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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Judge Peter Boshier
Michael Andrews
Amelia Evans
Arla Kerr
Natalie Pierce

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

FACULTY OF LAW
Te Kauhanganui Tātai Ture

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

PICKING UP THE PIECES: TRUTH AND JUSTICE IN SIERRA LEONE

Natalie Pierce*

The system of transitional justice established in post-conflict Sierra Leone was both unique and innovative. The Truth and Reconciliation Commission and the Special Court for Sierra Leone operated side by side and, at times, their jurisdictions overlapped. However, given their different conceptions of and approaches to justice, such overlap warranted careful consideration and regulation. Regrettably, the lack of any formal relationship agreement between the Commission and the Court may have unnecessarily cast doubt on the compatibility of such bodies, thereby diluting the powerful influence that Sierra Leone could have had on future post-conflict systems. This was evident when Samuel Hinga Norman, an indictee of the Special Court for Sierra Leone, expressed his desire to testify before the Truth and Reconciliation Commission. What had hitherto been a cordial relationship soured considerably in the Truth and Reconciliation Commission's final months. This paper traverses the case of Sierra Leone, drawing on comparisons from Timor Leste and South Africa, in order to identify minimum standards for future post-conflict societies.

I INTRODUCTION

Recent history has borne witness to horrific human rights violations in both internal and international armed conflicts. Since 1990 there has been an increase in the demand for individual criminal responsibility. This was addressed by the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[1] The creation of the tribunals sent a clear message that the international community was determined

* LLB/BA, University of Otago; LLM candidate in International Criminal Law, University of Otago. Formerly legal intern with the United Nations High Commissioner for Refugees, Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific. Currently Judicial Research Counsel, Dunedin. This is a revised version of a paper undertaken in a private capacity as part of the research programme at the University of Otago. Natalie wishes to thank Professor Kevin Dawkins for his invaluable support, insights and suggestions, as well as the NZJPIL reviewer and editorial committee.

1 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia [ICTY Statute], adopted by UNSC Resolution 827 (25 May 1993) S/RES/827/1993; Statute of the International Tribunal for Rwanda, annexed to UNSC Resolution 955 (8 November 1994) S/RES/955/1994 [Resolution 955].

to punish those responsible for serious crimes and, thereby, strengthened both international humanitarian and international criminal law.[2] This development ended nearly half a century of relative inactivity in international criminal law after the International Military Tribunals in Nuremberg and Tokyo following World War II.[3]

At present, two trends appear to be emerging. We can now identify an increase in "hybrid" courts of both national and international jurisdiction, alongside an increase in the demand for truth commissions – bodies that record the history of conflicts and promote reconciliation and rehabilitation.[4] These bodies form part of the system that is termed "transitional justice", that is, "justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes".[5] An inherent tension exists between truth-seeking and prosecutorial bodies. Various countries have grappled with establishing an appropriate balance between the need for reconciliation on the one hand and, on the other, the need for justice. This paper examines two transitional justice bodies that operated concurrently in Sierra Leone – the Special Court for Sierra Leone (the Special Court) and the Truth and Reconciliation Commission.[6] It will detail the historical impetus for establishing the two bodies and provide an analysis of their working relationship. Particular emphasis will be placed on the lack of any formal relationship agreement and the problems that arose as a result. Finally, it will consider other countries' experiences of transitional justice systems with a view to identifying important lessons for future

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2 Resolution 955, above n 1, 2, for example, states that "… the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed". The ICTY Statute, above n 1, art 1 clearly provides for the Tribunal's competence over "… serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 …".

3 After the Nuremberg and Tokyo trials, the United Nations proposed a separate international criminal court in 1948. This project was later suspended for more than thirty years. Despite the importance of the Nuremberg and Tokyo trials, they were not without drawbacks of their own. For more on these trials see RS Clark "Nuremberg and Tokyo in Contemporary Perspective" in T McCormack and GJ Simpson (eds) *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff Publishers, The Hague, 1997) 171, 184–185; Kriangsak Kittichaisaree *International Criminal Law* (Oxford University Press, Oxford, 2001); R Overy "The Nuremberg Trials: International Law in the Making" in P Sands (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, Cambridge, 2003) 1.

4 CT Call "Is Transitional Justice Really Just?" (2004) 11 BJWA 101, 105; Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations" (2006) 22 NZULR 213, 220.

5 R Teitel "Transitional Justice Genealogy" (2003) 16 Harv Hum Rts J 69, 69; J Elster *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, Cambridge, 2004) 79–81.

6 See generally Cesare PR Romano "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 NYU J Int'l L & Pol 709.

cases. Rather than proposing a uniform model, this paper attempts to set out working guidelines that should be considered when transitional justice mechanisms co-exist.

It is necessary to identify the fundamental concepts that underpin transitional justice. Essentially, two – some might say diametrically opposed – concepts of retribution and restoration form the basis of transitional justice. Retribution focuses on righting wrongs and preventing their recurrence through punishment. In post-conflict societies, this is most often the task of local, national, international or, more recently, internationalalised or "hybrid" courts.[7] In contrast, restorative justice has a rehabilitative focus and promotes reconciliation rather than judgment. In recent decades, there has been a paradigm shift in the way that the global community views conflict resolution. This has resulted in the proliferation of restorative mechanisms and institutions such as truth and reconciliation commissions.[8] Despite this demand for reconciliation, retribution and punishment still play an important role in post-conflict societies. Accordingly, restorative and retributive bodies both form part of United Nations policy solutions and in some cases they will operate side by side.[9]

In addition to the tensions that transitional justice bodies face when they operate simultaneously, they also face a number of other problems.[10] In fact, intense debate exists as to whether transitional justice mechanisms are the most appropriate way to deal with post-conflict situations. Truth and reconciliation commissions are both innovative and problematic.[11] Due to their uniqueness, they are

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7 The recognition and protection of human rights at the international level is recognised as creating an obligation to criminally prosecute those who commit serious violations of such rights: see, for example, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85. In addition, there exists an international obligation to repress and suppress violations of international humanitarian law, as identified, for example, in the 1949 Geneva Conventions on the Laws of War and in Protocol I to the Geneva Conventions (18 June 1977) 1125 UNTS 3. For a useful discussion on post-conflict justice issues, see Diane Ordentlicher "Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity" (27 February 2004) E/CN.4/2004/88.

8 Neil Kritz "Accounting for International Crimes and Serious Violations of Fundamental Human Rights: Coming to Terms with Atrocities – A Review of Accountability Mechanisms for Mass Violations of Human Rights" (1996) 59 Law & Contemp Probs 127, 128; Lyn Graybill and Kimberly Lanegran "Truth, Justice and Reconciliation in Africa: Issues and Cases" (2004) 8 African Studies Quarterly 1, 1.

9 See generally William A Schabas *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, 2006) [*The UN International Criminal Tribunals*]; UN Secretary-General "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies" (3 August 2004) S/2004/616.

10 Costi, above n 4, 24; Kittichaisaree, above n 3, 42; Rachel Kerr and Eirin Mobekk *Peace and Justice: Seeking Accountability After War* (Polity Press, Oxford, 2007) 8–11 and 138–146.

11 Call, above n 4, 101–103.

sometimes seen as a viable supplement to, or replacement for, judicial bodies.[12] Unfortunately, they are often under-funded and experience difficulties in obtaining detailed perpetrator testimony.[13] Their ability to achieve lasting peace has been questioned, especially when they grant or recognise amnesties.[14] It is, therefore, essential that truth and reconciliation commissions have a strategy to ensure that they are equipped to achieve the tasks assigned to them. In a similar vein, courts in post-conflict societies face various financial, political and logistical constraints. In some cases, these problems prevent them from adequately fulfilling their mandate, which in turn undermines the transitional justice process. Ignorance of these inherent problems and the failure to address them can be fatal to the transitional justice process and, ultimately, lasting peace.

This paper proceeds on the presumption that, notwithstanding the hurdles that transitional justice bodies inevitably face, both restorative and retributive justice principles are inherently valuable and often complementary. Justice is a multifaceted concept that can be approached from various angles. The question, therefore, is not whether transitional justice is worthwhile per se. Rather, the real question is how these bodies may be harmonised in order to maximise long-term peace and stability. Sierra Leone provides a fertile area for research. It is a unique case that illustrates the issues arising from the relationship between courts and alternative justice mechanisms. The lessons learned from Sierra Leone could, therefore, be instructive for countries addressing post-conflict issues in the future.

II BACKGROUND

Sierra Leone, a former British colony, is a West African coastal state rich in natural resources.[15] It was controlled by authoritarian rule until 1991, when civil war erupted.[16] Numerous coups and instability ensued.[17] Various atrocities were committed against civilians, particularly against

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12 See generally William A Schabas "Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone" in CPR Romano, A Nollkaemper and JK Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, Oxford, 2004) 157.

13 In Timor Leste, 7000 testimonies were taken by January 2004. None of them were from the perpetrators. See Comissão de Acolhimento Verdade e Reconciliação *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor Leste (CAVR)* (Advance Copy) www.cavr-timorleste.org (accessed 11 May 2009).

14 Stuart Wilson "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" (2001) 17 SAJHR 531, 542.

15 See generally D Amann "Message as Medium in Sierra Leone" (2001) 7 ILSA J Int'l & Comp L 237.

16 K Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 T Jefferson L Rev 149, 149.

17 Sierra Leone Truth and Reconciliation Commission *The Final Report of the Truth and Reconciliation Commission of Sierra Leone* (vol 2, 2004) www.trcsierraleone.org (accessed 14 November 2008) ch 2: "Findings". See also Abdul Tejan-Cole "Painful Peace: Amnesty under the Lomé Peace Agreement in Sierra

women and children. Many suffered the amputation of limbs or were forced to work in diamond mines. Women and young girls were raped and children were conscripted as soldiers in what was a very bloody civil war. The Revolutionary United Front (RUF), which controlled more than half of the land in Sierra Leone in 1998, moved into the capital, Freetown, in 1999. Most of the city was destroyed in the process.[18] In response, on 7 July 1999, the Lomé Peace Accord was signed by the Government of Sierra Leone and the RUF.[19] A significant outcome of the Lomé Peace Accord was the establishment of the Truth and Reconciliation Commission. Controversially, the Lomé Peace Accord granted RUF members amnesty and power-sharing roles with the Government of Sierra Leone.[20] However, when further violence broke out in May 2000, the Sierra Leone Government reconsidered the position it had taken with respect to the RUF under the Lomé Peace Accord and appealed to the United Nations to establish a special court to prosecute RUF members.[21]

The result of this request was United Nations Security Council Resolution 1315 in August 2000 (Resolution 1315), which instructed the United Nations Secretary-General to negotiate an agreement with the Sierra Leone Government with a view to establishing a special court.[22] Resolution 1315 reiterated the United Nations' rejection of amnesties and noted the steps taken by the Government of Sierra Leone in creating a national truth and reconciliation process after the Lomé Peace Accord. However, it did not expressly indicate in the perambulatory paragraphs the need for a relationship agreement between the two transitional justice bodies. The operative provisions emphasised, inter alia, the importance of "... the impartiality, independence and credibility of the process ...", but without specification as to how this might best be achieved. Furthermore, Resolution 1315 requested that the United Nations Secretary-General include in his report recommendations on "... any additional agreements that may be required". This, however, was made with reference to international assistance. It did not directly indicate that the Secretary-General should also consider

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Leone" (1999) 3 Law, Democracy and Development 239, 243; S Beresford and A Muller "The Special Court for Sierra Leone: An Initial Comment" (2001) 14 LJIL 635, 637.

18 N Fritz and A Smith "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone" (2001) 25 Fordham Int'l L J 391, 396.

19 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (7 July 1999) S/1999/777 [Lomé Peace Accord].

