

## CHAPTER 8

# THE CHALLENGE OF JUSTICE AND RECONCILIATION

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### Introduction

Societies emerging from the aftermath of repressive regimes and armed rebellions are often confronted with the problem of how to deal with the legacy of past human rights abuses. Sierra Leone witnessed one of the most brutal rebel wars the world has ever seen. A report released in January 2002 by Physicians for Human Rights, which documented the brutality, said 53 per cent of displaced women and girls who had face-to-face contact with Revolutionary United Front (RUF) rebels experienced some form of sexual violence. The rate for women who had had contact with other groups of fighters was six per cent. One third of those who reported sexual assault said they were gang-raped.<sup>1</sup>

With some 60,000 ex-combatants, including ex-RUF, disarmed and in the process of being reintegrated into ordinary life, there is a major concern that, in the absence of effective and visible justice, communities where the victims (including amputees and rape survivors) live, will try to exact revenge. This may in turn lead to some sort of violent retaliation by the ex-combatants.<sup>2</sup>

Since the Nuremberg and Tokyo military tribunals at the end of the Second World War, international *ad hoc* or internationally mandated national tribunals have been established to prosecute those responsible for grave breaches of the four Geneva Conventions of 12 August 1949. The main function of such tribunals is to prosecute those alleged to have committed war crimes, crimes against humanity, genocide and other violations of international humanitarian law.

Truth commissions, on the other hand, are bodies established in the aftermath of intra-state conflicts to act as a mechanism for healing and national reconciliation, and in so doing to encourage the peace process. The main purpose of a truth commission is to investigate the truth, within a limited space of time, of past human rights violations, and to issue a comprehensive official report of its findings, together with recommendations. The goals of truth commissions are many, and vary from one country to another. In general, these goals include national reconciliation through public acknowledgement of past injustices; the provision

of an opportunity for victims to tell their stories as a cathartic exercise; the prevention of future abuses of human rights by instituting reforms in the police, military, judiciary and other state institutions; and the identification of perpetrators for possible prosecution.

Until the official end of armed conflict in January 2002, emergency regulations were in force in Sierra Leone while normal judicial procedures were suspended. As the focus of the peace process shifts from emergency assistance and security priorities towards restoration of the government authority and the rule of law, the role of the Sierra Leone judiciary has become a central concern. By September 2000 there were only 15 magistrates and 18 judges presiding over a court system that served the western area and the two provincial capitals of Bo and Kenema. A temporary magistrate's court located in Lungi covered the entire northern province. The judiciary remains thoroughly under-resourced, with case backlogs that threaten to overwhelm the capacity of the system to satisfy the post-war demand for justice.<sup>3</sup>

## **The Sierra Leone judiciary**

As with most state resources in Sierra Leone, the judiciary is most effective in Freetown and all but insignificant in the provinces. The judicial infrastructure was perilous even before the war, suffering from under-investment in court buildings, accommodation for itinerant judges and magistrates, and transport facilities. The RUF subsequently destroyed most of what remained of the courts, which were systematically targeted along with other institutions of state power as part of the rebel strategy.

Magistrates' courts deal with about 80 per cent of the caseload in Sierra Leone. Before the RUF incursions in 1991, there was at least one functioning magistrate's court in each of the twelve provincial judicial districts, staffed by a total of some 26 full-time magistrates. By September 2000, there were only 15 magistrates, most of them in Freetown. High courts had also operated in the eastern, southern and northern provinces (where some 85 per cent of the population live) prior to 1991, but these courts ceased to operate around 1995.<sup>4</sup> Moreover, by the end of 2001 there were only about 100 lawyers within that jurisdiction. Of this number, eight were in Bo and Kenema, while there were no practicing lawyers in the northern province.

Judicial capacity in Freetown suffered the least damage because the capital absorbed the exodus of judicial personnel from the provinces during the conflict.

However, there was no parallel expansion of courtrooms and infrastructure, and there are severe backlogs in the ten western area magistrates' courts that hear the vast majority of cases in the formal system.<sup>5</sup> The main impediments to the effective extension of the judiciary are the lack of infrastructure and logistics and the shortage of qualified staff. To address the latter, government is reactivating Justices of the Peace, who will be entrusted with handling lesser offences in the absence of resident magistrates.<sup>6</sup>

The United Nations' Interagency Appeal for Sierra Leone for the year 2003 is \$69.2m for emergency relief, and \$13.7m for recovery projects. Regarding the latter, there is a joint appeal by the United Nations Development Programme (UNDP) and UNAMSIL for \$670,000 towards the 'Recovery of Basic Capacity of Judicial Institutions'. The targeted beneficiaries are the Ministry of Justice, magistrates' and appellate courts, which are also seen as project implementing partners. While the project objectives are rather ambitious – the rapid capacity-building of judicial institutions, and the enhancement of their capability to deliver effective and fair justice, especially in rural areas – the concrete outputs and activities envisaged are rather modest, and include the following:

