

**EXPLORING THE RELATIONSHIP BETWEEN
THE SPECIAL COURT AND THE TRUTH AND
RECONCILIATION COMMISSION OF SIERRA LEONE**

Marieke Wierda, Priscilla Hayner and Paul van Zyl
The International Center for Transitional Justice, New York
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The ICTJ can be contacted at 20 Exchange Place, 33rd Floor, New York NY 10005, tel: (917) 438 9300, fax: (212) 509 6036, www.ictj.org.

Executive Summary: The simultaneous establishment of a Truth and Reconciliation Commission and a Special Court in Sierra Leone is a unique opportunity to advance complementary processes for accountability. However, before the Court and Commission begin, certain practical issues regarding their relationship will need to be addressed. This paper explores: (1) the legal relationship of the Commission and the Court; (2) the question of whether TRC information should be disclosed to the Court; (3) protective measures (in the case of disclosure); (4) whether other means of collaboration between the Court and the Commission are appropriate; and (5) mutual adjustments of operations. Finally, we propose language for a draft memorandum of understanding concerning information sharing.

I. Introduction

The simultaneous establishment of a Truth and Reconciliation Commission (TRC) and a Special Court in Sierra Leone to redress massive human rights violations during the civil war gives rise to a number of practical challenges. Considering these challenges in advance, and agreeing on measures to address them, will assist both institutions in functioning effectively and will minimize potential for rivalry. As Kofi Annan, Secretary-General of the United Nations, has said, “Care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.”¹

The Court and the TRC fulfill different but compatible roles in ensuring accountability. The Special Court is intended to punish individual perpetrators, namely those who bear the “greatest responsibility,” including the planners and instigators of the terrible violence that has marred Sierra Leone. The mandate of the TRC, on the other hand, is to investigate the causes, nature, and extent of the violence. The Special Court will also examine general patterns of crimes (an element of proving crimes against humanity), but its analysis will be limited to the facts relevant to specific cases before it. The Court will be able to try only a small number of perpetrators (estimated at 20 or less) and may convict only where there is proof beyond a reasonable doubt. The TRC will compile a wider analysis of the patterns of violence and a more complete record of the conflict.

Only a limited number of victims will take part in Special Court proceedings. The Commission will be the main forum for victims and others to describe their experiences. The Commission will also give broad recommendations on reparations, either to or regarding the Special Fund for War Victims provided for in the Lomé Peace Agreement. The Special Court, on the other hand, has the power to order the return property, proceeds, or assets acquired unlawfully or by criminal conduct, to their rightful owner or to the State of Sierra Leone.² It is expected that criminal trials will contribute to the re-establishment of the rule of law through the promotion of individual accountability, but

¹ Letter dated 12 Jan. 2001 from the Secretary-General addressed to the President of the Security Council (S/2001/40).

² Statute of the Special Court, Art. 19.

the TRC will fulfill an equally important role in making positive recommendations for legal, political, and administrative reform, thereby diminishing the likelihood of a repetition of abuses. These institutions thus fulfill complementary roles in providing for justice and accountability.³

At the same time there is obvious scope for overlap between the two institutions. The Special Court will have jurisdiction over violations of international humanitarian law since 30 November 1996. The Commission will cover events from the beginning of the civil war in 1991 until the conclusion of the Lomé Peace Accord on 7 July 1999.⁴ The overlap in their mandates is demonstrated below:

	Pre-Lomé international crimes	Post-Lomé international crimes	Pre-Lomé domestic crimes	Post-Lomé domestic crimes
TRC	Yes, from 1991	No	Yes, from 1991	No
Special Court	Yes, but only from 30 Nov. 1996	Yes	No (amnesty prevails: see Art. 10 of the Statute) ⁵	Yes (only if covered by Art. 5 of the Statute)

Some have suggested that it would have been preferable to sequence the Commission and the Special Court, implementing one before the other in order to avoid problems stemming from overlap.⁶ However, this issue is now moot, as both institutions are becoming operational in the middle of 2002.⁷ Others suggest that the Court exists to try

³ Indeed, the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) has shown that in situations of mass crime, a limited number of criminal prosecutions, no matter how successful, does not completely satisfy public or victim expectations for justice and acknowledgement. This is reflected in a statement by Judge Claude Jorda, president of the ICTY, in his latest address to the General Assembly. President Jorda referred to a Truth and Reconciliation Commission for Bosnia as “a mechanism complementary to the International Tribunal’s action and, moreover, one that is essential for the reconstruction of the country’s national identity.” Address by His Excellency, Judge Claude Jorda, President of the ICTY, to the UN General Assembly, 27 Nov. 2001.

⁴ TRC Act 2000, section 6 (1).

⁵ Discussions regarding the legality of the blanket amnesty granted under the Lomé Peace Accords are taking place both domestically and internationally.

⁶ Some have also suggested that the prosecutor should conduct his investigations prior to the TRC beginning its work, and issue a list of those whom he is going to prosecute, thus creating a clear division of labor between the institutions. This is very unlikely, because (a) the Prosecutor will not want to be bound by such a list; and (b) such a public list essentially amounts to public, rather than secret, indictments, which raise the possibility of the accused absconding, interfering with witnesses, or destroying evidence. The other ad hoc Tribunals (ICTY and ICTR) have generally abandoned the practice of public indictments (although these are still issued in certain cases). However, it is possible that a significant number of those persons sought by the Prosecutor of the Special Court will already be indicted and arrested before the TRC completes its work. This may decrease fears among less prominent perpetrators that they will be among those indicted and they may decide to come before the TRC.