20 Ibid. See Beresford and Muller, above n 17, 638. The United Nations stated that the amnesty would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law: UN Secretary-General "Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone" (30 July 1999) S/1999/836, para 54.

21 Letter from the Permanent Representative of Sierra Leone to the United Nations, addressed to the President of the Security Council (10 August 2000) S/2000/786, annex.

22 UNSC Resolution 1315 (14 August 2000) S/RES/1315/2000 [Resolution 1315].

the need for additional agreements with local bodies, such as the Truth and Reconciliation Commission.[23]

The United Nations Secretary General submitted, in response to the United Nations Security Council request in Resolution 1315, a report in October 2000. Annexed to this report were two draft instruments: the Statute of the Special Court and the bilateral Agreement between the United Nations and the Government of Sierra Leone. The Secretary-General's report comprised two key parts. The first addressed specific legal issues such as the nature, jurisdiction and organisational structure of the Special Court, as well as the enforcement of sentences in third states and the choice of the alternative seat. The second part addressed practical implementation issues. Significant in this regard was the Secretary-General's recommendation that some form of relationship agreement be concluded between the Special Court and the Truth and Reconciliation Commission. The negotiation process leading up to the report was intensive, with various changes made to the draft instruments. There existed high expectations that the Special Court would deliver just outcomes as a "... state of urgency ... permeate[d] all discussions of the problem of impunity in Sierra Leone".[24] Eventually, the Special Court, a "... treaty-based sui generis court of mixed jurisdiction and composition",[25] became fully operational in December 2002.

III MISSED OPPORTUNITIES TO DEFINE THE RELATIONSHIP

The Special Court and the Truth and Reconciliation Commission were established at different times and in response to different political events. Notwithstanding this, their work converged at various points. This part highlights these points of convergence and identifies instances where opportunities to define their unique relationship were missed. This will be demonstrated by an analysis of their respective legal bases, composition and jurisdiction. Given the nature of the crimes that each body sought to address and the scarce resources with which they were to achieve this, there was no room for operational disputes. To ensure an effective working relationship that could

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23 Ibid, perambulatory para 4 and operative paras 4 and 8(a).

24 UN Secretary-General "Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone" (4 October 2000) S/2000/915 [Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone], para 74.

25 Ibid, para 9. The final wording of both the Statute of the Special Court and the Agreement between the United Nations and the Government of Sierra Leone were the subject of changes by the Security Council: see Letter from the President of the Security Council, addressed to the Secretary-General (22 December 2000) S/2000/1234. The final versions, as applied by the Special Court for Sierra Leone and as referred to in this paper, were signed in Freetown on 16 January 2002 and were annexed to the domestic implementing legislation: Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone), Schedule: "Agreement between the United Nations and the Government of Sierra Leone" [Agreement between the United Nations and the Government of Sierra Leone] and Statute of the Special Court for Sierra Leone [Statute of the Special Court]. Following the implementing legislation, the Agreement between the United Nations and the Government of Sierra Leone was also recognised in the Headquarters Agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone, Freetown, 21 October 2003.

also act as a precedent for future post-conflict societies, some form of relationship agreement was clearly necessary. Unfortunately, in the desperate bid to dampen the raging conflict in Sierra Leone, no formal agreement was reached. As a result, issues that ought to have been clarified were simply left unanswered.

A Legal Bases of the Special Court and the Truth and Reconciliation Commission

1 Establishing the Special Court and the Truth and Reconciliation Commission – the early stages

As explained above, the Special Court was established by the Agreement between the United Nations and the Government of Sierra Leone.[26] The Agreement set out the organisational structure, jurisdiction and competence of the Special Court. Unlike other international criminal tribunals, such as the ICTY and the ICTR, the Special Court was not created under Chapter VII of the United Nations Charter. While the United Nations Security Council had at times stated that it was acting under Chapter VII with regard to Sierra Leone, it omitted any reference to Chapter VII in Resolution 1315. The significance of Chapter VII is that measures adopted under this part of the Charter are binding on all United Nations member states. Whereas the ICTY and the ICTR can demand international cooperation, the Special Court cannot. The Special Court is, therefore, a unique case, insofar as it lacks the same kind of international standing that its predecessors enjoyed.[27] As a treaty-based court, the operation of the Statute of the Special Court is governed by the law of treaties as codified in the Vienna Convention on the Law of Treaties.[28] The United Nations Secretary-General has aptly described it as a "treaty based organ, ... not anchored in any existing system".[29] In other words, the Special Court is a body that stands between international law on the one hand – albeit with significantly less international command than the ICTY and the ICTR

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26 Agreement between the United Nations and the Government of Sierra Leone, above n 25, art 1. See also the Special Court domestic implementing legislation: Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone).

27 This fact would later prove to be a problem for the Special Court for Sierra Leone [the Special Court], when it wished to try Charles Taylor, former President of Liberia. As the Special Court was not established under Chapter VII of the Charter, neighbouring states could not be compelled to surrender him. It is interesting to note that this situation had been anticipated by the United Nations Secretary-General in 2000 when he stated that in some cases, the Special Court should be afforded Chapter VII powers. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 10: "The Security Council may wish to consider endowing [the Special Court] ... with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court". Though the Taylor case is beyond the ambit of this paper, it is noteworthy in the context of the Special Court's establishment. This is not to say that had the Special Court been empowered by Chapter VII, Taylor would have been surrendered – various factors could have limited this.

28 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331. Under article 34, third states are not bound by this agreement.

29 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 9.

– and municipal law on the other. Whether this is necessarily a good position is a hotly contested issue and one that is beyond the ambit of this paper. For present purposes, it will be presumed that "hybrid" courts such as the Special Court are a valid transitional justice option, albeit one that needs careful consideration and planning.

The Truth and Reconciliation Commission differed from the Special Court in that it was a purely national institution. As part of the efforts made to establish peace in Sierra Leone between the Government and the RUF pursuant to the Lomé Peace Accord, the Commission was established under Sierra Leone law by the Truth and Reconciliation Commission Act 2000 (Sierra Leone) (the Truth and Reconciliation Act).[30] The Truth and Reconciliation Act reinforced the obligations under the Lomé Peace Accord by outlining the scope, mandate and jurisdiction of the Truth and Reconciliation Commission.[31] Unfortunately, in between the establishment of the Truth and Reconciliation Commission and its operational start date, it was unclear what status the Lomé Peace Accord would retain. This was the result of President Kabbah's announcement that the RUF had reneged on its obligations under the Lomé Peace Accord by instigating the Freetown massacre in May 2000 and his request for a special court to try RUF leaders.[32] Nothing was said about the effect that the creation of a special court would have on the Truth and Reconciliation Commission's autonomy. Consequently, when the Special Court and Truth and Reconciliation Commission were fully operational, there existed two transitional justice bodies that both believed in their own independence and authority.

2 The statutes and the question of primacy

The respective statutes of the Special Court and the Truth and Reconciliation Commission illustrate their curious relationship. Because both predated the creation of the Special Court, neither the Lomé Peace Accord nor the Truth and Reconciliation Act referred to the Special Court. Surprisingly, the Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone) (the Special Court Ratification Act) makes no explicit reference to the Special Court's relationship with the Truth and Reconciliation Commission.[33] It was quite apparent that some form of understanding between the Special Court and the Truth and Reconciliation Commission would need to be considered. On 4

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30 Lomé Peace Accord, above n 19; Truth and Reconciliation Commission Act 2000 (Sierra Leone) [Truth and Reconciliation Act], s 2(1). For a more detailed history of the establishment of the Truth and Reconciliation Commission and its early work, see *The Final Report of the Truth and Reconciliation Commission of Sierra Leone*, above n 17, (vol 1) ch 2: "Setting up the Commission".

31 Truth and Reconciliation Act, above n 30.

32 See Letter from the Permanent Representative of Sierra Leone to the United Nations, addressed to the President of the Security Council, above n 21.

33 The only reference to the Truth and Reconciliation Commission in the Statute of the Special Court, above n 25, is in section 15(5), which deals with juvenile offenders.

October 2000, the United Nations Secretary-General clearly expressed his expectation in this regard:[34]

> … the present report ... does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the National Truth and Reconciliation Commission. It is envisaged, however, that *upon establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed*. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

In the absence of any formal legislative recognition of the relationship between the two bodies, the related issue of primacy was left unsettled. The Truth and Reconciliation Commission did not have primacy over national courts. It could refer serious matters to the Sierra Leone High Court, which had competence over offences under the Truth and Reconciliation Act.[35] The Supreme Court of Sierra Leone is the highest and final appeal court pursuant to section 125 of the Constitution and it maintained supervisory rights over the Truth and Reconciliation Commission.[36] In stark contrast, the Special Court does have primacy over national courts. It can request that national courts defer competence in accordance with the Statute of the Special Court.[37] However, since the Truth and Reconciliation Commission was not a national court, it was proposed that it remain independent from the Special Court. This issue became all the more contentious after the Special Court Ratification Act was enacted in 2002. Section 21(2) of this Act states: "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."[38]

The Truth and Reconciliation Commission was a body created under Sierra Leone law. Prima facie, it could be required to comply with the rulings of the Special Court. However, before the Special Court Ratification Act was enacted, non-governmental organisations submitted that the Bill

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34 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 8 (emphasis added). See *Decision on the Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman against the Decision of Mr Justice Bankole Thompson to deny the Truth and Reconciliation Commission's Request to Hold a Public Hearing with Chief Hinga Norman (The Prosecutor v Sam Hinga Norman)* (Appeal Decision) (30 October 2003) SCSL-2003-08-PT para 5 (Appeals Chamber, SCSL) [*Norman Appeal Decision*].

35 Truth and Reconciliation Act, above n 30, ss 8(2) and 9(2).

36 Sierra Leone Constitution Act 1991 (Sierra Leone), ss 122 and 125.

37 Statute of the Special Court, above n 25, art 8(2).

38 Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone), s 21(2).

be amended so as to recognise the Truth and Reconciliation Commission's independence.[39] The proposed amendments never eventuated. As a result, the question of primacy was left open to a great deal of debate.

Since the primacy of the Special Court was contested, so too was the status and scope of Practice Directions issued by the Special Court to the Truth and Reconciliation Commission. Section 14(1) of the Truth and Reconciliation Act stated that the Truth and Reconciliation Commission was an independent body not subject to control. This provision was arguably necessary for it to fulfil its mandate. Article 17 of the Special Court Ratification Act, however, requires the Government of Sierra Leone to "comply" with requests for assistance made by the Special Court. The seemingly irreconcilable nature of these two provisions is exacerbated when one considers the change between the Agreement between the United Nations and the Government of Sierra Leone (the international agreement providing jurisdiction for the Special Court)[40] and the domestic implementing legislation, the Special Court Ratification Act. The latter instrument imports an obligation for *compliance* from national institutions, whereas the earlier Agreement required *cooperation* with the Special Court. The distinction between "compliance" and "cooperation" is clearly significant. Notwithstanding the clear legislative shift in favour of "compliance", the question of primacy and the status of Practice Directions remained contentious.