- Equip 70 Justices of the Peace (JPs) with basic office equipment and reference materials.
- Equip 14 clerks to assist the JPs and magistrates in recording and tracking cases (procure 14 computers and 14 solar panels with batteries for judicial districts up country and in the western area).
- Procure 14 vehicles and 14 motorcycles for distribution to twelve districts and two western area subdivisions.
- Provide basic training to JPs and clerks for their new functions, in liaison with magistrates' courts.<sup>7</sup>

Longer-term reform of the judicial system in Sierra Leone is a necessary adjunct to any notion of peace with justice. One area that requires consideration in the future is the harmonisation of common law and customary law. There is a need to balance the rights of children and of women under the customary law system with the human rights law enshrined in the constitution, and the other universal human rights instruments to which Sierra Leone is a party. However, this will involve a process that could take at least ten years, which is way beyond the expected temporal mandate of UNAMSIL.<sup>8</sup> The pri-

mary concern of the mission is therefore to support the interim justice mechanisms for Sierra Leone, namely the Special Court and the Truth and Reconciliation Commission.

## Special Court

The international community had compelling reasons to create a Special Court for Sierra Leone. First, the nature and extent of atrocities committed in Sierra Leone since 1991 constituted grave breaches of international humanitarian law under the four Geneva Conventions of 12 August 1949, as well as the 1977 Additional Protocols. Secondly, the parties had agreed to respect the rules and customs of warfare.<sup>9</sup> Thirdly, the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993, and for Rwanda (ICTR) a year later, created a significant precedent. The UN's determination that the establishment of such tribunals would contribute to the restoration and the maintenance of peace is of great importance. The subsequent adoption of the Rome Statute for the permanent International Criminal Court (ICC) made it even more difficult for the international community to ignore the situation in Sierra Leone.

Given the devastation of the economy of Sierra Leone, it was clear that the government did not have the necessary financial resources to set up a Special Court. However, due to the significant financial commitment involved with the establishment of such courts, the UN Security Council was not receptive to the proposal outlining the creation of yet another UN tribunal along the lines of Rwanda and the former Yugoslavia. It was under these circumstances that a hybrid national institution with UN oversight, similar to the war crimes tribunal for Cambodia, became acceptable.

In terms of Resolution 1315 of 14 August 2000, the UN Security Council authorised the creation of a Special Court to prosecute those who 'bear the greatest responsibility' for war crimes, crimes against humanity, and other serious violations of international humanitarian law committed in Sierra Leone.<sup>10</sup> Since the beginning of the conflict in Sierra Leone in 1991, the UN Security Council has issued a number of resolutions that appealed to parties to the conflict to respect human rights and humanitarian law. However, the Special Court for Sierra Leone will not, like the ICTY and ICTR, be established as a Chapter VII institution. The difference between the ICTR and ICTY and the Special Court for Sierra Leone, is that the former are UN institutions operating independently from the domestic courts. The Special Court is thus an

innovative model in the sense that it will apply both Sierra Leone's penal law and international law.

The court was set up under an agreement signed on 16 January 2002 by the government of Sierra Leone and the UN, to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian and Sierra Leone law that have taken place since 30 November 1996 (the date of a failed peace agreement between the government and the RUF).<sup>11</sup> The Special Court will function in accordance with the Statute of the Special Court for Sierra Leone, which forms an integral part of the agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court.<sup>12</sup>

According to the Special Court Agreement (article 2), the government of Sierra Leone and the UN Secretary-General will consult on the appointment of judges, who will be appointed for a three-year term and shall be eligible for re-appointment. The court will be composed of a trial chamber and an appeals chamber. The chambers will be composed of no fewer than eight and no more than eleven independent judges. Three judges will serve in the trial chamber, one of whom shall be appointed by the government of Sierra Leone, and the other two by the UN Secretary-General, upon nominations forwarded by member states, particularly those belonging to the Economic Community of West African States (ECOWAS) and the Commonwealth.

Five judges will serve in the appeals chamber, two of whom shall be appointed by the government of Sierra Leone, while the other three shall be appointed by the UN Secretary-General upon nominations forwarded by states – also particularly those belonging to ECOWAS and the Commonwealth.

The United Nations Secretary-General will appoint the chief prosecutor, and the government of Sierra Leone (in consultation with the UN), the deputy prosecutor, to assist the prosecutor in the conduct of the investigations and prosecutions.<sup>13</sup> While the deputy prosecutor will make recommendations regarding indictments, the final decisions rest with the chief prosecutor. Although international oversight will ensure independence and impartiality, the 'internationalised' aspect of the tribunal may have some negative effects, because some of the judges may have little understanding of the political and legal culture of Sierra Leone. However, the emphasis on the appointment of judges from West African and Commonwealth states should prove a mitigating factor.

