public Hearing with Augustine Ato Bao; decision rendered by Judge Bankole Thompson, Presiding Judge of the Trial Chamber, dated 3 November 2003 (hereinafter “Thompson Decision on the Bao Request”), at paragraph 8.

106 See the Inter-Office Memorandum of 21 October 2003 from Desmond de Silva QC, Deputy Prosecutor (on behalf of the Prosecutor), to Judge Bankole Thompson, Presiding Judge of the Trial Chamber; memorandum entitled: ‘Samuel Hinga Norman and the TRC’ (hereinafter “Objections of the Prosecutor”).

107 The sub judice rule is designed to prevent publication of matters that would directly affect the outcome of a pending trial.

109 See the Objections of the Prosecutor, at paragraph (a).
110. The Prosecutor’s “integrity of proceedings” objections can be summarised as follows:

a. The mere act of Chief Hinga Norman testifying before the TRC could stir up public feelings and frighten victims and potential witnesses from the proceedings. Indeed the public nature of the hearing would enable Chief Hinga Norman to intimidate victims and potential witnesses, probably through subtle means, which would irreparably damage the integrity of the proceedings.

b. Such a forum would provide Chief Hinga Norman with the opportunity to incite violence or threaten the security of the Special Court.

c. As some of the evidence to be used in the prosecution has been formally disclosed, any intimidation may have a direct impact on victims and witnesses. The Presiding Judge had already ordered protective measures against Chief Hinga Norman to ensure that victims and witnesses were sufficiently protected.\textsuperscript{110}

111. Finally, the Prosecutor submitted under his “Other concern” heading that peace in Sierra Leone rested upon a “fragile equilibrium”, which could be put in peril by the holding of the hearing.\textsuperscript{111}

ARGUMENT BEFORE JUDGE BANKOLE THOMPSON

112. The Hinga Norman matter was set down for argument on 24 October 2003 before the Presiding Judge of the Trial Chamber, Judge Bankole Thompson.\textsuperscript{112} The Commission in its submissions\textsuperscript{113} dealt with each of the Prosecutor’s objections.\textsuperscript{114}

The Interests of Justice

113. In relation to the sub judice objection, it was pointed out that, in law, any impugned public act or publication must create a real and substantial risk of prejudice to the administration of justice and it must be made with the specific intent of prejudicing a fair trial. The claim that the mere holding of a Commission hearing in advance of a trial would in itself violate the rule had no basis in law. The Prosecution did not supply any factual grounds to support a contention that there was any danger of the sub judice rule being violated.\textsuperscript{115}

\textsuperscript{110} See the Objections of the Prosecutor, at paragraph (b).

\textsuperscript{111} See the Objections of the Prosecutor, at paragraph (c).

\textsuperscript{112} Judge Bankole Thompson is a Sierra Leonean who had served as a High Court Judge in the 1980s. Prior to his appointment at the Special Court he taught criminal justice at Eastern Kentucky University in the United States, where he also served as Dean of its Graduate School.

\textsuperscript{113} See the Response By The Truth And Reconciliation Commission for Sierra Leone to the Objections from the Prosecution to the TRC’s Request to hold a Public Hearing with Chief Samuel Hinga Norman JP; before Judge Bankole Thompson, dated 24 October 2003. (hereinafter “TRC Submissions before Judge Thompson”)

\textsuperscript{114} The TRC’s submissions were presented by Mr. Howard Varney. The Prosecutor was represented by Mr. Desmond de Silva QC, Deputy Prosecutor.

\textsuperscript{115} Paragraph 4(d) of the Revised Practice Direction specifically prevented the Special Court from being influenced by any conclusion or comment that might be made by the Commission arising from a hearing with a detainee. The Prosecutor’s sub judice assertion was in any event moot, as the Commission had already agreed with the defence team not to canvass Chief Hinga Norman on the specific elements of the charges against him.
114. The Prosecution’s contention that it would be against public policy for an Accused to plead his case in public when he will be entitled to a fair and public trial was academic given the agreement reached between Defence Counsel and the TRC not to canvass issues forming part of the charges against Hinga Norman. Nonetheless, the Commission’s representative pointed out that, in the absence of a specific allegation, it could not be assumed that a mere appearance before the Commission would jeopardise the “interests of justice”.

115. The Commission noted that the Court was obliged when assessing the “interests of justice” to take into account a range of factors across a broad spectrum of interests. The Commission specifically pointed out that:

“The Special Court for Sierra Leone does not operate in a vacuum, but rather as one integral part of the post-conflict landscape in this country and as the standard bearer for wider principles of justice on a national and international level.”

The Commission submitted that the Court ought to be the guardian not only of the right to a fair trial, but also of other human rights, including freedom of expression. In the Sierra Leone context, there was an additional factor to consider, namely the right of Chief Hinga Norman, a prominent Sierra Leonean, to speak in a public forum before the TRC, to present his version of and perspectives on a critical period in the country’s history. It was submitted that any objection to the TRC’s request would have to strike a balance, weighing the effects of banning Chief Hinga Norman from speaking against the damage done to his freedom of expression and his right to appear publicly before the TRC. No such proportional assessment was undertaken by the Prosecution.

116. The Commission submitted that it was likely that Hinga Norman would feature in the TRC Report on account of testimony received from other sources. Fairness demanded that he be given an opportunity to provide his version of the conflict and to do so publicly.

117. Numerous other central role players in the conflict had been afforded their rights of testifying publicly before the Commission. Since there were examples of individuals in “comparable situations” to that of Chief Hinga Norman who had been granted the opportunity of a public hearing, the denial of an equal opportunity to Chief Hinga Norman in the absence of clear, substantial and reasonable grounds would constitute discrimination against him. It was contended that the harmful effects of a ban on Chief Hinga Norman from exercising his statutory and human rights far outweighed the speculative concerns raised by the Prosecution.

118. The Prosecution’s final “interests of justice” objection was that the institution of justice could be weakened by a public hearing before the TRC if a defendant were to exploit the occasion. The Prosecution did not allege that Chief Hinga Norman himself would exploit the situation, but rather claimed in the abstract that “a defendant” might do so. The TRC pointed out that it had already conducted a high-profile public hearing with an Accused before the criminal courts of Sierra Leone, namely Colonel (RUF) Vandy Kosia. No party made a claim that Kosia’s appearance at the TRC, on 24 May 2003, weakened the institution of justice.

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116 See TRC Submissions before Judge Thompson, dated 24 October 2003, at paragraph 2.3.3.
117 Reference to TRC Public Hearing with Colonel (RUF) Vandy Kosia, Freetown, 24 May 2003. At the time of his public hearing, Kosia was an “awaiting-trial” prisoner at Pademba Road Prison.
**Integrity of the Proceedings**

119. Under this heading, the Prosecution inferred that Chief Hinga Norman’s appearance before the Commission in an open manner may in itself stir up public feelings and pose a threat to the security of the Special Court. The Prosecution alleged that the security of its protected witnesses might be compromised by an appearance by Hinga Norman before the Commission. It was suggested that a public hearing would enable Chief Hinga Norman to intimidate victims “through more subtle means”. The suggestion was made without indicating what such “subtle means” might be.

120. The Commission invited the Judge to dismiss these suggestions as conjecture. The Judge was reminded that witness protection was essentially about keeping the identities of protected persons and in particular their locations secret. No allegation was made against Hinga Norman that he had breached standard protective measures apparently imposed to safeguard the identity of witnesses, even though he was granted reasonably unrestrained access to the outside world through communications with visitors and the use of his mobile phone.

**Threats to National Security**

121. The Commission argued that the Prosecutor’s assertion that a public hearing for Hinga Norman could threaten the “fragile” peace was without foundation. It was pointed out to the Judge that the Commission had conducted many public hearings with key faction leaders and the process had never precipitated an adverse reaction from any group among the Sierra Leonean population.

**Emergent Norms in National and International Law**

122. In an attempt to highlight the profound importance of the issue at hand, the Commission submitted that developments in national and international law created a presumption in favour of permitting Hinga Norman to appear before the Commission. Nationally, the established practice of the Truth and Reconciliation Commission had led to the recognition in national law of a *de facto* right to testify before the Commission. With regard to international practice, the Commission asserted the following:

“In the light of developments in post-conflict societies in the late 20th and early 21st centuries in dealing with past human rights violations, there exists on the part of victims a right to know the truth. Truth Commissions have been created in several countries around the world to meet that recognised obligation. There is considerable weight to the argument that establishing the “truth” is an essential component of the universally recognised “right to an effective remedy.” The Special Court is duly bound to consider such a right in respect of the Sierra Leone population in its determination of the parameters of this request “in the interests of justice”.”

\(^{118}\) See TRC Submissions before Judge Thompson, dated 24 October 2003, at paragraph 6.1.2.
123. The Commission concluded its representations by suggesting that the historic moment had arrived whereby a decision had to be made as to whether these two institutions were indeed going to work together on a complementary basis or not.

"Sierra Leone finds itself at a special moment in its history. Indeed Sierra Leone has the potential to offer the world a unique framework in the difficult process of moving from conflict to peace. We have two complementary institutions, namely the Special Court and the Commission, that are central to this process. Indeed the President and the Prosecutor of the Special Court are on record stating that the two institutions will work together to uncover the truth and provide the most comprehensive benefits to a post-conflict state.

The outcome of this proceeding will in large measure determine whether two such institutions can in fact be complementary. The consequences for the people of Sierra Leone – and indeed for the people in all conflict zones which envisage similar mechanisms of transitional justice – will be far reaching."\(^{119}\)

124. On 29 October 2003, representatives for the Commission, the Prosecutor and Augustine Bao argued before Judge Bankole Thompson on the question of Bao’s appearance before the Commission. The arguments of the Commission and the Prosecution were largely the same as those put forward in the Hinga Norman matter.\(^{120}\) Mr. Girish Thanki, who spoke for the Bao defence team, submitted in his representations to the Court that while many international commentators talk about the Sierra Leone conflict as a “war over diamonds”, there is another view that prevails at ground level. It is a view, Mr. Thanki continued, which reveals the “friction between rural Sierra Leone and urban Freetown” and which says much about “how the RUF came into existence, how it operated and how the conflict impacted on this nation”. Stressing the importance of the public appearance of his client before the Commission, Mr. Thanki concluded that the real story of the conflict, including these alternative views, “belongs to the people of Sierra Leone”.\(^{121}\)

\(^{119}\) TRC Submissions before Judge Thompson, dated 24 October 2003, at paragraph 6.1.3.