Essentially, three arguments support the primacy of the Special Court. First, since the Special Court has primacy over "any other body" as well as national courts, the Truth and Reconciliation Commission seemed to fall within this provision. Secondly, the clear change from *cooperation* to *compliance* with regard to Practice Directions, coupled with the Government's refusal to amend section 21(2) of the Special Court Ratification Act, indicates that the Special Court was intended to have some form of authority or primacy over the Truth and Reconciliation Commission. Finally, the doctrine of subsequent legislation may be applied; that is, where two instruments concerning the same subject matter conflict, the later in time prevails. This principle would indicate the primacy of the Special Court. Regrettably, notwithstanding these indications, the matter was never resolved explicitly. It was not until 2003 – a matter of months before the end of the Truth and Reconciliation

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39 The Campaign for Good Governance argued that the Government should ensure that: "The Act should in no way grant the Special Court primacy over the Truth and Reconciliation Commission, particularly with regards to demanding confidential information ... [and that such a position would]... decimate any impression of the Truth and Reconciliation Commission independence and demote it to a mere research arm of the Special Court." See Abdul Tejan-Cole, Acting Coordinator, The Campaign for Good Governance, to Solomon E Berewa, Attorney-General and Minister of Justice of Sierra Leone (15 March 2002) Letter, cited in Abdul Tejan-Cole "Note from the Field: The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission" (2003) 6 Yale Hum Rts & Dev LJ 139, 152 ["Notes from the Field"].

40 Agreement between the United Nations and the Government of Sierra Leone, above n 25.

Commission's mandate – that the Special Court's primacy over the Truth and Reconciliation Commission was confirmed.[41]

B Comparison of Composition and Jurisdiction

1 Composition

The Special Court is a hybrid court comprising both international and national elements. It consists of the Trial Chamber, the Appeals Chamber, the Office of the Prosecutor and the Registry.[42] The Appeals Chamber consists of three judges appointed by the United Nations Secretary-General and one judge appointed by the Government of Sierra Leone.[43] The Trial Chamber is comprised of three judges, two of whom are appointed by the United Nations Secretary-General and the remaining judge by the Government of Sierra Leone.[44] A second trial chamber may be set up if requested by the Prosecutor, the United Nations Secretary-General or the President of the Special Court.[45]

The Truth and Reconciliation Commission consisted of seven commissioners, four of whom were from Sierra Leone, the remaining three from other nations.[46] Unlike the Special Court, the President of Sierra Leone appointed all commissioners, including the Commission's chairperson and deputy chairperson.[47]

Neither the Special Court nor the Truth and Reconciliation Commission had time or resources to waste.[48] The Special Court was set up as a hybrid court of mixed composition partly due to fears about the neutrality of trials, as well as other practical considerations. The Sierra Leone judicial system understandably suffered during the civil conflict and lacked the resources to adjudicate post-conflict issues.[49] This was recognised in Resolution 1315.[50] Similarly, the Truth and Reconciliation

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41 *Norman Appeal Decision*, above n 34.

42 Statute of the Special Court, above n 25, art 11.

43 Ibid, art 12(1)(b).

44 Ibid, art 12(1)(a).

45 Ibid, art 2(1); Letter from the President of the Security Council, addressed to the Secretary-General, above n 25.

46 Truth and Reconciliation Act, above n 30, s 3(1).

47 Ibid, s 3(3).

48 Abdul Tejan-Cole "The Special Court for Sierra Leone: Conceptual Concerns and Alternatives" (2001) 1 AHRLJ 107, 119; International Centre for Transitional Justice *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year* (January, 2004) www.ictj.org (accessed 8 January 2009).

49 See The Commonwealth Human Rights Initiative *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone* (2002) www.humanrightsinitiative.org/publications (accessed 8 January 2008).

50 Resolution 1315, above n 22.

Commission had a formidable task assigned to it. It had to create an impartial historical record of the violations of human rights and international humanitarian law, address impunity, promote healing and reconciliation, and prevent the repetition of abuse.[51] In light of this, it was essential that both bodies could fulfil their mandates without unnecessary interruptions or operational disputes.

2 Jurisdiction

(a) Temporal jurisdiction

The Truth and Reconciliation Commission had a broad temporal jurisdiction allowing it to examine events between 23 March 1991, the first day of civil conflict, and 7 July 1999, the date on which the Lomé Peace Accord was signed. It could investigate matters before the civil conflict only as a matter of history. In contrast, the temporal jurisdiction of the Special Court is limited in scope. Its jurisdiction covers events after 30 November 1996, which coincides with the Abidjan Peace Accord.[52] The United Nations Secretary-General stated that this was to be preferred to an earlier date which would have imposed a "heavy burden" on the Court.[53] Other dates that were considered by the United Nations Secretary-General were also deemed to be unsatisfactory. Selecting 25 May 1997, the day of the Armed Forces Revolutionary Council coup, had undesirable political overtones, while 6 January 1999, the date of the Freetown invasion, may have given the impression of provincial favouritism, excluding the experiences of those in rural areas who were also victims of the atrocities.[54] It is particularly important in terms of the relationship between the Special Court and the Truth and Reconciliation Commission to note that there was a period of concurrent jurisdiction between 30 November 1996 and 7 July 1999.

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51 Truth and Reconciliation Act, above n 30, s 6(1).

52 Statute of the Special Court, above n 25, art 1. The Abidjan Peace Accord was, in the words of the Secretary-General, "... the first comprehensive Peace Agreement between the Government of the Sierra Leone and the RUF [as such, it pre-dated the Lomé Peace Accord]. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities resumed": Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 26(a). See Abidjan Peace Accord, Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front (RUF/SL), 30 November 1996.

53 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 26. The start date was a contested issue. The Government of Sierra Leone preferred 23 March 1991. See UN Secretary-General "Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone" (7 September 2001) S/2001/857, para 26 [Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone].

54 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, paras 26 and 27.

(b) Personal jurisdiction

The Special Court has jurisdiction over those bearing "greatest responsibility" for violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone after 30 November 1996.[55] The UN Secretary-General made it clear that the Special Court's personal jurisdiction would not be limited to political and military "leaders". As such, it was envisaged that the Special Court would prosecute "persons who bear greatest responsibility", a factor that would form part of the prosecutorial strategy rather than an element of the crime.[56] In contrast to this narrow personal jurisdiction, the Truth and Reconciliation Commission was not limited in this regard. As noted by the Government of Sierra Leone, the Special Court is for those who meet the personal jurisdiction requirements, while the Truth and Reconciliation Commission was for "everyone else".[57] It was estimated that the Special Court would only hear a maximum of 24 cases, whereas the Truth and Reconciliation Commission, in the end, heard nearly 8000 stories.[58] However, given the limited scope of the Special Court's personal jurisdiction and the comparatively wide personal jurisdiction of the Truth and Reconciliation Commission, there was still a real likelihood that their investigations could overlap. It was not impossible to envisage that the Truth and Reconciliation Commission would want to hear evidence from someone "most responsible" for some of the atrocities committed in the civil conflict. To create an accurate historical record would require all perspectives to be considered. The United Nations Expert Group at the time aptly suggested that the Prosecutor should define "those who bear greatest responsibility" and, thereby,

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55 Letter from the President of the Security Council, addressed to the Secretary-General, above n 25, 1. The effect of such a provision, whereby individual criminal responsibility is identified and apportioned according to a person's responsibility rather than their rank within a structure or organisation, meant that the Special Court was able to cast a wider net with regard to personal jurisdiction. See *The Prosecutor v Samuel Hinga Norman* (Decision on the Defence Preliminary Motion of Lack of Jurisdiction: Command Responsibility) (15 October 2003) SCSL-2003-08-PT-2369-2646 (Trial Chamber, SCSL). The apportionment of individual criminal responsibility to those who have control over the direct perpetrators of crimes but who may or may not directly participate in the commission of a crime themselves is not unusual in international criminal law. See, for example, Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3, art 28.

56 Letter from the UN Secretary-General, addressed to the President of the Security Council (12 January 2001) S/2001/40, paras 2–3.

57 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" (7–18 January 2002) Planning Mission Briefing Series 8.

58 International Centre for Transitional Justice, above n 48, 3. The Truth and Reconciliation Commission gathered some 7706 statements from victims and perpetrators. See *The Final Report of the Truth and Reconciliation Commission of Sierra Leone*, above n 17, Appendix 1, 2–3, Figure 4.A1.1a: "Count of Statement givers by District".

bring such persons under its exclusive jurisdiction.[59] This did not happen and, in 2003, the Truth and Reconciliation Commission sought to obtain evidence from one of those persons whom the Special Court had indicted for serious crimes.[60] Rather than defining the relationship and clarifying this issue, the Special Court chose instead to issue Practice Directions as and when appropriate. This may be a somewhat unsatisfactory precedent for future post-conflict cases where truth commissions and special courts operate simultaneously.

(c) Subject matter jurisdiction

The Special Court's subject matter jurisdiction is also limited in comparison to that of the Truth and Reconciliation Commission. It is charged with hearing cases concerned with violations of international humanitarian law and Sierra Leone law pursuant to Resolution 1315.[61] With regard to international humanitarian law, it has jurisdiction over crimes against humanity, violations of common Article III of the Geneva Conventions, Additional Protocol II to the Geneva Conventions, and matters of customary international law.[62] Jurisdiction under Sierra Leone law is confined to the abuse of girls under the Prevention of Cruelty to Children Act 1960 (Sierra Leone) and wanton destruction of property under the Malicious Damages Act 1861 (Sierra Leone).[63] In contrast, the Truth and Reconciliation Commission had the ability to hear a vast number of issues in order to fulfil its mandate.[64] It was not impossible to imagine the Truth and Reconciliation Commission and Special Court coming into conflict, given this overlap of subject matter jurisdiction. Equally, it was dangerous to assume that each body would circumnavigate each other in this regard.

IV PROBLEMS IN PRACTICE

Despite the considerable degree of debate about the potential conflict between the Special Court and the Truth and Reconciliation Commission, and although "much attention was devoted to defining the 'relationship' between the Truth Commission and the Special Court", many anticipated problems did not eventuate during the course of their relationship.[65] Some have suggested that, for this reason, the absence of a well-defined relationship was not as detrimental as originally

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59 Communiqué issued by the United Nations Expert Meeting on the Relationship between the Truth and Reconciliation Commission and the Special Court for Sierra Leone, New York (20–22 December 2001), cited in Tejan-Cole "Notes from the Field", above n 39, 149.

60 See *Norman Appeal Decision*, above n 34.

61 Resolution 1315, above n 22.

62 Statute of the Special Court, above n 25, arts 2–3.

63 Ibid, art 5(a).

64 Truth and Reconciliation Act, above n 30, s 6.

65 William Schabas "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone" (2004) 15 Crim LF 3, 4 ["A Synergistic Relationship"].

thought.[66] This paper departs from this approach. While the relationship between the Special Court and the Truth and Reconciliation Commission was mainly cordial, fundamental tensions existed. These tensions warrant discussion if lessons are to be learnt for future post-conflict societies. The case of *Prosecutor v Samuel Hinga Norman* (*Norman*) illustrates the tension between the Special Court and the Truth and Reconciliation Commission that surfaced in 2003.[67] By examining *Norman*, this paper assesses the suggestion that the unanswered question as to the relationship between the two bodies was of little consequence. It proposes, on the contrary, that ad-hoc or ill-defined relationships between transitional justice mechanisms in post-conflict societies have the potential to facilitate misunderstanding and create obstacles to achieving sustainable peace.

A Background

Samuel Hinga Norman was a member of the Sierra Leone Government in March 2003 when he was arrested.[68] During the civil conflict, Norman acted as the National Coordinator of the Civil Defence Forces, a military force that fought against the RUF.[69] In February 2003, Norman attended the opening service of the Truth and Reconciliation Commission, where he sat alongside United Nations officials and representatives of the Special Court.[70] After the ceremony, he was invited by a Commissioner to take part in an informal interview with the Truth and Reconciliation Commission. He was arrested only days later on an eight-count indictment for crimes against humanity, violations

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66 Schabas seems to indicate that the relationship was mainly positive, with the exception of the *Norman* case, which he has described as something that "came at the close of what had otherwise been a cordial and uneventful relationship": William Schabas "Cojoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court" (2004) 2 JICJ 1082, 1098 ["Cojoined Twins"]. Compare Michael Nesbitt "Lessons from the Samuel Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions can Co-exist" (2007) 8 German Law Journal 797. Nesbitt provides some interesting insights with regard to the relationship between the Special Court and the Truth and Reconciliation Commission. He recognises that, while they should not be seen as mutually exclusive, both need to be supported by clear structural guidelines in order to maximise their efforts and fulfil their mandates.

