ARTICLES

Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How trials and truth commissions can co-exist

By Michael Nesbitt[*]

A. Introduction

Sierra Leone is a poor nation in the midst of a laudable campaign to bring justice and reconciliation to a people desperately in need of it. Having suffered through the scourge of a decade long civil war, the nation employed two distinct yet related institutions to take a leading role in this campaign. Uniquely, the Government of Sierra Leone (GoSL) sought the assistance of the United Nations (UN) in setting up the world's first "hybrid tribunal", named the Special Court for Sierra Leone (SCSL), to work alongside the already conceived of Truth and Reconciliation Commission (TRC). These two institutions were to employ different procedures and, to an extent, different objectives in the hopes of achieving peace, justice and reconciliation.

The Sam Hinga Norman Decision (the Norman Decision) on the relationship between the SCSL and the TRC was the first international legal ruling to consider specifically *how* the procedural interplay and coordination between the two institutions can and should work. It directly addressed the goals of both TRCs and courts, how they work to help Sierra Leone and, as a corollary of their respective purposes and procedures, how they should share information and work together for the benefit of the nation. As such, the decision offers invaluable preliminary insight into both the relationship between TRCs and courts and how that relationship can either be fostered or hindered by the policies and legal decisions taken before and during the functioning of their concurrent operations.

---

[*] LL.M. New York University, Counsel, Department of Justice (Canada). The views expressed herein are delivered in a personal capacity and do not represent the positions of the Department of Justice or the Government of Canada. The author wishes to thank Elizabeth O'Grady, the editors of the German Law Journal, and two anonymous peer reviewers for their helpful insights and suggestions. Any mistakes or omissions are, of course, solely those of the author. Email: Michael.nesbitt@nyu.edu.

There are three primary reasons why a reinvigoration of the discussion surrounding the Norman Decision is important now more than ever. First, the summer of 2007 brought about presidential elections in Sierra Leone and the commencement of the Charles Taylor Trial at the SCSL sitting in The Hague, Netherlands. Together, these events have brought the country and the conflict back into the spotlight. The elections presented perhaps the first major post-conflict test to the nation's nascent democracy and relative stability; in many ways, the effect that the SCSL and TRC proceedings have had on engendering peace and stability will, for the first time, truly be tested. The renewed focus on the nation thus offers the perfect opportunity to analyze its post-conflict justice initiatives, how they interacted, and how effective they were, and to do so in a time and context where the answers truly matter. Second, Norman died in custody in February 2007, months before a verdict was to be reached in his case. Coupled with the election, his untimely death and the first of the SCSL's judgments have brought about a renewed debate in the country regarding whether Norman ever should have been indicted, and with it the renewed potential for civil unrest. Norman's death ensured that his story will never be told through one of Sierra Leone's transitional justice mechanisms, a result that could potentially have been avoided. With this in mind, an analysis of the Norman Decision can shed light on how this situation might have been different. Third, the International Criminal Court (ICC) is now fully operational: trials have finally commenced and it is expanding the number of conflicts it is investigating. Now is the perfect time to consider how the ICC might interact with a TRC in any of these conflict countries, and what can be learned from the only international case to deal with this question.

This paper will proceed by first setting out the goals and objectives of TRCs and international criminal trials in the abstract. Whether any particular TRC or trial can achieve these theoretical goals is open to much debate,[1] and it is suggested will depend largely on the context of the past events, on the functional ability of the institution(s) created, on the facilities of those who run them and on their ability to work with the social/cultural/political leaders of the impacted country. Next, this paper will offer a theoretical analysis of whether the goals and objectives of TRCs and courts can mesh to create the possibility of synergies between their concurrent operations; it finds that they can.

With this in mind, this paper will apply such an ideal to a critique of the Norman Decision both at the trial and appellate stages. The result is the opportunity to

[1] See generally, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998); TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, 3 vols., (Neil J. Kritz ed., 1995); and RUTI TEITEL, TRANSITIONAL JUSTICE (2000).

glean novel advice from the analysis with a view to providing both the ICC and other international courts that are operating contemporaneously with TRCs with the ammunition necessary to make such an ideal the reality. At the very least, this discussion provides the initial building-blocks for achieving such synergies.

What this paper will not do is provide advice on policy implications that extend beyond those that can reasonably be ascertained from the judgment. For example, although the issue of resources and how they should be shared was a "significant tension" in developing and administering the TRC and SCSL, the SCSL did not speak to this issue and it thus falls beyond the parameters of this paper.[2]

B. Purposes of Trials and TRCs: A theoretical perspective

I. The TRC Process

To date there have been approximately thirty truth commissions established around the world, depending on how one defines them.[3] Truth commissions are

---

[2] William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1082, 1088-90 (2004). In the Sierra Leone Context a number of individuals and institutions offered advice on a wide variety of coordination initiatives. See Marieke Wierda/Prisilla Hayner/Paul van Zyl, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission in Sierra Leone*, INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (ICTJ) 5, 24 June 2002, available at: http://www.ictj.org/images/content/0/8/084.pdf (ICTJ Report), last accessed 11 July 2007; Human Rights Watch, *Human Rights Watch Policy Paper on the Interrelationship Between the Sierra Leone Special Court and the Truth and Reconciliation Commission*, 18 April 2002, available at: http://www.hrw.org, last accessed 9 April 2005; Amnesty International, *Sierra Leone: Renewed Commitment Needed to End Impunity* 13-15, 24 September 2001, available at: http://web.amnesty.org/library/index/engafr510072001, last accessed 13 April 2005; Office of the Attorney General and Ministry of Justice Special Court Task Force, *Briefing Paper on Relationship Between the Special Court and the Truth and Reconciliation Commission: Legal Analysis and Policy Considerations of the Government of Sierra Leone for the Special Court Planning Mission* (Planning Mission Briefing Series, January 7-18, 2002), available at: http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/

SLGovTRC_SpCt_Relationship.pdf, last accessed 13 April 2005; Celina Schocken, Notes and Comments, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY JOURNAL OF INTERNATIONAL LAW 436 (2001-2002).

[3] MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS Appendix 1 (2006); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS Appendix 1 (2002). Other countries might be added to the lists provided by these authors. For example, Bahrain, Bosnia, and others have been discussing TRCs, and Liberia has recently commenced statement-taking, see online at: http://www.trcofliberia.org/; Morocco recently released its own TRC or "Instance Equité et Réconciliation" report: online at http://www.ier.ma/rubrique.php3?id_rubrique=309. See also United States Institute of Peace, online at http://www.usip.org/library/truth.html#tc.

generally temporary bodies with a statutory mandate lasting six months to two years. They may be established for any number of specific reasons.[4] Generally, however, they are established to help a nation overcome a period of conflict, intense human rights abuses or authoritarian rule and to assist the society in moving forward psychologically, legally, politically, culturally and in some cases, spiritually. In a broad sense, they are a way of dealing with past violence in the hopes of securing higher objectives: peace, justice, reconciliation and accountability.[5]

In order to achieve such higher objectives, truth commissions employ a number of means and methods such as statement-taking from victims and perpetrators of human rights abuses, investigations into the causes of the conflict or abuses, witness interviews and historical enquiries.[6] The end product will often be a report, distributed to the focus country writ large in any number of ways, coupled with a set of recommendations, public hearings and awareness campaigns that take place throughout this process and upon the release of the final report.[7]

A number of theories have developed about what goals TRCs can pursue, and what operational methods can be undertaken, to engender peace, justice and reconciliation.[8] The first such oft-cited goal of TRCs is, quite obviously, the search for the truth regarding the conflict and its underlying causes.[9] This is generally pursued by accumulating documents and testimony that form the foundation for a historical record of the conflict. It is stated in this regard that a truth commission can dispense with rumors and myths that may be detrimental to communal self-

---

[4] MARK FREEMAN, *id.,* offers perhaps the best discussion on this topic. See especially 27-28.

[5] See generally, Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS 849, 855 (2003); Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,* 16 HUMAN RIGHTS QUARTERLY 4, 597 (1994); HAYNER.(note 3), 24-31; FREEMAN, *id.,* 37-40; PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 24-31 (2001); and Kritz (note 1).

[6] See Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination between Commission and Court*, 104 COLUMBIA LAW REVIEW 730, 731 (2004); ALEX BORAINE, A COUNTRY UNMASKED, (2000). For a specific example see the Sierra Leone TRC Objectives, *infra,* notes 52-55.

[7] For a broader discussion of various TRCs around the world, their mandates and methods of operation, see works by Priscilla B. Hayner, *supra*, notes 3, 5; United States Institute for Peace (note 3).

[8] For a good overview of such theories, see MINOW (note 1), especially 52-59; Rotberg and Thompson (note 1).

[9] See Evenson (note 6), 731.

understanding in a way that trials cannot.[10] In comparison to criminal trials, TRCs provide a larger forum for more victims and witnesses to testify and otherwise become involved with the peace process, as well as an opportunity for them to have the world acknowledge the wrong that has been done.[11]

Further, TRCs are not limited by the requirement to reach a verdict on the guilt or innocence of any one person, but rather have greater room for flexibility in providing conclusions, which can be broader than the findings of courts. TRCs can thus invest more time into a consideration of the history and causes of conflicts.[12] By addressing the causes of conflict in this way, TRCs may provide a greater opportunity to overcome future rifts in society – or address a dominant group's impartial telling of national history or mythology – while using reason and understanding to decipher the nuanced truth and prevent the repetition of violence.[13] It is also sometimes argued that the creation of collective memory, or dealing with the past, in itself is beneficial to reconciliation and future peace.[14] The theory then is that the *process* of TRCs and the search for truth is in many ways as beneficial and cathartic as the end product; the TRC's engagement with victims, social and advocacy groups, domestic institutions, and the opportunity for victims to tell their stories can be therapeutic for those involved.[15]

Numerous other benefits are said to accrue from the TRC process. For example, a TRC can make recommendations in its final report that vary from institutional reform policies to reparations strategies[16] to reintegration strategies (for

---

[10] See Thomas Buergenthal, *United Nations Truth Commission for El Salvador*, El Salvadore Truth Commission Report 321 (1993). Even those otherwise skeptical of the merits of TRCs acknowledge that, at a minimum, they can narrow the range of permissible lies: see Michael Ignatieff, *Articles of Faith*, 25 INDEX ON CENSORSHIP 5, 113 (1996).