\(^{120}\) The TRC’s submissions were again presented by Mr. Howard Varney. The Prosecutor was represented by Ms. Boi-Tia Stephens. The Bao Defence Counsel was Mr. Girish Thanki.

\(^{121}\) See the minutes of the Oral Representations regarding the Request by the Truth and Reconciliation Commission to conduct a Public Hearing with Mr. Augustine Ato Bao; before Judge Bankole Thompson, 29 October 2003.
THE DECISION OF JUDGE BANKOLE THOMPSON

125. On 29 October 2003, Judge Bankole Thompson denied the request by the Truth and Reconciliation Commission for a public hearing with Chief Hinga Norman. Judge Thompson reasoned that the Commission had prejudged the matter and was therefore violating Hinga Norman’s presumption of innocence. Judge Thompson’s reasoning hinged upon the part of the request where the Commission had said that it was important for Chief Hinga Norman to testify because he had “played a central role” in the conflict. In short, Judge Thompson’s reasoning was defective.

126. The Thompson Decision precipitated considerable disillusionment among members of local civil society. Whilst it was not to be the final word on the question of whether Chief Hinga Norman would appear before the Commission, it represented the first public departure by the Special Court from the previously co-operative position it had adopted towards the Commission’s work. Whatever potential remedial measures stood to be rendered subsequently on appeal, Judge Thompson’s denial of the request heralded a significant turning point in the public appraisal of the relationship between the two institutions.

127. The Commission had been advised by the Registrar that the Special Court’s Revised Practice Direction contained a presumption in favour of granting a request. Judge Thompson’s decision however afforded little regard to such a presumption. In fact the Judge limited himself to “two alternative judicial options”, which he characterised as unconditional approval or flat refusal. He failed to consider a third option, namely the approval of the request subject to conditions. This narrow interpretative approach, which was apparent throughout the Thompson Decision, reflected unwillingness on the part of the Trial Chamber to accept that the interests of justice in Sierra Leone in fact hinged upon the successful fulfilment of the mandates of both the TRC and the Special Court.

128. The fact that Chief Hinga Norman played a central role in the conflict should not have been contentious. After all, it was the Prosecutor who brought an indictment against Hinga Norman and a Judge of the Special Court who authorised that indictment. If there was no credible suggestion that Hinga Norman had played a central role, then he ought not to have been indicted in the first place. As it was, the indictment of Hinga Norman had been approved over six months earlier by the Special Court in the following terms:

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122 See the Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman; decision rendered by Judge Bankole Thompson, Presiding Judge of the Trial Chamber, dated 29 October 2003. (hereinafter “Thompson Decision on the Hinga Norman Request”)
123 See the Thompson Decision on the Hinga Norman Request, at paragraph 12.
124 In the week following the issuance of the Thompson Decision, a number of local civil society groups made statements to the press expressing their dissatisfaction and calling upon the TRC to appeal the Decision. See, for example: Press Conference convened by John Caulker on behalf of the TR Working Group on 4 November 2003; and Press Conference convened by Ngolo Katta on behalf of the CCYA on 5 November 2003.
125 See the letter of 17 October 2003 from Robin Vincent, Registrar of the Special Court, to the Truth and Reconciliation Commission; letter entitled: ‘Objections of the TRC to the Revised Practice Direction’.
126 See the Thompson Decision on the Hinga Norman Request, at paragraph 8.
“Samuel Hinga Norman was the National Co-ordinator of the CDF. As such he was the principal force in establishing, organising, supporting, providing logistical support [for] and promoting the CDF. The Accused was also the leader and commander of the Kamajors and as such had de jure and de facto command and control over the activities and operations of the Kamajors.”

Based on the terms of this indictment alone, it was entirely reasonable for the TRC to conclude that Hinga Norman’s testimony would be relevant to its mandate and appropriate for airing in a public session of the Commission.

129. The presumption of innocence is a right belonging to Chief Hinga Norman until proven guilty. Even if he should wish to give up this right, it would be done entirely within his own discretion. In refusing the request for a hearing, Judge Bankole Thompson violated Chief Hinga Norman’s freedom of expression, as well as his right, as a person presumed innocent, to continue to participate in the reconciliation process in his own country.

130. In the Commission’s view, the learned Judge strayed beyond the parameters of his decision-making prerogative. He concerned himself with what he perceived to be the interests of the Accused and appointed the Court as the guardian thereof. Indeed, he surmised, without any reference to rights or to the close engagement of Defence Counsel, that the Court was the “very forum to which he looks for the protection of his due process rights and ultimate vindication.”

128 He further saw fit to criticise what ought to have been the unfettered right of Chief Hinga Norman to exercise his fundamental and statutory rights to testify before the Commission, where he concluded that:

“I would be grossly remiss, if not derelict, in my judicial duty if I failed to place on record my strong judicial reservations about the proposed course of action, on the part of the Accused.”

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131. The learned Judge adopted what he referred to as a “contextual reading” of the TRC Act 2000. He equated “perpetrators” with offenders who are “willing to confess their guilt.” Building on this platform, he averred that the word “perpetrator” had to be given a “restrictive connotation” and “therefore, cannot properly be applied to an ‘indictee’ who has pleaded not guilty.” Finally the Judge made a conclusion in which he stated his view of the application of the TRC Act 2000:

“[The TRC Act 2000] is predicated upon the notion of restorative justice which aims at the reconciliation of self-confessed perpetrators, victims, and the state as a whole. Once a person has been indicted, he does not fall within the statutory ambit of the Act.”

127 See Prosecutor v. Sam Hinga Norman (Case No. SCSL-2003-08-I), Indictment before the Special Court for Sierra Leone, 7 March 2003, at paragraph 12.

128 See the Thompson Decision on the Hinga Norman Request, at paragraph 14.

129 See the Thompson Decision on the Hinga Norman Request, at paragraph 16.

130 See the Thompson Decision on the Hinga Norman Request, at paragraph 12.
132. The Judge tendered such reasoning apparently as a means of excluding the detainees from the TRC process. Yet not even the most accommodating reading of the TRC Act 2000 would permit the novel interpretation constructed by Judge Thompson. To have confined the meaning of “perpetrator” to the definition suggested by the Judge would necessarily have excluded the vast majority of perpetrators in the Sierra Leone conflict from the ambit of the Commission. The reality of the Commission’s work was that most perpetrators were not willing to disclose their involvement in atrocities, at least not in advance of a hearing or interview; yet their participation in the TRC process was vital to developing understanding, to recording historical facts and to opening the accountability debate to the Sierra Leonean public.

133. Having legally excised the detainees from the purview of the Commission, Judge Thompson concluded that the institutional role of the Commission must yield to the other “societal interest” at stake, namely the Accused’s right to a fair and impartial trial. In support of this contention the Judge proposed that persons facing international crimes enjoyed what he called “super due process rights”:

“In the overarching scheme of things, it is the duty of International Judges to safeguard the interest of the International Community that persons charged with international crimes are accorded what may be characterised as “super due process rights” in vindicating themselves regardless of national considerations, however compelling.”

134. Judge Thompson did not explain the meaning of “super due process rights”. He simply offered a single, un-sourced “perception” that international indictees are not afforded “adequate procedural justice” due to “the horrendous nature and enormity of the crimes” for which they have been indicted.

135. As far as the Commission has been able to determine, it seems that the notion of “super due process rights” in international criminal law was a novel construct of the Judge himself. The expression “super due process rights” was in fact an abstraction from the system of “strict review” applied at the sentencing phase of capital cases in the United States of America. Under that system, “super due process” is invoked in order to intensify the scrutiny lent by a court to the review of procedures undergone to reach a sentence of death. As such, even in the United States, “super due process” applies to the so-called “penalty phase” of a court’s adjudication, not to the trial phase and certainly not to the pre-trial phase. It was a wholly inappropriate notion for Judge Thompson to introduce into a decision of this nature.

136. Judge Thompson did not ascribe any significance to the arguments made by the Prosecution in its objection to the Commission’s request. The Judge in fact expressed his displeasure at the suggestion of the Prosecution’s representatives that they would “reserve their option to investigate further crimes if the Accused were to testify before the Commission”. He stated that this suggestion “was not necessary and does not accord with our profession’s respect for the doctrine of fundamental fairness.”

131 The same error was made by the President of the Special Court, Judge Geoffrey Robertson, at paragraph 42 of his Decision on appeal.
132 See the Thompson Decision on the Hinga Norman Request, at paragraphs 14, 15 and 16.
133 See the Thompson Decision on the Hinga Norman Request, at paragraph 15.
134 See the Thompson Decision on the Hinga Norman Request, at paragraph 15. In the appeal of this matter, Judge Robertson stated firmly that the Prosecution would have been well within its rights to adopt such a course.
137. The decision of Judge Bankole Thompson left the Commission with much discomfort. The rights of Hinga Norman and indeed the other detainees to appear before the Commission had been dismissed on the basis of a novel but untenable reading of the TRC Act. Judge Thompson apparently sought to disqualify all detainees who had pleaded not guilty from coverage by the TRC Act.

138. Judge Thompson’s decision included another inventive but equally unsustainable contention: that due process rights – transformed into “super due process rights” – trumped the other rights of detainees and the wider society. The actual wishes of the detainee and the fact that he was represented by a team of highly qualified and experienced local and international lawyers were of little consequence to the learned Judge. In the wake of the Thompson decision, the Commission resolved to move the matter on to appeal before the President of the Special Court in its Appeals Chamber, Judge Geoffrey Robertson.

THE APPEAL BEFORE THE PRESIDENT OF THE SPECIAL COURT

139. On 4 November 2003 the Commission and Chief Hinga Norman filed their joint grounds of appeal against the decision of Judge Bankole Thompson. The appellants noted some twenty-two (22) different grounds of appeal, setting out the individual questions of law and interpretation upon which the learned Judge had erred. The appeal was set down for the following day, 5 November 2003. Staff representing the Commission prepared written “short heads” of argument, which outlined the Commission’s objections to the Thompson decision.

