

1722

SCSL-2003-08-PT
(6421-6446)

6421



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

Before: Justice Robertson, President

Registrar: Robin Vincent

Date: 28th day of November 2003

The Prosecutor Against:

Sam Hinga Norman
(Case No. SCSL-2003-08-PT)

DECISION ON APPEAL BY THE TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE ("TRC" OR "THE COMMISSION") AND CHIEF SAMUEL HINGA NORMAN JP AGAINST THE DECISION OF HIS LORDSHIP, MR JUSTICE BANKOLE THOMPSON DELIVERED ON 30 OCTOBER 2003 TO DENY THE TRC'S REQUEST TO HOLD A PUBLIC HEARING WITH CHIEF SAMUEL HINGA NORMAN JP

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Jim Johnson, Senior Trial Counsel

Defence Counsel:
Timothy Owen
Quincy Whitaker
James Blyden Jenkins-Johnston
Sulaiman Banja Tejan-Sie

Truth and Reconciliation Commission:
Howard Varney
Ozonnia Ojielo



6422

THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”)**NOTING THE SUBMISSIONS OF THE PARTIES
HEREBY DECIDES AS FOLLOWS:**

1. This matter comes before me in the form of a joint application by Chief Sam Hinga Norman and the Truth and Reconciliation Commission (“TRC”). It arises from a decision of His Honour Judge Bankole Thompson, delivered on 29 October 2003, in which he refused a TRC request to conduct a public hearing with this indictee.¹ Judge Thompson entertained the request by virtue of his position as Presiding Judge of the Trial Chamber, given jurisdiction to do so by Rule 5 of the Practice Direction on the procedure following a request by a State, the TRC or other legitimate authority to take a statement from a person in the custody of the Special Court.² Rule 5 of that Direction provides that once it is proved that an indictee has given informed consent to questioning by the TRC, a joint request “will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court. An appeal against rejection shall be decided by the President if it is made expeditiously and jointly by the detainee and the requesting authority.”
2. The appeal having been made expeditiously and jointly by notice filed on 1 November 2003³ (Grounds of Appeal following on 4 November 2003⁴) I convened an oral hearing on the next day, 5 November, in which the Applicants and the Prosecution were fully represented and joined in a helpful discussion of what is, on any view, a novel and difficult question and one that is likely to recur for other indictees and in other post-war situations where the local or international community considers that the establishment of both a Special Court and a Truth Commission will assist in the restoration of peace and justice. For this reason, I have consulted with others who have relevant experience, especially of the TRC process. Because of the significance of the

¹ *Prosecutor v Norman*, Case No SCSL-2003-08-PT, Decision on the Request by the Truth and Reconciliation Commission to Conduct a Public Hearing with Samuel Hinga Norman, 29 October 2003.

² This Practice Direction was adopted on 9 September 2003 and amended on 4 October 2003.

³ Appeal by the Truth and Reconciliation Commission for Sierra Leone (“TRC” or “The Commission”) and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson delivered on 30 October 2003 to Deny the TRC’s Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP, 1 November 2003.

⁴ Grounds of Appeal by the Truth and Reconciliation Commission (“TRC” or “The Commission”) and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson (“The Decision”) delivered on 30 October 2003 to Deny the TRC’s Request to Conduct a Public Hearing with Chief Samuel Hinga Norman JP, 4 November 2003.

matter I permitted subsequent submissions in writing from all parties over the fortnight following the hearing.

6473

3. Although this decision takes a judicial form, it inevitably embodies a balancing of values and interests that I have undertaken in my role as President of the Special Court - a role which encompasses administrative and representative responsibility relevant to co-operation with other institutions like the TRC. It is not normally appropriate for one judge to review another's exercise of a discretion, so I have not treated this appeal as a judicial review of the decision of Judge Thompson or strictly as an appeal from his decision, but rather as a fresh hearing in a context where as President I have the flexibility to explore alternative solutions. It was the thinking behind the amendment of Rule 5 (which had originally provided that the decision of the Presiding Judge would be final) to allow the President to take a broader view about an indictee's contacts with third parties and institutions, a role he is in any event given by the Rules of Detention.⁵

Historical Background

4. The TRC was an express product of the Lomé Accord, which was signed on 7 July 1999.⁶ The Act to establish the Commission was itself passed by Parliament in February 2000.⁷ That was well before the Treaty which established the Special Court, agreed by the United Nations on 16 January 2002⁸ and ratified by the Sierra Leone government on 29 March 2002.⁹ So the Special Court, which has an overriding duty to try those accused of bearing greatest responsibility for the war, was not in prospect when the TRC was given statutory form. In consequence, the provisions of the TRC Act do not envisage that indictees may testify to it or any basis upon which they might do so. The Special Court was given, by Article 8 of its Statute, a primacy over the national courts of Sierra Leone (and, by implication, over national bodies like the TRC). It has an overriding duty to prosecute those alleged to bear the greatest responsibility for the war, with which duty the

⁵ See Rule 48(c) of the Rules governing the detention of persons awaiting trial or appeal before the Special Court for Sierra Leone or otherwise detained on the authority of the Special Court for Sierra Leone, 7 March 2003, as amended 25 September 2003.

⁶ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999.

⁷ The Truth and Reconciliation Act 2000, February 2000.

⁸ 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.

⁹ The Special Court Agreement, 2002 (Ratification) Act, 2002, Sierra Leone (as amended), implementing legislation passed 19 March 2002, Presidential assent received 29 March 2002.