[11] Rajeev Bhargava, *Restoring Decency to Barbaric Societies,* in Rotberg/Thompson (note 1).

[12] See MINOW (note 1), 87; Evenson (note 6), 731; Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 JOURNAL OF INTERNATIONAL AFFAIRS 647, 656-62 (1999).

[13] This was a purported benefit of the Sierra Leone TRC. See Special Court Task Force Briefing Paper (note 2).

[14] See generally, MINOW (note 1).

[15] See generally, MINOW (note 1), 66-70.

[16] See Brandon Hamber and Richard A. Wilson, *Symbolic Closure through memory, Reparation and Revenge in post-Conflict Societies*, in THE ROLE OF MEMORY IN ETHNIC CONFLICT 144, 148-150 (Ed Cairns & Michael D. Roe eds., 2003). See also Morocco TRC (note 3).

perpetrators).[17] By seeking out the root causes of the conflict, the process offers the potential to prevent a recurrence.[18] In the past, the information gathered by Commissions has also, in some situations, led to subsequent prosecutions.[19]
Each of these benefits, coupled with the report officially acknowledging the abuses and the plight or strength of the victims/survivors, as well as the process of giving and hearing testimony and grieving with others, is said to promote healing in the community, leading to a sense of justice and reconciliation and ultimately, it is hoped, peace.[20] Whether to speak about the past and to believe that these benefits will be realized in any particular context is a choice for the particularly affected society to make. Once the decision to pursue a TRC is taken, however, this decision should not be denigrated to the status of "second-rate justice". Its methods are uniquely situated to provide a distinct type of justice and reconciliation. Whatever tact the TRC takes to achieve this goal, it is the theoretical persuasiveness of its methods that has made it such a popular post-conflict model for so many countries.

II. The Trial Process

Before discussing the potential synergies between TRCs and trials,[21] it is useful to reiterate the general assertions about what criminal trials do for a society. The most obvious benefit of a criminal prosecution is the imposition of punishment on an

---

[17] Hamber and Wilson, *id.*, 150-53. See generally, The International Center for Transitional Justice, *Parameters for Designing a Reparations Program in Peru* (2002), available at: www.ictj.org, last accessed 12 July 2007.

[18] See Richard Goldstone, LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA Foreword (Charles Villa-Vicencio & WilHelm Verwoerd eds., 2000); HAYNER, UNSPEAKABLE TRUTHS (note 5).

[19] This was the case with respect to the TRC Report in Argentina following its "Dirty War", where now International Criminal Court Chief Prosecutor led the way with subsequent prosecutions of army personnel. El Salvador had a similar experience subsequent to the release of its report.

[20] The Office of the Attorney General and Ministry of Justice Special Court Task Force specifically foresaw this result accruing from the TRC process at, *supra*, note 3. See generally MINOW (note 1); Rotberg & Thompson (note 1); Paul van Zyl (note 12), 665-67; Laura R. Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARVARD INTERNATIONAL LAW JOURNAL 287, 290; HAYNER, UNSPEAKABLE TRUTHS (note 5), 24-31; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,* 14 European Journal of International Law 3, 481, 484 (2003); Miraldi (note 5), 855.

[21] For an excellent canvassing of this issue see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE LAW JOURNAL 2537 (1991); Juan Mendez, *Accountability for the Past*, 19 HUMAN RIGHTS QUARTERLY 255 (1997); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW AND CONTEMPORARY PROBLEMS 4, 9 (1996); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions,* 59 LAW AND CONTEMPORARY PROBLEMS 4, 197 (1996); Robinson, *id.*, 489.

individual. By extension, it may serve a retributive function. In the case of mass abuses, such punishment may establish a culture of accountability and in so doing end a culture of impunity "that breeds future despots."[22] The threat of individual sanctions and the end of impunity might thus deter individuals from criminal conduct.

Similarly, the renewal of criminal prosecutions against perpetrators of mass abuses can assert – or reassert – the ethic of the rule of law in a country.[23] As such, it performs a communicative or "educative" function espousing anew common values and theories of justice.[24]

It is also said that "punishment plays an important role in reversing the citizens' adaptation to a dictatorial system in which fear drove them from pursuing their ideals and political activities, into apathy, isolation, and self-disdain."[25] Some, perhaps most notably Emile Durkheim, have argued that such punishment combined with the act of trying and judging an individual can create the social solidarity necessary for societies to reconcile themselves in the face of potential sectarian or ethnic divides.[26] In this sense, the historical narrative formed through judgment is, much as in the case of truth commissions, seen as a benefit of trials.

Other justifications for prosecutions include: social healing under the theory that one cannot forgive what cannot be punished; the potential to pave the way for compensatory justice; the rehabilitation of perpetrators or victims through the airing of their grievances or punishment; and, to consolidate democracy by associating a new government with a new ethic of justice.[27] There are clearly many debates about whether such theories of justice (particularly with respect to

---

[22] Everson (note 6), 751. See also Orentlicher, *id.*, 2542-43.

[23] See Everson, *id.*; Orentlicher, *id.*, 2643-44.

[24] *Id.*

[25] Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 160, 163 (N. Roht-Arriaza ed., 1995).

[26] See e.g. Emile Durkheim (EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79 (1964)) who argues that a form of consensus solidarity is formed, as opposed to Mark Osiel (MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (2000)) and Carols Nino (CARLOS S. NINO, RADICAL EVIL ON TRIAL (1996)), who see such solidarity as being formed through "civil dissensus" and debate as to the legitimacy of the "truth" of the judgment. From different perspectives, both come to the same conclusion that solidarity may be formed.

[27] See, *supra*, note 21.

retribution), are valid or at least cogent; however, it suffices to say that if a country sets the trial process in motion, then these will likely constitute some of its justifications for what it hopes to accomplish. This is what is important to keep in mind as it is this theory, in connection with the theory that TRCs will offer their own purported benefits, which we use to evaluate the *actual* workings of both institutions on a case-by-case basis in order to determine if their potential synergies, as outlined below, can be met in reality.

Whether these theoretical synergies between trials and TRCs will actually achieve their intended effect, as sought in Sierra Leone for example, may not be known for decades to come. In any event there may never be a causal connection made between post-conflict justice initiatives and each of the benefits that theorists have ascribed to them. In this sense, as with justice, crime and punishment more broadly, we have to trust that the theory is strong and that the anecdotal evidence from victims and witnesses about the benefits of testifying or seeing justice be done is, in itself, sufficiently telling.

III. Synergies between the Trial and TRC Processes: Their overlapping objectives

In theory trials and TRCs are constituted to work toward the same ultimate goals: to lay the foundations for a stable peace and to promote justice and reconciliation.[28] Both espouse various methods of achieving reconciliation and accountability (as seen above), which it is hoped will assist with the reconciliation of society, victims and fragmented groups with the goal of resolving the country from a period of conflict to one of relative peace. In most cases, the creation of both TRCs and international tribunals is a response to times of conflict, oppression and systemic abuse in flagrant violation of decency and humanity; they are methods used to investigate and overcome such conflict and abuse.[29]

Charles Villa-Vicencio has said that, "[t]rials may well be necessary *in some situations,* but they are frequently insufficient to deal effectively with lawlessness. More is required."[30] In many contexts, the same might – and probably should – be

---

[28] See Sierra Leone TRC and SCSL Objectives, *infra*, notes 52-55; Special Court Task Force Briefing Paper (note 2). See also FREEMAN (note 3), 3.

[29] For a good overview of the similar objectives of truth commissions and courts, see FREEMAN (note 3), 73-83.

[30] Charles Villa-Vicencio, *Why Perpetrators should not always be prosecuted: Where the International Criminal Court and truth commissions meet*, 49 EMORY LAW JOURNAL 205, 210 (2000) (emphasis added). He posits that TRCs can be that stated "more".

said of TRCs.[31] TRCs and trials clearly differ greatly in their methods of operation and, to an extent, also in their primary focus (*i.e.* a focus on the individual as opposed to society). But this is not fully the case. Both seek to achieve their higher goals through accountability – truth seeking and social reform to name but a few forms of addressing accountability deficits. In accomplishing these tasks, TRCs for example can generally provide for a broader enquiry into historical causes of conflicts beyond the scope of individual trials – even beyond those that delve into a level of historical enquiry.[32] But prosecutions can provide specific deterrence, incarceration and judgments of guilt that are not achieved by TRCs. Thus, both work toward the reconciliation of society and toward peace, but each approach this goal with different methods and in some cases with a view to different societal needs. As such, former ICC employee Darryl Robinson has often posited that "[w]here used to *supplement* criminal investigations and prosecutions, truth commissions offer many important benefits that are not provided by prosecutions alone."[33] Here, the same may – and probably should – be said of prosecutions.

In a practical way, TRCs and trials can also offer each other reciprocal benefits. While TRCs can uncover witnesses and evidence for prosecutions in some situations, trials can close the impunity gap often discussed as the downside of the TRC process.[34] Moreover, criminal trials cannot possibly prosecute all those suspected of war crimes and crimes against humanity in devastated societies.[35] The reality is that many crimes will go unpunished and the truth about such crimes, and potential the whereabouts or fate of their victims, will be unheard and often ignored. TRCs can offer a legitimate opportunity to fill this void.

This is not an attempt to canvass all the ways in which TRCs and courts can work together or support each other. Nor is it an attempt to definitively state whether any given TRC can work effectively with a court to produce synergies. And it is certainly not a call for both TRCs and courts to be used in all situations where

---

[31] See Orentlicher (note 21) for a discussion of the duty to prosecute for serious international crimes.

[32] See generally HAYNER, UNSPEAKABLE TRUTHS (note 3), 101. For example, the Nuremberg Court looked into the history of the conflict, but could not return to many root causes looking back to 1919.

[33] Robinson (note 20), 484.

[34] See HAYNER, UNSPEAKABLE TRUTHS (note 3), 102.

[35] See Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies,* in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 46-47 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

methods of transitional justice are employed.[36] Rather, it is an attempt to demonstrate some of the benefits and areas of overlap, and bring to light the common higher goals of the two institutions, in order to provide a legitimate starting assumption that courts and TRCs do not have to compete with each other to realize their objectives. In theory at least, they can indeed assist one another.