140. The Commission submitted that the institutions of the Special Court and the TRC both had important roles to play in reaching the truth and addressing impunity in the context of post-conflict Sierra Leone. The Special Court seeks to prove and establish beyond reasonable doubt the elements of specifically-framed charges against individuals who are alleged to bear the greatest responsibility. It endeavours to reach the truth in relation to the role of those individuals. In so doing it would hopefully provide a deterrent against future abuses.

141. The TRC, on the other hand, endeavours to establish the wider truth in relation to the roles of all key players and factions in the conflict. It was averred on behalf of the Commission that it was only when the full truth (or as close to the full truth as possible) was placed squarely before the public that society is able to examine itself honestly and robustly. It was this exercise that would permit society to take genuine measures to prevent repetition of the horrors of the past.

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135 See the Grounds of Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship Judge Bankole Thompson delivered on 29 October 2003 to deny the TRC’s Request to Conduct a Public Hearing with Chief Samuel Hinga Norman JP, before Judge Geoffrey Robertson, The President of the Special Court, filed on 4 November 2003 (hereinafter “Grounds of Appeal against the Thompson Decision”).

136 See the Heads of Argument in the Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship Judge Bankole Thompson delivered on 29 October 2003; presented on 5 November 2003 (hereinafter “TRC Heads of Argument in the Appeal against the Thompson Decision”). None of the other parties to the proceedings supplied written heads of argument.
The Commission submitted that the two institutions should do everything within their powers to ensure that the dual causes of truth and addressing impunity were served, both at the level of individuals who bear the greatest responsibility and at the level of society at large:

“We submit then that it cannot be a question of the role of one institution giving way to the role of the other. It can only be a question of how we arrive at a solution that permits Sierra Leone to reach the truth and address impunity at both essential levels.”

The Commission contended that Judge Thompson had failed to consider this critical question. He had failed to situate his decision in the appropriate context of Sierra Leone’s unique transitional justice arrangement. In particular it was submitted that the trial Judge had:

a. misrepresented the institutional character of the TRC, particularly in his tendency to assign to the Commission the character of a court of law;
b. failed to undertake any form of proportional assessment of the various rights and interests at stake in this matter; and
c. erred in his characterisation of the Special Court as a guardian of so-called “super due process rights”.

**The Bintumani Appeal**

As it turned out, none of the matters raised by the Commission in its written heads of argument were canvassed in the appeal before Judge Robertson. The hearing was held in a conference room at the Bintumani Hotel in Western Freetown on the evening of 5 November 2003. The appeal turned out not to be an appeal at all but rather something of an unstructured discussion.

A few minutes prior to entering the appeal venue, the Commission’s team was surprised to learn from the Hinga Norman Defence lawyers that there would be no need to present any arguments, since Judge Robertson had advised them informally that he was inclined to let the hearing with Hinga Norman proceed. The Judge was simply interested in working out the “mechanics” of the hearing. There would accordingly be no appeal as such but simply a “discussion” to settle the details. The Defence and Commission teams walked into the conference room with a modicum of relief. Their sense of security proved to be a false one.

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137 See TRC Heads of Argument in the Appeal against the Thompson Decision, dated 5 November 2003, at paragraph 1.5.
138 See TRC Heads of Argument in the Appeal against the Thompson Decision, dated 5 November 2003, at paragraph 1.7.
139 See the record of the Oral Discussion in the Appeal against the Thompson Decision; before Judge Geoffrey Robertson, President of the Special Court, held at the Bintumani Hotel, 5 November 2003 (hereinafter “Oral Discussion in the Bintumani Appeal”). All the excerpts contained herein, including quotes from Judge Robertson, are taken from the record of the Oral Discussion in the Bintumani Appeal.
140 The two Defence lawyers present at the appeal on behalf of Chief Samuel Hinga Norman were Timothy Owen QC and Quincy Whitaker.
141 The TRC legal team comprised Howard Varney, Gavin Simpson and Sebastiaan Verelst. The Prosecution was represented by Jim Johnson and Mohamed Bangura.
146. While there was no appeal in the formal sense, the impression conveyed to the Commission by the Defence lawyers was not entirely correct. As the hearing progressed, it became clear that it was not simply a question of settling the mechanics for a hearing. Judge Robertson would instead swing from an apparently permissive position at the beginning of the hearing to a diametrically opposing position at the end of the hearing. At the close of the hearing the Judge, to the surprise of the Commission’s representatives, proposed that the Commission ought to suspend its activities until the completion of the trials before the Special Court.

147. At the commencement of the appeal “hearing”, Judge Robertson explained that he was “going to come at it from a different position”. He explained that there would be no need for a formal appeal and that he intended to conduct the proceedings informally by way of a discussion. No objections were lodged at the time as the representatives for the Applicants had been primed to expect a positive outcome. Yet with hindsight there ought to have been no such striking departures from conventional procedure and from the Practice Direction, which referred to “an appeal”.  

148. Judge Robertson’s novel approach did away with the rigours of standard appeal practice. The Judge confirmed his approach in his written decision. He conceded that he was not treating the appeal “strictly as an appeal” and went on to assert his choice to regard it as “a fresh hearing”.

149. The substance of the Bintumani Appeal began with a lengthy overview of the background as seen through the eyes of Judge Robertson. Excerpts of the Judge’s overview are set out below:

“…. This problem is not really new. It’s been discussed in the literature. We all thought it possible to avoid the problems that were predicted to arise. This problem was not foreseen but it has arisen… Lomé and the TRC Act did not make provision for the Special Court. Had it done so it would have made it clear what [the TRC] could and could not do. … In respecting its missions [the TRC] must be placed in a position to establish a historical record. The Special Court would avoid, if it could at all, interfering with that first objective of the TRC.

[…] Here we have an indictee who has pleaded “not guilty.” The first perspective is to give Hinga Norman his stand. In general it does not seem to me to pose any problems at first blush. Defence Counsel gave the client expert advice.

As far as Hinga Norman is concerned … in some quarters he is a hero, in others, a villain. … When the matter first arose the first consideration was “freedom of speech”. An indictee retains such as is compatible within the constraints of Court… My main concern is not to inhibit anyone from giving testimony in any form but to let them know what they are letting themselves in for; particularly if [it is] going on public record. … It’s wrong to bar the prosecution. But [the] client [must] be aware of the risks.”

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142 See the Revised Practice Direction of 4 October 2003, at paragraph 5.
143 See the Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr. Justice Bankole Thompson, delivered on 29 October 2003 to Deny the TRC’s Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP; decision of Justice Geoffrey Robertson, President of the Special Court, 28 October 2003 (hereinafter “Decision of Justice Robertson on Appeal”), at paragraph 3.
150. The Judge appeared to be setting the scene for the granting of the appeal. He asked whether all the parties were in general agreement with the overview he had provided. The representatives of all parties reacted in the affirmative, agreeing, as Mr. Varney stated for the Commission, “in large measure”. The Judge then sought from Jim Johnson, the Prosecutor’s representative, certain background details on Hinga Norman, including his role in the current Government. He further raised the question as to whether Hinga Norman had the “approval of Government” when he was conducting operations. Mr. Johnson replied that he did. The Judge then turned to Defence counsel, Tim Owen, and asked whether this would be part of Hinga Norman’s defence, to which counsel replied that it would be. This answer brought the role of President Kabbah into sharp focus and the Judge added:

“If you establish a prima facie against him [President Kabbah], he’ll have to appear in the witness box.”

The Judge suggested that Hinga Norman had “reached the point where [he] had decided to take the risk of testifying to the TRC”.

151. Judge Robertson then began to consider the modalities of a proposed hearing and turned to Howard Varney, the Commission’s representative:

“[So effectively] you want to take over the Special Court for a few days and install TV cameras, etc.”

The Judge wished to know which television and radio studios would be present during the hearing. He enquired into details as to how the hearing would be portrayed on television and whether the Sierra Leone Broadcasting Service would be content to broadcast digested proceedings in a format he described as “highlights of the day’s play”. He wished to know details such as: who the Commissioners were; who would lead the evidence on behalf of the Commission; whether the evidence was under oath; how long the hearing would last; whether counsel would take Hinga Norman through his statement; and whether there would be cross-examination. Mr. Varney dealt with each of these questions as far as was possible, but stressed that the procedure for the Hinga Norman hearing was yet to be determined because it would ultimately rely upon an agreement between the Commission and the Defence team.  

\[144\] Notwithstanding Mr. Varney’s clarification on this point, Judge Robertson later remarked: “My concern is that there doesn’t seem to be any settled procedure, but rather a certain sense of making it up as you go along.”
152. The Commission laments the fact that the President of the Court chose to give deference to precedents from contexts that bore little relation to Sierra Leone. Judge Robertson made no reference to the available examples of TRCs in action, such as the South African precedent or even that of the detainees in Pademba Road Prison. Judge Robertson instead preferred to highlight the experience of the Hutton Inquiry and made comparative remarks on the case of John Stonehouse.

153. The Judge turned to the question of the TRC Report and revealed that he had resolved some of the temporal problems in his own mind based on assumption:

"I had always assumed that the report would be published before the trials started [to serve] as a useful tool of judicial notice."

He enquired from Mr. Johnson when the Prosecution expected to commence the trials. Mr. Johnson replied that he was "foreseeing early next year [2004]; February or March."

154. Judge Robertson then wished to know whether the Commission would "make a determination on the guilt or innocence of certain individuals":

"Has the Commission addressed the issue of making judgements on people? Would the TRC make judgements?"

Mr. Varney explained the nature of findings that truth commissions make and reminded the Judge that "the TRC is not a court". Judge Robertson indicated that it would be preferable if the Commission refrained from making pronouncements on the roles and responsibilities of the indictees held by the Special Court.

155. The Judge advised that the Court would have to "deal with the public expectations and the way those play out on witnesses." He added that "finding the historical truth of what happened may overlap with the [Special Court’s] investigations." Turning back to the question of media coverage Judge Robertson stated:

"Visions come to me of Goering at the German TRC of 1946 – giving radio and TV performances of his version of the war... It makes me feel uncomfortable."

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145 Awaiting trial prisoners in South Africa appeared before the Human Rights Violations Committee of the South African TRC on a routine basis. The Sierra Leone TRC had extensive contact with awaiting trial prisoners at Pademba Road, including the holding of a public hearing.