The Special Court will have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the

Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of the Additional Protocol II of 8 June 1977.<sup>14</sup> Other serious violations of international humanitarian law, which the Special Court shall have the power to prosecute (under article 4 of the Statute) include conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.<sup>15</sup>

The court will have the power to prosecute persons who committed crimes against humanity as part of a widespread or systematic attack against any civilian population. Significantly, the list of inhumane acts includes 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'.<sup>16</sup> According to article 5 of the Statute, the Special Court will also have the power to prosecute persons who have committed certain crimes under Sierra Leone law, including offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926.

The Special Court will set a precedent by trying juveniles 'bearing the greatest responsibility' for atrocities. In Sierra Leone, children below the age of 15 years were abducted and used as child soldiers, thus rendering them both victims and perpetrators. However, it is customary international law that children under the age of 15 years may not be recruited, nor participate in hostilities.<sup>17</sup> A compromise has been reached whereby the court may try suspects who were 15 years of age and above at the time of the offence, taking into account such factors as the rehabilitation and reintegration of offenders and the truth and reconciliation process.<sup>18</sup>

A unique feature of the Special Court is its location in Freetown, where the court will be easily accessible to the victims, and the people of Sierra Leone will be able to follow its proceedings. The fact that trials will take place in Freetown will send a powerful message to the people of Sierra Leone that justice is being done within the framework of the rule of law. In contrast, the ICTY, with its seat in The Hague, and the ICTR, with its seat in Arusha, Tanzania, are far removed from the victims in the former Yugoslavia and Rwanda.

The budget for the Special Court is estimated at US \$58m for three years, with approximately \$16m earmarked for the first year. Since it is not a UN body, the Special Court will not be funded through assessed or mandatory contributions, but rather through voluntary contributions from concerned member states. About 15 to 20 countries have expressed support, including the United Kingdom, Canada, Lesotho, the Netherlands and the United States of

America. Some have started to deposit money in the trust fund for the Special Court, but progress towards the target budget remains extremely slow.<sup>19</sup>

According to the Special Court Agreement, the UN Secretary-General will commence the process of establishing the court when he has sufficient contributions in hand to finance the establishment of the court and 12 months of its operations, plus pledges equal to the anticipated expenses of the following 24 months of the court's operation. It is further understood that the UN Secretary-General will continue to seek contributions equal to the anticipated expenses of the court beyond its first three years of operation. Should voluntary contributions be insufficient for the court to implement its mandate, the UN Secretary-General and the UN Security Council shall explore alternate means of financing the Special Court.<sup>20</sup>

In January 2002 a planning team led by UN Assistant Secretary-General for Legal Affairs, Ralph Zacklin, visited Sierra Leone to examine practical arrangements for its operation. The team reached agreement with the government on a site for constructing the court building, and on the use of existing courtrooms, should the need arise before April 2003, when the permanent premises are scheduled for completion. In April 2002 UN Secretary-General, Kofi Annan, appointed a senior attorney with the US Department of Defense, David Crane, as the chief prosecutor of the court, and Robin Vincent of the United Kingdom as registrar.<sup>21</sup> On 26 July 2002 the UN Secretary-General and the government of Sierra Leone announced the appointments of the following eight judges who will serve in the trial chamber and the appeals chamber of the Special Court:

- *Trial chamber:* Pierra Boutet (Canada) and Benjamin Mutanga Itoe (Cameroon), appointed by the Secretary-General; and Bankole Thompson (Sierra Leone), appointed by the government of Sierra Leone.
- *Appeals chamber:* Emmanuel O. Ayoola (Nigeria), Alhaji Hassan B. Jallow (The Gambia) and Renate Winter (Austria), appointed by the Secretary-General; and Gelga King (Sierra Leone) and Geoffrey Robertson (United Kingdom), appointed by the government of Sierra Leone.<sup>22</sup>

The court is still very much in the establishment stage, and is hoping to start business in late 2003. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased approach will be adopted in accordance with the chronological order of the legal process. The appointment of judges, the prosecutor and the registrar, along with investigative and prosecution staff, is the first phase of the operation of the court. The

process of investigations and prosecutions of those already in custody will be the next step. In the initial phase, judges of the trial chamber and the appeals chamber will be convened on an ad hoc basis for dealing with organisational matters, and serving when required to perform their duties. Judges of the trial chamber will take permanent office shortly before the investigation process has been completed. Judges of the appeals chamber will take permanent office when the first trial process has been completed.<sup>23</sup>