Now it may be said that even if the higher goals of TRCs and courts do not conflict, the methods may do so. But if the end goal is the same then presumably, operating efficiently, the two institutions would determine which method best met the specific objective sought. If both seek the same goals through different methods then surely it can be said it is a blessing and not a curse to have the option of discussing which method, or amalgam of methods, will provide the best opportunity for society to overcome its past. So long as the two institutions have the same general higher objectives and the two of them are operating concurrently, they can theoretically meet an increased number of purported societal needs given their different approaches to justice and reconciliation and the different benefits they have to offer.

As such, there is no reason for a presumption of conflict between the two institutions, only a recognition that in some cases negotiation as to which particular need should be met in a particular situation will be necessary. For example, one institution may have primacy, say with respect to having access to those most responsible for abuses, but presumably simply spelling this primacy out or making this determination on a societal needs basis would be the pareto efficient outcome for society and thus for both institutions in meeting their objectives.

C. Case Study: Sierra Leone and the Hinga Norman Decision

I. The Country Context

Sierra Leone, with its 4.6 million people comprised of eighteen distinct indigenous ethnic groups, was ranked at the bottom of the United Nation's 2003 Human Development Index Report as the poorest country in the world.[37] One does not

---

[36] Jose Zalaquett perhaps best articulates the "ethic of responsibility" in meeting the needs of society first rather than imposing justice systems on a society not prepared for them. *See* Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, HASTINGS LAW JOURNAL 43 (1992); Jose Zalaquett, *Why Deal with the Past?*, in DEALING WITH THE PAST 15 (Alex Boraine et. al eds., 2nd ed., 1997).

[37] UK Foreign & Commonwealth Office Country Profile, *The Republic of Sierra Leone*, available at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1019744991317, last accessed 3 April 2005. See United Nations,

have to look far for an explanation. For these 4.6 million people, 2003 represented the first year of peace in more than 10 years.[38] Preceding this time of relative peace, a devastating decade long civil war ravaged the economy and the people, killing more than 50,000 people, maiming another 30,000 civilians and causing at least one third of the population to be internally displaced or flee to neighboring refugee camps.[39] Sadly, the Sierra Leonean conflict was characterized by brutal human rights abuses, the deliberate targeting of civilians, physical mutilation and dismemberment, widespread rape and looting and most saliently the use of child soldiers – who often became both coerced perpetrators and unfortunate victims.[40]

An attack in 1991 from neighboring Liberia by the now infamous Revolutionary United Front (RUF) signaled the commencement of the relevant conflict.[41] By 1997 the RUF, still engaged in warfare with the GoSL, was asked to amalgamate or join with new threat to the peace in Sierra Leone, the newly formed Armed Forces Revolutionary Council (AFRC), which was made up primarily of "disaffected" Sierra Leone Army soldiers. The AFRC, led by former Army Major Johnny Paul Koroma – now an indicted person at the SCSL,[42] had staged a coup that year and had ousted President Ahmad Tejan Kabbah from the capital, Freetown. But the

---

Human Development Report 2003: Millennium Development Goals: A compact among nations to end human poverty, available at: http://hdr.undp.org/reports/global/2003/, last accessed 3 April 2005.

[38] UK Foreign and Commonwealth Office Country Profile, *id.*

[39] *Id,* Human Rights Section. Evenson (note 6), 733 states that 2 million were internally displaced, with 500,000 refugees and 5,000 children turned into combatants.

[40] Koroma's whereabouts remain unknown. See generally, *id.* See also Schabas (note 2), 1086-87. One of the most well-known policies was the amputation of limbs: "soldiers" amputated the hands of those captured who were wearing long sleeves, while those unfortunate to be caught with short sleeves or none at often lost their whole arms.

[41] UK Foreign and Commonwealth Office Country Profile (note 37). Foday Sankoh led the RUF throughout the decade long conflict. See EARL CONTEH-MORGAN & MAC DIXON-FYLE, SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY: HISTORY, POLITICS, AND SOCIETY (1999) and JOHN L. HIRSCH, SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY (2001). As a result of the support offered to the FLA by the Government of Liberia, both leading up to and in perpetuation of the violent conflict, now deposed Liberian dictator Charles Ghankay Taylor was indicted by the Special Court for Sierra Leone: see Special Court for Sierra Leone, *Indictment of Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, 7 March 2003. See also Special Court for Sierra Leone, *The Prosecutor v. Charles Ghankay Taylor (Decision on Immunity from Jurisdiction)*, Case No. SCSL-2003-01-I, 31 May 2004.

[42] See Special Court for Sierra Leone, *Indictment of Johnny Paul Koroma also known as JPK*, Case No. SCSL-2003-03-I, 7 March 2003. Even at the time he was leading the AFRC from prison, Johnny Paul Koroma had been charged previously with treason. Specifically, he was indicted for crimes against humanity, violations of common article 3 to the Geneva Conventions and to Optional Protocol II and other serious violations of international humanitarian law.

Sierra Leone Civil Defense Force (CDF), led by the formerly indicted and now deceased Sam Hinga Norman, cooperated with ECOMOG[43] to oust the coalition insurgents and return the President to the capital.[44] Still, the AFRC and RUF continued to hold vast swaths of Sierra Leonean territory. Indeed, the rebels had attacked Freetown again by January of the following year.[45] As had become commonplace in the fighting in Sierra Leone, each of these aforementioned groups were alleged to have committed widespread and systematic human rights abuses, including the CDF but most prevalently the RUF and AFRC.[46]

By May of 1999 the GoSL and the rebel groups agreed to the first cease-fire. This led to the (somewhat notorious) Lome Peace Agreement of July 1999, agreed upon by the GoSL and the RUF.[47] While the country was again in conflict and turmoil by May of 2000, November of that same year brought the Abuja Agreement and the end to the war – but significantly not to the violence.[48] It was not until January of 2001, when the United Nations Assistance Mission in Sierra Leone (UNAMSIL) had been deployed as a peacekeeping force throughout Sierra Leone, that former President Kabbah declared disarmament to be completed and the war over.[49]

Two distinct but related mechanisms were chosen to assist the nation in its effort to cope with the atrocities of the past and to transition it into a more stable and democratic future: (1) a Truth and Reconciliation Commission; and, (2) the Special Court for Sierra Leone.

---

[43] ECOMOG was the Nigerian-led ECOWAS armed monitoring group: see UK Foreign and Commonwealth Office Country Profile (note 37); see also Miraldi (note 5), 849-850.

[44] President Kabbah and his government had been in neighboring Ghana after seeking refuge there following the coup. See UK Foreign and Commonwealth Office Country Profile (note 37).

[45] Over 5,000 people were killed in these attacks and "most of the eastern suburbs of Freetown were destroyed. See UK Foreign and Commonwealth Office Country Profile (note 37).

[46] *Id*.

[47] "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lome Accord)", *Sierra Leone Web*, available at: www.sierra-leone.org, last accessed 5 April 2005. The Lome Agreement was "notorious" because it offered a full amnesty to the leaders of all Parties to the conflict and as such offered a potential barrier to prosecutions as the SCSL began indicting these very same individuals. The conflict was resolved when the SCSL established that it had jurisdiction to hear cases in Sierra Leone and essentially dismissed the amnesty's applicability to the Court. See Special Court for Sierra Leone, *Decision on Challenge to Jurisdiction: Lome Accord Amnesty*, 13 March 2004, available at www.sc-sl.org, last accessed 5 April 2004.

[48] ECOWAS brokered the agreement.

[49] See UK Foreign and Commonwealth Office Country Profile (note 37). The State of Emergency was lifted by March of that year.

II. The Truth Commission

The TRC was promulgated through the "Truth and Reconciliation Act of 2000" (the Act),[50] an official act of Government "in line with Article XXVI of the Lome Peace Agreement".[51] Although this was done under domestic law, it had heavy UN backing in the form of funding, personnel and technical assistance. According to the Act, the TRC was established for the general purpose of:

> creat[ing] an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[52]

More specifically, the Act states that the TRC was "to investigate and report on the causes, nature and extent of the violations and abuses…including their antecedents…context…and the role of both internal and external factors in the conflict."[53] Moreover, the TRC was enabled to "help restore the human dignity of the victims and promote reconciliation…."[54]

Through the fulfillment of these objectives, the TRC was envisaged by the GoSL and others as a mechanism by which "catharsis for constructive interchange between the victims and perpetrators" could take place.[55]

According to the Act, the TRC was to accomplish these goals through a system of evaluation of historical documents, interviewing of witnesses and victims, working with community and religious groups, the holding of public hearings; and it was to give special attention to the atrocious particulars of the conflict in Sierra Leone,

---

[50] The Government of Sierra Leone, "The Truth and Reconciliation Act of 2000", *Sierra Leone Web,* available at: www.sierra-leone.org, last accessed 4 April 2005.

[51] *Id*.

[52] *Id*., Part III – Functions of the Commission, para. 6(1).

[53] *Id*., paras. 6(2)(a), 6(2)(a)(1).

[54] *Id*., para. 6(2)(b).

[55] The Government of Sierra Leone, *Memorandum of Objects and Reasons (attached to the Bill)*, addendum to "The Truth and Reconciliation Act of 2000", *Sierra Leone Web,* available at: www.sierra-leone.org, last accessed 4 April 2005.

namely sexual abuses and the use of child soldiers.[56] The findings were to be summarized in a report outlining the Commission's various recommendations:

> The report shall…make recommendations concerning the reforms and other measures, whether legal, political, administrative or otherwise, needed to achieve the object of the Commission, namely the object of providing impartial historical record, preventing the repetition of the violations or abuses suffered, addressing impunity, responding to the needs of victims and promoting healing and reconciliation.[57]

The Act further stipulated that the GoSL was to "faithfully and timeously implement the recommendations of the report",[58] and the Commission "shall…organize its archives and records, as appropriate, for possible future reference".[59] The Report was finally released in October 2004,[60] and it remains to be seen whether the Government "faithfully and timeously" implements the recommendations in an effort to fulfill the TRC's stated objectives.