Government bound itself to co-operate.¹⁰ There was nothing in the Court's Agreement or Statute which required the Court to compromise its justice mission by deferring to local courts or national institutions.

5. The expectation of the United Nations in this respect is set out in the report of the Secretary General at paragraph 8:

The present report... does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court by the appointment of its Prosecutor, arrangements regarding co-operation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and co-operation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.¹¹

6. The spirit of co-operation envisaged by the Secretary General had in fact resolved all problems without the need for any formal agreements, until this particular issue concerning whether indictees should give public testimony to the TRC arose late in October 2003. The Office of the Prosecutor, which has substantially more resources than the TRC, has followed a different and independent process of investigation. The Prosecutor even announced that he would not use any evidence collected or heard by the Commission, although this undertaking was made at a time when it was not envisaged that any indictee would testify (and the Prosecutor has made clear that he will not be constrained from using indictee testimony). Even so, this was a very considerable compromise by an organ of the Special Court: if crucial evidence against an author of a crime against humanity were to surface at a TRC hearing, one would expect the Prosecutor to obtain it (if a document) or to subpoena the witness, certainly if the testimony was given in public. Nonetheless, the Prosecutor is entitled to make agreements or announce self-denying ordinances and "no go" areas, and he gave this undertaking precisely to avoid any possible conflict with the

¹⁰ See Article 17 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

¹¹ Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915; Archbold (International Criminal Courts), Appendix E2.

TRC process. What he cannot do, of course, is bind defendants: if evidence vital for their defence is given at a TRC hearing, then the Trial Chamber would not be prevented from entertaining a defence application to obtain it.¹²

7. The TRC report is due in February 2004, just before the Special Court trials are due to start. Judicial notice might be taken of it, and it might provide considerable assistance to the Court and to all parties as an authoritative account of the background to the war. It will recommend to the government reforms designed to prevent re-ignition of violence. But the TRC has not, significantly, given any undertaking to suspend judgement on individuals awaiting trial in this court. Should any statement of fact or opinion in the TRC report be challenged by either side, the Court would have to make up its own mind on the evidence presented to it. Bishop Humper (the TRC Chairman) joined me on 4 December 2002 in expressing the hope that the Commission and the Court would complement each other, with mutual goodwill and an understanding of our separate responsibilities.
8. There were a number of concerns expressed in 2002 about possible problems in having a TRC and a Special Court in operation at the same time: none has come to pass. Ironically, the question of an indictee's public testimony did not appear to be problematic, if only because it was not envisaged that the TRC would, or could properly, seek to obtain it. The initial expectation in this respect of informed persons well-disposed to both processes was expressed in an illuminating report by the International Centre for Transitional Justice ("ICTJ"):

In the case of persons indicted by the Special Court, the TRC should decline to interview them altogether until the proceedings against them are concluded.¹³

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

¹² This issue is discussed by one Commissioner, William A. Schabas, in "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone", (2003) *Human Rights Quarterly*, p. 1035.

¹³ Marieka Wierda, Priscilla Hayner and Paul Van Zyl, "Exploring the Relationship between the Special Court and the TRC of Sierra Leone", *ICTJ* (New York: 24 June 2002), p. 18.

Judge Thompson's Decision

6426

9. This application was refused by Judge Thompson in a carefully considered decision delivered on 29 October 2003. His starting point was that “it is the unquestionable expectation of the international community that judges of the Special Court should discharge their judicial functions independently and impartially free from pressures (institutional, societal, political or otherwise). (Article 13(1) of the Court's Statute).”¹⁴ His concern was that the TRC Statute only permitted public testimony from “victims of abuses and violators; perpetrators of abuses and violations and interested parties” none of which three categories properly described an indictee. He feared, from this aspect of the Act and from the Commission's claim that “the accused did play a central role in the conflict in Sierra Leone”¹⁵, that he would testify under the rubric of a “perpetrator”, contrary to the presumption of innocence and in a forum where his rights could not be protected. Notwithstanding the societal interest in the TRC process, “the accused's right to a fair and public trial always prevails”.¹⁶ It prevails, in Judge Thompson's judgement, even over the indictee's own decision to waive his due process rights: the Court in effect was to be the judge of where his best interests lay:

It is incontrovertible that what is at stake here is the accused's right to a fair and impartial trial before the Special Court where he can enjoy ample opportunity, with all the judicial guarantees and procedural safe-guards, to vindicate himself. Nothing should be done to deprive him of that opportunity or unduly burden premature exercise of that right.¹⁷

10. I do not sit judicially to review this decision for reasons that I have already explained.¹⁸ The applicants point out that “playing a central part” in the conflict does not necessarily entail the commission of human rights abuses and that President Kabbah and other ministers have testified, neither as “victims” nor as “perpetrators” but rather (I suppose) as “interested parties”. The presumption of innocence, to which the Judge attached much weight, is really a rule which places the burden of proof on the Prosecution at trial; it is not a straitjacket which insulates an indictee, against his wishes, from all forms of questioning prior to his trial. The applicants say that the

¹⁴ Decision on the Request by the TRC to Conduct a Public Hearing with Samuel Hinga Norman, para. 9.

¹⁵ See Request SHN 001 / submitted on 07 October 2003 by the Truth and Reconciliation Commission for Sierra Leone to conduct a public hearing with Chief Samuel Hinga Norman JP in terms of the Special Court for Sierra Leone Practice Direction adopted on 9 September 2003, as amended on 4 October 2003, para. 9.