⁷ The TRC is expected to enter its preparatory phase in early July, 2002, and become operational in October. The Special Court will also commence investigations in mid-2002. However, the TRC’s mandate is limited to 12 to 18 months and it will thus finish its work before the Special Court completes its trials.

those with the greatest responsibility for crimes whereas the TRC exists for “the rest.” But this is an artificial distinction, since the Commission, in its analysis of the conflict, must also address the question of who is responsible. In the absence of a clear division of labor, questions about the institutions’ relationship must be confronted: the most important is whether information the TRC gathers should be made available to the Special Court. It is therefore necessary to examine whether the legal relationship between the two institutions regulates this issue.

II. The Legal Relationship Between the TRC and the Special Court

The TRC, which was first agreed to in the Lomé Peace Accord, preceded the establishment of the Special Court. The Commission was established under Sierra Leonean law by the Truth and Reconciliation Commission Act in February 2000.⁸ The approach taken in Lomé was one of full amnesty in combination with a truth commission, without the possibility of prosecutions or civil suits. The creation of the Special Court represented a shift in approach. Although the international legal instruments establishing the Special Court (the Agreement between the Government of Sierra Leone and the United Nations and its appended Statute)⁹ came later, these were silent on the pre-existing Commission. Neither of these instruments makes any explicit reference to the Commission, except for a general mention of “truth and reconciliation mechanisms” in the context of juvenile offenders.¹⁰

However, the powers of the Special Court *vis-à-vis* the TRC have since been specified in the legislation implementing the Special Court Agreement in Sierra Leone’s domestic law. Thus the Special Court Agreement (Ratification) Act 2002 (hereafter: Special Court Act), states at section 21 (2):

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.

Section 21 (2) has legal consequences for the way in which the Commission will conduct its work. For instance, the TRC Act provided the Commission with the power to gather information in confidence, pursuant to section 7 (3):

The Special Court may benefit from, and even take judicial notice of portions of the TRC’s final report which describe the general factual background to certain crimes.

⁸ The Lomé Peace Accord of July 1999 granted “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.” (Art. IX) It also provided for the establishment of the TRC (Art. XXVI).

⁹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appending the Statute of the Special Court, signed in Freetown on 16 Jan. 2002.

¹⁰ The Special Court’s Statute states at Art. 15 (5): “In the prosecution of juvenile offenders, the Prosecution shall ensure that the child-rehabilitation program is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.”

At the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis and the Commission shall not be compelled to disclose any information given to it in confidence.

This clause not only grants a power to the Commission but also imposes a duty on its behalf to respect confidentiality. It is easy to see the potential for legal conflict: the Special Court could rely on section 21 (2) of the Special Court Act to order the TRC to disclose information granted confidentiality pursuant to section 7 (3). The question then becomes which of these provisions prevails.

The clause in section 21 (2) that reads “*Notwithstanding any other law,*” indicates that the Special Court’s power to order disclosure of information supersedes the confidentiality clause in the TRC Act. However, section 21 (2) is a blunt provision of wide scope, seemingly drafted with the intention of covering all possible persons and institutions (“every natural person, corporation, or other body created by or under Sierra Leone law”).¹¹ Section 21 (2) does not legislate explicitly for the Commission but binds it.¹²

The relationship between the Special Court and the Commission is therefore dictated by the broad powers of the Special Court. We submit that it is not resolved to satisfaction, and that the legal framework leaves room for an agreement to be concluded which better accommodates the various public interests at stake.

III. Information Sharing

A. Policy considerations

Although the Special Court Act gives the Court the power to issue binding orders, it is silent on the circumstances in which the Special Court should issue such orders. It is submitted here that the unrestricted use of such orders *vis-à-vis* the TRC will cause many people to fear cooperating with it, thus eroding its ability to function (this argument is elaborated below). The question of how the two institutions should relate should not be assessed purely in terms of law but also is also one of policy.¹³

¹¹ Section 2 (1) of the TRC Act establishes the TRC as a “body corporate” under Sierra Leone law.

¹² Moreover, section 21 (4) provides for circumstances under which persons can raise objections to an order to disclose issued by the Special Court. Section 21 (4) states: “If a person to whom an order of the Special Court is directed is unable to execute that order, he shall report forthwith the inability to the Special Court and give reasons therefore.” Although this does not detract from the binding nature of the obligation for persons to comply with orders from the Special Court, it alludes to the fact that the Court may reconsider if strong policy objections are raised.

¹³ Similar policy considerations apply in according privilege to particular types of information in ordinary criminal proceedings (e.g. medical privilege, journalistic privilege, national security privilege): these are discussed further in section IV below.

The important point is that *both* institutions have been established to achieve important goals, and neither should function at the expense of the other.¹⁴ Although the Special Court should be a strong and effective institution, the success of the Commission is equally important for many reasons: (1) most Sierra Leoneans are more likely to come into direct contact with the Commission than with the Special Court; (2) the establishment of the Commission is the result of a widespread consultative process and the Commission enjoys much public support; (3) an effective Commission can assist the reintegration of ex-combatants and facilitate the use of community-based reconciliation processes; (4) the TRC process is particularly appropriate in the case of Sierra Leone, where there has been mass duress and high numbers of juvenile perpetrators and victims; and (5) the truth-seeking function of the Commission will be critical to reconstruct and document the conflict, the details of which have been steeped in confusion.