67 *Norman Appeal Decision*, above n 34. But for the challenges that arose in this case, the absence of a formal relationship agreement may have been disregarded as but an abstract matter and, therefore, of little consequence. In fact, the otherwise positive relationship between the two bodies may be the reason why the conflict in *Norman* is understated in some commentaries. This paper proposes that the *Norman* decision forces us to address various conceptions of justice and identify how it may be achieved. The decision demands that we confront the real possibility that future post-conflict societies may host concomitant transitional justice bodies and that we plan for such situations. Peace is as stable as the foundation we lay for it; we must ensure that the necessarily multifaceted nature of transitional justice does not in itself become the source of contention, competition and division.

68 See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa* (Indictment) (5 February 2004) SCSL-03-14-I (Trial Chamber, SCSL) [*Norman Indictment*].

69 Ibid.

70 Schabas "Cojoined Twins", above n 66, 1092.

of common Article III to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.[71] This came as a shock to many in Sierra Leone, since he was regarded by many as a hero for combating the rebel RUF forces. Notwithstanding this, the Civil Defence Forces had been accused of numerous atrocities in the civil conflict, one of the most horrific being forced cannibalism.[72] After his arrest, in May and June 2003, the Truth and Reconciliation Commission approached the Special Court to inquire about possible interviews with detainees. At issue was whether Norman could, as an indictee before the Special Court, provide evidence in a public interview prior to his case being heard before the Special Court. Prima facie, the Truth and Reconciliation Commission could elect to interview any person with a view to pursuing its mission in article 26(1) of the Lomé Peace Accord, as identified in sections 7, 8(1)(c), and 9(1) of the Truth and Reconciliation Act.[73] Notwithstanding the ostensible authority of the Truth and Reconciliation Commission to conduct its hearings as it deemed fit, the Special Court also had significantly broad powers that are worth noting. The Court had legal authority to issue orders which, under section 20 of the Special Court Ratification Act 2002, had the same effect as if they had been issued by a Sierra Leone court. Section 8(2) of the Statute of the Special Court provided for the concurrent jurisdiction with national courts, although the Special Court could formally request that a national court defer its competence. Finally, under section 21(2) of the Special Court Ratification Act, it had broad powers to regulate the detention of and access to those held in custody "notwithstanding any other law" in Sierra Leone, but in line with its mandate and international human rights standards.[74] The issue of primacy was a divisive one, and *Norman* highlights the diametrically opposed viewpoints held by the Special Court and the Truth and Reconciliation Commission about their respective powers and how they were to interact.

Initially, none of the indictees was willing to cooperate with the Truth and Reconciliation Commission. Norman's defence attorney, JB Jenkins-Johnson, wrote to the Truth and Reconciliation Commission in June 2003 and stated that it would be inappropriate for his client to appear before the Truth and Reconciliation Commission whilst also being an indictee before the Special Court.[75] At the end of the Commission's hearing phase, and after President Kabbah presented powerful

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71 *Norman Indictment*, above n 68.

72 Schabas "Cojoined Twins", above n 66, 1092.

73 Lomé Peace Accord, above n 19; Truth and Reconciliation Act, above n 30, ss 7, 8(1)(c) and 9(1).

74 Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone), Part VI; Statute of the Special Court, above n 25, art 17.

75 Letter from Mr JB Jenkins-Johnson, legal representative of Chief Hinga Norman, to the Registrar of the Special Court (17 June 2003) JBJJ/ZYS, cited in Schabas "Cojoined Twins", above n 66, 1093. As mentioned above, the Truth and Reconciliation Commission initially contacted a number of Special Court indictees who, as the Appeals Chamber described, "... declined a chalice that they were doubtless advised was poisoned": *Norman Appeal Decision*, above n 34, para 17.

testimony, Norman instructed his lawyer to inform the Truth and Reconciliation Commission of his desire to testify.[76] According to Norman, his trial before the Special Court had been delayed significantly and, therefore, he wanted to be heard by the people of Sierra Leone as a record for the future. It is of note that, at this stage, Norman did not indicate how he wished to give evidence to the Truth and Reconciliation Commission. Under section 7 of the Truth and Reconciliation Act, he could have given private evidence that would not be publicised until the conclusion of his trial. This is initially what the Truth and Reconciliation Commission had sought.[77] The Truth and Reconciliation Commission contacted the Special Court, and the Court Registrar, with the aim of facilitating cooperation between the two bodies, issued a Practice Direction pursuant to Rule 33D of the Special Court's Rules of Procedure and Evidence.[78]

The first Practice Direction did not preclude the Truth and Reconciliation Commission from obtaining evidence from detainees. Rather, it established a system that regulated the gathering of such information. It required the Truth and Reconciliation Commission to apply to the Special Court for permission to interview a particular detainee.[79] If successful, the Truth and Reconciliation Commission would then be required to list specific questions it intended to ask.[80] At the interview, a legal officer of the Special Court would supervise and would be charged with the authority to intervene, stop specific questions and, in some cases, terminate the interview.[81] All interviews would be recorded and transcribed.[82] Perhaps most concerning for the Truth and Reconciliation Commission was the requirement that all interview transcripts would be issued to the Prosecutor for potential use at trial.[83]

The Truth and Reconciliation Commission was concerned about the right to take evidence on a confidential basis. This is a curious position, given that the Truth and Reconciliation Commission eventually pursued a public statement from Norman. Nevertheless, the Truth and Reconciliation Commission wrote to the Court Registrar and a revised version of the Practice Direction was issued

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76 Schabas "Cojoined Twins", above n 66, 1093.

77 Franklyn Kargbo to Robin Vincent, Registrar of the Special Court for Sierra Leone (3 September 2003) Letter, cited in *Norman Appeal Decision*, above n 34, para 17.

78 Special Court of Sierra Leone Rules of Procedure and Evidence 2002, r 33D; 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 (9 September 2003) [Practice Direction].

79 Practice Direction, above n 78, para 5.

80 Ibid, para 2(g).

81 Ibid, para 6.

82 Ibid, para 8(b).

83 Ibid, para 8(c).

on 4 October 2003.[84] The revised Practice Direction first allowed for transcripts to be forwarded to the Special Court's Management Section, rather than directly to the Prosecutor. Transcripts would remain confidential during trial and would only be made available to the parties at trial upon an order of the presiding judge.[85] Secondly, it included a presumption in favour of granting access to detainees for interviews, the only caveat being a refusal based on the judge's determination that it was "necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court".[86]

B Trial Chamber Decision

Despite reasonable concessions made by the Special Court in the revised Practice Direction, the Truth and Reconciliation Commission lodged an urgent application with the Special Court's Trial Chamber for a "public hearing" with Norman.[87] Not surprisingly, the Prosecutor objected in the pre-trial submissions, claiming that a public hearing would be sub judice.[88] He stated that it had the potential to disturb the fragile peace that prevailed in Sierra Leone and to intimidate both victims and trial witnesses alike.[89] Underlying these objections was the very real fear that a public hearing would breach Norman's right to a fair trial by distorting the presumption of innocence.[90] The Truth and Reconciliation Commission maintained that the Prosecutor's arguments were untenable and speculative. It contended that the Truth and Reconciliation Commission public hearing would, in fact, contribute to peace and stability and that Norman's right to be presumed innocent would be safeguarded by the Special Court's judges. Essentially, according to the Truth and Reconciliation

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84 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).

85 Ibid, paras 4(b) and 4(c).

86 Ibid, para 5. This is a crucial caveat to the access provisions. It highlights the perception of the Special Court that it maintained authority over the Truth and Reconciliation Commission despite its clear desire to work side by side in an otherwise cooperative fashion. It also indicates the divergent conceptions as to the nature of and best ways to achieve "justice".

87 *Motion for Public Hearing on the Request of the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Chief Hinga Norman (The Prosecutor v Samuel Hinga Norman)* (Trial Decision) (29 October 2003) SCSL-2003-08-PT-3257-3264, 4 (Trial Chamber, SCSL) [*Norman Trial Decision*].

88 Inter-Office Memorandum from Desmond de Silva QC, Deputy Prosecutor (on behalf of the Prosecutor) to Judge Bankole Thompson, Presiding Judge of the Trial Chamber "Samuel Hinga Norman and the TRC (Objections of the Prosecutor)" (21 October 2003), cited in Schabas "A Synergistic Relationship", above n 65, 46.

89 Ibid, paras (c) and (b) respectively.

90 *Norman Trial Decision*, above n 87, para 5.

Commission, victims had a right to know the truth and Norman had consented to the Truth and Reconciliation Commission's request.[91]

The Trial Chamber judge, Thompson J, rejected the Truth and Reconciliation Commission's application.[92] He did so under the authority of Rule 5 of the revised Practice Direction by finding the refusal to be "necessary in the interests of justice or to maintain the integrity of proceedings of the Special Court".[93] He stated that to grant the application would prejudice the right to be presumed innocent. Section 7 of the Truth and Reconciliation Act allowed the Truth and Reconciliation Commission to hear from "perpetrators of any abuses".[94] In other words, section 7 presumed that those being heard by the Truth and Reconciliation Commission were indeed guilty of abuse – something that had not yet been determined at trial.[95] In Thompson J's view, society's right to know the truth in this case had to give way to the right to a fair trial. He duly noted that this approach was favoured both nationally and internationally:[96]

> In the overarching scheme of things, it is the duty of international judges to safeguard the interest of the international community that persons charged with international crimes are accorded what may be characterised as "super-due process rights" in vindicating themselves, regardless of national considerations, however compelling.

C Appeal Chamber Decision

The Truth and Reconciliation Commission appealed to the Special Court's Appeal Chamber on 1 November 2003, challenging Thompson J's decision regarding the presumption of guilt and his views as to international trends.[97] The Truth and Reconciliation Commission submitted that Thompson J had incorrectly defined the Truth and Reconciliation Commission as a court, capable of calling Norman's innocence into question. As to international trends, it submitted that other courts favoured the Truth and Reconciliation Commission's approach. The ICTY has recognised the need to balance other interests with the right to fair trial,[98] and the ICTR has also acknowledged

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91 Ibid, para 4.

92 Ibid, paras 5–8.

93 Ibid, para 5.

94 Ibid, paras 10–12; Truth and Reconciliation Act, above n 30, s 7.

95 *Norman Trial Decision*, above n 87, para 11.

96 Ibid, paras 14–15.

97 See *Norman Appeal Decision*, above n 34, para 2.

98 The ICTY balances the rights of an accused with the rights of witnesses, in accordance with the ICTY Statute, above n 1, art 20(1), which states that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that procedures are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". In *Norman* it was, according to the Appeals Chamber, in the interests of witnesses and victims to preclude a

limitations on the right to fair trial in some cases.[99] The Truth and Reconciliation Commission argued that various other rights outweighed Norman's right to a fair trial – something that he had, in fact, consensually waived. Such rights were the right to testify before the Truth and Reconciliation Commission, his right to freedom of expression,[100] and the public's right to know the truth from an accurate public record produced by the Truth and Reconciliation Commission under its mandate.[101]

The President of the Appeal Chamber, Robertson J, gave his decision on 28 November 2003.[102] Robertson J allowed the appeal in part by permitting Norman "to testify to the TRC upon condition that he has been fully apprised and advised of the dangers of so doing".[103] This was conditional on Norman giving evidence "in writing (with the benefit of legal advice) and sworn in the form of an affidavit".[104] Most importantly, Robertson J ruled out the possibility of a public hearing:[105]

> All that is denied is a public hearing, an event more conducive to its reconciliation work (which cannot apply to indictees who plead not guilty) than its business of constructing an historical record … The time to give public testimony will be if and when he exercises his right to give evidence on oath.