¹⁶ Decision on the Request by the TRC to Conduct a Public Hearing with Samuel Hinga Norman, para. 14.

¹⁷ Decision on the Request by the TRC to Conduct a Public Hearing with Samuel Hinga Norman, para. 16.

¹⁸ See para. 3 above.

decision failed to take into account the importance of an indictee's autonomy and his freedom of speech or to note the presumption which paragraph 5 of the Practice Direction sets up in favour of an application which comes with the indictee's informed consent.

11. Irrespective of these submissions, however, it remains the fact that Judge Thompson, Presiding Judge of the Chamber which must accord a fair trial both to this defendant and to other defendants and to the Prosecution, finally concluded that the integrity of such a trial would be undermined were he to grant the application in the form in which it was presented. He was not asked to consider alternatives, but I have sought to find a compromise that will maintain the integrity of the Special Court process whilst permitting the TRC to fulfill its statutory mandate and allowing an indictee (but only if he wishes) to have his say. That solution must be capable of application not only to this indictee but to others who wish to testify and capable of replication elsewhere in circumstances where courts and truth commissions operate in tandem.

The TRC

12. The object of the TRC is set out in Section 6(1) of its Act. It 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 the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.

This is a broad mandate, although I pause at this juncture to note that it is to report only on the period from 1991 to the Lomé Accord of July 1999. The Special Court jurisdiction is to try those accused of the greatest responsibility for war crimes from November 1996, the date of the failed Abijan Accord, (which ironically also contained a provision for a TRC) to the end of the conflict, which broke out again after Lomé and continued until early 2002. If the TRC mandate had been limited to end with the Abijan Accord there would be no difficulty, but there is an overlapping period until July 1999 which will be the subject of scrutiny both by the TRC, and in the different context of a criminal trial, by the Special Court.

13. The TRC functions may broadly be divided, in accordance with its title, into those of providing an historical record (“truth”) and those of assisting victims to come to terms with their perpetrators (“reconciliation”). The “truth” functions, described in Section 6(2)(a) of its Act,¹⁹ could be interpreted as permitting findings about individual responsibility - the prime function of the Special Court. The “reconciliation” functions, described in Section 6(2)(b) are not so problematic, so long as they invite victims to reconcile with perpetrators who do not bear great responsibility and are not Special Court indictees.²⁰ It is possible to envisage an indictee pleading guilty and then going before the TRC to beg his victims’ forgiveness, and subsequently asking for any such forgiveness to be taken into account by the Court in mitigation of his sentence. But that is not this case and no indictee has yet evinced any intention to plead guilty. It is the “truth” aspect which is of most concern, together with the “reconciliation” procedures which the TRC wishes to adopt (or adapt) to hear evidence from indictees.
14. The Act does not lay down any procedure for TRC reception of information or evidence. Section 7(1) of the Act is couched in very general terms:

7.(1) The Commission shall, subject to this Act, solely determine its operating procedures and mode of work with regard to its functions which shall include the following three components:-

- (a) undertaking investigation and research into key events, causes, patterns of abuse or violation and the parties responsible;
- (b) holding sessions, some of which may be public, to hear from the victims and perpetrators of any abuses or violations of from other interested parties; and
- (c) taking individual statements and gathering additional information with regard to the matters referred to in paragraphs (a) or (b).

¹⁹ Section 6(2)(a) reads: “to investigate and report on the causes, nature and extent of the violations and abuses referred to in subsection (1) to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred, the question of, whether those violations and abuses 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”.

²⁰ Section 6(2)(b) reads: “to work to help restore the human dignity of victims and 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, and by creating a climate which 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”.

There are other, very general, powers - to require that statements be taken on oath, to hold private interviews, or to arrange for information to be given in confidence, which "the Commission shall not be compelled to disclose".²¹ There is in effect a power to prosecute for perjury those who testify so any indictee who does so would in theory face double jeopardy.²² It may be significant that the Act itself does not give "public sessions" any special importance or prominence, or treat them as central to the functioning of the Commission. "Sessions" are merely permitted, "some of which may be public".

15. The TRC was to have completed its work and submitted a final report by October of this year: it has obtained an extension of time until the end of December. A representative was recently reported as telling the International Crisis Group that its final product "will be a report on the causes of the war (including an historical narrative) that attempts to offer a road map with recommendations on a range of reforms necessary to prevent a new conflict".²³ This would be unexceptional, and obviously helpful to the country and to the Court. But there is no guarantee that its "historical narrative" will not include a judgement on the responsibility (even the guilt) of individuals indicted by the Special Court. I was told at the hearing by TRC representatives that the Commissioners are preparing to make some assessments of responsibility, and I have been given no assurance that indictees awaiting or undergoing trial will not be "judged" guilty or innocent by the Commissioners (who are not qualified judges), whether or not they testify to the TRC. The TRC has made no "self-denying ordinance" in this or any other respect that is comparable to the decision of the Special Court Prosecutor to refrain from using evidence presented to the TRC. If its report carries any conclusion about the criminal responsibility of an indictee, then the professional judges of the Special Court will have to ignore that premature judgement, as indeed they are trained to do. But its publication may create expectations and anxieties among prospective witnesses and other defendants and prove indirectly damaging to either Prosecution or Defence. For the very reason that it would necessarily be a premature judgement, it might be shaken or reversed after all the evidence is heard and exposed to the test of cross-examination at the trial. Any such result might discredit the TRC report, but the Court

²¹ Section 7(3).