III. The Special Court for Sierra Leone (SCSL)

The SCSL represents the first hybrid court to try international crimes. That is, it is the first court to be created through an amalgam of international and national law and jurisdiction, it applies both international law and Sierra Leonean criminal law, and its judges are both foreign and national. This *sui generis* institution was organized and established through an agreement between the GoSL and the UN at the request of the GoSL (the Agreement),[61] with "[t]he Statute of the Special Court for Sierra Leone" (the Statute) appended to it, establishing the terms and procedure

---

[56] See generally, "The Truth and Reconciliation Act of 2000" (note 50), Part III – "Functions of the Commission".

[57] *Id*., Part V – "Report and Recommendations", para. 15(2).

[58] *Id*.. para. 17

[59] *Id*., para. 19.

[60] See *Sierra Leone Truth and Reconciliation Commission Final Report* (2004), available at: http://trcsierraleone.org/drwebsite/publish/index.shtml, last accessed 17 September 2007.

[61] The Government of Sierra Leone, "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone" ("Special Court Agreement") appending the Statute of the Special Court, signed in Freetown on 16 January 2002, *Sierra Leone Web,* available at: www.sierra-leone.org, last accessed 17 July 2007. Article 1 officially establishes the Court.

of the SCSL.[62] The Agreement was then officially established domestically through implementing legislation called "The Special Court Agreement (Ratification) Act 2002".[63]

The SCSL was mandated by the Ratification Act 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"[64], a now familiar phraseology to those who study international criminal tribunals.[65] Its mandate was a welcome contradiction to the approach taken in setting up the TRC in the Lome Agreement, whereby a full amnesty was granted without the possibility of domestic prosecutions or civil proceedings.[66]

The temporal limitations on the SCSL's jurisdiction differed from that of the TRC; namely, the SCSL is responsible for such aforesaid crimes committed "since 30 November 1996".[67] This temporal limitation was explicitly extended to include those that "threatened the establishment of and implementation of the peace process in Sierra Leone";[68] in other words, it explicitly included jurisdictional authority over the investigation of those individuals who re-started the conflict after the Lome Peace Accord or other cease-fire agreements. Significantly, the SCSL is also statutorily barred from prosecuting those offenders under the age of 15, and those between ages 15 and 18 are to have special consideration for "his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society…."[69] The thinking behind this special provision was that reintegration was acutely preferable for young offenders,

---

[62] The Government of Sierra Leone, "The Statute of the Special Court for Sierra Leone", *Sierra Leone Web*, available at: www.sierra-leone.org, last accessed 17 July 2007.

[63] [No. 9 of 2002], Sierra Leone, as amended, available at: www.sierra-leone.org/Laws/2002-9.pdf, last accessed 11 July 2007.

[64] *Id*., Article 1: "Competence of the Special Court," para. 1 (emphasis added).

[65] See e.g. the Rome Statute of the International Criminal Court, 1 July 2002, Art. 1, available at: http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, last accessed 17 April 2007.

[66] See Lome Accord (note 47).

[67] Statute of the SCSL (note 62). In particular, the following crimes were made a part of the SCSL's jurisdiction: crimes against humanity (Article 2); violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 3); other serious violations of international humanitarian law; and, crimes under Sierra Leonean law (Article 5).

[68] *Id*.

[69] *Id*., Article 7: Jurisdiction over persons of 15 years of age.

both to ensure their own growth as well as the growth of a society that could "lose" a generation due to the heavy involvement of child offenders in the conflict, and that it would be difficult to justify finding a child "most responsible" for the conflict as compared to a fully developed adult.[70]

IV. The Relationship between the SCSL and the TRC: Pre-planning and coordination

Let us now look at the pre-planning that was done in consideration of the simultaneous operational functioning of the SCSL and the TRC. Prior to the commencement of the institutions' operations, then Secretary-General of the UN, Kofi Annan, stated that "[c]are must be taken to ensure that the [SCSL] and the [TRC] will operate in a complementary and mutually supportive manner, fully respectful of their *distinct but related functions*".[71] However, this axiomatic policy statement did not translate into an effective cooperation strategy in practice, despite the best efforts of many of those monitoring the situation.[72]

A good deal of work was undertaken in an attempt to move toward a cooperation agreement between the TRC and the SCSL, or at least to develop principles for how they might interact contemporaneously.[73] However, neither the Statute of the SCSL nor the Agreement between the GoSL and the UN makes explicit mention of the TRC, although they were both conceived of and signed after the TRC Act.[74] One

[70] There were many statements that discouraged the Court from exercising its jurisdiction over children under 18. See Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95 (2001): "The members of the Council continue to believe it is extremely unlikely that juvenile offenders will in fact come before the Special Court and that *other institutions, such as the Truth and Reconciliation Commission*, are better suited to address cases involving juveniles." (Emphasis added.) See also, Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234 (2000); Stephanie Bald, *Searching for a Lost Childhood: Will the Special Court for Sierra Leone Find Justice for its Children?*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 537 (2002).

[71] Kofi Annan, Letter dated 12 January 2001 from the Secretary-General of the United Nations addressed to the President of the Security Council, UN Doc. S/2001/40 (2001) (emphasis added). See also Letter dated 22 December 2000 *id.*, 1; Letter dated 31 January 2001, *id.*; Eleventh report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2001/857 (2001), para. 66.

[72] See e.g. ICTJ Report (note 2); Human Rights Watch Report (note 2). Both offered thoughtful insights into how the relationship between the TRC and SCSL should be organized. See also, Situation of human rights in Sierra Leone, UN Doc. E/CN.4/2001/35 (2001), which details the proposal for a consultative process to arrange the relationship between the two institutions made by the Office of the High Commissioner for Human Rights and the United Nations Assistance Mission for Sierra Leone.

[73] William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIMINAL LAW FORUM 3, 25-41 (2004); UN Doc. E/CN.4/2002/3 (2002), especially para. 70.

[74] See Statute of SCSL (note 62) and "Special Court Agreement" (note 61).

potential exception is Article 15(5) of the Statute, which states: "In the prosecution of *juvenile offenders*, the Prosecution shall ensure that the child-rehabilitation program is not placed at risk and that, *where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability*."[75] Article 15(5) recognizes the various functions and benefits of TRCs and courts, and arguably foresees the TRC as providing the better forum in this situation to deal child offenders, an approach which should be commended. It also presciently recognizes the need for dealing with different offenders in different ways and allowing for the relevant mechanisms to take advantage of their respective comparative advantages. However, it does nothing to advance how the working relationship between the two mechanisms might function or how information will be shared and interaction will take place. As we shall see, these very considerations came to an unfortunate head before the TRC concluded its work.

Further, Article 21(2) of the Agreement between the SCSL and the UN does state that: "Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone Law shall comply with any direction specified in an order of the Special Court."[76] This language would seem on its surface to place the TRC within the authoritative jurisdiction of the SCSL. But an explication of whether the TRC was intended to be specifically subordinated to the SCSL, or how information flowing from the SCSL to the TRC was to be dealt with, was not offered.[77]

In contrast, all of Part IV of the Statute, Articles 15-19 – "Mutual Assistance between Sierra Leone and the Special Court" – contemplates various forms of interaction between the Government as an institution and the SCSL. Articles 20-22 in Part V further contemplate how "Orders of the Special Court" shall be viewed in domestic law. Clearly, the foresight and planning necessary to ensure the effective functioning and interaction between institutions is possible and was possible in the context.[78]

In seeming contradiction to Article 21(2), Article 7(3) of the TRC Act states that: "At the discretion of the Commission, any person shall be permitted to provide

---

[75] Statute of SCSL, *id*. (emphasis added).

[76] See "Special Court Agreement" (note 61), Article 21(2).

[77] William Schabas argues that such a conclusion would indeed be preposterous. See Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25(4) HUMAN RIGHTS QUARTERLY 1035, 1049 (2003).

[78] "Special Court Agreement" (note 61).

information to the Commission *on a confidential basis* and the Commission *shall not be compelled to disclose any information given to it in confidence*."[79] This clause does more than just grant authority to the Commission to conceal certain confidential information; it places a *duty* on it to do so.[80] The obvious question that then arises as a result of this contradiction is: in the event of conflict, which provision prevails when the SCSL orders the delivery of confidential documents from the TRC?

V. The Relationship between the SCSL and the TRC: the Sam Hinga Norman Decision

1. How the conflict arose between the SCSL and TRC

Precisely the aforesaid conflict arose before the SCSL, substantially as a result of a lack of agreement on how or whether the relationship between the two institutions should be pre-planned.[81] The source of this conflict was purportedly addressed, to a very limited degree, by Rule 5 of the SCSL's Practice Direction "on the procedure following a request by a State, *the TRC* or other legitimate authority to take a statement from a person in the custody of the Special Court."[82] This unilaterally promulgated, voluntary direction, which appropriated to the SCSL the powers of determination over the exchange of indictee testimony between itself and the TRC, was issued in September 2003 in response to the impending conflict between the TRC and the SCSL over Norman's testimony.[83] The Practice Direction stated that: "once it is proved that an indictee has given informed consent to questioning by the TRC, a joint request '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

[79] Truth and Reconciliation Act (note 50) (emphasis added).

[80] The repetition of the word "shall" is clearly mandatory in this context. See ICTJ Report (note 2), 5.

[81] For a discussion on the extensive attempts to pre-plan the relationship, and even conceive of a cooperation agreement, see Schabas (note 73), 25-41.

[82] See Special Court for Sierra Leone, *Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman*" Case No SCSL-2003-08-PT (Norman Appeal Decision), para. 1, available at: www.sc-sl.org, last accessed 17 September 2007 (emphasis added); "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", 9 September 2003, para. 5. A revised Direction was issued 4 October 2003 that responded in part to certain TRC concerns: "Revised 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", 4 October 2003. Both were adopted pursuant to Rule 33(D) of the Rules of Evidence and Procedure of the Special Court.

[83] The TRC was explicitly dissatisfied with the Direction: see Schabas (note 2), 1094; Neil Boister, *Failing to get to the Heart of the Matter in Sierra Leone? The Truth Commission is Denied Unrestricted Access to Chief Hinga Norman*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1100, 1102 (2004).

proceedings of the Special Court'."[84] The Practice Direction does not define what the relevant "interests of justice" are or what is to be considered with respect to the "integrity of the proceedings" of the SCSL. It does not consider the workings, procedures or requirements of the TRC, nor does it deal with other exchanges of information such as the SCSL's documents, witness testimony of non-indictees, or other relevant information that potentially could or should be passed along as between the institutions. Thus, when the SCSL confronted the conflict in the Norman case it did so essentially with only the guidance of the unilateral, voluntary and ambiguous Rule 5 of the Practice Direction.