The importance of Robertson J's decision lies in his analysis of the relationship between the Special Court and the Truth and Reconciliation Commission. He described the case as a "novel and

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public hearing, as outlined by the Prosecutor in his preliminary submissions. It would be unfair to say that the Special Court was not considering the interests of all concerned. The Special Court believed that, in this particular case, the right to a fair trial should prevail, given the severity of the alleged crimes.

99 *The Prosecutor v Pauline Nyiramasuhuko & Arsène Shalom Ntahobali* (Decision in the Matter of Proceedings under Rule 15bis(D)) (15 July 2003) ICTR-97-21-T, ICTR-98-42-T, para 33 (Trial Chamber, ICTR). The judges in this case, however, also acknowledged (at para 33(i)) the pronouncement of the ICTY Trial Chamber II in *Prosecutor v Seselj* (Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence) (9 May 2003) IT-03-67-PT, para 21 (Trial Chamber, ICTY), which stated:

> The phrase "in the interests of justice" potentially has a broad scope [and] includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account.

While the Truth and Reconciliation Commission could propose that the right to a fair trial should have been weighed against other rights, it perhaps overlooked other statements within this judgment that appear to favour the line of reasoning behind the Special Court's decision.

100 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 19(2).

101 Truth and Reconciliation Act, above n 30, ss 6–8.

102 *Norman Appeal Decision*, above n 34.

103 Ibid, para 41.

104 Ibid.

105 Ibid, para 42.

difficult question" that could be relevant in future post-conflict societies where both a Special Court and Truth Commission must coexist.[106] He discussed three core issues that are relevant to this paper: the question of primacy, evidence issues and the rights of indictees before transitional justice bodies. Each of these will be discussed in turn.

1 Primacy

Despite the debate as to whether the Special Court held a position of primacy over the Truth and Reconciliation Commission, Robertson J clarified this at the outset.[107] Essentially, he saw the problem as one of temporal and functional overlap between the two bodies.[108] He stated unequivocally that the Special Court had "primacy over national courts (and by implication, over national bodies like the TRC)".[109] This primacy, according to Robertson J, stemmed from article 8 of the Statute of the Special Court.[110] His conclusion was reinforced by the absence of any provision in the United Nations Agreement with the Government of Sierra Leone requiring the Special Court to yield to any other court or national institution. It had authority to pursue its justice mission and the Government was bound to cooperate.[111]

Notwithstanding the clear primacy of the Special Court over the Truth and Reconciliation Commission, Robertson J acknowledged that, up to this point, the relationship between the two bodies had, in fact, been based on mutual goodwill.[112] This was, of course, until the Truth and Reconciliation Commission demanded to conduct a public hearing with one of the Special Court's central indictees. As such, Robertson J left it open for the Prosecutor to use Truth and Reconciliation Commission evidence before the Court, since the Prosecutor's earlier undertaking not to use such evidence was made "at a time when it was not envisaged that any indictee would testify [before the Truth and Reconciliation Commission]".[113] Robertson J thus conceded from the outset

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106 Ibid, para 2.

107 Regarding the debate surrounding the Special Court / Truth and Reconciliation Commission relationship, see William A Schabas "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone" (2003) 25 HRQ 1035, 1048.

108 *Norman Appeal Decision*, above n 34, para 12.

109 Ibid, para 4.

110 It is interesting to note that Robertson J points to primacy in this section. Related to this provision in section 21(2) of the Special Court Agreement, 2002 (Ratification) Act 2002 (Sierra Leone). This section demands compliance (by every natural person, corporation or *any other body* created by or under Sierra Leone law) with directions specified in an order of the Special Court, notwithstanding any other law. Section 8 of the Statute of the Special Court states that the Special Court shall have primacy over the national *courts* of Sierra Leone.

111 *Norman Appeal Decision*, above n 34, para 4.

112 Ibid, para 6.

113 Ibid.

that both bodies ought to endeavour to cooperate where possible, but that ultimately the Special Court would not defer to the Truth and Reconciliation Commission, especially where indictee testimony could threaten the overriding duties of the Special Court.

2 Evidence

Robertson J was particularly concerned that a premature assessment of individual criminal responsibility by the Truth and Reconciliation Commission in its final report would create anxiety about the outcome of the trial. It had, in fact, been indirectly suggested by Truth and Reconciliation Commission representatives that some assessments of responsibility would be made.[114] Such an assessment could, according to Robertson J, "create anxieties among prospective witnesses and … prove indirectly damaging to either Prosecution or Defence".[115] It would not be appropriate for Norman to be judged in advance and, therefore, the question was not *whether* he could tell his story, but *how* he could tell his story without in any way prejudicing the integrity of his trial.[116] The trial would, undoubtedly, be damaged (even if indirectly) if Norman were to testify before the Truth and Reconciliation Commission. The Commission lacked the judicial capacity to pass judgment and had no established rules of procedure and evidence with which to obtain the testimony in an appropriate manner.[117] Such a "spectacle" would not be acceptable in any other international criminal tribunal and, accordingly, granting an application for a public hearing would have established a dangerous precedent.[118] Robertson J thus came half way by allowing Norman to give evidence privately and suggested delaying the final Truth and Reconciliation Commission report until the conclusion of the trial.[119] In doing so, he did not aim to "… obstruct the TRC but to provide fundamental protection for men facing charges alleging heinous crimes which if proved could lead to long years of imprisonment".[120]

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114 Ibid, para 15.

115 Ibid.

116 Ibid, paras 17–19.

117 Ibid, para 25.

118 Ibid, para 31.

119 Robertson J also noted that a private interview was not precluded under the Truth and Reconciliation Commission's statute. In fact, there was no presumption in favour of a public hearing under section 7 of the Truth and Reconciliation Act. In such circumstances, it would have been appropriate for the Truth and Reconciliation Commission, given its overlapping mandate with the Special Court, to choose a private interview: see *Norman Appeal Decision*, above n 34, para 14; Truth and Reconciliation Act, above n 30, s 7.

120 *Norman Appeal Decision*, above n 34, para 21.

3 Indictee rights

Robertson J provided a useful explanation regarding the conflicting rights in the case. On the one hand, Norman had a right to freedom of speech and, on the other, the right to a fair trial. The latter right extended not only to Norman but to all involved in the trial process: the Prosecutor and its witnesses, victims and other indictees awaiting trial. In his view, the case for recognising the right to free speech may have been decided differently had Norman already pleaded guilty. Since he had not, a public hearing would be "wholly inappropriate".[121] If Norman were to be granted the right, it would expose him to unnecessary problems in the domestic courts:[122]

> It is understandable – although I wonder whether it is really necessary – that the TRC should wish that information to be stated on oath. This course would, at least in theory, make the indictee vulnerable to a perjury prosecution in the national courts and I do not consider it right or fair that he should be exposed to such double jeopardy.

Since Norman intended to plead "not guilty" and defend his actions by arguing that he used reasonable force against the RUF, the right to freedom of speech in the form of a public hearing could justifiably be limited. His freedom of speech would be limited only as far as was consonant with his status as a detainee.[123] The principle that a detainee retains his or her rights other than those necessarily suspended is a clear common law principle.[124] Furthermore, the decision to preclude Norman from testifying publicly was for the Special Court alone. It was not for the Truth and Reconciliation Commission to dictate how the Special Court would give effect to his freedom of expression.[125]

As aforementioned, the Special Court did not completely prevent Norman from exercising his right to free speech. He could exercise his right by presenting a written and sworn affidavit or a written and unsworn statement, by meeting with Truth and Reconciliation commissioners in the detention unit or by making a joint application with the Truth and Reconciliation Commission for a private session.[126] The Truth and Reconciliation Commission would, therefore, be equipped with the information it needed for a complete historical record. Interestingly, Robertson J considered that the reconciliation function of the Truth and Reconciliation Commission was a distinct function to truth-seeking and, accordingly, could not apply to those who had not yet been found guilty of any

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121 Ibid, para 39.

122 Ibid, para 38.

123 Ibid, para 39.

124 Ibid, para 40, citing *Raymond v Honey* [1983] 1 AC 6 (HL) and *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

125 *Norman Appeal Decision*, above n 34, para 38.

126 Ibid, para 41.

crime.[127] In conclusion, he aptly summarised the relationship between the Truth and Reconciliation Commission and the Special Court:[128]

> The work of the Special Court and the TRC is complementary and each must accommodate the existence of the other ... [T]he Special Court respects the TRC's work and will assist it so far as is possible and proper, subject only to our overriding duty to serve the interests of justice without which there may not be the whole truth and there is unlikely to be lasting reconciliation.

D Missed Opportunities and the Consequences in Norman

Establishing the Truth and Reconciliation Commission and Special Court at different times and pursuant to different political events gave rise to numerous legal and practical issues that warranted clarification in a formal agreement. Unfortunately, the opportunities to address these issues were missed.

Essentially, two main opportunities to define the relationship arose. First, it was reasonable to expect that relationship issues would be addressed and finalised during the negotiations between the United Nations and the Sierra Leone Government prior to the enactment of the Special Court Ratification Act. Resolution 1315 flagged the existence of the Truth and Reconciliation Commission in its preamble.[129] More importantly, the United Nations Secretary-General clearly expressed his expectation that some form of working relationship would be drafted.[130] Secondly, the two bodies could have forged a memorandum of understanding (or other form of agreement) either before the Special Court became operational or shortly thereafter. This was suggested in various United Nations-sponsored meetings at the time. The International Centre for Transitional Justice, for example, assiduously researched the issues and presented a draft memorandum for consideration.[131] Human Rights Watch discussed matters relating to evidence and suggested

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127 Ibid, para 42.

128 Ibid, para 44.

129 Resolution 1315, above n 22, preambulatory para 4.

130 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, above n 24, para 9. This is certainly not to say that earnest efforts were not made to deal with the planning concerns. Planning meetings were arranged through the Office of the High Commissioner for Human Rights and the United Nations Assistance Mission in Sierra Leone. It was identified that some form of relationship agreement would contribute to the successful fulfilment of the Special Court and the Truth and Reconciliation Commission mandates. Regrettably, these efforts were not formally implemented. For a useful overview of this period, see *The Final Report of the Truth and Reconciliation Commission of Sierra Leone*, above n 17, (vol 3B) ch 6: "The TRC and the Special Court", paras 40–46.

131 This draft was annexed to the conference paper presented by the International Centre for Transitional Justice at the meeting for the United Nations Expert Group on the Relationship between the Truth and Reconciliation Commission and the Special Court, organised by the Office of the High Commissioner for Human Rights in New York in December 2001.

possible solutions if Truth and Reconciliation Commission evidence were to be admitted to the Special Court.[132] In 2001, when preparing the draft statute for the Special Court, the United Nations Secretary-General reported that the Office of the High Commissioner for Human Rights and the United Nations Mission in Sierra Leone were preparing guidelines on the relationship between the Truth and Reconciliation Commission and Special Court.[133] In December of that year, the United Nations High Commissioner for Human Rights reported that "[t]he modalities of cooperation should be institutionalised in an agreement between the Truth and Reconciliation Commission and the Special Court …".[134] Regrettably, despite these suggestions, the Truth and Reconciliation commissioners were not involved in this process and no comprehensive information-sharing arrangement was concluded.[135]

Various justifications could be provided for the failure to conclude a relationship agreement. After all, financial resources were scarce and political pressure demanded that a special court be established as quickly as possible. Neither of these justifications can completely account for the missed opportunities in this case. Two years passed between President Kabbah's initial plea for help in May 2000 and the Special Court's commencement of operations in December 2002. Given the time, money and effort that had been invested in drafting the constitutive documents of the Special Court, a relationship agreement would not have been overly burdensome. In any case, the obvious overlap of jurisdiction and the contentious issues of primacy, practice directions, evidence and information-sharing ought to have overridden any concerns based on political expediency. However, the Truth and Reconciliation Commission seemed unwilling to draft an agreement if it would compromise the Commission's confidentiality, the Special Court was prepared to issue ad hoc practice directions as and when required, and the Government of Sierra Leone displayed wavering support during the entire process.[136] Before the Special Court Ratification Act entered

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132 "Policy Paper on the Interrelationship Between the Sierra Leone Special Court and the Truth and Reconciliation Commission" (18 April 2002) www.hrw.org (accessed 20 April 2008).