For these reasons, the Court should refrain from exercising its powers in a way that will cause the Commission to be perceived as its investigative arm. Such an association will lead persons who fear the Court to also fear the Commission, thus rendering it unable to fulfill the role for which it was intended.

B. Methodology of gathering information

Some suggest that the informal way in which truth commissions gather information renders such information inadmissible in court and that it will therefore be useless to the Special Court. However, the other ad hoc tribunals (the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)) have applied liberal rules of evidence and have admitted evidence in an informal format. For instance, the ICTY allows admission of written statements made out of court, and the ICTR rules may soon be amended to allow for the same.¹⁵ The Special Court will base its rules on those of the ICTR.¹⁶ Even if such information cannot be relied on as evidence in court, it could still be used in investigations. However, it is useful to bear in mind the different methodologies each institution will use to gather information.

1. The Special Court

Procedures before the Special Court are adversarial: the parties (prosecution and defense) will each be responsible for their own evidence collection and presentation.¹⁷ The Report written by the Planning Mission on the Establishment of the Special Court for Sierra

¹⁴ These goals include accountability for perpetrators, acknowledgement for victims, prevention of future violence, and, ultimately, the return of a lasting peace and respect for human rights. Criminal prosecutions are imperative in the light of the seriousness and viciousness of the offences perpetrated, but the fact remains that prosecutions are likely to involve only a handful of perpetrators and victims. For many, the TRC will be the only available public forum to discuss the events of the civil war.

¹⁵ See the ICTY Rules of Procedure and Evidence, Rule 92 *bis*. Moreover, many TRC statements may be given under oath, subject to the TRC Act section 8 (1), thus adding to their reliability.

¹⁶ Statute of the Special Court, Art. 14.

¹⁷ Pursuant to Art. 15 (2) of the Statute, the Prosecutor will “have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.” The Prosecutor will therefore fulfill a role analogous to that of many domestic police in conducting investigations.

Leone pursuant to its visit in January 2002 gives insight into how the Prosecutor may conduct his investigations.¹⁸ First, it comments on the paucity of available evidentiary material. It then states that:

In developing a prosecutorial strategy, the Prosecutor, bearing in mind the limitations of the evidentiary material, will, as a first step, be required to “map the conflict”, reconstruct the history of the hostilities, study the organizational and command structure of the different factions and the means of their financial support. On the basis of this study, an investigation launched into the crimes committed would lead the Prosecutor to “those who bear the greatest responsibility”, and enable him or her to establish a limited but comprehensive list of indictees on the basis of the parameters indicated.¹⁹

This indicates that investigations may consist of two phases: (1) gathering a wide scope of materials in order to develop a general familiarity with the conflict; and (2) compiling evidence in individual cases. TRC information may be relevant to either of these phases (even if it is not admissible in court).

2. The TRC

The Commission may gather its information in a number of ways, laid out in section 7 of the TRC Act. For instance, it may

2. undertake its own investigations and research into key events;
3. hold hearings or sessions, some of which may be public;
4. take individual statements; and
5. permit persons to provide information to the Commission on a confidential basis, according to section 7 (3) of the TRC Act.²⁰

In practice, truth commissions have gathered most of their information by taking individual statements in a private, one-on-one meeting between individual victims or witnesses and a statement-taker. This information is of a private nature and is neither in the public domain nor necessarily confidential. It is difficult to predict how the Commission in Sierra Leone will conduct its work and how often it will seek to rely on section 7 (3). However, we can assume that most of the information gathered by the TRC will not be readily accessible to those outside the Commission.

¹⁸ See the Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, annexed to a Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Dec. S/2002/246 (hereafter Planning Mission Report). Mr. David Crane from the United States was appointed Chief Prosecutor for Sierra Leone on 12 April 2002.

¹⁹ Planning Mission Report, para. 39.

²⁰ This section has now been superseded by the Special Court Act s. 21 (2).

C. *Approaches to information sharing between a Court and a TRC*

For convenience, we propose three conceptual models for thinking about information sharing between courts and non-judicial mechanisms such as truth commissions:

1. The “fire wall” model, in which there would be no information sharing from the Commission to the Court.
2. The “free access” model, in which all Commission information would be available to the Court.
3. The “conditional sharing” model, in which there would be some information shared between the Commission and the Court.

The “fire wall” model

The “fire wall” model entails a block on the sharing of information from a truth commission to the criminal justice system.

This approach enables a clear message in public information campaigns, which could state, “Information that you disclose to the TRC in confidence will not be disclosed to the Prosecutor.” This message will be attractive both to perpetrators of high rank who fear prosecution, low-level or mid-level perpetrators who may fear implicating their commanders, and victims who may fear retaliation. In Sierra Leone, this fear is not speculative: PRIDE, a local NGO that works closely with ex-combatants in Sierra Leone, has written:

We have witnessed the negative reaction of ex-combatants about information sharing. . . . Many out-rightly have reversed their initial consent to face the TRC upon hearing about this possibility. To them, there seems to be evidence that the TRC will be an investigative arm of the Special Court and that whatever is being said at the TRC will be used to prosecute them or point the Prosecutor towards them as potential witnesses against their commanders. . . . From our daily interactions, we know that many are willing to participate with the TRC so long as they can be guaranteed that this will not send them to the Special Court as a defendant or a witness against their commanders.²¹

Thus, according to PRIDE, an explicit and complete dissociation from the Special Court would strengthen the Commission and enable it to better gather testimony from ex-combatants from various factions. Perpetrator testimony can provide crucial information to the TRC about the causes of the conflict.