Moreover, while the issue of how to navigate the relationship between truth commissions and courts has arisen in the national context in the past, the peculiar relationship between a *hybrid* court and a TRC operating simultaneously was novel and essentially unplanned for when the Norman case arose.[85] As such, it is the first international case to explicitly address some of the corollary complexities involved in this novel relationship.

As mentioned, Norman was the head of the GoSL's CDF, an entourage widely viewed as responsible for defending the Sierra Leonean civil society against the rebel groups[86] and for helping to bring about an end to the conflict; unfortunately, as is often the case in these situations, the CDF was widely culpable for human rights and humanitarian abuses – as were all parties to the conflict.[87] Thus the CDF, and its personification in the form of Norman, manifests one of the many complex controversies that often accompany trials in the wake of armed conflicts: should the prosecutor proceed against an individual who is seen in some circles of civil society as a hero and liberator while also seen by the law as potentially "most responsible" for some of the worst atrocities that took place during the conflict? For the purposes of the indictment, this conflict was resolved when a number of political factors came to weigh on the prosecution, such as the need to investigate all sides responsible for the atrocities so as not to seem politically biased in terms of its

---

[84] See Norman Appeal Decision (note 82), para. 1.

[85] See Schabas (note 2), 1082. Note that this is also happening in East Timor; the relationship between the former TRC and present domestic prosecutions is beginning to take shape in Peru, has already taken place in countries such as Chile and South Africa, and the likelihood of more examples presents itself in the transition of numerous other societies.

[86] See E. Pape, *Cleaning House*, LEGAL AFFAIRS 69 (2003); IRIN News, United Nations Office for the Coordination of Humanitarian Affairs, *Sierra Leone: Analysis – Election could turn on Kamajor war heroes/criminals,* (7 September 2007) available at: www.irinnews.org, last accessed 17 September 2007.

[87] See Schabas (note 2), 1085. See also, *Sierra Leone Truth and Reconciliation Commission Final Report* (note 60), vol. 2, chapter 2 (see e.g. *Findings against the CDF in respect of women,* paras. 508-510).

investigations and indictments. Thus, as leader of the CDF, Norman was a clear and visible suspect and as a result was indicted. In the circumstances, this was arguably the correct decision in terms of enforcing accountability, overcoming impunity and addressing the perception of one-sided prosecutions.[88] In terms of its long-term effects on leaders attempting to defend their society, that remains to be seen; but it would be difficult to defend the proposition that the indictment should not have been served because future defense leaders might, as a result, be loathe to do their jobs in defense of nations for fear of future international indictment. This justification would presume that to do their jobs effectively requires that international humanitarian law be ignored. In other words, so long as civil defense can be effectively accomplished without breaching fundamental human rights and humanitarian norms and laws, then this argument is morally and legally untenable.

In any event, Norman was indeed indicted in Sierra Leone.[89] This indictment corresponded with the TRC wrapping up its work in December of 2003. As such, the TRC wished at the time to interview Norman before finishing its work (he was clearly one of the primary figures in the conflict and could speak to much of the history and many of the claims made to the TRC). It therefore filed with the SCSL a request to take a statement from him.[90] Norman, somewhat surprisingly, was in favor of this proposition.[91] Indeed, he even initiated the process to try to ensure that it happened.[92] So, the SCSL was forced to rule on whether Norman could be handed over to the TRC for the purposes of statement taking while his trial was proceeding.[93]

---

[88] Commissioner Schabas has noted that the TRC found that the atrocities committed by the CDF "were on a par with the worst the RUF had to offer." See Schabas (note 73), 12.

[89] See Special Court for Sierra Leone, *The Consolidated Indictment – Samuel Hinga Norman*, Case No. SCSL-03-14-I.

[90] Truth and Reconciliation Commission for Sierra Leone, "Request to conduct a public hearing with Chief Samuel Hinga Norman," filed on 9 October 2003 with the Special Court for Sierra Leone pursuant to Rule 33(D) of the "Rules of Procedure and Evidence of the Special Court".

[91] Agreement in writing of Samuel Hinga Norman signed by his Counsel on 14 October 2003. See Special Court for Sierra Leone, *Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman*, Case No. SCSL-2003-08-PT (Norman Trial Chamber Decision), available at: www.sc-sl.org.

[92] Norman Trial Chamber Decision, *Id.*, para. 16.

[93] The preliminary judgment was made by Justice Bankole Thompson. See *id.*, paras. 6 and 8.

2. The Trial Chamber decision

At the Trial Chamber, Judge Bankole Thompson issued the first ruling on the TRC's request.[94] He determined that he was either: "(i) to approve the Request [for a TRC interview with Norman], or (ii) to refuse it if "*satisfied that a refusal [was] necessary in the interests of justice and to maintain the integrity of the proceedings of the Special Court….*"[95] He went with the latter option.[96]

Judge Thompson came to his decision first on the ground that to allow Norman to testify before the TRC would bring about a fundamental clash with and have "grave ramifications for, the cardinal principle of criminal law that a person accused of [a] crime is presumed innocent until convicted."[97] He then expounded on the importance of the presumption of innocence, a point with which it is hard to argue. But he did not explain how voluntary testimony before an independent, non-inquisitorial body would violate this principle.

He based his reasoning on a concern with the TRC investigating "the centrality of [Norman's] role in the conflict".[98] This is confirmed by reading his second concern, where he pointed out that "there are three categories of persons that may statutorily testify before the Commission", including "perpetrators," "victims" and "interested parties," and then determined that Norman was invited by the TRC "to testify as a '*perpetrator of abuses and violations*'."[99] He supported this conclusion with "two assertions upon which the Request [was] predicated".[100] The "first [was] that the Accused did play a central role in the conflict; the second [was] that the Commission perceive[d] that the Accused played a central role in the conflict…."[101] In Justice Thompson's view, it was thus disingenuous to view Norman as having been invited to testify before the TRC as either a "victim" or an "interested

---

[94] *Id.*

[95] *Id.*, para. 8 (emphasis added).

[96] The term erroneous is meant in both the subjective sense and objective sense. The decision was erroneous in the subjective sense for reasons that are laid-out below. The reasoning is objectively erroneous in the sense that his decision was, strictly speaking, overturned on appeal.

[97] Norman Trial Chamber Decision (note 91), para. 10 (emphasis added).

[98] *Id.*, para. 11.

[99] *Id.*, (emphasis added).

[100] *Id.*, para. 12.

[101] *Id.*

party".[102] Moreover, Judge Thompson found that the word "perpetrator…cannot be properly applied to an indictee who has pleaded not guilty to each of the seven (7) counts", because it implied (at least before the TRC), that the individual had indeed committed crimes during the conflict.[103] Thus, the assertion that Norman was "central" to the conflict was "inconsistent with the presumption of innocence."[104] Judge Thompson found that any institution that presumptively characterized an individual as a perpetrator offended the notion that an indictee should be presumed innocent by reversing his burden of proof before that institution, thereby affecting subsequent determinations by other institutions.[105] He also stated that this reversal of burden offends the "privilege against self-incrimination" and "the right to remain silent".[106]

However, centrality and criminal guilt in and of themselves must certainly mean two different things. Centrality does not admit the involvement in the commission of crimes, and more fundamentally it does not admit for the presumption of *guilt* in crimes that were committed. Moreover, while the Judge did not see it as established in court as such, it is impossible to see Norman as anything but "central" to the conflict as he readily admitted to having been the CDF leader. There is simply no question that the CDF existed or that he was the leader.[107] In this context, what is more striking is that Judge Thompson himself presumed that someone who was "central" to the conflict could only be a "perpetrator" and not a "victim", or, more persuasively, an "interested party". Given the large amount of evidence submitted to the TRC by colleagues and enemies of Norman, and given his indisputable involvement in situations that fall within the jurisdiction of the TRC, it would have been perfectly reasonable for the TRC to have viewed Norman as an "interested party" who wished to give his side of the story, or at least as someone that had a story that, given his prominence, needed to be told in order to fulfill the TRC's mission to uncover the history and truth of the conflict. Viewed in this light, the TRC's presumption with respect to his involvement in the conflict would not have amounted to a violation of his presumption of innocence; and, the presumption of involvement in the conflict did not itself speak to his criminal guilt weighed on the relevant beyond a reasonable doubt standard of proof that only the SCSL is occupied with in this situation.

---

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*, para. 13.

[106] *Id.*, para. 15.

[107] He was after all arrested in his Ministerial Office as a member of the Cabinet (Schabas (note 2), 1092).

Furthermore, were the Accused to voluntarily testify before the TRC, it is difficult to see how this would amount to a violation of his right to be presumed innocent (or to remain silent or not self-incriminate). The right to remain silent is a right as against external coercion and one that an individual should be able to disregard or waive voluntarily at any point with proper legal advice.[108] But even the assertion that Norman would have had to waive his right to innocence in order to testify before the TRC presumes that an antecedent presumption of guilt as to the complicity of an individual for crimes (in the abstract), and as adjudged by a non-judicial body such as the TRC, offends the presumption of innocence (for specific crimes) before a separate judicial body, such as the SCSL. Viewed in this light, the result of Judge Thompson's decision is to inadvertently bring into question the independence and impartiality of the SCSL.[109] Without further evidence beyond what was present here, such as facts evincing the coercion of the Accused or a legal requirement that the Accused testify against himself at the TRC, this disposition should not be followed in the future.

The second consideration driving Judge Thompson's decision was that:

> there are two competing and conflicting societal interests involved….One is the…interest that all persons accused of criminal conduct are entitled to a fair and public trial *so that…the guilty may be punished and the innocent vindicated*….The other is the TRC's institutional role in developing and establishing the historical record of the…conflict in Sierra Leone….[110]

Judge Thompson stated that the "consistent and accepted judicial trend…is to resolve the conflict in favor of…the accused person's right to a fair and public

---

[108] This is in contrast to Judge Thompson who believes that the Accused should *not* have "a license to incriminate himself elsewhere." See Norman Trial Chamber Decision (note 91), para. 14. Such a restriction on free speech would seem very hard to justify without further explanation. If someone in a criminal trial wishes to admit guilt outside of the trial and has been instructed by his counsel to do so then it is for him to bear the consequences. But again this is not the situation here as the Accused would not necessarily even be admitting guilt, at least not guilt in the criminal sense.