146 The Hutton Inquiry was set up by United Kingdom Government in 2003 to investigate the circumstances surrounding the death of the government scientist Dr. David Kelly. Geoffrey Robertson participated in a preliminary legal tussle over the right to screen the proceedings of the Hutton Inquiry on television.

147 John Stonehouse (1926 - 1988) was a British politician and cabinet minister under Prime Minister Harold Wilson. Stonehouse achieved notoriety for faking his own death.
156. At this point Mr. Johnson on behalf of the Prosecution said that there were “ongoing efforts to intimidate and scare witnesses right now”. He added:

“I would hate to see this being used in some effort to promulgate that. I can provide documents to you, but not other parties around the table. The concerns of July apply now, and in fact possibly apply more so.”

157. The Judge and the Prosecution then engaged in a discussion on Hinga Norman and the potential volatility of his supporters:

Judge Robertson: He was the head of a military unit? An armed force that was fighting, perhaps too vigorously, in support of the Government?

Mr. Johnson: Certainly fighting in support of the Government. His force [was] sometimes sanctioned by the Government.

Judge Robertson: Have they laid down arms?

Mr. Johnson: Some of them have done.

158. When the Commission and Defence lawyers attempted to direct Justice Robertson back towards the question of rights he responded:

“I’ve made the Court’s view clear. Rights are amenable to dilution.”

159. Now firm in his view that a public hearing before the Commission would be tantamount to giving Hinga Norman a chance for a “party political broadcast”, Justice Robertson came up with his proposal:

“The TRC has apparently never thought to take a statement from him… Hinga Norman is entitled to send his account of the conflict in the form of a book; a written version which could be carefully considered by his lawyers… There would be minimum risk to him; [it would be of] great help to you; [it] would not measurably damage the integrity of the Special Court…. What about a written submission with Commissioners invited to go and ask questions [on the written submission]?

160. The Judge then commented on the wisdom of having two institutions such as the Special Court and the Commission in operation at the same time:

“It may be that our hope of working together and at the same time may not be possible.”

He suggested that the best resolution would be for the Commission to suspend the issuance of its report until all the trials at the Special Court were complete. This would deal with the concerns of the Prosecution; the Commission would be able to glean useful materials from the trials and more importantly the Commission could then arrange all the hearings it wished to hold with the detainees, who would by then be convicted prisoners, or perhaps acquitted.

161. Mr. Varney pointed out to Judge Robertson that there was no prospect of securing a suspension of the Commission’s proceedings. He also advised that it had always been open to the TRC to obtain Chief Norman’s testimony by way of a written submission. No approval or intervention by the Special Court was ever required to obtain written testimony.
162. Judge Robertson concluded the Bintumani Appeal with an invitation to all parties for further representations. When reminded by Mr. Varney of the Commission’s time constraints he advised that his decision would be issued within one week. In fact, it took the President of the Court more than three weeks to issue his decision.

163. The appeal, in the manner conducted by Judge Robertson, served to limit and close down argument on the key issues of substance. The “discussion” approach could in theory have provided a forum for debate between members of collegial international institutions. However, continual interjections and changes in the topics under discussion prevented any meaningful debate from taking place. The parties were unable to present and develop legal argument.  

AFTER THE BINTUMANI APPEAL

164. Following the appeal at the Bintumani Hotel, the Commission felt it necessary to write to Judge Robertson to caution him against pursuing the ideas he raised in the latter stages of the “discussion”:

“It would be impractical and indeed unlawful for the TRC to suspend its operations and reconstitute itself in two years’ time or whenever the trials were concluded. There will be no extension of the TRC’s mandate beyond the statutory six months already granted by President Kabbah. We urge you to exclude this suggestion from your considerations.”

165. On 12 November 2003, only two days before Judge Robertson’s ruling was expected to be issued, the Commission received copies of written submissions from the Prosecutor that had been transmitted to the President of the Court. The submissions endeavoured to back up the claim that the public hearing with Hinga Norman could be used as a forum by Kamajors and former CDF members to threaten the security of the Special Court and destabilise the entire country. The Commission responded as follows in a further letter to the President of the Court:

“We submit that it is highly improper for Mr. Crane to make such submissions some two days before a ruling is due on our appeal. The TRC can hardly be expected to investigate and assess claims made by the Prosecution at this late stage.

The vague statements based on hearsay as set out in paragraph 5 of Enclosure Two (dated 20 October 2003), such as those that portray Kamajors in Bo allegedly “boasting …that they were still in control” – whatever that is supposed to mean – could have been investigated had they been raised prior to the hearing before Judge Thompson. A reading of the enclosures reveals that there is absolutely no reason why such information could not have been disclosed timeously.

The approach taken was contrary to the information provided by the Court beforehand, namely that each party would have 15 minutes to present argument, as was the case in the trial chamber. 

See the Letter from the Honourable Justice Laura Marcus-Jones, Deputy Chairperson of the TRC, to the President of the Special Court, Judge Geoffrey Robertson, dated 7 November 2003.

See the Supplementary Submissions from the Prosecutor of the Special Court in the Appeal before the President of the Court dated 11 November 2003.
The 7 November 2003 memorandum authored by Mr. Robert Parnell, Chief of Security for the Special Court, adds little to the UN FSCO Security update of 23 October 2003. This curious one-and-a-half page memorandum does not even disclose the identity of the former CDF leader apparently arrested in connection with so-called "Operation Free Hinga Norman." Nor does it disclose the nature of any charge or charges preferred against this individual, if indeed the matter was taken this far.

The memorandum contains claims with regard to the potentially "destabilising influence" of the former CDF in Bo, which we are led to believe arises from the Government's inability to improve economic conditions in the country. It ends in any case with the conclusion that the CDF is incapable of mounting insurrection, or for that matter of attacking the Special Court. In short, the memorandum does not appear to support Mr. Crane's view that the "fragile equilibrium which exists today in Sierra Leone" is at stake.

To underscore the baseless claims of the Prosecution, the UN FSCO security update for the very week in which the alleged "Free Hinga Norman" meeting took place concludes that the "security situation in the country continues to remain stable". Indeed "stable" has been the assessment for the last several months and continues to be the security assessment for the present week.\footnote{Confirmed in a telephone conversation between Mr. Varney and the Duty Officer at the Security Unit of UNFSCO at 4:15 p.m. on 13 November 2003.} Little or no weight can be attached to Mr. Parnell's memorandum.

While claiming merely to reiterate its "position as previously submitted before Judge Thompson", the Prosecution's submission impermissibly attempts to introduce matters of substance, which it could have introduced at the initial hearing, or indeed could have applied for leave to introduce at the appeal hearing.\footnote{See the Letter dated 13 November 2003 from Howard Varney, Head of Investigations, to the President of the Special Court.}

\footnote{See International Crisis Group, Sierra Leone: The State of Security and Governance, ICG Africa Report No. 67, 2 September 2003 at page 13.}

166. An independent assessment carried out by the International Crisis Group in the second half of 2003 suggested that the Kamajors were in no position to destabilise the country:

"While one leader claimed that the CDF could mobilise if necessary within 24-48 hours, Kamajor ability to achieve mass destabilisation depends on two things: man-power and weaponry. It appears the Kamajors would have difficulty assembling enough of either. The rank and file are increasingly unhappy with their leadership, who they claim have kept most reintegration benefits to themselves. Many joined the CDF to defend the country and the government, not to avenge any specific leader, so there appears to be little willingness to mobilise because of Special Court indictments. Furthermore, there appear to be distinct groups within the Kamajors, each with their own leaders, financiers, and loyalties that may work against unified action. While the Kamajors could cause local disruptions, there is little evidence they could destabilise the country."
THE DECISION OF JUDGE GEOFFREY ROBERTSON

167. The decision of Judge Robertson was finally issued on 28 November 2003. It purported to overturn the decision of Judge Thompson. In reality, it offered little more to the detainees and to the Commission than what was possible in the wake of the Thompson decision. Judge Robertson refused to permit Hinga Norman to testify in person. The Judge ruled that Hinga Norman should transmit information to the Commission only “in writing” and stated:

“There shall be no public hearing of the kind requested or any other kind prior to the conclusion of the trial.”154

168. The decision was made available barely four weeks before the Commission closed its doors on all formal activities. The late issuance of the decision was notwithstanding the Commission’s case for special urgency and the Judge’s own undertaking to return his ruling within one week. Indeed by 28 November 2003 the decision of Judge Robertson had become academic.

169. The reference in the decision that Hinga Norman might be allowed to meet with the Commissioners “if they apply for that purpose” or that he and the Commission may “meet for a confidential session if a joint application is made” was, in the view of the Commission, irrelevant. The Special Court’s own Practice Direction did not permit confidential interviews, even after its revision.155 The Commission had already declined to apply to speak to detainees on a “confidential” basis because the Commission could never guarantee the confidentiality of the information supplied under the conditions imposed by the Court. The Commission’s position in this regard had been stated clearly and consistently throughout.156

170. Moreover with the Commission winding up its formal activities on 31 December 2003, the procedures involved in applying afresh to the Special Court stood no chance of being completed.157

171. Nonetheless, the Special Court’s media release158 described the Robertson decision as having opened the way for Hinga Norman to “testify before the TRC”. Several newspapers carried stories that reported the decision in this light. The fact that the scope for Hinga Norman’s testimony had in fact been confined to a written submission was lost in the fine print.