However, section 21 (2) of the Special Court Act makes it impossible to give perpetrators absolute assurances that their information will not be shared with the Special Court.²² Furthermore, a “fire wall” approach has major potential pitfalls. Refusing to share any

²¹ Letter from PRIDE to ICTJ, 2 Feb. 2002.

²² This is unless the Special Court would agree not to use section 21 (2) *vis-à-vis* the Commission.

confidential information may foster the perception that the TRC is withholding information critical to the work of the Special Court. Apart from problems of perception, the Commission may find itself in possession of confidential information critical to avoiding a miscarriage of justice before the Special Court (e.g., information indispensable to either the prosecution or the defense). Most significantly, it may find itself in possession of exculpatory material, i.e. material that suggests the innocence or mitigates the guilt of the accused or which may affect the credibility of prosecution evidence.²³

For instance, the Commission may gather information that blatantly contradicts evidence before the Special Court on the guilt or innocence of a particular accused. In another scenario, persons may make statements to the TRC that are inconsistent with their subsequent testimony before the Special Court (“prior inconsistent statements”). In either of these situations, if the defense becomes aware that the TRC has such information to which it has no access, it is likely to argue that the accused is not receiving a fair trial. This may result either in the Special Court ordering the Commission to disclose the information, or the Court facing the difficult dilemma of whether it can proceed fairly with the case against the accused. In general, if the TRC fails to disclose information indispensable to proceedings before the Special Court, this may lead to a miscarriage of justice.²⁴

Thus, the “fire wall” model is not only difficult to implement in Sierra Leone under the current law, but is also problematic in its own right, as it could hinder the Court’s ability to deliver justice.

The “free access” model

On the opposite end of the spectrum is a “free access” model, under which the court would have unconditional access to everything coming before a truth commission, including confidential information.²⁵

²³ See ICTY Rule 68, which defines exculpatory evidence as evidence that tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

²⁴ Finally, if there is no information sharing, the risk remains that prosecutors will rely on factual descriptions in the Commission’s final report to identify and subpoena witnesses who have participated in TRC proceedings. (Although the Commission may make every effort to disguise the identity of particular victims, their identity may be able to be gleaned from the facts.) Another problem under this model is that even if a message is conveyed that there will be no sharing of information, this message may not be believed. The Special Court represents an important shift in policy, from a complete pardon and amnesty to limited prosecutions, and many perpetrators may be fearful of another shift in policy, where it would later be decided that information should be shared. Further mistrust of a message of no information sharing is likely to be stimulated by those who seek to obstruct cooperation with either the TRC or the Special Court.

²⁵ A variant of a free access model applies in East Timor, where prosecutors of the Serious Crimes Unit have theoretical access to all perpetrator statements given to the Commission for Reception, Truth, and Reconciliation. Such statements will be given to a Community Reconciliation Process Statements Committee, which forwards them to the prosecutor together with an assessment whether the crimes mentioned in the statement are suitable for prosecution as “serious crimes” or suitable for community reconciliation procedures. The prosecutor then has 14 days in which to notify the Commission of whether it intends to prosecute: section 24 of UNTAET/Reg./2001/15 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor. See also Schedule 1 to that Regulation.

In the context of Sierra Leone, the advantages of this approach accrue mostly to the Special Court because it would have full access to all Commission information. Those in favor have argued that both victims and low-level perpetrators want to use the TRC as a venue to give their account of what has happened and want that testimony to contribute to prosecutions before the Special Court.²⁶ However, this contradicts the accounts given by PRIDE and other NGOs working with ex-combatants and victims, who warn that free access of information is likely to have a major chilling effect on the willingness of perpetrators and victims to cooperate with the TRC.²⁷

Under a “free access” model, the TRC might be perceived as an investigative arm of the Special Court, and cooperation with it would be seen as synonymous with cooperation with the Special Court. As a result, information would be lost to both the TRC and the Special Court, and the TRC could not function effectively either as a truth-seeking mechanism or as a venue for reconciliation.

For these reasons, both of the absolutist approaches represented by the “fire wall” and the “free access” models should be put aside in favor of a compromise.

The “conditional sharing” model

The “conditional sharing” model advocates an approach where the institutions would agree that the TRC will disclose information to the Court if specific conditions are met. These are fully laid out in the section below.

Sharing certain types of information, such as public information, is not problematic and usually will not threaten the safety of any particular witness. This includes statements made during public sessions as well as statements of experts and information contained in public documents. Most forensic or physical material yielded by investigations will also fall into this category (although arrangements will need to be made regarding custody).

The most serious potential for conflict, however, arises regarding access to statements from victims, witnesses, and perpetrators taken by the Commission in a one-on-one setting or where the Commission has promised that the statement will remain confidential. Victims may give statements to the Commission that could be very useful to the Special Court, since the latter will adjudicate crimes for which the wider context must be presented in evidence (crimes against humanity, for example, require proving a widespread or systematic attack against a civilian population). However, the prospect of

²⁶ Some argue that an additional advantage of the free access model is that both institutions will be relying on the same sources of information, therefore reducing the risk of potentially contradictory findings and increasing the likelihood of producing a joint, single account of the civil war in Sierra Leone. However, it is submitted that the possibility of these two institutions to come to different conclusions is a natural result of the different methods of gathering information and the varying standards of proof that each will apply, and that this is not necessarily negative.