133 Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, above n 53, para 47.

134 The High Commissioner did not recognise the primacy of the Special Court. Rather, the relationship was merely defined as one that required each body to act "in a complementary and mutually supportive manner": Schabas "A Synergistic Relationship", above n 65, 27. Notwithstanding the fact that the High Commissioner maintained that each body was independent, the need for a relationship agreement was recognised all the same.

135 While it is understandable that the Truth and Reconciliation Commission did not wish to appear as though it would divulge confidential information to the Special Court and risk a reduction in public hearing participation, this does not altogether explain the lack of an agreement between the two bodies. Ultimately, a basic structural framework within which potential disputes could be addressed was necessary.

136 This is notwithstanding the Government of Sierra Leone's enthusiasm to accept the United Nations instruments and ensure that a Special Court would be appropriately established: Letter from the President of the Security Council, addressed to the Secretary-General (12 July 2001) S/2001/693, 2.

into force on 12 April 2002, the Government of Sierra Leone wrote to the Secretary-General to confirm that it had complied with all duties regarding the Agreement.[137] This is a curious statement, since the United Nations Secretary-General's report in 2000 indicated a clear expectation of a formal relationship agreement, which was never concluded.

The consequences of the ill-defined relationship raise concern. While it could be argued that, notwithstanding *Norman*, the relationship was mainly cordial, the broader implications of Sierra Leone's experience are worrisome. The Truth and Reconciliation Commission addressed the absence of a regulating instrument between the two bodies. In its final report it stated:[138]

> 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.

In hindsight, therefore, it is clear that the cost of not defining the relationship was far greater than the cost of defining it. Many months were spent debating the issue of primacy when the Truth and Reconciliation Commission should have been wrapping up its investigations and, in the end, neither the Commission nor the Special Court was able to hear Norman's testimony. Norman died in custody and, accordingly, was neither acquitted nor found guilty of the charges he faced. Had the trial proceeded, it is likely that various theoretical and practical obstacles would have been encountered on both sides. The dispute over Norman not only demanded precious time and resources; it also has broader consequences. The clash between the two bodies has the potential to taint Sierra Leone's transitional justice legacy. It creates the deceptive impression that courts and commissions will either operate in complete harmony or be entirely incompatible. Neither extreme is, in fact, correct. Due to their different conceptions of justice and overlapping tasks, truth commissions and courts will understandably differ on various issues during the course of operations. It would be misleading to give the impression that such overlap can simply be regulated in an ad hoc fashion or not at all. If a lesson can be learned from Sierra Leone, it is that transitional justice mechanisms may often require close scrutiny and regulation if they are to bring about lasting changes for a post-conflict society.

V LESSONS FROM TIMOR LESTE AND SOUTH AFRICA

As indicated at the outset, truth and reconciliation commissions are proving to be an increasingly popular transitional justice option for post-conflict societies. Between 1974 and 1994

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137 Schabas *The UN International Criminal Tribunals*, above n 9, 39.

138 *The Final Report of the Truth and Reconciliation Commission of Sierra Leone*, above n 17, (vol 3B) ch 6: "The TRC and the Special Court for Sierra Leone", para 46.

twenty had been created and in 2004 there were more than thirty worldwide.[139] In Timor Leste, the work of the truth commission was intended to complement the prosecutorial process. In contrast, the South African truth commission operated as an alternative to criminal trials in the national courts. The following comparative analysis highlights not only the uniqueness of each post-conflict solution, but also the way in which careful planning can mitigate jurisdictional disputes.

A Timor Leste

1 The Timor Leste truth commission and the Special Panels: legal bases and mandates

The truth commission in Timor Leste, the Commissao de Acolhimento, Verdade e Reconciliacao de Timor Leste (the Timor Leste truth commission), was established on 13 July 2001 by United Nations Transitional Administration in East Timor Regulation 2001/10 (Regulation 2001/10).[140] It was an independent State-approved body aimed at promoting "national reconciliation and healing".[141] Regulation 2001/10 clearly established the Timor Leste truth commission's powers which, inter alia, required the "referral of human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of offences where appropriate".[142] Five to seven national commissioners led the truth commission.[143] Unlike Sierra Leone, where the status of the Truth and Reconciliation Commission was contested, the status of the Timor Leste truth commission was unequivocally set out in Regulation 2001/10.[144] Interestingly, a "Selection Panel" in Timor Leste decided the composition of the truth commission and was comprised of political, civil and religious groups, as well as the Transitional Administrator for East Timor.[145]

The Timor Leste truth commission had two main functions: truth-seeking with regard to human rights violations and community reconciliation. As part of its truth-seeking function, it was entitled to investigate both low and middle-level crimes, as well as serious crimes.[146] It also had broad

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139 Priscilla B Hayner *Unspeakable Truths: Confronting State Terror and Atrocity – How Truth Commissions Around the World are Challenging the Past and Shaping the Future* (Routledge, New York, 2001). See also Kritz, above n 8.

140 United Nations Transitional Administration in East Timor [UNTAET] Regulation 2001/10 (13 July 2001) UNTAET/REG/2001/10.

141 Ibid, preamble.

142 Ibid, s 3.1(a)–(i), in particular s 3.1(e). Unfortunately, when cases were referred to the Office of the General Prosecutor, there was no guarantee that a prosecution would result.

143 Ibid, s 4.1.

144 Ibid, s 2.2.

145 Ibid, s 4.3(a)(i)–(xii).

146 Ibid, s 13.1(a)(iv).

search and seizure powers, as well as jurisdiction to examine the role of international State and non-State actors in human rights violations.[147] Despite these extensive powers, the Timor Leste truth commission was subject to some important limitations. It could not, for example, grant amnesties for human rights violations dealt with under the truth-seeking process and it was also required to refer serious criminal offences to the appropriate authority.[148] In comparison to its truth-seeking functions, the Timor Leste truth commission's community reconciliation activities were more heavily limited. Subject matter jurisdiction in this regard was restricted to low and middle-level offending.[149] The Timor Leste truth commission was, therefore, prevented from encroaching upon the exclusive jurisdiction of the Special Panels for Serious Crimes (the Special Panels) with regard to serious crimes.[150]

Approximately one year before the Timor Leste truth commission was created, the United Nations Transitional Administration in East Timor (the Transitional Administration) sought to establish a court to prosecute those responsible for serious criminal offences that took place in 1999. In January 2000, an International Commission of Inquiry recommended that the United Nations Security Council establish an international tribunal.[151] Unfortunately, despite assurances from Indonesia that it would independently administer justice in Jakarta, there has been little will in Indonesia "to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed in East Timor".[152] On 6 June 2000, the Transitional Administration established the Special Panels in Timor Leste's capital, Dili.[153] This was an improvement on the earlier justice system that the Transitional Administration had previously established: eight local courts that were simply ill-equipped to deal with the volume and subject matter of the cases.[154] The Transitional Administration accordingly reduced the number of courts to

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147 Ibid, ss 3.1(d) and 14.1(h). This is analogous to the broad investigative powers of the Truth and Reconciliation Commission in Sierra Leone: Truth and Reconciliation Act, above n 30, s 8(1).

148 UNTAET Regulation 2001/10, above n 140, s 38.1.

149 Ibid, sch 1, points 1–3.

150 Ibid, sch 1, point 4.

151 UN Office of the High Commissioner for Human Rights "Report of the International Commission of Enquiry on East Timor to the Secretary-General" (31 January 2000) S/2000/59.

152 David Cohen "Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta" www.ictj.org (accessed 6 September 2008).

153 UNTAET Regulation 2000/15 (6 June 2000) UNTAET/REG/2000/15. The Dili District Court had a mandate to consider serious crimes pursuant to sections 10.1 and 10.2 of UNTAET Regulation 2000/11 (6 March 2000) UNTAET/REG/2000/11. This regulation anticipated the possibility for special panels to be set up within the District Court in Dili, but noted that this would not preclude the jurisdiction of an international tribunal, were one to be established.

154 Hansjörg Strohmeyer "Making Multi-Lateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor" (2001) 25 Fletcher Forum of World Affairs 107; Hansjörg

four, with a District Court and Court of Appeal in Dili.[155] The Special Panels in the Dili District Court were unique. Rather than operating on their own, they were designed to work within the domestic system.

The Transitional Administration also provided a prosecution service for the Timor Leste courts.[156] The Office of the General Prosecutor was based in Dili and was divided into two departments. The first department dealt with ordinary crimes, the other with serious crimes.[157] The Deputy General Prosecutor for Serious Crimes was assisted by a Special Crimes Unit.[158] The Deputy General Prosecutor for Serious Crimes (and, therefore, the Office of the General Prosecutor) is relevant since it had a direct influence on the Timor Leste truth commission's Community Reconciliation Programme. The four Special Panels were granted exclusive subject matter jurisdiction to prosecute those found guilty of "serious crimes" under United Nations Transitional Administration in East Timor Regulation 2000/15.[159] The Special Panels in Dili's District Court were later empowered with jurisdiction over torture committed between 1 January 1999 and 25 October 1999.[160] International law provisions in respect of serious crimes were applied in accordance with the definitions provided in the Rome Statute of the International Criminal Court.[161]

It is clear that, although established at different times, the respective functions and jurisdiction of both the Timor Leste truth commission and the Special Panels were clearly set out in their foundational documents. While the truth commission was independent and possessed extensive powers to fulfil its mandate, it could not deal with cases that were subject to the exclusive subject matter jurisdiction of the Special Panels. Other than through its truth-seeking functions, the truth commission was limited to addressing low and middle-level crimes.

2 The Timor Leste truth commission and the Special Panels: working relationship issues

The work of the Timor Leste truth commission overlapped with that of the Special Panels in two key areas. First, there existed an interesting relationship between the Office of the General

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Strohmeyer "Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor" (2001) 95 Am J Int'l L 46.

155 UNTAET Regulation 2000/11, above n 153, s 10. This was later amended: UNTAET Regulation 2000/14 (10 May 2000) UNTAET/REG/2000/14. See also Suzannah Linton "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 MULR 122, 138.

156 UNTAET Regulation 2000/16 (6 June 2000) UNTAET/REG/2000/16, s 1.

157 Ibid, s 5.1.

158 Ibid, s 14.6.

159 UNTAET Regulation 2000/15, above n 153, s 2.2.

160 UNTAET Regulation 2000/11, above n 153, s 10.1.

161 UNTAET Regulation 2000/15, above n 153; Rome Statute of the International Criminal Court, above n 55.

Prosecutor (and thereby the Special Panels process) and the Timor Leste truth commission with regard to information-sharing. Secondly, the truth commission came into contact with the Office of the General Prosecutor with regard to Community Reconciliation Programmes.