[109] Perhaps it is better to ask why an accused would waive his right to silence than to ask if he can do so? In Norman's case, his legal representative is not to blame: his defense counsel had warned him against testifying before the TRC while he was indicted before the SCSL. See Letter of 17 June 2003 from Mr. J.B. Jenkins-Johnston, legal representative of Chief Hinga Norman, to the Registrar of the Special Court, found in Schabas (note 73), 43.

[110] Norman Trial Chamber Decision (note 91), para. 14 (emphasis added).

trial."[111] But, as discussed above, it is not clear that yielding to the TRC would jeopardize the rights of the Accused.[112] Indeed, this statement presumed *ex ante* that a conflict existed between the societal interests favoring the two institutions. Such a conflict does not necessarily exist. Reflecting on the purposes of both trials and TRCs as discussed in this paper, there is ample evidence, at least in theory, of overlap between the interests and objectives of both institutions.[113] To the extent that they differ there is no necessary conflict between recounting history and indicting specific criminals from this history. Ultimately, both institutions seek to achieve the broader goals of justice, reconciliation and assisting conflict victims to move on, both individually and as a nation. The starting point of the analysis should be a presumption of non-conflict between the interests served by a TRC and those served by a court. To support any deviation from this initial presumption more evidence than was proffered in support of the presumption of innocence argument should be garnered.

In any event, it is not ideal that a representative of one of the two "competing" institutions be the ultimate arbiter of which interests receive the greatest weight. At the very least the Norman trial judgment evinces the need for pre-planning the exchange of indictees and other witnesses, documents and other information in the development stage of the TRC and court negotiations so that a competition does not result between the institutions in the pursuance of their objectives. Any pre-planning should result in a document that is more formal than the SCSL's Practice Directive and should be the result of negotiations between the court and the TRC. Consideration should be made for how the *voluntary* exchange of documents, that might be vital either to a case or to the TRC, but which in contrast to the Norman case are not requested by the other institution (maybe because of lack of knowledge as to their contents or existence), might take place between the two institutions. Further, it would seem that some assurance should have been made that, in the result of a conflict, an appeal could be made to a neutral party with a sufficient understanding of the objectives and procedures of both institutions, who would then determine how, if at all, the sharing of witnesses and documents would take place.

---

[111] *Id.*.

[112] As judge Thompson asserts at *id.*.

[113] TRC Commissioner William Schabas comes to this very same conclusion. He states that the experience of Sierra Leone: "demonstrated the feasibility of the simultaneous operation of an international court and a truth commission. The Sierra Leone experience may help us to *understand that post-conflict justice requires a sometimes complex mix of therapies,* rather than a unique choice of a single approach from a menu of alternatives." See Schabas (note 2), 1088 (emphasis added). See also Robinson (note 20), 484.

3. The Appeals Chamber decision

In this case, no such appeal arrangements had been made and, as such, the recourse for the Commission and Norman was a joint application for appeal to the President of the Appeals Chamber, Justice Geoffrey Robertson.[114] The essence of the appeal was that Justice Thompson had failed to recognize that the SCSL and TRC performed distinct roles in advancing the same ultimate goal: a peaceful transition.[115] Significantly, the TRC also pled for: Norman's freedom of expression, which in this case could be exercised through testimony before the TRC (a non-judicial body); the victims' right to know the truth;[116] and, the inter-related public interest in ensuring that the TRC was able to effectively and completely, to the best of its ability, fulfill its mandate of creating an impartial historical record.[117]
Justice Robertson considered his resolution of these issues "novel" and of great pertinence to other post-conflict situations.[118] It was he that first explicitly made reference to the potential for lessons learned from this then-unique relationship. According to the SCSL Press Office, in coming to his decision "Justice Robertson emphasized that there was no conflict between the Court and the TRC and that they should respect each other's separate but complementary role."[119] This would seem to represent a positive advance from the presumptive reasoning of the Trial Chamber.

---

[114] See Norman Appeal Decision (note 82).

[115] In other words, Justice Thompson had treated the TRC as if it was a court and subsequently held it to a similar standard of practice and evidence. This was most obvious in his characterization of the TRC as a body capable of placing the indictee in the "legal category of perpetrator." See Boister (note 83), 1104.

[116] The genesis of such a right stems from the Inter-American Human Rights system. See *Trujillo Oroza Reparations*, Inter-Am Ct. H.R. (Ser. C) No. 92, para. 115 (2002); *Ellacuria v. El Salvador,* Case 10.488, Inter-Am Court of Human Rights OEA/serL/V/II.106 (1999); *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C), No. 4 (1988), especially paras. 174, 181; *Bamaca Velásquez v. Guatemala*, Petition No 11.129/1993, Judgment of 25 November 2000, especially para. 41; Report of the Inter-American Commission on Human Rights in *Monesnor Oscar Arnulfo Romero and Galdamez v. El Salvador,* Report No. 37/00 of 13 April 2000. See also the Committee against Torture, which speaks of the right of victims to an impartial investigation into torture on its territory: e.g. *M'Barek v. Tunisia*, Communication No. 60/1996, 12, U.N. Doc. CAT/C/23/D/60/1996 (2000). See also, FREEMAN (note 3), 6-9.

[117] See, generally, Boister (note 83), 1104-05.

[118] Norman Appeal Decision (note 82), para. 2.

[119] Special Court for Sierra Leone, Press and Public Affairs Office Press Release, "Sam Hinga Norman may Testify," Freetown, 28 November 2003, available at: www.sc-sl.org, last accessed 26 September 2007.

However, Justice Robertson's decision deliberately did not address the merits of the presumptive reasoning as posited by the Trial Chamber, nor did it address the substance of that ruling more generally.[120] As such, the lessons learned from the trial experience as outlined in this paper remain particularly salient as the law, and presumably the underlying assumptions of Judge Thompson, have yet to be comprehensively addressed by a court or confronted at law or theory from a paradigmatic standpoint.

Justice Robertson construed the objectives and duties of the two institutions in very narrow, strict terms. By returning to "first principles" he asserted that the TRC was useful for truth and reconciliation and the SCSL was created to determine individual criminal responsibility; he found that the SCSL "offer[ed] the most effective remedy."[121] He also found that the TRC and SCSL have "separate and *severable* objectives" rather than simply "distinct roles" as the TRC asserted.[122] This would appear to implicate a potential conflict between the *objectives* of the institutions, a position seemingly contrary to his stated opinion; and it effectively returns us to a foundational premise not too far from that of Judge Thompson.

In the end, Justice Robertson did accept the application in part. The practical result of the appeal decision was as follows:

1. Norman could testify before the Commission but such testimony was to be presented through a sworn affidavit. The hearing could not be public.[123]
2. This could be supplemented by an *in camera* meeting with the Commissioners. Unlike other testimony, it was not to be subsequently or simultaneously broadcast.[124]

In coming to his determination, Justice Robertson began by presuming that the SCSL was given "primacy" over the TRC by virtue of Article 8 of its Statute, which gives the SCSL primacy over national courts and "by implication" over other

---

[120] Justice Robertson stated that: "It is not normally appropriate for one judge to review another's exercise of discretion, so I have not treated this appeal as a judicial review…or strictly as an appeal from his decision, but rather as a fresh hearing in a context where as President, I have the flexibility to explore alternative solutions". See Norman Appeal Decision (note 82), para. 3, and also paras. 9-10.

[121] *Id.*, para. 33.

[122] *Id.*

[123] *Id.*, para. 39.

[124] *Id.*, para. 41.

national bodies including the TRC.[125] This is a contentious presumption and one that preferably should be spelled out in future relationships between two such institutions operating simultaneously. In this case, there is no indication that a TRC is precisely similar to, or should be treated as a national court, and thus subordinated as such – Rule 8 only refers to "national courts" and not to truth finding bodies.[126] The relationship, given the institutions' distinct *and* overlapping objectives, should rather be reciprocal to the fullest extent possible. In the case of ambiguity it should again be noted that it would at least be preferable to allow an independent adjudicator to make such a decision rather than leaving it up to the SCSL to determine "by implication" that it had primacy over an equally valid mechanism used, as the SCSL is, to assist society in its post-conflict transition. The favoring of the SCSL's position over that of the TRC offers further support for the contention that it was problematic to have vested the SCSL with the sole authority to adjudicate such a dispute between it and the TRC. For example, in the same paragraph of the judgment that gave primacy to the SCSL (see above), Judge Robertson finds nothing in the SCSL's Agreement or Statute "which required the Court to *compromise* its justice mission."[127] However, the same can be said for the TRC Agreement, which contemplated the existence of an *equally important* institution for the Sierra Leonean transition but did not contemplate another institution compromising its mission. In any event, it is unclear that compromising its position *vis-à-vis* the TRC would lead to a compromise of the justice mission of the SCSL.

Justice Robertson also perceived the actual functioning of the TRC process to have been a "spectacle" in comparison to the SCSL's proceedings.[128] Most telling is his statement that: "The *event* will have the *appearance of a trial,* at least the *appearance of a sort of trial familiar from centuries past*, although the first day of uninterrupted testimony may resemble more *a very long party political broadcast*."[129] In not so subtle terms, he disparages the TRC process as an antiquated trial the equivalent in some senses to a "very long" and partisan political, *i.e.* non-legal, spectacle. Such

---

[125] *Id.*, para. 4.

[126] See Abdul Tejan-Cole, *The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission,* 6 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 139, 151 (2003), who also argues that Justice Robertson's "primacy" argument is incorrect. See also, Schabas (note 77), 1058.

[127] Norman Appeal Decision (note 82), para. 4.

[128] *Id.*, para. 30.

[129] *Id.*, (emphasis added). See also, *id.*, para. 31 where Justice Robertson states that the Nuremburg Tribunal would not have allowed defendants to "participate in such a *spectacle*" (emphasis added).

perceptions are bound to influence the decision of the judge and prejudice the position of the TRC. Again, this militates in favor of an independent adjudicator for such disputes who has a working knowledge of both institutions and their objectives and manifest advantages. Moreover, it would appear that before TRC and court staff begin work on their contemporaneous investigations, if they are to benefit from a reciprocal and mutually advantageous relationship, some educational or institutional sensitization program, akin to Bar association courses in common law countries, may be necessary. Such programs can ensure effective and efficient interaction and mutual understanding of the two institutions' objectives and procedures. If a TRC is chosen by society to function for its purported benefit, it must be respected as a viable and legitimate institution to accomplish *each* of its goals, at least in theory and without explicit wording to the contrary.