²⁷ It must be borne in mind though, that cooperation with the Court is not the only factor that may give rise to this fear. For instance, if the Commission decides to name perpetrators itself, this may also give rise to fears among victims and perpetrators.

this information being shared may be enough to deter many perpetrators and victims from cooperating with the TRC. How should this be resolved?

IV. Proposal for Information Sharing

As noted above, if TRC information is placed completely beyond the purview of the Special Court, this may erode the Court's ability to do justice. At the same time, the Commission must be able to function effectively. The key is in finding the right balance between these competing interests.

Such balancing exercises between various public interests are by no means unique to the interplay of courts and truth commissions. Courts are often required to balance competing public interests in dispensing criminal justice. A relevant example is journalistic privilege, the scope of which was recently contested in the case of *Brdjanin and Talić*, before the ICTY. A retired reporter of the *Washington Post* appealed against a subpoena that a judge of the Tribunal had issued against him. The reporter argued that journalists should be granted a public interest privilege to refuse to testify other than in exceptional cases, where evidence is crucial to proving guilt or innocence. He also argued that compelling testimony from war correspondents impairs their news-gathering function and that journalists may become "perceived by potential sources as an investigative arm of a judicial system."²⁸ However, the Tribunal decided that the essence of journalistic privilege is to allow a journalist to protect his sources, and because the reporter in this case had published the information, he could not now claim a privilege over it.²⁹ In another case, the ICTY decided that employees (current or former) of the International Committee of the Red Cross (ICRC) have a privilege from being compelled to testify before the ICTY because of the confidential status of ICRC information, a confidentiality generally recognized by States that forms part of customary international law.³⁰

Balancing exercises are therefore common. Several considerations may weigh into balancing the competing interests of the Special Court and the Commission. One such consideration is the importance of the information to the Court's ability to do justice. Another is whether the information may be obtained elsewhere. Further guidance is found in the ICTY practice of ordering disclosure of information from sovereign States: the Rules of the ICTY require that such information is shown to be relevant and necessary to the fair determination of a particular case, and that the request for disclosure is specific so as not to be unduly onerous on the State.³¹

²⁸ International Herald Tribune, 11- 12 May 2002, "Newspaper appeals war crimes subpoena: Reporters would be at risk, court is told."

²⁹ New York Times, 10 June 2002, "UN Court Says Reporter Must Testify."

³⁰ *Simić et al.*, Order Releasing Ex Parte Confidential Decision of the Trial Chamber, 1 Oct. 1999.

³¹ ICTY Rule 54 *bis*.

We therefore propose that the following procedure should govern information sharing between the TRC and the Special Court (this procedure is further outlined in a draft memorandum of understanding in Annex A):³²

1. Either the prosecution or the defense may request access to TRC information. The requesting party will apply to a judge or Trial Chamber for an order for disclosure. The request for information must be specific, in as far as possible identifying a specific document and not requesting broad categories of information (the purpose is to avoid “fishing expeditions”). The judge or Trial Chamber may also issue such orders on his or its own initiative (provided they meet the conditions set out below).
2. The judge or Trial Chamber will act as an independent arbitrator between the party seeking the information and the TRC, and will ensure the fair and uniform application of the conditions provided below. In order for the request to be granted, a party must demonstrate that:
 - a. It pertains to information which is essential to the fair determination of the case before it;
 - b. The information cannot reasonably be obtained from another source.

We would propose that information from the Commission should be requested only during trial proceedings and not during investigations. At the investigation, it is not yet possible to determine whether particular information is essential to the fair determination of a case.³³ In the process of deciding whether to issue an order, the judge or Trial Chamber should provide an opportunity for a Commission representative to be heard, and should consider the impact of the order on the ability of the Commission to fulfill its functions. It should also (a) consider the safety of the person who has given the statement, or any other persons mentioned in the statement, and may give such persons the opportunity to be heard or provide them with notice; (b) provide adequate protective measures for persons who feel at risk, taking into account any protection applied by the Commission; and (c) give the other party to the case an opportunity to be heard if it is in the interest of justice to do so.

3. If the judge or Trial Chamber, upon hearing representations from all the parties, decides to order information to be disclosed by the Commission, it shall review the information obtained before disclosing it to the parties. If the information is manifestly irrelevant, it will not be relayed to the parties (unless it becomes relevant at a future date).

³² The conditional sharing approach was adopted by an Expert Group which convened in New York and Freetown, and whose conclusions are reflected in the Planning Mission’s Report: Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, attached to a letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2002/246 at para. 55.

³³ In fact, if judges are asked to make such a determination even before the case begins, they could be disqualified from sitting on the Trial Chamber that tries the case later, for having “pre-judged” the matter.

4. A statement given to the Commission should be accorded immunity from being used in Special Court proceedings against the person who made it (although it can still be admitted in evidence against others).³⁴ This will enable the Commission to inform persons accordingly, thereby creating an additional incentive to cooperate with the Commission.³⁵ The Prosecutor could only proceed against that person on the basis of independently obtained evidence.³⁶ The onus will therefore be on the prosecution to show that its case against that person is built on such independent evidence.
5. The Commission must warn persons coming before it that while there will be no *general* sharing of information with the Special Court, in exceptional instances the Court may require the Commission to disclose statements, even if taken in private or confidentially.³⁷ Especially when the Commission uses its power to compel persons before it to answer questions, it should remind persons that their statements will not be used against them in subsequent criminal proceedings (although this does not preclude disclosure of the statement, and it could be used against others accused).