The United Nations mission has had somewhat of a strange relationship with the Special Court, due to the hybrid nature of the latter body, but the public information section has provided as much information as they can about the rationale and mandate of the court.<sup>24</sup> On the other hand, the section has been able to disseminate a great deal more information about the Truth and Reconciliation Commission (TRC), including the broadcast of the TRC's weekly press briefings on UNAMSIL Radio.<sup>25</sup>

## **The Truth and Reconciliation Commission**

For a host of practical reasons, the Special Court cannot be expected to try all perpetrators. It is estimated that the number of potential defendants to be tried by the Special Court will not exceed between 20 and 30, and that these will be primarily senior military and political leaders.<sup>26</sup> This limitation, and the fact that the Special Court will only try those 'bearing the greatest responsibility', leaves room for many other cases of human rights abuses and crimes against humanity to be considered by a truth commission, and/or to be tried by the national courts of Sierra Leone.

The Truth and Reconciliation Commission is widely regarded as one of the pillars of the Lomé Peace Agreement of 1999, which paved the way for the end of the war. According to this agreement, the TRC is intended

to address impunity, break the cycle of violence, provide a forum for both victims and perpetrators of human rights violations to tell their story and get a clear picture of the past in order to facilitate genuine healing and reconciliation...

Modelled on past commissions in countries such as Chile, Guatemala, Haiti, and South Africa, the TRC hopes to investigate and report on the causes, nature and extent of human rights violations that occurred in the country, help restore the human dignity of victims, and promote reconciliation. Although it

has been established through an act of parliament by the government of Sierra Leone, the TRC will be an independent body.<sup>27</sup> As in Haiti, the Truth and Reconciliation Commission for Sierra Leone will be a mixed commission, composed of seven commissioners, including nationals and non-nationals of Sierra Leone.<sup>28</sup> In order to ensure transparency and independence of the commission, the selection of the four national commissioners is to be co-ordinated by the UN Secretary-General's Special Representative, and the office of the United Nations High Commissioner for Human Rights (UNHCHR) will co-ordinate the appointment of the three international commissioners.<sup>29</sup>

The Truth and Reconciliation Commission is expected to complete its work within a period of twelve months, and is required to submit a comprehensive report with a set of recommendations to the government. The specific mandate of the commission is:

to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered.<sup>30</sup>

The main purpose of the TRC is two-fold. Firstly, it is to investigate the 'causes, nature and extent' of gross human rights violations and abuses, and to determine whether such violations 'were the result of deliberate planning, policy or authorisation by any government, group or individual, and the role of both internal and external factors in the conflict'.<sup>31</sup> Secondly, it is to restore the human dignity of victims by providing both victims and perpetrators with the opportunity to give an account of human rights violations committed during the armed conflict.<sup>32</sup> In carrying out these functions, the commission shall pay 'special attention to the subject of sexual abuse and to the experiences of children within the armed conflict'.<sup>33</sup> This broad mandate ensures that all parties to the conflict are subject to investigation, including the government and other internal and external agencies.

In addition to engaging in a pedagogical exercise and attempting to reconstruct the national identity of future generations of Sierra Leoneans, the commission is expected to make recommendations

...concerning the reforms and other measures, whether legal, political, administrative or otherwise, needed to achieve the object of the

commission, namely, the object of providing an impartial historical record, preventing the repetition of the violations or abuses suffered, addressing impunity, responding to the need of victims and promoting healing and reconciliation.<sup>34</sup>

Once the commission has submitted its report to the president, a 'follow-up committee' will be established to monitor the implementation of its recommendations.<sup>35</sup>

In carrying out its mandate, the commission will hold public hearings in which victims make statements about past human rights violations and may request information from any source, including government officials and private individuals. The commission will search and seize documents without prior notification; interview individuals or organisations at its discretion in private; and undertake research on the causes, nature and patterns of human rights violations.<sup>36</sup>

The Truth and Reconciliation Commission for Sierra Leone is vested with investigative powers to request that information be given under oath or affirmation.<sup>37</sup> If necessary, the commission may issue summons and subpoenas in order to fulfil its mandate.<sup>38</sup> Failure to respond to a subpoena or summons or providing false information constitutes contempt of court and may be referred to the high court for possible prosecution.<sup>39</sup> Anyone who obstructs the work of the commission is liable to a fine not exceeding 1m Leones, or a term of imprisonment not exceeding one year, or both.<sup>40</sup> The commission may not be compelled 'to disclose any information given to it in confidence'.<sup>41</sup> Hearings may be held in public or, where necessary, in private. Importantly, the truth and reconciliation model in Sierra Leone allows for individual and not collective responsibility. It also allows individuals, but not groups, to make statements or appear before the commission.<sup>42</sup>