4. The end result: The case for pre-planning and working cooperatively

As a result of the decision, Norman refused to cooperate with the TRC and the TRC completed its work without ever interviewing this central figure.[130] This was an unfortunate end to the relationship between the TRC and the SCSL that, according to Commissioner William Schabas, had "otherwise been a cordial and uneventful [one]."[131] This is to say that too much should not be read into the dispute. It was one event and does not reveal a complete intractability in the cooperative model.

Where problems did arise, the Norman decision evinced that they are likely to be a practical result of the *decision* not to plan for the exigencies of such a situation, as opposed to a theoretically inevitable result.[132] The Norman dispute arose precisely because there was no strict procedure for the exchange of information between the institutions or the handling of disputes when such exchanges were requested. To this end, it cannot be overstated that the roles of the two institutions are complementary in part because they are formally separate in functional practice yet overlapping in their higher objectives and, at least to an extent, also in jurisdiction.[133] In other words, they function as two separate entities working as a

[130] Schabas (note 2), 1096.

[131] *Id.*, 1098.

[132] After the decision the Court issued a statement saying the appeal was allowed: see SCSL Press Release (note 119). Meanwhile, the TRC issued a statement saying that the rule had "dealt a serious blow to the cause of truth and reconciliation in Sierra Leone…." (see Truth and Reconciliation Commission, Press Release, Freetown, Sierra Leone, 1 December 2003, available at: www.sc-sl.org, last accessed 20 April 2005). See, generally, Boister (note 83), 1108.

[133] Marissa Miraldi argues that while they have the same ultimate purpose, they are able to reach different people as a result of their separate jurisdictions. As a result, there is a need to work together to complete the picture. See Miraldi (note 5), 855. See also Tejan-Cole (note 126), 150-151.

complementary dyad of transitional justice for the benefit of the post-conflict society. Their purposes of being often directly overlap, as has already been addressed in the theory section of this paper.[134]

Moreover, while the two institutions may collect information or do their day-to-day work separately, it may be necessary or at least beneficial to share such information *because* they are not separate in the content of their investigations: they are in essence investigating the same events only on a different scale, one focusing primarily on individual complicity for crimes committed and the other focusing, in general, on a broader enquiry into the conflict and its constituent causes. The salient point here is that future decision-makers in such a situation must not conflate "separate but complementary" with "competitive rivals but complementary" as Judge Robertson seems to have done.[135] The question then should not be one of competition and win-lose but rather of how to reconcile the concerns of both institutions in fulfilling their mandates to best achieve the higher objectives of both, which is to say a peaceful transition, justice and movement beyond the past and toward a brighter future. Elizabeth Evenson calls this a "totality-of-the-circumstances approach," and explains that it "allows the specific characteristics of each transitioning society to shape coordination, while recognizing the common needs of justice, accountability, and reconciliation to which transitional justice responds."[136]

Neither institution can best achieve its mandate if the relationship is not structured to optimize this objective, even if certain lesser objectives of each institution are sacrificed in the process (to minimal degrees). There may be a conflict between the assertions of the institutions as to how to best accomplish certain goals, but this should not amount to a fundamental conflict that must necessarily lead to a victory of one at the expense of the other. While it may seem this way in some situations, such a position would on the whole imply no room for compromise, which is simply not the case.

The end decision in this case was to allow the TRC to interview Norman (which it did not do), and to disabuse the accused of the right to testify before a live broadcast. Care should be taken here as, especially in a society like Sierra Leone with a high illiteracy rate and low courtroom capacity, this affects the number of people that can hear or have access to the evidence – and by extension the history.

---

[134] Tejan-Cole, *id.*, 150, provides further support for such a conclusion.

[135] The "Special Court Task Force" made a special plea not to "pitch…the two institutions as rivals". See Special Court Task Force Briefing Paper (note 2), 8, para. 6.1.

[136] Evenson (note 6), 730.

The benefit of such access both to the accused and to the reconciliation function of the TRC should not be overlooked. As Priscilla Hayner has noted, the effectiveness of a TRC is often largely dependent on its ability to make such testimony accessible to the victims of the conflict.[137] Care would thus have to be taken to strike the appropriate balance in such a situation considering the legitimate concerns of both institutions.

A final point bears mentioning. Judge Robertson expressed a legitimate concern that the TRC could come to a determination on the individual responsibility of an accused which contradicts the court's judgment in that individual's case.[138] From the time a nation begins thinking about proceeding with both a TRC and trials, this should represent a fear because, while based on a theoretically different standard of proof, a conflicting position between a TRC and court would likely nonetheless obfuscate the history and the guilt of the accused in the mind of the relevant society. One solution offered by Justice Thompson might be to release a "preliminary" TRC Report that is subsequently updated when the trial process is completed. At least in the case of Sierra Leone, and likely in most situations, such a solution was practically infeasible as it would involve the indefinite extension of the Commission's mandate (and its employees' jobs), and of the truth until such a time as the (often seemingly interminable) court processes wrap-up. Perhaps a better approach would be to ensure that the public outreach divisions of both institutions are clear as to the burden of proof used by both a court and truth commission.

This is all to say that while the contemporaneous functioning of courts and TRCs can be theoretically compelling as a response to conflict or mass abuse, it is also true that elements of the relationship between two such institutions should be pre-coordinated in a nuanced and sometimes binding way in order to avoid the pratfalls that the Norman decisions evinced. In this case, while there was a good deal of discussion, consultation and debate about how the two institutions might work in parallel,[139] in practice the result was of limited assistance to either institution. This lack of pre-planning between the SCSL and the TRC was actually largely the result of a decision taken by individuals, and was not reflective of a lack of sophisticated analyses that might be used to guide the relationship of the institutions operating in parallel.[140] This is a mistake that the ICC and future hybrid courts must not repeat. As the TRC's Final Report states:

---

[137] See e.g. HAYNER, UNSPEAKABLE TRUTHS (note 5).

[138] Norman Appeal Decision (note 82), para. 15.

[139] Schabas (note 73), 25-41.

[140] *Id.*, 29.

> 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. 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.[141]

The Norman decisions clearly demonstrate that this is an understatement: the TRC and SCSL absolutely should have given more consideration to a working arrangement between the two institutions.

D. Theoretical Dilemmas and Recommendations: The ICC, hybrid tribunals and TRCs

Going beyond the merits of the judicial reasoning itself and the specific verdict on indictee testimony before TRCs, two corollary theoretical debates are directly manifested by the Norman case: (1) how to deal with confidential testimony flowing from a TRC to a court, and with information sharing between the institutions more broadly;[142] and, (2) dealing with public testimony before a TRC and its effect on the trial process and the community at large. This section will focus primarily on these two debates.

From the Norman context it was clear even before he decided not to testify that witness participation in the TRC process would be dependant on how confidential information was dealt with by the SCSL.[143] Clearly a court has an interest in bringing all evidence forward with respect to indictees in order to best serve its purpose. Yet a TRC may find it difficult to procure witness testimony – especially from those indicted by a court – if it cannot guarantee the confidentiality of this testimony. At least in this case, the TRC was dependent on confidential testimony

---

[141] Sierra Leone Truth and Reconciliation Commission Final Report (note 60), vol. 3b, chapter 6, para. 46. See also vol. 2, chapter 2, paras. 588-90.

[142] For a comprehensive review of how to deal with the exchange of testimony more broadly see Human Rights Watch Report (note 2); ICTJ Report (note 2).

[143] Post-Conflict Reintegration Initiative for Development and Empowerment & the International Centre for Transitional Justice, *Ex-Combatant views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone* 19 (12 September 2002) available at: http://www.ictj.org/images/content/0/9/090.pdf, last accessed 11 July 2007.

to ensure its success. The TRC would therefore prefer to view such information as similar to that given by a client to his lawyer, which is to say privileged.[144]

In support of this position, Professor Neil Boister stated after the Norman dispute that "had confidentiality been granted, there would probably have been no call for a public hearing and no possibility of self-incrimination to justify the denial of that public hearing."[145] In other words, ensuring the confidentiality of witness testimony would also overcome the dispute between the institutions as to whether the testimony should be made publicly, all else being equal.

It is recommended that survey research on the country context is conducted before a decision is made on the confidentiality of testimony before a TRC in order to determine whether such a guarantee is needed to ensure the success of the TRC. Professor Boister's conclusion stems from the particular context in Sierra Leone, and is thus likely to hold true for some, but not all, accused in other contexts as well. But generally, while the resolution of this issue involves a balancing of interests, it would seem that in most cases the balance will favor the privileging of confidential testimony before TRCs in that the conflict is between what the TRC *needs* in order to get witness statements (*i.e.* it needs confidentiality agreements in some cases to be a success), and what the court *would like* to in order to improve its external information-gathering networks. Because courts in such situations will have an interest in the success of the TRC, and in post-conflict justice more generally, this should be an acceptable proposition in most circumstances.

Specifically with respect to the ICC[146] and the flow of information between itself and a TRC, the Rome Statute of the ICC states that: "States Parties shall…comply with requests by the Court to provide…assistance in relation to investigations and prosecutions", including but not limited to "[t]he provision of records and documents, including official records and documents."[147] Note that this is limited to "States Parties" and, depending on the structure of any particular TRC, the application of this provision may be ambiguous. Should this provision be found to apply, however, it is arguably the case that documents transmitted by virtue of a request by the ICC can nevertheless be deemed confidential or privileged by virtue of Article 87(4) of the Rome Statute. This Article states that:

---

[144] See Boister (note 83), 1109. See also HAYNER (note 3), 209.

[145] See Boister, *id.*, 1109-1110.

[146] For arguments supporting the ICC's cooperation with TRCs, see generally, Robinson (note 20), 484.

[147] Rome Statute (note 65), Article 93(i).

> In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.[148]

In this case, it would have to be found that protecting the confidentiality of testimony would "ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families." Note that Article 87(4) does not pertain to indictees, so it might be difficult to apply it in a context like Norman's.