Although there is bound to be some reluctance to cooperate, it is hoped that fear will be outweighed by a desire to participate in the truth and reconciliation processes of the Commission.

The approach proposed above in relation to information sharing has the distinct advantage of not affecting the fundamental structure of either institution. No amendments are required to existing laws. Instead, the institutions may choose to conclude a memorandum of understanding. We propose possible language for such a memorandum in Annex A.

The following observations arise from the procedure proposed above:

- *Autonomous nature of each institution.* A distinct advantage of this proposed procedure is that each institution will continue to function autonomously without

³⁴ The TRC Act currently does not provide a legal basis to grant perpetrators such immunity, so use-immunity would actually have to be given by the Special Court. A similar type of immunity was granted to persons who applied for amnesty before the Amnesty Committee of the TRC in South Africa. Applicants were given the guarantee that their statement would be inadmissible against them. Immunity is also often granted to statements taken by Commissions of Inquiry where witnesses may be compelled to answer questions which may incriminate them but those statements may not be used or received in evidence against those witnesses in a criminal proceeding taking place later, other than a prosecution for perjury in the giving of the evidence.

³⁵ This is also consistent with due process protections of non-self-incrimination, particularly because the TRC Act allows the Commission to compel persons to answer questions posed to them: section 8 (1) (d) of the TRC Act 2000.

³⁶ The statement could still be used either to prosecute others or to contest the credibility of subsequent evidence the perpetrator gives if he himself decides to testify.

³⁷ Some suggest that the TRC should provide persons whose statements are shared with notice, however, it may be onerous and in some cases impossible to do so.

being drastically affected by the other's operations. Also, the onus is on parties before the Special Court to identify requested information, so that no additional burden is placed on the Commission to identify or filter out information that may interest the Special Court. It is hoped that the Court will use its power to request information from the Commission sparingly.

- *Difficulties in identifying with specificity the information required.* The prosecution and defense may not always be able to identify the information they wish to request. For instance, the defense may not know of the existence of exculpatory information or may not be able to identify such information with any specificity. (On the other hand, in many cases the defense may simply request any prior statements made by key prosecution witnesses.) On this point, the Special Court will be able to derive guidance from the case law of the ad hoc tribunals, which have held that a request for exculpatory evidence should be sufficiently specific so as not to be a “fishing expedition,” but need not be so specific as to precisely identify which documents shall be disclosed.³⁸ (For instance, a request may be deemed specific if it asks for statements given *by* named persons, but may be deemed too broad if it asks for all statements given *about* named persons.)
- *What if critical information is not requested?* A situation may arise where the TRC receives information critical to incriminating or exculpating a particular accused (e.g. clear evidence of direct involvement in crime within the Court's jurisdiction), but the parties remain unaware that the information exists and are therefore unable to request it. Should the Commission take a proactive stance in sharing the information? In general, critical exculpatory information should be shared. In the case of incriminating information which may be critical to a particular case, the TRC should urge the person providing such information to make contact with the Special Court, but the Commission itself should not share this information unless through the procedure of conditional sharing outlined above.
- *Application of ICTR Rule 70.* Some experts have suggested using Rule 70 of the ICTR Rules as a means of protecting confidential information the TRC shares with the Special Court. Rule 70, paragraph B, states:

If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information . . .

³⁸ This was decided in the case of *Blaskić* before the ICTY, in an Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, dated 26 Sept. 2000 at para. 4.

This would allow the Commission to provide information to the Prosecutor (or defense) for the purpose of investigations. The Prosecutor (or defense) would use the information without disclosing that it originated from the TRC. Although Rule 70 would give the TRC anonymity as the source of the information, it does not protect the identity of those who provided the information and thus does not resolve the fear of victims. For these reasons, Rule 70 does not provide a satisfactory solution.³⁹

- *Who decides?* Some have suggested that disputes about information sharing should be decided by an independent third party, such as the High Court of Sierra Leone. However, the Trial Chamber will be in a much better position to assess the merits of a request and the relevance of the information sought. The benefits of using an interlocutor may therefore be offset by the difficulties associated with making decisions based on incomplete information. For these reasons, information sharing disputes should be resolved by the Special Court, not the High Court.
- *Information sharing after the TRC finishes its mandate.* From a practical point of view, the Commission will have a much shorter life-span than the Court and it will therefore be necessary to designate a representative to continue representing the Commission before the Special Court, and to make specific information available to it as required. This representative could be a member of the Follow-up Committee established under section 18 (1) of the TRC Act 2000, or another designated body or person, such as one of the national commissioners.
- *Information sharing from the Special Court to the TRC.* Finally, some argue that information obtained by the Special Court should be shared with the TRC. We believe information from ongoing investigations should not be shared, as it may be detrimental to the investigation. Furthermore, confidential information such as closed-session testimony before the Special Court cannot be made available to the public for reasons of witness protection. On the other hand, much of the information coming before the Special Court is in the public realm and thus can easily be gathered by a TRC liaison. Judgments of the Special Court may also provide a useful source of information to the TRC.