²² See Section 9(2) which reads: "Any person who willfully obstructs or otherwise interferes with the Commission or any of its members or officers in the discharge of the Commission's functions under this Act, commits an offence and shall be liable on conviction to a fine not exceeding one million loenes or to a term of imprisonment not exceeding one year or both such fine and imprisonment".

²³ "Sierra Leone: The State of Security and Governance", *ICG Africa Report No. 67*, (Freetown/Brussels: 2 September 2003), p. 12 (ICG interview with TRC representative, May 2003).

must take no account of this: its judges remain committed by oath to reach their verdicts according to the evidence before them.

16. One solution to the problem could be for the TRC to issue a preliminary report in February and then suspend its operations until the trial process has been completed, when it would reconvene to consider the trial evidence and prepare and publish a final report, incorporating the results of the trials. But I am told that no such course can realistically be contemplated.

The Indictee

17. In these circumstances, a competent lawyer would be unlikely to advise an indicted client to run the risk of testifying before the TRC. There are no procedural safe-guards; he might make damaging admissions under questioning from the counsel to the Commission or from the Commissioners themselves and these admissions could be used by the Prosecution, whose self-denying ordinance does not extend to indictee testimony; he might be condemned in the Commission's report in a way which would create an expectation of his conviction by the Special Court and in consequence frighten off potential defence witnesses. When the TRC first approached a number of indictees, earlier in the year, they all declined a chalice that they were doubtless advised was poisoned. There came a point, however, when this applicant changed his mind. In a letter dated 26 August 2003 to his lawyer, copied to the TRC and the Court, Chief Sam Hinga Norman refers to legal advice given him in June to the effect that his appearance before the TRC would be inappropriate. But since, almost 6 months after his arrest, "there is no news about the start of the trial... I would prefer to be heard by the people of Sierra Leone and also be recorded for posterity". He refers to the fact that President Kabbah has testified, as have other ministers of the Government.
18. I have considerable sympathy with Chief Hinga Norman's concerns about his trial fixture. He expected a speedy trial but after six months in custody there was not yet a trial date. He is himself a Minister of Government and political leader. He heard broadcast testimony from the President and he too wanted to make his appeal to "the people". He thinks that it is discriminatory not to permit him to do so. He possesses, even as an indictee remanded in custody, a qualified right to freedom of speech. That right must be capable of assertion, in some meaningful way, to answer, if he wishes, any allegations that have been made against him in another forum: particular

resonance attaches to free speech when it is sought as a “right of reply”. He is entitled to set out his own account for posterity. The practical question concerns only the method by which this should be done whilst he awaits his trial.

19. To these claims of the indictee must be added the claim of the TRC itself to be put in a position to decide where the truth lies. The Commission states in paragraph 9 of its Application:

The TRC perceives Chief Samuel Hinga Norman JP to have played a central role in the conflict in Sierra Leone. The Commission’s report - insofar as it purports to present an impartial historical record - would not be complete without hearing from Chief Hinga Norman the particular details of his role in the conflict and his insights and views into its causes, course and character.²⁴

As will appear, I endorse this claim, so far as it goes. The TRC certainly can have the indictee’s evidence, if (and only if) he is fully prepared to take the risk of volunteering it. The crucial question, again, is the form in which that evidence may be secured.

The Special Court Practice Direction

20. The Special Court was first approached by letter from the Executive Secretary of the TRC sent on 3 September 2003, peremptorily requesting that the indictee be made available for interview in the unit where he is being detained on 4 September - the very next day. Significantly, this was a request for a private interview, lasting two days, with several TRC investigators. It was not a request for a public hearing.²⁵ On any view the timing of the request was impracticable, but the Registrar immediately consulted with me, the Vice President and the Presiding Judge of the Trial Chamber, and a Practice Direction was produced with great urgency in an effort to co-operate with the TRC.²⁶ The Practice Direction was promulgated on 9 September 2003.²⁷ The chief concern of the judges was that indictees should know what they were letting themselves in for if they gave interviews to the TRC, and to ensure that in that event they would be given every reasonable protection against self-incrimination. Thus any prisoner who agreed to participate in

²⁴ See Request SHN 001 / submitted on 07 October 2003, para 9.

²⁵ Letter dated 3 September 2003 from Franklyn Kargbo to Robin Vincent, Registrar.

²⁶ The suggestion by Schabas (n. 12 above) that the Special Court actually opposed indictee testimony is incorrect although his article was apparently written before the Practice Direction and its amendment.

²⁷ Practice Direction on the Procedure to Take Statements from a Person in the Custody of the Special Court for Sierra Leone, 9 September 2003.

the process had to signify his agreement in writing, confirmed by a lawyer who had advised him about it; he had to be provided with a list of written questions and told he was not obliged to answer any particular one; he had to be informed that his answers might be used against him by the Prosecution and that no “finding” by the TRC about him would sway the Court. Any interview had to be supervised by a lawyer appointed by the Registrar and had to be held in the presence of a lawyer for the indictee.

21. It must be understood that these were protections laid down not to obstruct the TRC but to provide fundamental protection for men facing charges alleging heinous crimes which if proved could lead to long years of imprisonment. That protection was essential where they were facing impromptu questioning by a skilled counsel for the TRC and by the commissioners themselves. There was not, indeed never has been, any inhibition against an indictee volunteering or communicating information to the TRC in writing, either directly or through his lawyers. The indictee retains freedom of speech to this very considerable extent, that he can write a book, if he wishes, about “his role in the conflict and his insights and views into its causes, course and character” and have it sent to the TRC - by his lawyers, who will sensibly vet it first. It is surprising that the TRC does not appear to have requested information in written form from this indictee. It is also surprising that it has shifted its request from a two day private interview with investigators to a full-scale public hearing broadcast “live” to the nation.