154 See the Decision of Justice Robertson on Appeal, 28 November 2003, at paragraph 41.
155 See the Revised Practice Direction of 4 October 2003, at paragraphs 4(b), 4(c) and 7. As noted earlier in this chapter, the Revised Practice Direction specifically required each meeting between the TRC and a detainee to be monitored by a “legal officer” and tape recorded by the Registry. The Trial Judge had the power subsequently to order the transcript of any meeting to be disclosed at the trial of the detainee. There was accordingly no possibility of a confidential interview under the Revised Practice Direction.
156 See the letter of 8 October 2003 from the Truth and Reconciliation Commission to Robin Vincent, Registrar of the Special Court; letter entitled: “Objections of the TRC to the Revised Practice Direction”.
157 Reference to the exchange of correspondence between the Registrar of the Special Court and the Truth and Reconciliation Commission on 4 and 5 December 2003. In his letter of 4 December 2003, the Registrar stated that a meeting with Hinga Norman could be arranged by way of “written notification”. In its reply of 5 December 2003, the Commission pointed out that paragraph 41 of the Robertson Decision stated unambiguously that an “application” was required.
172. The Commission corrected this misconception in a press statement released on 1 December 2003. The Commission advised that there would be no hearings with Chief Hinga Norman or any of the other detainees. The rights of the detainees to participate in the truth and reconciliation process in an open and transparent manner had been effectively extinguished. Extracts from the Commission’s media statement of 1 December 2003 read as follows:

"PRESS RELEASE BY THE TRC
Freetown, Sierra Leone, 1 December 2003

SPECIAL COURT DENIES HINGA NORMAN’S RIGHT (AND THAT OF THE OTHER DETAINES) TO APPEAR PUBLICLY BEFORE THE TRC

... The Court’s press statement has created expectations in the minds of the public both locally and internationally that a TRC hearing with Hinga Norman is imminent.

The press statement is however misleading. The President of the Special Court in fact ruled that Chief Hinga Norman may not appear in a public hearing before the Commission. The Judge decided that Chief Hinga Norman may provide only a sworn written statement to the Commission.

The ruling, in the view of the TRC, has dealt a serious blow to the cause of truth and reconciliation in Sierra Leone. As a citizen of Sierra Leone and as a key role-player in Sierra Leone’s recent history, Chief Hinga Norman has a right to appear before the TRC to tell his story. All equivalent role-players have appeared before the TRC, including prisoners awaiting trial at Pademba Road Prison. ...

... The restriction of Chief Hinga Norman’s testimony to a written statement has denied him the opportunity to speak with the TRC in an open and transparent manner.

There will be only one TRC in Sierra Leone and the Special Court has closed the door on any meaningful participation in that process by all the detainees in its custody. In effect the decision of the President of the Special Court has:

- rejected the right of the detainees to testify before the TRC;
- denied the freedom of expression of the detainees to appear openly and publicly before the TRC;
- denied the right of the Sierra Leonean people to see the process of truth and reconciliation done in relation to the detainees; ...

Sierra Leone had the opportunity to offer the world a unique framework in moving from conflict to peace. Sadly, this opportunity was not seized. The causes of truth, reconciliation and transitional justice have not been served by the decision of the Special Court.

The Commission wishes to advise the public that there will be no hearings with Chief Hinga Norman or any of the other detainees as the ruling by the Special Court forecloses such a possibility."
In an effort to contain the growing tide of publicity that was adverse to the Special Court, the Court's Press and Public Affairs Office arranged a talk show on Radio UNAMSIL. The guests were Special Court Registrar, Robin Vincent, and TRC Executive Secretary, Franklyn Kargbo. On the basis of this talk show, the Court's Press and Public Affairs Office crafted another press release\(^\text{159}\) in which it claimed that the Commission had corrected "certain inaccuracies" in its 1 December 2003 media statement. The wording of the Special Court release was highly misleading. It forced the Commission to issue a statement denying that it had made any such retraction:

"PRESS RELEASE BY THE TRC
Freetown, Sierra Leone, 3 December 2003

TRC STANDS BY ITS STATEMENT ON HINGA NORMAN

The Special Court issued a statement on 3 December 2003 claiming that the TRC had corrected "certain inaccuracies" in its 1 December 2003 press release on the Special Court’s decision to deny the right of Chief Sam Hinga Norman to appear before the TRC.

The TRC has done no such thing. The TRC rejects the attempt by the Special Court’s media office to mislead the public in this regard.

The TRC stands by its statement issued on 1 December 2003 in relation to Hinga Norman. Hinga Norman has been denied his freedom of expression and his statutory right to appear before the TRC to tell his story. The people of Sierra Leone have been denied the opportunity of hearing from Hinga Norman in an open and transparent manner. As a result the causes of truth, reconciliation and that of addressing impunity have been seriously undermined.

Mr. Franklyn Kargbo, the Executive Secretary of the TRC, did state in his interview with Radio UNAMSIL that, notwithstanding the setback of the Court’s decision, the TRC will still issue a credible and impartial historical record of the conflict in its final report.

Mr. Kargbo’s statement must not be interpreted to mean that the TRC is retracting or correcting its earlier press release…

One point is clear amidst the exchange of press statements. The TRC has been effectively blocked by the Special Court from holding any hearings or meetings with the detainees."

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\(^{159}\) See the Special Court for Sierra Leone Press and Public Affairs Office, Media Release entitled "The Special Court Responds to TRC Statement", dated 3 December 2003.
174. On 11 December 2003, J. B. Jenkins-Johnston and Sulaiman B. Tejan-Sie, legal representatives for Chief Hinga Norman, issued a press statement “for and on behalf of” Chief Hinga Norman:

“... So even though the Judge conceded that Chief Norman had a right to testify upon condition that he had been warned, and clearly stated that he was satisfied that Chief Norman had been "expertly" warned, he still refused to allow him to testify. It would seem to us on the Chief's legal team that the position taken by both the Trial Chamber and the President of the Court is full of conflicts, inconsistencies and contradictions, all leading to one final result – **to stop Chief Sam Hinga Norman from testifying before the TRC.** That goal has been achieved, albeit for reasons which are not clear to us, and which certainly do not augur well for whatever the Special Court sees itself as having been mandated to do.

Chief Sam Hinga Norman entertains no doubt that he has been unfairly treated, unnecessarily targeted and unjustly deprived of his legal and constitutional rights, by reason of which he now seriously doubts whether he will get real Justice from this Special Court. He further believes that this unfortunate episode of a head-on clash between the TRC and the Special Court has done much to obstruct the course of peace and reconciliation in Sierra Leone, and has clearly demonstrated the short-sightedness and skewed thinking behind the policy of setting up both the Truth and Reconciliation Commission and the Special Court at the same time.

The President [of the Special Court]'s ruling is regarded by Chief Sam Hinga Norman not only as an unwarranted attempt to silence him but also as a challenge to the very Act creating the TRC, which was ratified by [the] Sierra Leone Parliament in 2000.

Finally, Chief Sam Hinga Norman wishes to say to the people of Sierra Leone that notwithstanding the treatment he has received at the hands of the Special Court, and the unduly belligerent, provocative and intimidatory utterances of the Prosecutor himself, he still believes in the rule of Law and to this end will continue to advise his people to remain law-abiding and be patient, as he knows that at the end of the day he will be vindicated and will walk free from this nightmare.

May God continue to bless our beloved Country Sierra Leone.”

175. The Commission did invite Chief Hinga Norman and the other detainees to make written representations in order to supply their versions of the conflict. Sadly, none of the detainees responded to the requests. The Commission finds this to be highly regrettable. The Commission, however, acknowledges that the preference of the detainees was for public hearings and, by the time this option was finally shut down in December 2003, there was little time left to prepare and finalise written submissions.

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160 See: Press Statement issued for and on behalf of Chief Sam Hinga Norman, on the Refusal of the Special Court to grant him a Public Hearing before the Truth and Reconciliation Commission; signed by J. B. Jenkins-Johnston and Sulaiman B. Tejan-Sie, Counsel for Chief Sam Hinga Norman, dated 11 December 2003.
THE ROBERTSON DECISION ANALYSED

176. Judge Robertson wrote that the question before him was one that was "novel and difficult." However, the question was far from novel. The immediate and local precedents were part of the written records before Judge Robertson, namely the numerous instances in which the Commission had interviewed or held hearings in public with detainees facing multiple-count criminal indictments before the Sierra Leone courts.

177. Moreover, the most publicised Commission in the world, the South African TRC, worked side by side with a criminal process that saw awaiting-trial and convicted prisoners appearing publicly in the TRC hearings on a routine basis. It may be added that fair trial protections are just as jealously guarded by the South African judiciary as they are by the Special Court for Sierra Leone.

178. In the Sierra Leonian and South African precedents overlooked by Judge Robertson, the elaborate concerns and travesties of justice as postulated by the Special Court simply did not arise.

179. One of the distinguishing factors is that the justice bodies referred to in these examples were national bodies; whereas the Special Court is better described as a hybrid creature, an amalgam of both national and international legal systems. It is implied in the thinking of the Special Court – and in the decision of Judge Bankole Thompson it was stated explicitly – that the international character of the Court poses special problems that justify its stance. In reality, though, the practical considerations and legal issues entailed in the administration of justice are no different, whether the body in question is national, international or quasi-international.

**Primacy over the TRC**

180. In providing his "historical background," Judge Robertson made the point that the Special Court possesses "primacy" over the Commission:

"The Special Court was given, by Article 8 of its Statute, a primacy over national courts of Sierra Leone (and, by implication, over national bodies like the TRC)."

181. In fact, Article 8 of the Statute of the Special Court provides no support at all for the popular contention that the Special Court has primacy over the TRC. It reads:

**Article 8: Concurrent jurisdiction**

"The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the proceedings, the Special Court may formally require a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence."

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See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 2.

Particular reference is made here to the Human Rights Violations Committee of the South African TRC. The workings of this Committee, through its hearings and accompanying investigations, closely approximated the mode of operation of the Sierra Leone TRC.

See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 4.
182. It is clear from the title of Article 8 that the “primacy” bestowed on the Special Court is limited to cases of “concurrent jurisdiction” between courts. The Commission is not a court. It is equally trite to point out that the Commission does not have any criminal proceedings before it. The provision merely requires deference from the national courts in instances where both the Special Court and the national courts wish to lead prosecutions against the same individual, or on the same matter. This means that following a formal application by the Special Court, a national court is obliged to halt its own criminal proceedings in respect of an Accused that the Special Court wishes to act against.\textsuperscript{164}

183. Notwithstanding the clear meaning of Article 8, the provision was invoked by Court spokespersons and other commentators to assert “superiority” over the Commission.