(a) Information sharing

The Timor Leste truth commission's relationship with the Office of the General Prosecutor and the Special Panels was regulated by a memorandum of understanding. In contrast to Sierra Leone, where regrettably no such memorandum was concluded, Timor Leste established a framework to ensure a mutually beneficial working relationship:[162]

> With regard to the CAVR's [Timor Leste truth commission's] truth-seeking function:
>
> (a) The CAVR will release specific information it has gathered through its truth-seeking function to the OGP upon request and in circumstances where the confidentiality of witnesses or the victims is preserved to the greatest extent possible.
>
> (b) The OGP will request information only if it is deemed specifically relevant to an active criminal investigation or prosecution which has been initiated by the OGP independently of any information which has been requested from the Commission.
>
> (c) The OGP is able to provide information to the CAVR that is relevant to its truth-seeking function only in circumstances where this does not prejudice *ongoing investigations or prosecutions* or the confidentiality of *witnesses or victims* and it is *consistent with the mandate of the OGP*.

Each subparagraph achieved a very distinct goal. The first allowed the Office of the General Prosecutor to obtain information from the truth commission, though it also recognised that the truth commission operated successfully by guaranteeing confidentiality.[163] Confidential information would, therefore, be invulnerable, although some cases would demand that the truth commission yield to the overriding duty to prosecute. The second subparagraph prevented abuses of the truth commission system, that is, the truth commission could not be reduced to an information and research branch of the Office of the General Prosecutor. Finally, and most relevant when considering the problems in Sierra Leone, the third subparagraph explicitly stated that the mandate of the Special Panels would trump that of the truth commission in cases of conflict between the two bodies.[164] Had such an explicit provision existed in Sierra Leone, confusion and contention may have been avoided. The *Norman* case, for example, could have been avoided if the primacy of the

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162 "Memorandum of Understanding Between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working Relationship and an Exchange of Information between the Two Institutions" (4 June 2002), para 9 (emphasis added).

163 UNTAET Regulation 2001/10, above n 140, s 44.

164 It also alludes to the right to a fair trial (in the broadest sense) as it was described by Robertson J in the *Norman Appeal Decision*, above n 34, paras 15 and 28.

Special Court had been expressly recognised. Timor Leste, therefore, illustrates the value of a memorandum of understanding that regulates the working relationship of two bodies dealing with the same subject matter. Such a memorandum should have been put in place in Sierra Leone and ought to be considered in future cases.[165]

(b) The Community Reconciliation Programme and the adjudication of serious crimes

The Community Reconciliation Programme was a source of tension for the Timor Leste truth commission / Special Panels relationship. In principle, the Timor Leste truth commission did not have jurisdiction over serious crimes when operating the Community Reconciliation Programme due to the immunities it could grant to individuals.[166] Such immunity, while perhaps acceptable for minor crimes, would not have been appropriate for serious criminal offences.[167] Despite a clear distinction between the respective subject matter jurisdiction of each body, the definition of "serious crimes" remained equivocal. Acts that would normally constitute minor crimes, such as assault or destruction of property, could be considered "serious" if committed against a political group or a significant number of people. Where the line between minor and serious crimes should have been drawn was, therefore, unclear. To resolve this, Regulation 2001/10 set out criteria for consideration.[168] In determining whether a crime was "serious", consideration would be given to the nature of the crime, the total number of acts committed and the deponent's individual role in the commission of the crime. Importantly, Regulation 2001/10 clearly stated that, "in no circumstances shall a serious criminal offence be dealt with in a Community Reconciliation Process".[169]

Unfortunately, the principle that "in no circumstances" would the Community Reconciliation Programme deal with serious criminal offences conflicted with another provision in the Regulation. Section 27 indicated that, in cases where the Timor Leste truth commission did not receive express notice from the Office of the General Prosecutor stating that it wished to exercise its jurisdiction in the case (within fourteen days of the Office of the General Prosecutor receiving a Community Reconciliation Programme case application from the truth commission), the truth commission could

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165 This is not to suggest that the case of Timor Leste is without problems. In terms of defining the relationship between retributive and restorative justice mechanisms, however, the attempt made in Timor Leste is a useful starting point from which further improvements can be made.

166 UNTAET Directive on Serious Crimes 2002/9 (18 May 2002) UNTAET/2002/9.

167 After a Community Reconciliation Programme, a Community Reconciliation Agreement could be reached between the person who had confessed to a crime and the Timor Leste truth commission. A Community Reconciliation Agreement resulted in immunity from civil and criminal prosecution in respect of the acts or omissions for which the person had provided full disclosure of all relevant information under UNTAET Regulation 2001/10, above n 140, ss 31–32. The Community Reconciliation Agreement would be delivered to the District Court, and subsequently form an Order of the District Court pursuant to ss 28.1 and 28.2.

168 UNTAET Regulation 2001/10, above n 140, sch 1.

169 Ibid.

proceed with a Community Reconciliation Programme.[170] Thus, on the one hand the Timor Leste truth commission appeared to be completely prevented from encroaching on the exclusive jurisdiction of the Office of the General Prosecutor yet, on the other, it was entitled to proceed with potentially serious crimes if there was no indication of prosecution. Not surprisingly, this system was problematic. Practically, it was unreasonable to presume that the Office of the General Prosecutor would be in a position to give notice of exclusive jurisdiction within a fourteen day period, given the sheer volume of work to which it was assigned.[171] The Regulation incorrectly presumed that it would have enough information on the Community Reconciliation Programme applicant to justify an exclusive jurisdiction notice.

This situation led to what some call an "impunity gap". Perpetrators of serious crimes could effectively be excluded from both the Community Reconciliation Programme and Office of the General Prosecutor prosecutions.[172] This created confusion and bitterness, since low-level offenders could be reprimanded while perpetrators of serious crimes could avoid appearing before either body. To combat this problem, Regulation 2001/10 was amended in 2002.[173] The new Directive afforded the Office of the General Prosecutor greater discretion as to whether crimes should be subject to a Community Reconciliation Programme hearing but without requiring an indication as to the likelihood of prosecution. Further, the wording of the Regulation was changed to read that "in principle" a serious crime could not form part of a Community Reconciliation Programme. The Office of the General Prosecutor could, therefore, refer a case back to the truth commission allowing it to proceed with a Community Reconciliation Programme hearing, but with no indication as to whether the crimes were in fact "serious", nor whether there would be any prosecution by the Office of the General Prosecutor if the reconciliation process failed. Therefore, although the definition of "serious crimes" was addressed, it was not a perfect solution.

Despite the efforts made to avoid the impunity gap and to enhance the Timor Leste truth commission's understanding of the definition of serious crimes, problems still remained. In theory, it was possible for perpetrators of serious crimes to take part in the Community Reconciliation Programme. While this may have reduced the pressure on the already overworked Office of the General Prosecutor, it raises serious questions as to whether a Community Reconciliation Programme is the most appropriate forum for serious crimes.

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170 Ibid, ss 27.6–27.8.

171 Ibid, s 24.6. The notice period could be extended for another 14 days under s 24.8, however no indication was given as to whether further extensions could be granted thereafter.

172 Many people were denied participation in the Community Reconciliation Programme since the Office of the General Prosecutor had not indicated whether or not it would prosecute under its exclusive jurisdiction.

173 UNTAET Directive on Serious Crimes 2002/9, above n 166, s 1.

3 Lessons learned from Timor Leste

Timor Leste is an interesting case that presents some useful insights for future post-conflict societies. It was successful in electing commissioners in an open and transparent way. Further, it was unique in establishing an internationalised court within a local criminal framework. In theory, this could be a useful way of strengthening local criminal justice systems in post-conflict societies. Most importantly, Timor Leste is a good example of how a memorandum of understanding or some other form of formal relationship agreement can avoid confusion when courts and truth commissions face jurisdictional overlap. Unfortunately, along with these successes, Timor Leste also illustrates the problems associated with ill-defined crimes. The Office of the General Prosecutor was overworked due to a lack of cooperation from Indonesia, while the Timor Leste truth commission wanted to initiate the Community Reconciliation Programme as quickly as possible. The confusion over serious crimes created an impunity gap that angered many. In future cases, therefore, it must be clear what constitutes a serious crime and how each body will deal with contentious cases. If this is not achieved, transitional justice bodies risk losing considerable credibility. Notwithstanding this, if implemented appropriately, the Timor Leste approach could work well in future cases.

B South Africa

In contrast to Sierra Leone and Timor Leste, where it was envisaged that the truth commissions and courts would have concurrent jurisdiction, the South African Truth and Reconciliation Commission (the South African truth commission) acted as an alternative to local prosecutions. The following discussion of the South African truth commission's power to grant amnesties is intended to illustrate just one approach to post-conflict justice. Whether amnesties are, in fact, necessary or desirable is a divisive question. Notwithstanding this, the amnesty issue demanded that South Africa unequivocally demarcate the bounds of the South African truth commission's relationship with national courts. If anything, South Africa highlights how jurisdictional conflicts can be avoided by clear statutory delineation.

1 Establishing the South African truth commission: legal basis and mandate

South Africa's system of apartheid plagued the nation for nearly thirty years. As it grappled with democracy in the early 1990s, it was hindered by the political leaders who remained in power and the security forces that answered to them. Accordingly, with the political elite protecting their own interests, real reconciliation with the past was never envisaged. Rather than a moral imperative, the amnesty alternative established by the postamble to the Interim Constitution was a political compromise between the outgoing National Party and the African National Congress aimed at achieving national unity.[174]

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174 South Africa (Interim) Constitution 1993 (South Africa), postamble.

It was envisaged that this postamble and, by implication, any body created as a result, would enjoy primacy under the Constitution.[175] The suggestion that a truth and reconciliation commission could be used to achieve peace was not well received and some went so far as to propose blanket amnesties as an alternative.[176] Not surprisingly, this approach was rejected. Months of debate culminated in the adoption of the Promotion of National Unity and Reconciliation Act 1995 (South Africa) (the South African National Unity Act), which established the South African truth commission.

2 The statutory primacy of the South African truth commission

The South African National Unity Act clearly established the objectives and mandate of the commission and its primacy over national courts. Its purpose was to pursue national unity and reconciliation by establishing a complete picture of the historical human rights violations, facilitating and granting amnesties, making known the whereabouts of victims, reporting its findings and recommending policies to prevent future abuses.[177] Further, it could facilitate investigations into the accountability – political or otherwise – for any human rights violation.[178] In addition, the South African truth commission could grant amnesty in respect of acts associated with political objectives.[179] The South African truth commission's powers exceeded those of Sierra Leone's Truth and Reconciliation Commission, which could neither comment on legal accountability nor grant amnesties for acts committed during the conflict. Finally, the independence of the South African truth commission was explicitly stated in the South African National Unity Act:[180]

> The Commission, its commissioners and every member of its staff shall function without political or other bias or interference and shall, unless this Act expressly provides otherwise, be independent and separate from any party, government, administration or any other functionary or body directly or indirectly representing the interests of any such entity.

The South African truth commission had broad powers to call witnesses and demand the production of articles for examination.[181] This was notwithstanding the fact that such evidence might have

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175 Ibid, s 232(4).

176 G Simpson "Blanket Amnesty Poses a Threat to Reconciliation" (22 December 1993) *Business Day* Johannesburg.

177 Promotion of National Unity and Reconciliation Act 1995 (South Africa), s 3(1)(a)–(d).

178 Ibid, s 4(a)(i) and (v).

179 Ibid, s 4(c).

180 Ibid, s 36(1).

181 Ibid, s 31(1).

been incriminating.[182] The commission was required, however, to consult the Attorney-General, who had to be satisfied that it was reasonable, necessary and justified in an open and democratic society.[183] The Attorney-General also had to be satisfied that the person had refused or was likely to refuse to answer questions or produce articles to the South African truth commission on the ground that it could be incriminating.[184] Further, while the truth commission could demand the production of any article relevant to its investigations,[185] it was required to take steps to prevent any undue delay of intended or pending judicial proceedings.[186] These provisions indicate that, while the South African truth commission maintained primacy over national courts, it was clearly envisaged in the South African National Unity Act that it would endeavour to operate reasonably with regard to them.