22. The Practice Direction was the result of earnest consultation, and marks an important shift from the principle initially endorsed by the ICTJ and set out at paragraph 8 above. This shift was made in part out of a willingness to co-operate with the TRC, subject to iron-clad protection of indictees’ rights, and in part to reflect the recent common-law recognition that prisoners retain a certain core freedom of speech. Nonetheless, the promulgation of the Practice Direction was followed by TRC objections that it would infringe its powers to take evidence in confidence - powers that it seemed to want to use in respect of Chief Hinga Norman. There was correspondence and further meetings with the Registrar before an amended Practice Direction was adopted on 4 October, precisely to meet TRC objections to the first practice direction and to permit them to apply for a confidential hearing. For the purposes of the record, I set the current Direction out in full:

The Registrar of the Special Court for Sierra Leone,

NOTING that a State, the Truth and Reconciliation Commission (“TRC”), or other legitimate authority may on occasion request the assistance of the Court to take evidence for the purposes of their proceedings from a person who is in the custody of the Special Court or who is in the custody of another authority based on an order or request of the Special Court;

HEREBY issues this Practice Direction in consultation with the President of the Special Court pursuant to Rule 33(D) of the Rules of Procedure and Evidence of the Special Court, setting out the procedure governing such requests:

1. A request by a State, the TRC, or other legitimate authority for assistance to question or take evidence from a person who is in the custody of the Special Court or who is in the custody of another authority based on an order or request of the Special Court (“detainee”) shall be transmitted to the Registrar. In addition, all correspondence between the detainee and a State, the TRC, or other legitimate authority shall be copied to the detainee’s counsel.
2. Requests shall be in writing and shall contain:
 - (a) details of the authority (“requesting authority”) making the request;
 - (b) the name of the detainee to whom the request relates;
 - (c) details of the purpose of the request and a summary of the reasons for the request;
 - (d) a description of any offences or suspected offences charged or likely to be charged or under investigation by the requesting authority;
 - (e) any relevant dates, such as the date of the trial at which the evidence is required, or any cause for special urgency (as appropriate);
 - (f) details of any caution which should be given to the detainee under the law of the requesting authority;
 - (g) a list either of specific questions or of subject areas about which questions are to be asked; and

6434

- (h) a description of any persons from the requesting authority seeking to be present at the questioning and a description of the facilities which will be required for recording and transcribing the questioning.
3. The Registrar shall notify the President of any request. The request shall be forwarded to the Presiding Judge as appropriate, and to the Prosecutor and the Defence Office.
4. The Registrar shall inform the detainee and the detainee's counsel of the request. The Registrar shall ensure that the detainee has ample opportunity to take legal advice before deciding whether or not to agree to the questioning and is made aware:
- (a) that the detainee is not obliged to agree to the questioning or, if he does, that he is not bound to answer any particular question;
- (b) that the questioning will be transcribed and the transcript filed with the Court Management Section;
- (c) that a copy of the record may be made available, upon order by the Presiding Judge, to a party or defence counsel for potential use in proceedings before the Special Court unless the questioning is covered, in whole or in part, by a confidentiality order, statute, or protocol, in which case a party or defence counsel may apply to the appropriate chamber for an order that the record of the questioning shall be disclosed in the interests of justice (which may include the interests of justice with respect to other suspects or accused before the Special Court); and
- (d) that no decision, judgement, conclusion, or comment by the requesting authority will be allowed to influence the Special Court in determining the detainee's guilt or innocence.
5. In the event that the detainee agrees to the questioning (such agreement having been signed in writing by the detainee and confirmed by the detainee's counsel), the Registrar shall inform the parties and place the request before the Presiding Judge. The Presiding Judge shall instruct the parties and the detainee's counsel on the procedures to be followed on making representations concerning the request. After such representations are made the Presiding Judge shall grant approval (conditional or otherwise) if the said judge is

satisfied that the detainee agrees to the questioning and has been fully advised in terms of paragraph 4 above. In such circumstances, the request for questioning will only be rejected if the Presiding Judge is satisfied that a refusal is necessary in the interests of justice or to maintain the integrity of the proceedings of the Special Court. An appeal against rejection shall be decided by the President if it is made expeditiously and jointly by the detainee and the requesting authority.

6. Once the Presiding Judge has approved the request, the Registrar shall make appropriate arrangements for the questioning to proceed on a date convenient for the detainee's counsel to be present. The Registrar shall ensure that the detainee has the services of an interpreter if requested.
 7. The questioning shall be supervised by a legal officer nominated by and acting on behalf of the Registrar. This officer shall have the authority to stop the questioning if it goes significantly beyond the scope of the questions notified pursuant to paragraph 2 (g) above and/or if any conditions imposed by the Presiding Judge (e.g., as to identification of protected witnesses) are not observed.
23. The Practice Direction again relates only to the taking of oral evidence and in no way prohibits or obstructs written correspondence. At the TRC's request, it makes provision for a confidential process of receiving information. Most importantly, paragraph 5 sets up a presumption that the Presiding Judge will grant a TRC request if satisfied that the indictee has given an informed consent, unless "satisfied that a refusal is in the interests of justice or to maintain the integrity of the Special Court".