The interim secretariat of the Truth and Reconciliation Commission was set up in late March 2002 to begin the preparatory processes for the establishment of the commission. It started with only one member of staff, the executive secretary, and subsequently grew to a complement of 14 staff, comprising international advisers and national consultants.<sup>43</sup>

While the Lomé Peace Accord rather unrealistically envisaged that the commission would be set up within 30 days of the signing of the agreement, this vision was realised on 5 July 2002, when the TRC was inaugurated in Freetown, with the following commissioners:

- Rt. Rev. Joseph Humper (Chair)
- Hon. Justice Laura Marcus-Jones (Deputy chair)
- Professor John Kamara
- Mr Sylvanus Torto
- Mrs Satang Jow
- Professor William Schabas
- Ms Yasmin Sooka

One of the immediate tasks that the commission faced after its inauguration was the need to prepare a budget, which would facilitate its fundraising efforts. As part of the planning process for the commission, the Office of the High Commissioner for Human Rights had prepared a budget for the commission, which required the sum of \$9.9m for the commission's activities over a fifteen-month period. The commission reviewed this budget with the assistance of a mission from the Office of the High Commissioner for Human Rights, and agreed on the need to have a separate budget for its preparatory phase, which began immediately on the inauguration of the commission.

The commission also reviewed its budget for the 12-month operational period mandated by the Truth and Reconciliation Commission Act of 2000, and was assisted by the OHCHR mission to design a budget that segments its activities into respective phases. This enabled the commission to produce a more realistic budget for its activities, and will also make it easier for the OHCHR and the commission to raise the additional funds that may be required.

During the three months preparatory phase, (5 July to 4 October 2002), the commission focused on a number of other essential activities, including:

- hiring of staff;
- procurement of office space;
- designing and undertaking a public education campaign; and
- undertaking a sensitisation programme and preliminary background research.

Because the conflict in Sierra Leone was unique in several respects, the TRC cannot adopt a prescribed model as the answer to dealing with all aspects of the conflict. The commission's approach will be uniquely Sierra Leonean, at all times guided by what is in the best interests of the people of Sierra Leone. In this context, one of the preliminary background research projects of the TRC (funded by OHCHR and conducted by an NGO called Manifesto 99) involved research into the traditional methods of conflict resolution and reconciliation in Sierra Leone.

During the preparatory period, much emphasis was placed on the need for intensive public sensitisation and mass education across the nation. Since its inauguration, hundreds of Sierra Leone people have visited the TRC offices to express their willingness to make statements to the commission on the conflict. The commission regards this as an extremely positive sign, although it had to advise the general public that the statement-taking phase of its activities would only commence in October 2002, after sufficient trained personnel had been recruited to deal with statements.<sup>44</sup>

The sensitisation challenges are very real. For example, while the TRC is to pay 'special attention to the subject of sexual abuse and to the experiences of children within the armed conflict', women survivors do not necessarily have much faith in the process. A report released in January 2002 by Physicians for Human Rights noted that of the respondents to their survey, 42 per cent thought their perpetrators should be punished. The most common reasons cited for not punishing a perpetrator were the spirit of reconciliation, fear of reprisal, a lack of confidence in the system, or wanting to forget about the incident. Only 35 per cent of the women believed punishment would prevent further sexual violence, and only 23 per cent were willing to give their names to either the Special Court or the TRC.<sup>45</sup>

Another group of persons of primary concern to the TRC's work, the amputee victims of the civil war, threatened not to appear before the commission until certain demands were met. On 30 August 2002, when the commission paid a 'sensitisation' visit to the Amputee Camp at Aberdeen Road, Freetown, the residents said that they felt abandoned, while the perpetrators of the crimes were being compensated (through the reintegration scheme for ex-combatants). They demanded that all amputees be given a monthly allowance of a bag of rice and Le 200,000 (about \$100). They also wanted the government to educate their children for free, and to pay them a one-off reintegration allowance equivalent to about \$150. However, the *Sierra News* of 4 September 2002 reported that the TRC boycott threat by members of the War

Amputees Association had been dropped after a meeting with President Kabbah at his Hill Station Lodge. According to the newspaper, President Kabbah admonished the amputees not to be misled by a few ill-motivated persons, and pledged his government's commitment to alleviating the suffering of amputees and other war wounded persons.<sup>46</sup>

Politicians also harbour some scepticism about the TRC, and the commission has actively engaged them by hosting a meeting with leaders and representatives of the various political parties in the country, in order to gain their cooperation and especially that of their supporters. Concerns raised by the various parties centre around:

- possible reparation for victims;
- activation of the Special Fund for War Victims;
- witness protection challenges and risks of false testimony;
- the financial status of the commission; and
- the level of national and international support for the commission.