V. Witness Protection

Although it is hoped that conditional sharing will not significantly diminish people's resolve to cooperate with the Commission, effective measures of protection may provide additional incentives for such cooperation. For both institutions, witness protection will mostly (if not exclusively) consist of concealing to the public the identity of the person

³⁹ It should be noted that Rule 70 will apply in the proceedings before the Special Court, unless the Rules of Procedure and Evidence of the Special Court will provide otherwise; see Art. 14 of the Statute of the Special Court for Sierra Leone.

testifying or giving a statement. It is unrealistic to expect either the TRC or the Special Court to expend significant resources on more sophisticated measures, such as resettlement.

The Special Court and the Commission should probably operate distinct victim and witness protection units, as there is protection inherent in such separation. If the TRC accords confidentiality to information and then makes it available to the Court, the Court should consider granting matching protective measures (e.g., closed session, pseudonym, deletion of identifying information). Finally, there should ideally be an independent legal service available to advise individuals on their position before they come in contact with the Special Court or the Commission. (This role can probably be fulfilled by a pre-existing non-governmental organization, such as the Lawyers Center for Legal Assistance.)

VI. Sharing of Work Product

The above analysis has focused mainly on the considerations involved in sharing statements given to the TRC. But the various memoranda containing internal analysis by the Commission may also be of interest to the Special Court. The considerations regarding this type of information are different.

Any analysis is likely to compile the information of numerous statements and can simply omit identifying details. On the other hand, public perception of the Commission's autonomy is at least as urgent regarding this type of information. Also, the TRC will probably not want to share any of its analysis before it issues its final report, as its preliminary findings and conclusions might change as subsequent information comes to light.

Once the Commission has finished its work, its final report will be available to the Special Court. Also, the Special Court may wish to call on commissioners as expert witnesses, to testify to the background behind particular crimes. For example, persons who served on the Commission of Experts for the former Yugoslavia, an analogous fact-finding body, have served as witnesses before the ICTY.

In this regard, the TRC Act currently makes no provision for the immunity of its members or staff from *testifying* in civil or criminal proceedings: it simply states that they themselves shall not “be liable for any acts carried out within the scope of [their] duties.”⁴⁰ But while the work of the TRC is ongoing, we suggest that (1) the commissioners and the staff be granted immunity from testifying in proceedings before the Special Court (for staff, the immunity should remain in place after the work of the Commission has concluded, as well);⁴¹ and (2) any work-product of the Commission

⁴⁰ TRC Act section 14 (4).

⁴¹ This distinction is to avoid the Court compelling Commission staff to testify in order to obtain information which would otherwise be unavailable under conditional sharing.

should be exempted from disclosure (in the same way as work-product is often exempted from disclosure in national legal systems).

VII. Other Means of Collaborating: Joint Investigations, Translation Services, Public Awareness

Finally, does it make sense for the two institutions to cooperate in other areas, such as by carrying out joint investigations and training of statement-takers, sharing a translation service, or conducting joint public awareness campaigns? The main argument in favor of such collaboration is that it may save resources and thus appeal to international donors.

However, the scope for saving resources in this manner is not significant. For instance, TRC investigators will gather a wide range of facts regarding broad patterns of abuse. In contrast, investigators for the Special Court must gather evidence pertaining to specific events and ensure that the evidence will be admissible in court. Naturally, there will be overlap, but each must work to a particular purpose. On the related question of joint training, the type of witness statement or deposition taken by a Special Court investigator may be quite different in format and more rigorous in its requirements than the more informal statement given to a TRC interviewer. There may be certain common elements in their training, such as in learning how to provide support to juvenile or severely traumatized victims, but the savings would be minimal. (Manuals used for such training naturally could be shared.)

There are strong arguments against cooperating on translation. Some cooperation may be possible; e.g., if a public document has been translated for the Commission, the Special Court should have access to it. However, the number of translators or interpreters cannot be reduced significantly by attempts to collaborate in this realm. Moreover, sharing these services creates potential for informal sharing of information, even if inadvertent.

In general, sharing staff or other resources will probably result in only limited cost-saving. On the other hand, the damage to public perception would be pervasive. The perception of the Commission and the Court as autonomous institutions will be significantly harmed if they are seen to collaborate too closely. We propose that the two institutions function independently and maintain separate staff.

This is not to say that the two institutions should not communicate at all. Invariably, complications may arise in conducting separate investigations on the same subject. If the general relationship is one of open channels of communication, such matters can be resolved on a case-by-case basis, perhaps through liaison officers. If disputes should arise in the course of investigations, it is hoped that they will be resolved in an amicable manner.

However, both institutions would benefit a great deal from collaborating in public information campaigns. Joint campaigns are a good opportunity to explain the distinct and autonomous nature of each institution, while at the same time avoiding contradictions

and rivalry and enhancing confidence in the two institutions. If such campaigns were conducted separately, confusion and mistrust could result.