This Joint Application

24. The TRC duly brought before the Presiding Judge an application which complied with these protocols and was joined by Chief Hinga Norman. The TRC supplied a list of some 32 fairly broad subject areas they wished him to cover. They further requested at least two days occupancy of the Special Court courthouse, for a public hearing which would be broadcast live to the nation with edited highlights on the evening television news. I quote extracts from the TRC application to the Court:

Chief Hinga Norman will be required to take an oath prior to making any statement before a hearing of the TRC... In consultation and agreement with his legal representatives the Commission will determine in advance the scope of the hearing and the ambit of the questions that will follow his initial statement to the Commission. Chief Hinga Norman's legal team will be at his side throughout the hearing and will be permitted to intervene at any time on their client's behalf... The TRC would suggest that the courthouse on site at the Special Court compound be used for the public hearing... The hearing will be presided over by five commissioners (possibly six)... Selected representatives of the public will be in attendance... The TRC's public hearings are normally broadcast live. We accordingly request that two telephone line connections be made available to enable SRBS and UNAMSIL radio to broadcast the hearing. In terms of facilities the TRC will supply its own transcribing and video equipment and support staff who will manage the recording. The TRC will also employ a photographer for the purpose of taking still photographs of the hearing. With regard to the time required to conduct this public hearing the Commission requests that two full days be reserved. It is envisaged that the first session on the first designated day will commence at 10am and conclude by 5pm.²⁸

25. I asked the TRC head of investigation, Mr Howard Varney, some questions to elicit further details of the proposed procedure. He thought the indictee could read from a prepared script, face-to-camera as it were, for the first day, although he agreed that it might be possible for his counsel to "lead" him through his evidence as would be the case at trial. Then the following day the indictee would be questioned by the Commissioner's counsel, an experienced barrister, then by his own counsel and by each of the Commissioners in turn, who would be sitting in the courtroom on the judges' bench. Bishop Humper (who is not of course a judge or trained lawyer), would preside and would determine the procedure to be followed as the hearing progressed. It would be desirable to have some victims present and indeed preferable to have the whole hearing in a town hall where many victims could be present. The hearing would be broadcast live on SRBS radio and Radio UNAMSIL and television would show "snippets" in the evening. The indictee would be given the opportunity to make an "uninterrupted presentation" for as long as he required. There was no written or settled procedure. Mr Varney confirmed that there was nothing in the Act to prevent findings of fact against individuals and he understood that the TRC would indeed make findings on the role of factions and of certain individuals. There would be no standard of proof in respect of such findings as Mr Varney correctly observed: "The TRC is not a court".

²⁸ Request SHN 001 / submitted on 7 October 2003, paras 16-17, 19-24.

6437

26. The Prosecution opposes the joint application, despite admitting that the availability of evidence on oath from the defendant at an open hearing “had a certain appeal” - for reasons that are obvious. Nevertheless, it asserted that such a hearing would undermine the integrity of the Special Court, imperil the security situation in the country and could serve to intimidate witnesses given that the indictee has a large following, even if this was not his intention. The latter claim is always easy for prosecutors to make and often difficult for defendants to refute. It could have been discounted, but for the TRC’s warning that if the Chief did not testify then his supporters might cause unrest and even “unleash powerful emotions” against the Special Court. This comment, made on behalf of the TRC at the hearing, indicates that the prosecution concerns may have some foundation. Mr Tim Owen, for the Chief, immediately disassociated himself from this TRC argument and I accept his statement that unrest is the last thing his client would wish to stir up. (That is evident from his very first statement to his followers after his arrest, in which he made it clear he would co-operate with a process which he believed would establish his innocence). But the danger of unintended consequences, in a society where factions still have access to arms and where the war ended only last year, must be born in any judicial mind. To allow any accused to testify live-to-air, for several days in an uncontrolled environment, may be asking for unpredictable trouble.
27. Following the hearing I received written submissions from all parties, which I carefully considered but do not think they much advance the arguments made at the hearing.²⁹ The prosecution again draws attention to the “fragile equilibrium”³⁰ in the country and to the potential for destabilisation where the forces which the indictee commanded are still in active association and interested in securing his freedom, although there is no evidence that they intend to do so by unlawful means, much less that Chief Hinga Norman is likely to encourage such a course. There is frustration, on all sides, because his trial date has not yet been fixed, a matter to which I shall have to revert.
28. I have had to remind myself of the legitimate interests of others who have not been represented. There are other indictees, many from factions which fought against Chief Hinga Norman and

²⁹ See Letter with enclosures from David Crane, Prosecutor, to Judge Geoffrey Robertson, President, dated 11 November 2003; Letter from Howard Varney, Head of Investigations at the TRC to Judge Robertson, President of the Special Court, dated 13 November 2003; Additional Submissions on behalf of Chief Hinga Norman on his application to appear before the Truth and Reconciliation Commission of Sierra Leone, dated 12 November 2003, filed on 27 November 2003.