However, the political parties all agree that the establishment of the commission is a necessary instrument for lasting peace and prosperity in the country, and they have made pledges of support for the commission's work, as well as sensitising their supporters on the importance of their participation in the TRC. A parliamentary sub-committee on the TRC has also been established, and a number of parliamentarians have already contacted the commission regarding their intention of being actively involved in the commission's visits to the regions.<sup>47</sup>

Without a fully staffed secretariat, the TRC appointed portfolio heads among the commissioners to deal with specific issues during the preparatory phase, as follows:

- Finance and fundraising – Professor John Kamara
- Reconciliation and protection – Rt. Rev. Joseph Humper (Chair)
- Administration and logistics – Mr. Sylvanus Torto
- Public information and education – Mrs. Satang Jow

- Legal and report writing – Professor William Schabas and Hon. Justice Laura Marcus-Jones (Deputy chair)
- Deployment/Investigation/Research – Hon. Justice Marcus-Jones and Ms. Yasmin Sooka.

These portfolios will probably be expanded by the time the commission enters its operational phase, to include other thematic issues that are crucial to the work of the commission.<sup>48</sup>

By the end of August 2002 the TRC had finalised its detailed plan of activities for the operational period, which envisages three phases:

*Deployment phase*, comprising various initial activities both in the regions and in Freetown, including statement taking and investigations.

***Hearings phase, which will comprise the following two sub-phases:***

- *Hearings for people affected by and participants in the conflict.* The commission will be holding sessions, some of which may be public, to hear the victims and perpetrators of any abuses or violations, or other interested parties. The objective is to help restore the human dignity of victims, and to promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered, and for perpetrators to relate their experiences. This will also be done by creating a climate that fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the experiences of children within the armed conflict.
- *Hearings looking at the different sectors or components of society and the role they have played in relation to the conflict and its antecedents and aftermath.* This will provide an opportunity for relevant stakeholders and interested parties to make submissions aimed at developing a broader understanding of the conflict, and also to offer proposals and recommendations.

*Report-writing phase*, which is expected to commence at the beginning of the ninth month of the TRC's operational activities, in August 2003. By this time the bulk of the data analysis, investigations and hearings, as well as research activities, should have been completed.

Reconciliation activities will, of course, be ongoing throughout the operational period. The Operational Plan of Action has been shared with OHCHR in Geneva, who is expected to transmit it to donors and other interested parties.<sup>49</sup>

While the TRC is confident that it has sufficient funding to proceed with its work,<sup>50</sup> it started on a difficult note with barely a tenth of its 12-month budget in place. At the time the commissioners were sworn in, it had received very little in cash and pledges, and was far short of its \$9.9m budget. During the TRC briefing on 11 September 2002, Commissioner Schabas bemoaned what he described as a 'critical funding situation', recalling that pledges amounted to \$1,580,739, of which \$1,107,825 had been received. This excluded the sum of \$97,000 donated by the government of Sierra Leone, and its contribution in kind of premises for the TRC.<sup>51</sup>

Funding problems have obviously delayed the appointment of secretariat staff for the TRC. Lack of readily available investigative capacity is a major challenge for both the Special Court and the TRC, with the probability that much of the hard evidence of atrocities will be destroyed before either institution is fully operational.

For example, on 17 June 2002 a group of experts from the Argentinean Forensic Anthropology Team<sup>52</sup> (EAAF – Spanish acronym) arrived in Sierra Leone to investigate patterns of human rights abuses during the ten-year civil war. The team's task was to map mass gravesites, assess the amount of forensic expertise required to carry out more investigations, and advise on how to preserve forensic evidence. The experts were also to propose guidelines for future investigations that could support the Special Court and the TRC.<sup>53</sup>

According to TRC Spokesperson, Ozonnia Ojielo, the team "literally found evidence of mass graves and killing sites all over the districts of Kambia, Port Loko, Kailahun and Kono in the north and east".<sup>54</sup> Many owners of the properties where some of the alleged crimes were committed are eager to return to their properties and develop them. Local communities brought the forensic experts to houses where up to 50 or 60 people were herded together and burnt, and where human skulls and bones were still to be found. The TRC subsequently launched a nationwide appeal to Sierra Leoneans not to tamper with suspected former mass graves and 'slaughterhouses', as vital evidence could be lost.

The forensic experts also advised that the TRC may need to collaborate with other interested bodies like the Special Court, establishing a joint mandate in

investigations to establish the patterns of killings, causes of death and possible identities of victims.<sup>55</sup>

## Conclusion

The fact that the Special Court will target only the ‘most responsible’ perpetrators of atrocities committed in Sierra Leone means that it is not necessarily at variance with the TRC process, but rather reinforces the idea that the two institutions are complementary. The underlying message of both institutions is that, while it is necessary to have reconciliation, the people of Sierra Leone also recognise the need for justice.