In any event, the Rules of Procedure and Evidence of the ICC could (and should) buttress the above-mentioned position that TRC testimony can (and must), in some circumstances, be deemed confidential.[149] The ICC Rules provide that: "communications made in the context of a class of professional *and other* confidential relationships shall be regarded as privileged", so long as they are made "in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure."[150]

The ambiguity and potential for conflict is palpable in this situation. Is the relationship between a TRC and certain witnesses confidential with respect to the ICC and can such testimony ever produce a reasonable expectation of privacy? If so, in what circumstances? While this latter question may have to be answered on a case-by-case basis, it is clear that the ICC is not immune from the type of dispute that arose in the Norman case. In general, it follows from the discussion that where a witness before a TRC views his or her testimony as private, or requires privacy in order to offer testimony, for the sake of ensuring the effectiveness of a TRC his or her testimony should indeed be considered privileged and confidential.

---

[148] *Id.*

[149] See Boister (note 83), 1109-1110.

[150] ICC Rules of Procedure and Evidence, Rule 73(2), UN Doc. PC NICC/2000/1.Add.1 (2000). Note also the *UN Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,* UN doc. E/CN.4/Sub.2/199/20/Rev.1, Annex II. (1997), which "state that evidence resulting from TRC investigations should be safeguarded for later use by the courts", but "it is not clear that this includes evidence given *in confidence*." See Boister (note 83), 1109 (emphasis added).

However, this calculus must change with respect to *exculpatory* evidence. In this situation, it is not just about handing over confidential information so the court has a better chance of a successful prosecution, but about the innocence of an individual, which is at stake. The fundamental right to liberty, and potentially to life, is at risk of being undermined by not coming forward with testimony in this context, which is not the case with respect to inculpatory evidence. Moreover, changing the calculus for exculpatory evidence is unlikely to worry a Commissioner of a TRC, as noted by a former prosecutor at the SCSL, Abdul Tejan-Cole, because it is unlikely that a perpetrator will "be afraid to make statements if he is aware that the only circumstance in which his statement will be used is to secure his own acquittal or the acquittal of another [alleged] perpetrator."[151] However, this does not mean that said information should be used directly as evidence in court. This could undermine the supposed independence of the institutions and cause the TRC to be perceived as the investigative wing of the court.[152] Instead, the aim here should be to bring to light before the court the existence of exculpatory evidence and allow the defense to pursue such information at his or her discretion, provided of course that specific defense requests are made for specific exculpatory evidence (in other words, fishing expeditions by defense counsel should not be permitted).[153]

Where there is no issue of confidentiality, the two institutions should be permitted to share information freely – at their own discretion.[154] The Sierra Leone context evinces that, for the most part, neither institution will search for, nor need, information from the other; thus, information-sharing will not likely be a problem in day-to-day operations. Confrontations over evidence will be the rare case and again, when they do occur, should be resolved by appeal to an independent body such as the High Court of the country or a pre-determined mediator with an understanding of both institutions.[155] Of course, the level and method of sharing should again be pre-planned by each institution in collaboration with one another, at least through operational guidelines that offer considerations regarding when to share such information. Account must again be taken of the country context so

---

[151] Tejan-Cole (note 126), 155.

[152] In the Sierra Leone context there was indeed confusion as to the respective roles of the two institutions as it was. See Schabas (note 2), 1099.

[153] *Id*. Further, the standards of evidence before both bodies are different thereby making it practically impossible for the defense to lead certain TRC 'evidence'.

[154] See Human Rights Watch (note 2).

[155] Boister (note 83), 1114.

that, if sharing information would cause a disruptive conflation of the two institutions' mechanisms and procedures in the mind of the public, then such a rule would not be followed or at least would be restricted.[156]

The second broad issue illuminated by the Norman case, touched on in the above discussion of the Norman trial and appellate decisions, concerns the openness of the TRC hearing itself with respect to the testimony of indicted witnesses. Norman was ultimately not permitted to give his testimony publicly. Legitimate concerns were raised in Justice Robertson's decision both about the rights of co-defendants, who were otherwise not asked or able to testify at the TRC, being adversely affected by the Accused's testimony, and that Norman's testimony would endanger potential witnesses at the SCSL or even the political stability in the country.[157] Such concerns may be valid and should be expressly considered in future situations where the exchange of an indictee's testimony is at issue between the court and TRC. However, unlike the Norman appeal judgment, in the future the reasonable risk of witness intimidation or politically motivated uprising caused by the accused's testimony as specifically given at a TRC should be evidenced through research rather than through judicial surmisals. At least some probative circumstantial evidence should be brought to bear on the case to support such a claim. Again, any such consideration should be weighed against the defendant's right to freedom of expression[158] and the aforementioned argument that, especially in countries with high illiteracy rates, the public testimony of the accused is central to the effective completion of the TRC mandate in terms of spreading the truth. Indeed, more than one prominent academic has said that "the TRC process implies a right…to hear the truth."[159] Presumably if reconciliation follows from knowing the truth, then the TRC's ability to promote reconciliation is also inter-linked with its ability to make certain testimonials publicly known.

The imminence and legitimacy of the threat of an uprising or political instability will have to be weighed against these other policy concerns in determining the best path forward for post-conflict justice.[160] Of course, at least the country context,

---

[156] This was a continuing concern in Sierra Leone where the distinction between the two institutions was often misunderstood.

[157] Norman Appeal Decision (note 82), para. 41.

[158] Boister (note 83), 1110.

[159] See *id*. See also, HAYNER, UNSPEAKABLE TRUTHS (note 5). See further, the numerous "right to truth" cases, *supra* (note 116).

[160] This is supported by domestic criminal law systems as well where the "salutary effects" of testimonial bans are weighed against the "deleterious effects to the free expression." See e.g. *Dagenais v. Canadian*

including its literacy rate, the extent to which the trials are or will be followed by the public, the local importance of public testimony, the likelihood of political reprisals and the existing security situation will be central to this decision.
Further, these aforesaid risks may be equally relevant with respect to trial testimony. So, the increased risk that the publication of TRC testimony may create for the public and to specific witnesses would have to be demonstrated with either reliable evidence or at least an anecdotal correlation (strict causality in such a situation would be very hard if not impossible to prove) between the testimony and the possibility of such a danger arising.

Other more discrete and absolute recommendations flow from the case-study as well. Given the importance of pre-planning that has been stressed in this paper, the ICC Prosecutor should have a mechanism in place to assess the initiatives and methods of all TRCs active in "situations" (i.e. countries being investigated) that are referred to the ICC for the purposes of potential future indictments.[161] This assessment could lead to an internal report on how the two institutions might support one another and begin the necessary relationship for coordinating efforts in the particular country context.

Moreover, much like the SCSL Practice Direction adverted to, an accused indicted by the ICC who is also testifying before a TRC should be, in most cases, afforded a lawyer to provide advice about the processes. Alternatively, this right should only be waived when it is done freely and by an individual of conscious and sound mind. The accused in such a situation must be reasonably informed that: he is not obligated to answer any question asked of him by the TRC; his answers could be used against him in court; and, he may have a lawyer present. Or, he may be offered some alternative yet similar assistance, which guarantees the same protections with respect to the right to silence, to be informed, and to have counsel. Such protections must be offered from the outset of his involvement with the TRC.[162]

Although coordinating and providing these services will have additional costs, the costs of *not* prospectively planning for each of the contingencies in the TRC-court relationship could prove to be much more onerous. If the ultimate goal of these post-conflict institutions is peace, justice and reconciliation then they should be served through preparation and coordination of (at least) two contemporaneously

---

Broadcasting Corp. (CBS), 94 CANADIAN CRIMINAL CASES, THIRD SERIES 289, 317 (1994); *A.G. v. Sport Newspapers Ltd.* [1991], 1 WEEKLY LAW REPORTS 1194, 1200.

[161] Villa-Vicencio (note 30), 221.

[162] See, generally, Norman Appeal Decision (note 82), para. 20.

operating mechanisms of transitional justice. Besides, the cost of litigating these issues at a later date, as was done in Sierra Leone, can hardly be seen as an economically efficient route.

E. Conclusions

As William Schabas, a Commissioner of the Sierra Leonean TRC, has said: "Increasingly…given the presence of the ICC, the coexistence of [Courts and TRCs] will no longer be an option, but simply a fact."[163] William Schabas represents the views of the TRC in this regard.[164] He goes on to conclude that: "The lessons of the Sierra Leone experience suggest that it is not unreasonable for the two bodies to operate in parallel."[165] This is eminently true in the general sense. Still, a number of recommendations stem from the analysis of the Sierra Leone context and the Norman Decision that will provide for more effective future operations between TRCs and courts.

First and perhaps most saliently, *ad hoc* coordination between courts and TRCs is not an effective approach, at least with respect to witness testimony and the sharing of pertinent information. Coordination is needed in the form of pre-planning for the consequences of simultaneous operations.

When disputes do arise, an independent decisor of the outcome is superior to allowing the institutions themselves to unilaterally make determinations. In Sierra Leone, it has been suggested that the High Court could have been appointed the arbiter of such disputes.[166] Where the local courts are not capable of such action, either logistically or jurisdictionally, potentially another independent board or mediator should be organized or appointed to accomplish this goal.

There is need for a greater understanding of the multifarious goals of transitional justice and how different institutions, and in particular TRCs, work in different ways to achieve the various purposes that are thought to lead, rightly or wrongly, to a peaceful and effective transition. This is evident in the strict construction of the

---

[163] Schabas (note 2), 1099.

[164] *Sierra Leone Truth and Reconciliation Final Report* (note 60), vol. 3b, chapter 6, para. 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."

[165] *Id*.

[166] See Boister (note 83), 1114.

purposes of the TRC by the SCSL in both the trial and appellate decisions and by the concern leveled at the TRC operations by the Justices.

Ultimately, as Charles Villa-Vicencio has stated: The "relationship between the ICC and truth commissions should not be viewed as mutually exclusive…. [They can] ultimately have similar goals and can benefit from each other."[167] The Norman case has made this conclusion salient. Now, it is for the ICC and others to learn from the experience in Sierra Leone so that, when operating contemporaneously, the two institutions will indeed benefit one another rather than compete.

[167] Villa-Vicencio (note 30), 217-218.