³⁰ Letter with enclosures from David Crane, Prosecutor, to Judge Geoffrey Robertson, President, dated 11 November 2003.

against whom he might well testify at any TRC hearing. It would hardly be fair to them to be subjected to public attacks which they could not answer. It would place pressure on them to give evidence to the TRC, waiving their right against self-incrimination, perhaps with disastrous results. An interesting indication of just how dangerous is the road down which the TRC would draw indictees is provided by its application in the case of *Augustine Gbao*, an indictee from a different faction.³¹ This application was also refused by Judge Thompson albeit on different grounds.³² What strikes me is the extent and detail of the conditions upon which his testimony was offered to, and apparently accepted by, the TRC. These include:³³

- (i) That the Chairman of the Commission provide a written assurance to Mr Bao's defence counsel that he will retain full control of the proceedings and, acting in good faith, will fully brief the participants in the proceedings of these conditions and the importance of them, and that he will not permit any breaches of these or other conditions and will generally protect Mr Bao from any intervention which might serve to prejudice Mr Bao's future trial;
- (ii) That Mr Bao be permitted to retain his right to silence at all times and that he be permitted to withdraw from the proceedings at any time;
- (iii) That Mr Bao's legal team be permitted to sit with him throughout the proceedings and to have rights to audience for the purpose of intervening at any stage where it becomes necessary to protect Mr Bao's rights and in particular his right to a fair trial before the Special Court;
- (ix) That Mr Bao's legal team be permitted an opportunity to remedy any inadvertent damage which may have been caused to Mr Bao's right to a fair trial before the Special Court.
- (iv) That any transcripts or recordings produced by the Truth Commission should not be passed onto any third party except with the written consent of Defence Counsel for Mr Bao or by order of a judge of the Special Court;

³¹ The TRC Application is contained in: Request AAB 002 / Submitted on 10 October 2003 by the Truth and Reconciliation Commission for Sierra Leone to conduct a public hearing with Mr. Augustine Ato Bao in terms of the Special Court for Sierra Leone Practice Direction adopted on 9 September 2003, as amended on 4 October 2003.

³² *Prosecutor v Gbao*, Case No. SCSL-2003-09-PT, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with the Accused, 3 November 2003.

³³ See Defence Agreement and Response to Truth and Reconciliation Commission for Sierra Leone request to conduct a public hearing with Mr. Augustine Ato Bao in terms of the Special Court for Sierra Leone Practice Direction adopted on 9 September 2003, as amended on 4 October 2003, 17 October 2003.

(v) It is to be noted that the Defence for Bao reserve the right to take any legal action necessary to remedy any prejudice to a fair trial caused by any of the activities of the Truth Commission linked to these proceedings. To this end, it is requested that any findings or conclusions of the Truth Commission intended to be published in its final report concerning Augustine Bao's role in the former conflict be copied to counsel for Augustine Bao at least 14 working days before the publication of that report. Defence counsel for Mr Bao undertakes to respect the confidentiality of any such statements save for the purpose of presenting the nature of such statements to a judge for the purposes of any legal proceedings designed to protect Mr Bao's right to a fair trial, should that become necessary.

29. Conditions of this kind - different for each indictee who testifies, depending one supposes on the advice of their different lawyers - need only be set out to be recognised as recipes for endless disruption and litigation, in the TRC itself, in national courts and in the Special Court. Allowing an application to permit public testimony along the lines suggested by this application would - as these conditions demonstrate - run risks of the fair trial rights of an indictee being jeopardised at a hearing before the Bishop in the Special Court building. This could lead to an application for an injunction in the Supreme Court of Sierra Leone, or an application before the Special Court for protective measures. Suppose counsel for Mr Gbao takes exception to passages in the draft TRC report: will he apply on the basis of this agreement with the TRC to injunct it in the national courts, or seek a right to refute it, or apply for protective measures before the Trial Chamber? The prospects of litigation - and consequent diversions and delays to Special Court trials - are endless.

Discussion

30. What is actually proposed by this application may be described in different ways: it might appear as a spectacle. A man in custody awaiting trial on very serious charges is to be paraded, in the very court where that trial will shortly be held, before a Bishop rather than a presiding judge and permitted to broadcast live to the nation for a day or so uninterrupted. Thereafter for the following day or days, he will be examined by a barrister and then questioned from the bench by the Bishop and some five or six fellow Commissioners. In the immediate vicinity will be press, prosecutors and "victims". His counsel will be present and permitted to interject but there are no fixed procedures and no Rules of Evidence. The event will have the appearance of a trial, at least the appearance of a sort of trial familiar from centuries past, although the first day of

uninterrupted testimony may resemble more a very long party political broadcast. It is not necessary to speculate on the consequences of this spectacle: there may be none. There may be those the Prosecution fears which could lead to intimidation of witnesses and the rally of dormant forces. There may be those that doubtless informed the original advice of his lawyers against testifying - namely fodder for the Prosecution, an adverse effect on public perceptions of his innocence and a consequent disheartening of potential defence witnesses. There will probably, I fear, be this consequence, namely intense anxiety amongst other indictees, especially from rival factions, and concerns over whether they should testify to the TRC as well, or in rebuttal. The spectacle of the TRC sitting in court may set up a public expectation that it will indeed pass judgement on indictees thus confronted and questioned, whose guilt or innocence it is the special duty of the Special Court to determine.