\textbf{The “Spectacle” of a TRC Hearing}

184. The Commission has already expressed its consternation at Judge Bankole Thompson’s misconstruction of the institutional character of the TRC as a court of law. Such misconstruction led Judge Thompson to erroneous conclusions. Judge Robertson viewed the Commission in similar terms. Judge Robertson feared that the Commission would set itself up as a mock court performing the “special duty” assigned to the Special Court. He seemed particularly affronted that the proposed hearing would happen in a courtroom within the Special Court’s own precinct. Judge Robertson characterised the request of the Commission as an unwarranted straying onto Special Court territory:

\begin{quote}
"But the TRC has not, significantly, given any undertaking to suspend judgement on individuals awaiting trial in this court."\textsuperscript{165}
\end{quote}

\begin{quote}
"… I have been given no assurance that indictees awaiting or undergoing trial will not be "judged" guilty or innocent by the Commissioners (who are not qualified judges) …"\textsuperscript{166}
\end{quote}

\begin{quote}
"The spectacle of the TRC sitting in court may set up a public expectation that it will indeed pass judgement on indictees thus confronted and questioned, whose guilt or innocence it is the special duty of the Special Court to determine."\textsuperscript{167}
\end{quote}

\begin{quote}
"I cannot believe that the Nuremberg Tribunal would have allowed its prisoners to participate in such a spectacle, had there been a TRC in Germany after the war …"\textsuperscript{168}
\end{quote}

\underline{Underline added}

\textsuperscript{164} The most recent example was the case of Santigie Borbor Kanu (alias “Five Five”), who was one of the Accused in a treason trial before Freetown High Court No. 2 at the time of his indictment by the Special Court. The treason trial in question was \textit{The State v. Corporal Daniel Sandy and 17 Others}. For a report on the irregularities in the transfer alleged by the Director of Public Prosecutions (DPP), Mr. Brima Kebbie, see the following news article: “Five Five Indicted… as Treason held up”; \textit{Awoko} newspaper, Freetown, 18 September 2003. The article quotes the DPP as saying: “I was not informed about the arrest, which is why I am in court for the trial this morning. The treason trial will not continue in the absence of one of the accused persons. It is the responsibility of the Special Court to inform my office so I can enter a nolle prosequi (non prosecution) for Santigie Kanu. This could be done in a day provided the Special Court informs us on time.”\textsuperscript{165} See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 7.

\textsuperscript{166} See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 15.

\textsuperscript{167} See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 30.

\textsuperscript{168} See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 31.
In building his argument that the Commission ought to have refrained from proceeding with its requests to hear the detainees publicly, Judge Robertson relied on an opinion that was no longer held by its authors:

“The initial expectation in this respect of informed persons well-disposed to both processes was expressed in an illuminating report by the International Centre for Transitional Justice ("ICTJ"):

In the case of persons indicted by the Special Court, the TRC should decline to interview them altogether until the proceedings against them are concluded.169

This absolute position (which the ICTJ authors no longer maintain) at least gave full force to the universal value that nothing should be done to endanger fair trial. The TRC, by this application, wishes to go towards the other extreme: it seeks not only to interview indictees, but to do so in public, in a courtroom over several days, in a form that will permit them to broadcast live to the nation, and then face sustained questioning shortly before their trial.170

Not only did the ICTJ change its view on this matter; it said as much in the very submission that Judge Robertson himself invited the organisation to make. The Commission was later informed that “the ICTJ authors” had outlined their new position explicitly in a submission to Judge Robertson in November 2003:

"ICTJ, in communications to both the Court and the TRC, subsequently took the view that it would indeed be possible to hold a public hearing of the TRC without violating the fundamental rights of the Accused or the integrity of proceedings before the Special Court, provided certain conditions were met, namely:

(1) defence counsel would be present to advise the Accused (who would be participating on a voluntary basis) before and during the public hearing; and

(2) there would be a delayed transmission, to allow any threats to witnesses or to general security to be deleted from public broadcasts.

If these conditions were met, ICTJ was of the view that a public hearing would not hinder a fair trial for the Accused, nor would it pose an additional substantial risk to witnesses or security.

[…] ICTJ stressed the importance of distinguishing a public hearing by the TRC from a Court hearing; for instance, if the hearing were to be held in a courtroom, the Commissioners should not sit where the judges would sit…

170 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 31.
Furthermore, ICTJ took the position that such a hearing would assist the TRC in its truth-seeking function, enabling it to better fulfill its mandate of preparing a historical record and giving recommendations for future change. (At the time that ICTJ made its intervention, the possibility of a private hearing of the accused did not appear to be a viable option).

Moreover, ICTJ was of the opinion that if the Special Court was seen to be responsive to the local context and the operations of the TRC by taking an innovative approach, that this could also benefit public confidence in the Special Court.

The revised position of the International Centre for Transitional Justice, reflected in the above passages, was not conveyed in Judge Robertson’s written decision.

The Judge’s contention that the Commission wished to go to the “other extreme” reflects his rigid views of a post-conflict institution that falls outside of traditional legal process. There was nothing extremist about the request of the Commission. As has been pointed out, what was being requested by the Commission had already taken place in Sierra Leone. Similar hearings have taken place in South Africa. As far as the Commission is aware, nobody has levelled claims of “going to extremes” against the South African TRC or for that matter against the Sierra Leone TRC for its interactions with the Pademba Road prisoners. In this regard Judge Robertson is out of step with current notions of transitional justice.

The Judge makes much of the fact that the proposed hearing would take place in the Special Court courtroom. The implication is that this facet of the Commission’s request was part of a design engineered by the Commission to imitate or take over the role of the Court. In fact, the courtroom at the Special Court precinct – where the detention facility is situated – was the only suitable venue available for the proposed hearing. The Commission would have been more than happy to relocate the hearing elsewhere if the Court had consented.

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171 Marieke Wierda, on behalf of the International Centre for Transitional Justice; e-mail correspondence reflecting the ICTJ position with regard to the Appeal before Judge Robertson, dated 10 March 2004.

172 South African TRC hearings enjoyed extensive television coverage and at times live radio broadcasts. In some countries such as the United States and the Czech Republic even criminal courts are covered by live radio and TV broadcasts, which have not endangered their legal processes.
Encroaching on Special Court Functions

189. In assessing the functions of the Commission, Judge Robertson came to the conclusion that these could impinge on the Special Court’s own functions:

“The TRC functions may broadly be divided, in accordance with its title, into those of providing an historical record (“truth”) and those of assisting victims to come to terms with their perpetrators (“reconciliation”). The “truth” functions ... could be interpreted as permitting findings about individual responsibility- the prime function of the Special Court. The “reconciliation” functions ... are not so problematic, so long as they invite victims to reconcile with perpetrators who do not bear great responsibility and are not Special Court indictees.”

190. The learned Judge appeared to be concerned with what he referred to as the “truth” and the “reconciliation” aspects of the Commission’s functions, namely the two core functions of the Commission. He seemed particularly troubled that the fact-finding elements of establishing the truth might lead to “findings about individual responsibility”. The delivery of such findings, he declared, formed the “prime function” of the Special Court. Judge Robertson was less opposed to the “reconciliation” aspect of the Commission, so long as the Commission only invited victims to reconcile with lesser perpetrators, namely those who did “not bear great responsibility and are not Special Court indictees”.

191. The Commission cannot imagine that such territorial concerns on the part of the Special Court could ever be taken seriously. Commissions, not to mention Truth Commissions, routinely make findings about individual responsibility. Indeed, that is what commissions are essentially established to do. Judge Robertson’s suggestion that the Commission should confine its reconciliation activities to lesser perpetrators “who do not bear great responsibility” was equally unreasonable. If such a notion were to have been entertained, it would have required the Commission not to approach the “worst” of the perpetrators for fear that they may be on the Special Court’s suspect list. The learned Judge was, in effect, suggesting that the Commission should suspend its operations pending the completion of the Special Court’s tasks. The implication may sound outlandish, yet that is exactly what Judge Robertson suggested to the Commission’s legal representatives at the end of the Bintumani appeal.

192. The Judge’s choice of words to describe the Commission’s original approach to the detainees was unfortunate:

“When the TRC first approached a number of indictees, earlier in the year, they all declined a chalice that they were doubtless advised was poisoned.”

The publication of such a theatrical metaphor in a decision under the hand of the President of the Court inferred that there was something poisonous about the agenda of the TRC, supposedly a “complementary” organisation.

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173 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 13.
174 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 13.
From a Confidential Interview to a “Full-scale Public Hearing Broadcast”

193. Judge Robertson holds much store in his claim that the Commission declined to pursue with its original request to conduct private or confidential interviews with Hinga Norman in favour of a public hearing:

“It is also surprising that it [the Commission] has shifted its request from a two-day private interview with investigators to a full-scale public hearing broadcast “live” to the nation.”

[and]

“It has never explained why it has shifted first from its initial request for a two-day private interview – a request which might well have been granted – to a request for permission for a confidential interview (which might also have been granted) to an application for the televised spectacle described above.”

The suggestion that the Judge is really making is that the TRC could have gone for the quiet option but chose instead the unseemly route of a “televised spectacle”. The Judge cast the TRC’s decision in this regard as being eminently unreasonable. Yet the Judge denied the reader of his Decision the full benefit of the preceding history of negotiations between the TRC and the Special Court.

194. Judge Robertson gave no prior indication to the Commission that he was surprised by its modified approach to the application. If non-explanation of the Commission’s changed approach was really such a startling omission, as Judge Robertson made it out to be in his Decision, then it is equally disturbing that the Judge neglected to raise it during the Bintumani appeal. Had the question been raised, Judge Robertson would have been referred to the extensive correspondence between the Commission and the Registrar, which amply illustrated the extent to which the Commission struggled to persuade the Court to permit confidential interviews with its detainees.

Indeed the Commission held back its applications for nearly a month (between 9 September and 4 October 2003) in the hope that the Court would permit confidential interviews. As it turned out, the Revised Practice Direction excluded confidentiality, let alone privacy, as a facet of interviews for which the Commission might apply.

175 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 21.
176 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 32.
177 The Commission is satisfied that Judge Robertson had sight of all correspondence between the TRC and the Registrar, since it was confirmed by the Registrar that the TRC’s various submissions on the topic were forwarded to the President of the Court for his consideration. Indeed much of the original delay in the process was attributed to the difficulties in obtaining feedback from Judge Robertson due to the fact that he spent most of his time in London.
195. It was only after the Commission had exhausted all its avenues in this regard that it advised the Registrar that it would not jeopardise the rights of the detainees to a fair trial by engaging in interviews in which it could not guarantee confidentiality. It seems that the President of the Court was prepared to adopt a somewhat generous view of "confidentiality". According to the Judge, the Revised Practice Direction provided "for a confidential process of receiving information." In fact it provided for an official from the Registrar’s office to monitor the interview within earshot. In addition, the monitoring officer had authority to intervene should the questions stray off the approved subject areas. In effect it was envisaged that a Court representative would sit at the interview table. The entire interview would be tape recorded and lodged at the Registrar’s office. Parties to the proceedings could thereafter apply to the trial judge for the disclosure of the transcript “in the interests of justice”.