The TRC will attempt to avoid collective guilt and will set the historical record straight, thus encouraging national reconciliation across the political spectrum. The TRC process is expected to address the plight of the youth of Sierra Leone and of the estimated 50,000 to 60,000 women and young girls who have been victims of sexually related offences resulting from the conflict. The TRC is also expected to make recommendations on reparations and how to reform state institutions such as the military, police, judiciary and the health sector.

The Special Court, unlike the TRC, cannot be expected to give a historical account of the ‘causes and nature and extent’ of the conflict of Sierra Leone. However, the Special Court may contribute to a number of important outcomes, such as:

- bringing an end to the culture of impunity, by conveying a clear message that the international community will not tolerate the kind of atrocities committed in Sierra Leone;
- avoiding retribution by victims, if those bearing the ‘greatest responsibility’ are punished by an independent and impartial institution; and
- restoring the rule of law and setting a precedent for future prosecution of war crimes, and crimes against humanity, by courts in Sierra Leone (and thus helping to improve the legal system of Sierra Leone, since no provision is currently made for the prosecution of war crimes under the penal laws).

Of particular importance is the concern expressed by the RUF regarding the relationship between the TRC and the Special Court.<sup>56</sup> These relate primarily to

issues of evidence that might be used before both the Special Court and the TRC. For example, if both bodies need to investigate an alleged massacre at a certain place, they surely cannot both independently exhume the same mass grave. This implies that a proper *modus operandi* must be worked out, so that the two institutions can co-operate to include the sharing of information.

On the other hand, since the TRC is not a court of law, defendants appearing before the TRC might be subpoenaed to appear before the Special Court. Because the TRC has only quasi-judicial powers to issue summonses and subpoenas for purposes of carrying out its investigations, Special Court defendants would not be able to invoke the *non bis in idem* rule (i.e. that they cannot be tried twice for the same offence, since the TRC is not a court of law). Obviously, this would affect the willingness of people to testify openly before the TRC.

Such dilemmas, arising from the two institutions functioning, to a degree, in tandem, have left many Sierra Leoneans apathetic and unclear about the roles of the Special Court and the TRC, while others are worried about overlaps in their responsibilities. In response to an NGO request for clarification in March 2002, Attorney General (now vice president) Solomon Berewa stated that the TRC,

... far from being fault-finding and punitive, is to serve as the most legitimate and credible forum for victims to reclaim their human worth, a channel for perpetrators to expiate their guilt. The process has been likened to a national catharsis involving truth telling, respectful listening and compensation for victims.

Berewa also said that the Special Court "... is to operate as an international entity subject to international criminal law. Its objects are entirely punitive and, like any court, will apply predetermined laws and rules of procedure. It is by no means a cheap exercise."<sup>57</sup>

During his 11 September TRC briefing, Professor Schabas attempted to set the record straight by simply stating that:

- The TRC is Sierra Leonean owned but is totally independent from government and any other establishment or body.
- The TRC is not a judicial body and it does not prosecute anybody or mete out punishment to anyone.

- The TRC and the Special Court are two different entities with different mandates and mode of operations.
- The TRC is not a ‘trap’ for those appearing before it to be sent before the Special Court.<sup>58</sup>

The first public hearings of the TRC are likely to elicit a huge measure of publicity (and hopefully better donor support), as will the first trials before the Special Court further down the line. Although vitally important to national reconciliation, these high profile, internationally sponsored measures for short-term transitional justice, should not overshadow the long-term needs of the judiciary. Next to the provision of mass basic education and the harnessing of Sierra Leone’s mineral resources for the benefit of the people, ensuring effective access to justice is arguably the most important element of a process aimed at sustainable peace and development.

## Notes

- 1 UN Office for the Co-ordination of Humanitarian Affairs (OCHA), Sierra Leone, Integrated Regional Information Network (IRIN) focus on the challenges of reconciliation, Freetown, 15 July 2002.
- 2 Ibid.
- 3 N Thompson, *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone*, Commonwealth Human Rights Initiative and the Sierra Leone Bar Association, Freetown, September 2002, p 4. <<http://www.humanrightsinitiative.org/publications/Sierra%20Leone%20Report.pdf>>
- 4 Ibid, p 10.
- 5 Ibid, p 11.
- 6 United Nations, *Interagency Appeal for Relief and Recovery, Sierra Leone 2003*, 19 November 2002, p 50. <<http://www.reliefweb.int/appeals/2003/files/sle03.pdf>>
- 7 Ibid, p 76.
- 8 Interview with the Chief of Human Rights, Mr. Rodolfo Mattarollo, 23 October 2001.
- 9 For example, Article 21 of the 1996 Abidjan Accord states that “The parties undertake to respect the principles and rules of international humanitarian law”.
- 10 Articles 2–7 of the Statute of the Special Court for Sierra Leone, as annexed to the Special Court Agreement. Hereafter referred to as “the Statute”.