The work of the Amnesty Committee illustrates the precise nature of the South African truth commission's primacy over national courts. The Amnesty Committee was one of three committees established by the South African National Unity Act.[187] The Act provided that the Committee Chairperson would be a judge, either still active in that capacity or discharged from active service.[188] The Committee could ensure that amnesty applications would be given priority if the applicant was in custody awaiting trial before national courts and could also postpone criminal proceedings in that regard.[189] Further, it could suspend civil proceedings until an outcome was reached.[190] The suspensory powers of the Amnesty Committee indicated primacy over the national courts, as did the effect of such amnesties. Applicants who were granted amnesty – whether they were standing trial, charged and awaiting sentence, or in custody serving a sentence – were entitled to have the criminal proceedings declared void, the record of the conviction expunged, and to be released.[191] They could not be criminally or civilly liable in respect of an act, omission or offence

182 Note that under ibid, s 31(3), incriminating answers or information obtained by the South African Truth and Reconciliation Commission hearings were deemed inadmissible in criminal proceedings. Such information could only be admissible if the person had been arraigned on a charge of perjury or a charge contemplated in the Promotion of National Unity and Reconciliation Act 1995 (South Africa), s 39(d)(ii) or under the Criminal Procedure Act (No 56) 1955 (South Africa), s 319(3).

183 Promotion of National Unity and Reconciliation Act 1995 (South Africa), s 31(2)(b).

184 Ibid, s 31(2)(c).

185 Ibid, s 29(b).

186 Ibid, s 29(3).

187 The other two committees established were the Human Rights Committee and the Rehabilitation and Reparation Committee.

188 Promotion of National Unity and Reconciliation Act 1995 (South Africa), ss 17(2), 17(3)(a) and 17(3)(b).

189 Ibid, ss 18(2) and 19(7).

190 Ibid, s 19(6).

191 Ibid, ss 20(8)(a), 20(8)(b) and 20(10).

that was the subject of a successful amnesty claim.[192] In total, approximately 7000 applicants applied for amnesty, nearly half of whom were from the African National Congress.[193] The South African truth commission, in providing amnesties that trumped criminal prosecutions, had a position of primacy that demanded utmost clarity. This is perhaps the reason why the relationship between the truth commission and the courts was unequivocal.

3 South Africa's legacy

Amnesties are sometimes seen as a necessary way to deal with mass violations of human rights. Whether they are a desirable method and whether they, in fact, promote reconciliation is another issue. Despite contention over the legitimacy of amnesties, either legally and constitutionally or morally, they remain a popular option for some truth commissions.

At the time of writing, Liberia, a neighbouring country of Sierra Leone, established its own truth and reconciliation commission. The Truth and Reconciliation Commission of Liberia (the Liberia truth commission) was established in 2005 by the National Transitional Legislative Assembly pursuant to the Accra Comprehensive Peace Agreement of 2003. For the meantime at least, it appears that it holds an independent position. Its work has explicitly been described as a "national priority" in its establishing legislation.[194] Cases before the Supreme Court of Liberia will be advanced for immediate hearing so as not to delay the Liberia truth commission hearings process.[195] It will not be compelled by "any authority" to disclose information obtained in confidence.[196] Analogous to the South African truth commission, the Liberia truth commission can recommend limited amnesties for crimes, although not for crimes against humanity or war crimes.[197] This raises the question as to whether a war crimes court will be established in Liberia. At a recent conference, the Chairperson of Sierra Leone's Truth and Reconciliation Commission warned Liberia of the dangers of concomitant transitional justice bodies:[198]

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192 Ibid, s 20(7). Note, however, that previous civil judgments were not affected by a successful amnesty claim: ibid, s 20(9).

193 Tom Lodge *Politics in South Africa: From Mandela to Mbeki* (James Curry, Oxford, 2003) 185.

194 An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia 2005 (Liberia), s 20.

195 Ibid.

196 Ibid, s 26(m).

197 Ibid, s 26(g). It is interesting to note the difference here between the South Africa truth commission's right to "grant" amnesties and the Liberian truth commission's ability to simply "recommend" amnesties. This indicates that the Liberian truth commission may not simply trump the national courts' jurisdiction, but rather work closely with them in this regard.

198 Sam Togba Slewion "The TRC will not grant Amnesties to Everyone" (5 June 2006) *The Inquirer* Liberia.

> The work of these two bodies [a war crimes court and a truth and reconciliation commission] cannot go together as the war crime tribunal undermined the work of the TRC in Sierra Leone because perpetrators were afraid to come forward for fear of being transferred to the war crime tribunal after their confessions before our Commission.

Despite these warnings some Liberians are – like many South Africans were in the 1990s – angry about the possibility of amnesties. In 2006, thousands of Liberians marched to call for the creation of an internationalised court.[199] Whether such a court will eventuate remains to be seen. If it does, then Liberia will need to consider the case of Sierra Leone. Section 42 of its establishing legislation allows the Liberia truth commission to form rules and procedures to fulfill its mandate.[200] If, like Sierra Leone, statutory provisions remain equivocal with regard to the relationship between the two bodies, then there might be room in this provision for some form of relationship agreement. Given the problems experienced in Sierra Leone and the provision for amnesties in Liberia, it would be advisable to address issues of primacy, amnesty, evidence and information sharing, especially where jurisdictions overlap.

VI CONCLUSIONS

The different approaches taken in Sierra Leone, Timor Leste and South Africa are indicative of the wide spectrum of options available to post-conflict societies to plan and implement their own unique transitional justice systems. At one end of the scale, Sierra Leone proceeded without any formal agreement between its two transitional justice bodies. At the other end, Timor Leste was a heavily regulated system that defined the relationship from the outset. In between these two poles, South Africa was able to define the relationship between the South African truth commission and other bodies, although this was less complicated than Timor Leste, since South Africa was a purely national model. All three cases present their own advantages and disadvantages. In Sierra Leone, the Special Court and the Truth and Reconciliation Commission were fortunate enough to interact in a cordial manner. When the *Norman* case arose near the end of the Truth and Reconciliation Commission's mandate, however, the relationship soured. The Timor Leste model was successful in precluding the Timor Leste truth commission from encroaching upon the exclusive subject matter jurisdiction of the Special Panels. Despite the memorandum of understanding that was drafted and the amendments that were sought to clarify the meaning of "serious crimes", however, the Timor Leste model was, in fact, excessively complicated, not to mention overburdened by a lack of cooperation from Indonesia. Finally, while South Africa answered the question of primacy with utmost clarity, the amnesties that were the impetus for such clarity were highly controversial.

The relative success of each model can be linked to the way in which the relationships between the transitional justice bodies were regulated. This, in turn, is linked to the context that gave rise to

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199 "Liberians Demand War Crimes Court" (4 July 2006) *BBC News* www.bbc.co.uk (accessed 21 April 2008).

200 An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia 2005 (Liberia), s 42.

their creation. It is unlikely that transitional justice will be internationalised in a uniform model. In fact, it is doubtful that such a model could meet the unique needs of post-conflict societies. Accordingly, this paper instead provides working guidelines for future cases. Having examined Sierra Leone, Timor Leste and South Africa, a set of central issues emerges. The following guidelines could indeed mitigate the problems associated with multiple transitional justice bodies and their relationship with one another.

A Preparation

When a post-conflict society establishes just one transitional justice body, as was the case in Sierra Leone prior to the Special Court and is currently the case in Liberia, it must make provision for the possibility of additional bodies in the future. While Liberia has a very general section in its enabling legislation that could accommodate a relationship agreement with a war crimes court in the future, it lacks specificity. Accordingly, the Liberian legislation could be amended to establish a plan for addressing the addition of a war crimes court or other body, should such a situation occur.

B Primacy

Where two transitional justice bodies are established at different times or as a result of different events and no prior plan has been made to deal with their relationship, it should be the duty of the negotiating parties to both address and finalise the question of primacy at the outset, that is, primacy should be addressed either before the additional body becomes operational or shortly thereafter. Resolving the issue of primacy (or, at the very least, instituting an operational protocol where transitional justice bodies have equal authority) is one of the necessary precursors to a successful relationship between transitional justice bodies. Once this is established, various potential conflicts will be mitigated or avoided altogether. A relationship agreement that addresses primacy as well as other issues should, as a minimum requirement, take the form of a memorandum of understanding, if not a more formal instrument.

C Practical Considerations

Once the question of primacy is addressed, potential areas of overlap must be identified, along with guiding principles to address the jurisdictional convergence. Although this is not an exhaustive list, particular consideration should be given to the following matters:

(1) establishing a clear prosecutorial strategy, as well as setting clear definitions of the crimes that each body will address;

(2) identifying rules that deal with the giving and receiving of evidence, especially as it relates to the prosecutorial strategy, as well as deciding how any evidence-sharing arrangement will be presented to the public without hindering the efforts of either body;

(3) coming to an agreement on the sharing of confidential information and setting conditions that will regulate requests for information;

(4) clarifying the status of practice directions and outlining both the procedure for issuing them and their effects;

(5) stipulating the nature and scope of the rights of an accused before each body, especially his or her rights when indicted before a prosecutorial body, keeping in mind international criminal justice standards;

(6) identifying conditions that should be recognised with regard to the right to a fair trial as well as the principles that underpin and guarantee the "integrity" of a trial; and

(7) dealing with freedom of speech by clarifying how each body will give effect to such a right, especially in the case of detainees, as well as assessing international trends in this regard.

D Contingency Plans

It is not always possible to anticipate all obstacles that may arise. Sometimes new circumstances give rise to a situation that neither party ever contemplated. Such was the case in Sierra Leone when Norman expressed his desire to testify. Before then, it was expected that indictees would simply await trial before the Court, while the Truth and Reconciliation Commission would deal with lower-level offenders. In light of this, it would be advisable to deal with the most pertinent areas of overlap and residual tensions, if or when they arise, through a pre-planned dispute resolution mechanism. This should be included in the relationship agreement between the parties. While many issues will be determined by the body that has primacy, others may be solved by a mediation process with the assistance of an independent third party. This mechanism may also be used when both bodies face unforseen circumstances that arise from factors other than or in addition to relationship tensions, such as an impunity gap. In Timor Leste, for example, the impunity gap may have been alleviated by consultation between the Special Panels and the Timor Leste truth commission and lodging an appeal for international assistance. Allowing for dialogue at the national and international levels could enable transitional justice bodies to garner further support to fulfil their mandates.

The Sierra Leone experience was indeed unique. The dynamic dual operation of a truth commission and hybrid court was originally seen as an opportunity to meet the various needs of the community and strengthen the national justice system. Unfortunately, as illustrated by the *Norman* case, the opportunities to define the relationship were missed. Consequently, despite the significant and positive work of both bodies, the legacy of the Sierra Leone transitional justice model may needlessly cast doubt on the compatibility of hybrid courts and truth commissions. As Timor Leste and South Africa demonstrate, relationship agreements and clear statutory provisions are a necessary precursor to any transitional justice programme. This is not to say that transitional justice mechanisms will be perfect – they will not. Nonetheless, addressing key issues such as primacy, evidence, information-sharing and dispute resolution mechanisms is crucial if these bodies wish to achieve real "justice" within the community. Whether other countries follow the Sierra Leone model of a concomitant hybrid court and truth commission remains to be seen. Whatever model emerges as

the most desirable, it is hoped that post-conflict societies will acknowledge and prepare for the inherent practical constraints they will face in the transitional justice process.