178 See the Revised Practice Direction of 4 October 2003, at paragraphs 7.

179 See the Revised Practice Direction of 4 October 2003, at paragraphs 4(b) and 4(c).

180 Indeed legal counsel for Issa Sesay suggested a legal challenge on this very point.

181 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.

182 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.

183 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.

184 See the letter of the Registrar dated 17 October 2003 in which he expressed disappointment at the TRC’s decision not to make use of the Practice Direction for purposes of confidential hearings.

185 See the reference to the ‘poisoned chalice’ by Judge Robertson at paragraph 17 of his Decision.

186 The view of Judge Robertson that these conditions made for a “confidential” interview was not shared by the Commission, nor by the detainees who had approached the TRC and their legal counsel.

196. The Judge himself was not in fact wedded to his viewpoint – he conceded the lack of confidentiality some fourteen paragraphs later in his decision. The Judge was advised that perpetrators were more likely to make confessions in private sessions than public hearings. For this reason, in the Judge’s view, the content of private or confidential interviews between detainees and the Commission may very well have warranted attention from the prosecution:

"... I am informed that it is rare for perpetrators, whether alleged or convicted, to use public hearings to make confessions: these are more likely to be forthcoming in private hearings. For that very reason, of course, private hearings cannot be fully immunised from prosecution scrutiny: the compromise adopted by this court is found in Practice Direction paragraph 4(c)."

187 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 23.

188 See the Revised Practice Direction of 4 October 2003, at paragraph 7.

189 See the Revised Practice Direction of 4 October 2003, at paragraphs 4(b) and 4(c). As noted above, the original version of the Practice Direction had provided for the immediate transmission of every interview transcript to the Prosecutor for use at trial.

190 Indeed legal counsel for Issa Sesay suggested a legal challenge on this very point.

191 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.

192 See the Reference to the ‘poisoned chalice’ by Judge Robertson at paragraph 17 of his Decision.

193 See the letter of the Registrar dated 17 October 2003 in which he expressed disappointment at the TRC’s decision not to make use of the Practice Direction for purposes of confidential hearings.

194 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.

195 Detainees were, on the face of it, offered the opportunity to talk freely and confidentially to the Commission. Indeed the Commission was urged to proceed with “confidential interviews”.

196 Judge Robertson, twice in his Decision, raised his consternation at the failure of the Commission to proceed down this road. What was not disclosed in advance was that any inkling of a frank conversation between the detainee and the Commission, especially one that entailed “confessing”, would result in “prosecution scrutiny”. If ever there was a “challice” that was doubtlessly “poisoned” it lay in the Special Court’s claim that it offered “confidential” interviews.
198. The Commission’s undertaking, in consultation with legal counsel of the three detainees, not to employ the Practice Direction for the purposes of confidential interviews has been amply vindicated by the Robertson Decision.

**Security Concerns**

199. The learned Judge went to great lengths to highlight an apparent admission by the TRC legal team that a denial of Hinga Norman’s right to testify before the Commission may “unleash powerful emotions” against the Special Court. Judge Robertson seized on this statement, suggesting that it “indicates that the prosecution concerns [on the security situation] may have some foundation.”

Building on his extrapolation of the statement, Judge Robertson suggested that, in the circumstances, to allow “any accused to testify live-to-air, for several days in an uncontrolled environment, may be asking for unpredictable trouble.”

200. Yet, the Judge proceeded in the very next paragraph of his Decision to contradict the alarmist conclusion he had just reached. Referring to written submissions he received from the Prosecutor after the Bintumani appeal, which dealt with the security situation and witness intimidation, and which he “carefully considered”, Judge Robertson stated:

“The prosecution again draws attention to the “fragile equilibrium” in the country and to the potential for destabilisation where the forces which the indictee commanded are still in active association and interested in securing his freedom, although there is no evidence that they intend doing so by unlawful means, much less that Chief Hinga Norman is likely to encourage such a course.”

*Underline added*

**The Bao Legal Team’s Conditions**

201. The Judge “had to remind” himself of the interests of the other detainees who were not represented at the hearing. Judge Robertson referred to several conditions put up by the legal representatives of Augustine Ato Bao, the other Special Court detainee whose application to appear before the Commission was heard by the Court:

“What strikes me is the extent and detail of the conditions upon which his [Mr. Bao's] testimony was offered to and apparently accepted by the TRC.”

The conditions put up by the Bao legal team were prepared and submitted on a unilateral basis. The Bao legal team, in its appeal papers, attempted to limit the damage by averring that Judge Thompson had “erred in placing undue and misplaced emphasis” on the conditions in question. The Commission had at no point accepted, nor even “apparently accepted,” the said conditions.

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186 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 26.
188 See the Supplementary Submissions from the Prosecutor of the Special Court in the Appeal before the President of the Court; rendered in the form of a collection of memoranda, accompanied by a letter signed by the Prosecutor, David M. Crane, dated 11 November 2003.
189 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 27.
190 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 28.
191 Grounds of Appeal by the Truth and Reconciliation Commission for Sierra Leone and Augustine Ato Bao against the Decision of His Lordship Judge Bankole Thompson delivered on 29 October 2003 to deny the TRC’s Request to Conduct a Public Hearing with Augustine Ato Bao; before Judge Geoffrey Robertson, The President of the Special Court, filed on 5 November 2003, at paragraph 5.
202. Judge Robertson made much of the conditions filed by the Bao legal team. He suggested that the prospects of litigation arising out of a TRC “hearing before the Bishop in the Special Court building” would be “endless.”\(^{192}\) He painted a picture of a litany of potentially damaging legal ramifications:

“...This could lead to an application for an injunction in the Supreme Court of Sierra Leone, or an application before the Special Court for protective measures. Suppose counsel for Mr. Gbao takes exception to passages in the draft TRC report: will he apply on the basis of this agreement with the TRC to injunct it in the national courts, or seek a right to refute it, or apply for protective measures before the Trial Chamber? The prospects of litigation – and consequent diversions and delays to Special Court trial – are endless.”\(^{193}\)

203. Judge Robertson’s concerns were speculative and repetitive.\(^{194}\) In South Africa and in Sierra Leone where detainees appeared before the Commission’s process on a voluntary basis there were no such legal consequences.\(^{195}\)

**Judge Robertson’s “Discussion”**

204. Under the “Discussion” section of his judgement, the Judge permitted himself a certain journalistic license in his characterisation of the proposed TRC hearing with Hinga Norman:

“A man in custody awaiting trial on very serious charges is to be paraded, in the very court where that trial will shortly be held, before a Bishop rather than a presiding judge... The event will have the appearance of a trial, at least the appearance of a sort of trial familiar with centuries past...”\(^{196}\)

Underline added

205. The Judge was hereby attempting to remind the reader that Bishops dispensed so-called “justice” in the most brutal manner in “centuries past”. By drawing the comparison, however, Judge Robertson contrives a highly inappropriate image that is diametrically opposed to the mode of proceedings before the Truth and Reconciliation Commission.

206. Other aspects of the Judge’s discussion lacked nuance and, in some instances, were simply wrong. For example, Judge Robertson suggested that unlike the South African TRC, the Commission:

“...had to operate in a society where some major players in the war are indicted in the Special Court.”\(^{197}\)

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\(^{192}\) See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 29.

\(^{193}\) *Ibid.* Although Mr Bao is referred to as “Gbao” in Special Court papers, in his letter to the TRC dated 16 September 2003, signed under his hand, he reflected his name as “Augustine Ato Bao”.

\(^{194}\) In respect of the injunction (before the national courts) and the protective measures (before Special Court) the Judge repeated himself on both points in the space of a paragraph.

\(^{195}\) In South Africa the TRC experienced a great deal of litigation against it, but none of the kind imagined by Judge Robertson (in circumstances arising from the voluntary appearance of detainees before the TRC).

\(^{196}\) See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 30.

\(^{197}\) See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 35.
On the contrary, the South African TRC also operated in a society in which significant criminal trials were underway. Although these were trials conducted by national courts, certain of these trials involved players in the conflict who were more senior in rank and stature than those currently facing trial before Special Court. These experiences ought to have provided a rich source of assistance for Judge Robertson.

The Thompson and Robertson Rulings Contrasted

207. The President of the Special Court described the ruling of Judge Bankole Thompson as a "carefully considered decision", although he was at pains to point out that he was not "judicially reviewing" the reasoning of Judge Thompson. While paying due deference to the Trial Chamber Judge, it was clear from Judge Robertson's brief assessment of the Thompson Decision that he saw himself as departing from it. Nevertheless, Judge Robertson appeared to be at one with Judge Thompson's central finding that the ambit of the Commission's work could not extend to an indictee who has pleaded not guilty. Judge Thompson's view was that the Commission was statutorily confined to dealing with perpetrators who were "willing to confess their guilt". Upon this foundation, Judge Thompson ruled that since all the indictees had pleaded not guilty, they all fell outside of the ambit of the TRC Act.

208. Judge Robertson view was slightly more nuanced. He maintained that the Thompson principle applied with particular reference to the Commission's reconciliation activities. Judge Robertson appeared to view reconciliation as little more than acts of confession and forgiveness between perpetrator and victim. His argument followed that an indictee who had pleaded not guilty could not confess; therefore the reconciliation process could not apply to the indictees – as all had pleaded not guilty. It appears that the learned Judge saw Commission hearings as having been devised largely in order to induce confessions, as opposed to being truth-telling exercises. In justifying his sworn testimony "solution", he stated:

"All that it [the Commission] is denied is a public hearing, an event more conducive to its reconciliation work (which cannot apply to indictees who plead not guilty) than its business of constructing an historical record."

There is some irony in the Judge's assertion that "all that is denied is a public hearing". That is all that the Commission asked for. The Commission does not share the learned Judge's notions of reconciliation, nor his views on what TRC hearings are designed to achieve.