- 11 *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, Freetown, 16 January 2002. <<http://www.sierra-leone.org/specialcourt/ta.htm>>. Hereafter referred to simply as the “Special Court Agreement”.
- 13 *Ibid*, Article 3.
- 14 The Statute, *op cit*, Article 3.
- 15 *Ibid*, Article 4.
- 16 *Ibid*, Article 2 g.
- 17 Article 4 of the 1977 Protocol II additional to the four Geneva Conventions of 12 August 1949.
- 18 The Statute, *op cit*, Article 7.
- 19 N Thompson, *op cit*, p 31.
- 20 Special Court Agreement, Article 6.
- 21 UN OCHA (IRIN), *op cit*.
- 22 UN Press Release, SG/A/813 AFR/444, 26 July 2002.
- 23 Special Court Agreement, Article 19.
- 24 Including the publication in *UNAMSIL Review* of the full text of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.
- 25 Interview with Margaret Novicki, UNAMSIL Spokesman and Head of Public Information Section, Freetown, 22 August 2002.
- 26 D Pratt & Nepean-Carleton, *Sierra Leone: Danger and Opportunity in A Regional Conflict*, Report to Canada’s Minister of Foreign Affairs, The Honourable John Manley, July, 2001, p 19.
- 27 See Truth and Reconciliation Commission Act, 2000, Sierra Leone Gazette, Vol. CXXXI, No. 9, 10 February 2000. Hereafter referred to as “the Act”.
- 28 *Ibid*, Article 3(1).
- 29 *Ibid*, Section 3(1) (Schedule).
- 30 *Ibid*, Section 6(1).
- 31 *Ibid*, Section 2(a).
- 32 *Ibid*, Section 2(b).
- 33 *Ibid*.

- 34 Ibid, Section 15(2).
- 35 Ibid, Section 18 (1) & (2).
- 36 Ibid, Section 8.
- 37 Ibid, Section 8(e).
- 38 Ibid, Section 8(1) (g).
- 39 Ibid, Section 8(2).
- 40 Ibid, Section 9(2).
- 41 Ibid, Section 7(3).
- 42 See Section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995.
- 43 Statement by Rt Rev. Dr Joseph Humper, Chairman, Truth and Reconciliation Commission, on the occasion of its first weekly briefing, 24 July 2002. <<http://www.sierra-leone.org/trcbriefing072402.html>>
- 44 Ibid.
- 45 UN OCHA (IRIN), op cit.
- 46 Seventh weekly briefing of the Truth and Reconciliation Commission, chaired by the Chairman Rt. Rev. Dr. Joseph Humper, 4 September 2002. <<http://www.sierra-leone.org/trcbriefing090402.html>>
- 47 Eighth weekly briefing of the Truth and Reconciliation Commission chaired by Professor William Schabas, 11 September 2002. <<http://www.sierra-leone.org/trcbriefing091102.html>>
- 48 Address by the Chairman of the Truth and Reconciliation Commission at the second weekly briefing of the Commission, 31 July 2002 <<http://www.sierra-leone.org/trcbriefing073102.html>>
- 49 Sixth weekly briefing of the Truth and Reconciliation Commission, chaired by the Deputy Chairman Justice Laura Marcus-Jones, 28 August 2002. <<http://www.sierra-leone.org/trcbriefing082802.html>>
- 50 Interview with Lizbeth Cullity, Human Rights Officer, Freetown, 22 August 2002.
- 51 Eighth weekly briefing of the Truth and Reconciliation Commission, op cit.
- 52 EAAF is a non-governmental organisation dedicated to applying forensic anthropology to the investigation of human rights violations. It is funded by the UN Office of the High Commissioner for Human Rights while its work in Sierra Leone is facilitated by UNAMSIL. Forensic anthropology applies techniques from physical anthropology and forensic medicine to solve legal cases involving skeletal or

near-skeletal remains. EAAF exhumes such remains to establish the cause of death and identify of the victims.

- 53 UN OCHA (IRIN), Sierra Leone: Argentinean experts to examine mass graves, 21 June 2002.
- 54 As reported by UN OCHA (IRIN) Abidjan, 22 July 2002.
- 55 UN OCHA (IRIN), 21 June 2002 op cit.
- 56 Interview with RUF leadership, Freetown, 28 October 2001.
- 57 UN OCHA (IRIN), 15 July 2002, op cit.
- 58 Eighth weekly briefing of the Truth and Reconciliation Commission, op cit.