VIII. Mutual Adjustment of Operations

For an effective system of cooperation, certain mutual adjustments by both institutions may be necessary. For instance:

- Each institution currently has the power to issue subpoenas.⁴² We suggest that the institutions agree to formally forfeit using such powers against each other.
- In some cases, the Court may ask the Commission to defer taking the statement of individuals that are due to come before the Court, either as a witness or as an accused. The Commission should respect these requests. In practice, this may mean that the TRC may not be able to interview some people at all, as it is only likely to be operational for a year to eighteen months. In the case of persons indicted by the Special Court, the Commission should decline to interview them altogether until the proceedings against them are concluded. In the case of potential witnesses or witnesses who have already testified before the Special Court, the Commission should inform them that the Special Court may require the TRC to provide access to their statement (to decrease the likelihood of an inconsistent statement). The Commission should proceed to interview them only after they have fully understood the consequences of providing statements in such circumstances.
- Some have suggested that confession before the Commission should be treated as a mitigating circumstance by the Special Court. As stated above, persons accused before the Special Court should not be questioned by the TRC until after conviction. If they wish to show remorse or confess, they should do so before the Special Court; this may result in mitigation of their sentence. But allowing indicted individuals to come before the Commission and confess and then withholding that confession from the Special Court (because of use-immunity or other barriers) would enable perpetrators to manipulate both institutions and may result in a miscarriage of justice. However, if a person is indicted subsequent to giving a statement to the Commission, the Special Court might consider any cooperation with the TRC or any demonstrated remorse as a mitigating circumstance in sentencing.
- Another question is whether in its final report, the Commission should proceed to name perpetrators as if there were no Special Court, or whether

⁴² Special Court Act section 21 (2), TRC Act section 8 (1).

it should defer naming particular perpetrators until their cases have concluded before the Special Court. We recommend that the Commission consider naming perpetrators, although doing so triggers many additional considerations such as due process guarantees.⁴³ The Commission should also consider the impact on any pending or probable future proceedings before the Special Court, and emphasize in its report the difference in standards of proof between truth commissions and criminal proceedings.

That aside, the Special Court will consist of professional judges who will be able to treat the TRC report with appropriate judicial discretion, weighing its probative value against the prejudice suffered by the accused. In this context, it is important to note that any TRC recommendations to prosecute would not be binding. Prosecutors have complete discretion to pursue only those cases that are likely to succeed in court.

IX. Conclusion

In sum, Sierra Leone deserves both an effective Special Court and a strong truth commission to come to terms with its past. For this reason, we propose a system that is within the legal framework of each institution but requires the Court to perform a balancing exercise in its requests for information from the TRC. We recommend that the relationship between the institutions remain cordial but distant to allow each to function autonomously and fulfill its potential. Regular meetings and use of liaison staff could help to ensure that interactions proceed smoothly.

Much of the success of the above depends on the high caliber of the officials and staff of each institution (including the judges, prosecutor, commissioners, and executive secretary of the TRC), and their ability to deal wisely with the interesting challenges that will inevitably arise.

⁴³ There are many additional considerations in naming names that the TRC should take into account. The ICTJ has explored this issue in its work and is able to consult on it.

Annex A

Draft Memorandum of Understanding Between the Truth and Reconciliation Commission and the Special Court for Sierra Leone

By virtue of this agreement, the Truth and Reconciliation Commission and the Special Court for Sierra Leone agree as follows:

- (1) To resolve all matters regarding cooperation in an amicable manner.
- (2) To forfeit the use of enforcement powers *vis-à-vis* each other, such as the power of subpoena, invested in the Special Court by virtue of the Statute of the Special Court and the Special Court Agreement 2002 Ratification Act, section 21 (2), and in the Truth and Reconciliation Commission by virtue of the Truth and Reconciliation Commission Act of 2000, section 8.

Furthermore,

- (3) The Special Court agrees to incorporate the Rule in Attachment A into its Rules of Procedure and Evidence;
- (4) Both the Special Court and the Truth and Reconciliation Commission agree that there shall be no sharing of confidential information except by application of the procedure laid out in that Rule.

Attachment A

Rule xx

Orders for the Disclosure of Information to the Truth and Reconciliation Commission

- (A) At any stage during the trial proceedings, either the prosecution or the defense may make an application to a judge or Trial Chamber for an order for the disclosure of information to be issued to the Truth and Reconciliation Commission. Such an application for an order shall be specific and identify, as far as possible, the information requested, and shall demonstrate that:
- (1) the information sought is *prima facie* material to the fair determination of guilt or innocence of the accused;
 - (2) the information sought cannot reasonably be obtained from another source.
- (B) In determining whether an order for the disclosure of information should be issued, the judge or Trial Chamber:
- (1) shall give a representative of the Truth and Reconciliation Commission an opportunity to be heard, including on the impact of the order on the ability of the Truth and Reconciliation Commission to fulfill its mandate;
 - (2) may give any persons whose safety will be affected by the sharing of information, including the person from whom the information originated, the opportunity to be heard and shall consider the impact on their safety of the sharing of information;
 - (3) may give the party other than the one making the request (prosecution or defense) an opportunity to be heard;
 - (4) may attach to the source of the information confidentiality or other protective measures, particularly if such information was granted confidentiality by the Truth and Reconciliation Commission.

- (C) If a request meets the conditions laid out in (A) and (B), the judge or Trial Chamber shall issue an order for disclosure.
- (D) If the judge or Trial Chamber receives information under the order which is manifestly irrelevant or which does not meet the conditions laid out in paragraph (A), it will not disclose the information to the parties, unless it becomes relevant at a later stage of the proceedings.
- (E) Any statements taken by the Truth and Reconciliation Commission from persons accused before the Special Court may not be used to prosecute them.
- (F) Staff members of the Truth and Reconciliation Commission shall not be compelled to testify before the Special Court, and Commissioners shall not be called to testify except on the Truth and Reconciliation Commission's final report.
- (G) The Truth and Reconciliation Commission shall not be compelled to disclose its work product.
- (H) An order issued may be appealed by anyone who has *locus standi* under this Rule.