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198 In one trial, S v Msane and 20 Others, (Durban & Coastal Division, 1996) the former Minister of Defence, Magnus Malan, and the entire hierarchy of the South African military from the 1980s, including three Generals and a Vice-Admiral, faced charges of murder and conspiracy to murder arising from a massacre committed by a military-supported Inkatha Freedom Party hit squad.
199 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraphs 9 to 11.
200 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraphs 9 to 11.
201 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraphs 9 to 11.
202 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 37.
203 See the Decision of Judge Robertson on Appeal, 28 November 2003, at paragraph 42.
Judge Robertson’s Justification for Refusing the Request

209. In the end, it was not the security risks; it was not the possibility that Hinga Norman would implicate himself or others; it was not the fact that Hinga Norman was an indictee; it was not the apparently unpredictable impact of a TRC hearing; nor was it the giving of evidence, which, in the view of Judge Robertson risked the integrity of the Court’s process. It was rather the much-vaunted public character of the proposed hearing. To put it in Judge Robertson’s words – it was the potential “spectacle” of the indictee being paraded before a Bishop. This spectacle would, according to Judge Robertson, appear as if it were convened to mete out justice. Moreover, it would look like it was administering that “justice” by reaching findings of fact: which was, according to Judge Robertson, the “special duty” of the Special Court.

210. It was upon little more than this misconstrued territorial concern that Justice Robertson denied Hinga Norman his right of self-expression and the right of the people of Sierra Leone to hear him in a public and transparent hearing.

211. The decisions handed down by Judge Bankole Thompson and Judge Geoffrey Robertson do not stand up to serious analysis. The Commission does not regard them as persuasive. The rulings constitute poor contributions to the development of transitional justice arrangements in post-conflict societies.

JUSTICE AND RECONCILIATION

212. Notwithstanding the ad-hoc manner in which the two institutions came into being they were expected to work side by side in order to unmask the truth. Judge Geoffrey Robertson, President of the Special Court, said as much when he presented his view of the task ahead in a Special Court publicity pamphlet. He also articulated his view that the Special Court has a primary role to play in achieving reconciliation, as it alone has the power to deliver justice, which is a prerequisite for reconciliation:

"Within the fallible parameters of human justice, with its fundamentals of due process, transparency and defence rights, we are charged 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 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."

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204 The potential security risks were dismissed by Judge Robertson at paragraph 27 of his Decision.
205 If the possibility of a detainee incriminating himself had been a real concern, the Judge would not have permitted the detainees to give any testimony to the TRC, even in writing.
206 See Neil Boister: Failing to get to the Heart of the Matter in Sierra Leone; paper circulated in February 2004, publication pending at the time of writing.
207 See the Introduction to the brochure entitled Special Court for Sierra Leone, published by the Special Court in March 2003.
213. The achievement of “justice” may very well advance the cause of reconciliation. Whether it brings reconciliation in itself is debatable. Whether the kind of justice referred to by the Judge, namely the retributive justice pursued by the Special Court, is capable of producing national reconciliation is equally debatable. Confining the achievement of justice to retributive justice is a narrow interpretation of what justice has come to mean in recent times.

214. These debates aside, the Commission finds it somewhat incongruous that one complementary post-conflict body sets itself up as the primary body to achieve the stated aim of the other post-conflict body, namely the Truth and Reconciliation Commission. It is also incongruous to assert that the prerequisite for achieving reconciliation is to carry out a function that the other complementary body is not empowered to do; namely to prosecute offenders in a court of law.

215. If Justice Robertson’s proposition is correct then the achievement of reconciliation is presumably dependent on the “successful” outcome of the prosecutions before the Special Court. However, achieving justice and addressing impunity are difficult enough tasks. There are huge uncertainties inherent in criminal trials. Prosecutions fail as often as they succeed. To rest reconciliation on the successful outcome of a legal process is a risky endeavour. This point was made forcefully in a unanimous decision of the South African Constitutional Court in 1996. The applicants in the matter contested the denial of their rights to judicial redress under the amnesty provision of the truth and reconciliation process:

“Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack; but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture that have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims.

Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.

208 It is unclear whether Judge Robertson’s proposition applies in respect of acquittals. Presumably it would apply so long as the outcome was “just”. Whether or not acquittals would lead to reconciliation is equally speculative.
The Act [that created the Truth and Reconciliation Commission] seeks to address this massive problem.

[...] The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully; to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones; to leave their yearning for the truth effectively unassuaged; to perpetuate their legitimate sense of resentment and grief...

209. The difficulties in preparing successful criminal prosecutions in the circumstances described by the late Deputy President of the South African Constitutional Court are not that dissimilar to those prevailing in post-conflict Sierra Leone.

210. The Commission's understanding of reconciliation and the activities it has taken in pursuit thereof are presented in the chapter on Reconciliation later in Volume Three B of this report.
CONCLUSION

220. The TRC and the Special Court will undoubtedly make significant contributions towards peace and justice in Sierra Leone. Their contributions could have been immeasurably stronger had the two institutions shared something of a common vision of the basic goals of post-conflict transitional justice.

221. The two bodies were not created out of some concerted and coherent plan. Rather, they arose from two different initiatives that were themselves contradictory. The TRC grew out of the amnesty in the Lomé Peace Agreement, while the Special Court emerged subsequently out of the decision to withdraw the amnesty, at least with respect to a limited number of persons.

222. Prior to the commencement of operations of the two bodies, there were attempts to anticipate and address issues of co-operation and potential conflict, although the issue that ultimately led to major difficulties in the relationship between the two bodies, namely the appearance of detainees before the Commission, was never really anticipated.

223. The establishment of these transitional bodies working in parallel did not work optimally. The two institutions had little contact and when they intersected at the operational level, the relationship was a troubled one.\textsuperscript{212}

Harmonisation of Objectives

224. It is the view of the Commission that the practical problems that afflicted the “dual accountability” model stemmed from the creation of the two institutions separately from each another. These problems were compounded by the subsequent and mutual failure of the institutions to harmonise their objectives.

225. Having outlined the problems involved with the parallel operation of the two institutions the Commission does not hold that justice and truth bodies should never work simultaneously in the future. Indeed there may be good reason to have two such bodies working in tandem. However there is clearly a need for greater thinking and planning before such a strategy is adopted.

226. Much of the difficulty lies in the fact that the two mechanisms represent different approaches to addressing impunity. Operational difficulties are likely given that they also share many objectives: both seek truth about a conflict, although in different forms; both attempt to assign responsibilities for atrocities; both work with similar bodies of law; and both are aimed at establishing peace and preventing future conflict.

227. Ultimately where there is no harmonisation of objectives a criminal justice body will have largely punitive and retributive aims, whereas a truth and reconciliation body will have largely restorative and healing objectives. Where the two bodies operate simultaneously in an ad-hoc fashion, conflict between such objectives is likely. Confusion in the minds of the public is inevitable.

\textsuperscript{212} For the full findings of the Commission in relation to the different roles of the TRC and the Special Court see the Findings Chapter in Volume Two of this report.
228. Harmonisation of objectives means that neither body can operate in a manner that is oblivious of the other. It is highly incongruous for one body to engage in intensive truth seeking and reconciliation exercises involving former participants in the conflict, while another body is independently pursing punitive actions against the same individuals. Harmonisation requires the developing of an operational model that permits the different objectives to be reached in a symbiotic manner.

229. Examples of where post-conflict societies have attempted to harmonise the objectives of post-conflict institutions include South Africa, East Timor and Peru. Different and nuanced operational models can be developed to suit particular circumstances.

Looking Ahead

230. It is likely that in the future there will be more truth commissions that work alongside international judicial bodies. This will particularly be the case as the International Criminal Court commences operations in different post-conflict countries. Future experiences of joint operations need not be troubled ones. Indeed the Commission is encouraged by the Rules of Procedure and Evidence of the International Criminal Court, which make provision for communications in the context of a class of “other confidential relationships” which are not subject to disclosure. The confidential communications provided for in the TRC Act would most probably have been covered by this protection. Such a provision in the Sierra Leone context may very well have prevented much of the discord that emerged.

231. In future post-conflict societies there may be compelling reasons to justify the establishment of a body to bring truth and reconciliation. Alternatively there may be strong grounds to support the creation of a body to address impunity and bring retributive justice. There may even be good cause to have both such bodies working side by side.

232. The Commission makes no recommendation on which particular model ought to be adopted. This will naturally depend on the prevailing circumstances and a range of other factors. There ought however to be recognition from the outset that there is a primary objective shared by both organisations, namely that the processes of both institutions must ultimately lead to the goal of building lasting peace and stability. In the pursuit of this objective both bodies are equal partners. The Commission does make specific recommendations to apply in the event that the parallel option is employed and these are set out in the Recommendations chapter.


214 The Recommendations chapter can be found in Volume Two of this report.
233. In the light of developments in post-conflict societies in the late twentieth and early twenty-first centuries in dealing with past human rights violations, there exists on the part of victims a right to know the truth. Truth Commissions have been established in several countries around the world to meet this recognised obligation. The Commission finds that there is considerable weight to the argument that establishing the “truth” is an essential component of the universally recognised “right to an effective remedy”.

234. The Commission also recognises that victims have a right to justice and to pursue this right through legal means. The reaching of justice is not always possible in societies devastated by years of civil strife. Most post-conflict societies do not have the capacity to deliver justice on war crimes or serious violations of human rights, let alone the capacity to attend to daily justice needs. In future post-conflict transitional justice arrangements the international community and national governments should seriously consider a major investment in the national justice systems of such societies. Such investment may take place in addition to or in the alternative to establishing international tribunals to investigate and prosecute violations of human rights. This option would be better suited to strengthening domestic skills and capacity. It would have a potentially lasting impact on local justice institutions.

235. Truth and Reconciliation Commissions represent one of the most viable means of securing a sustainable peace. Such commissions can strengthen the peace through the establishment of an impartial historical record of the conflict and the creation of a public understanding of the past that draws upon broad based participation.

233. It is only when the full truth (or as close to the full truth as possible) is placed squarely before the public that society can examine itself honestly and robustly. It is this cathartic exercise on the part of the nation that permits it to take genuine measures to prevent the repetition of the horrors of the past.