31. I cannot believe that the Nuremberg Tribunal would have allowed its prisoners to participate in such a spectacle, had there been a TRC in Germany after the war, or that the International Criminal Tribunals for the Former Yugoslavia or Rwanda would readily permit indictees awaiting trial to broadcast in this way to the people of Serbia or Rwanda. If it is the case that local TRCs and international courts are to work together in efforts to produce post-conflict justice in other theatres of war in the future, I do not believe that granting this application for public testimony would be a helpful precedent.
32. The applicants have not satisfactorily explained their insistence on public testimony. There are many other ways for the TRC to receive information, and its own Act suggests that public hearings might be an exception not the rule. It has never explained why it has shifted first from its initial request for a two-day private interview - a request which might well have been granted - to a request for permission for a confidential interview (which might also have been granted) to an application for the televised spectacle described above. It may have been unduly influenced by Chief Hinga Norman's insistence that he will only give evidence at a public hearing - a legitimate position on his part, but one which cannot bind the Court, no matter how much it may have shaped the TRC's application.
33. Let me to return to first principles. Truth Commissions and International Courts are both instruments for effectuating the promise made by states that victims of human rights violations

shall have an effective remedy.³⁴ Criminal courts offer the most effective remedy - a trial, followed by punishment of those found guilty, in this case of those who bear the greatest responsibility. TRC reports can assist society to move forward and beyond the hatreds that fuelled the war. Truth commissions offer two distinct prospects for victims - of truth, i.e. learning how and why they or their loved ones were murdered or maimed or mutilated, and of reconciliation, through understanding and forgiveness of those perpetrators who genuinely confess and regret. It seems to me that these are separate and severable objectives.

34. In what has been termed “transitional justice” periods, truth commissions may be the only option for weak governments. In this context they were common in South America in the 1980s - in Bolivia, Chile, El Salvador, Haiti, Argentina and so forth. They were usually accompanied by blanket amnesties and were not permitted to “name names” of those who might be identified as perpetrators of crimes against humanity, not to avoid prejudice to trials (which were not in prospect), but to avoid political embarrassment. The reports nonetheless shed light on abuses - in some cases, as with “*Nunca Mas*”, very great light. They achieved a degree of truth, but without justice and in many cases without reconciliation - see the recent public demands in these countries to vacate the amnesties and prosecute the perpetrators. The Lomé Accord of 1999 offered both a blanket amnesty and a TRC: only after that agreement was comprehensively violated did the international community deploy its muscle to insist on the prosecution of those bearing the greatest responsibility for the war.
35. The Sierra Leone TRC may have emerged from a dishonoured agreement, but it took on a statutory form that does not preclude its co-existence with the subsequently established Special Court. It was modelled to some extent on the South African TRC although it must be understood that this body offered what were in effect plea-bargains: those who testified were only absolved from criminal liability if they testified truthfully and were prepared if need be to repeat that testimony in court against others. This plea-bargaining aspect has not been replicated in Sierra Leone’s TRC statute. It has had to operate in a society where some major players in the war are indicted in the Special Court.

³⁴ Article 2(3) of the International Covenant on Civil and Political Rights, GA res. 2200A(XXI), 21 GAOR Suppl. No. 16 at 52.

36. In the case, as here, of Truth Commissions coinciding with court trials of alleged perpetrators, there is a dearth of precedent. In East Timor, a Memorandum of Understanding has been drawn up between the Office of the General Prosecutor (OGP) and the Commission (CAVR) which provides that:

The OGP is able to provide information to the CAVR that is relevant to its truth-seeking function only in circumstances where this does not prejudice ongoing investigations or prosecutions or the confidentiality of witnesses or victims and is consistent with the mandate of the OGP.³⁵

This does not address the specific issue of indictee testimony, although it demonstrates that in balancing the interests of the two processes, the value of fair trial must be overriding.

37. There is some assistance to be drawn from the experience of Peru, where the issue has arisen in relation to testimony by members of *Shining Path* who were awaiting trial. The TRC chose, I am told, to hear any testimony offered by such indictees in private, so as not to impact on their trial, even though the trial process there was to be inquisitorial rather than adversarial. This may be a helpful pointer to the desirability of finding a compromise solution which involves information volunteered to a TRC in a form that cannot reasonably affect ongoing trials. I note also that the TRC in that case wrestled with the difficulty inherent in public hearings for *convicted* perpetrators, namely that this can provide a “soapbox” or platform for justification of their crimes. It declined to provide such hearings for persons whose testimony (which it saw in written form in advance) was either self-promoting or at odds with other credible information it had gathered. This is not an issue here, but it does demonstrate how public hearings can be problematic for TRCs even when those who testify are not awaiting trial. Despite some well-publicised confessions at the South African TRC, I am informed that it is rare for perpetrators, whether alleged or convicted, to use public hearings to make confessions: these are more likely to be forthcoming in private hearings. For that very reason, of course, private hearings cannot be fully immunised from prosecution scrutiny: the compromise adopted by this court is found in Practice Direction paragraph 4(c).

³⁵ Memorandum of Understanding Between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working Relationship and Exchange of Information between the Two Institutions, 4 June 2002, para. 9.

38. As I have explained, the TRC is not required to hold public hearings. It has many powers to obtain evidence in different ways - even through confidential processes. It has held some meetings at which victims have been able to confront perpetrators. It has held a few public hearings at which ministers and even the President have spoken. It is entirely understandable that it should seek information from Chief Hinga Norman and from other indictees who are "central figures" whether or not they are guilty of war crimes. It is understandable - although I wonder whether it is really necessary - that the TRC should wish that information to be stated on oath. This course would, at least in theory, make the indictee vulnerable to a perjury prosecution in the national courts, and I do not consider it right or fair that he should be exposed to such double jeopardy. This prospect would need to be excluded by agreement. But if there is one way of obtaining such sworn testimony without endangering the integrity of the Special Court, then it is right that the TRC should have it in that fashion and no other.
39. It would clearly not be right that the TRC apply its "reconciliation" processes of public hearing, confrontation with victims, live broadcast and so on to Special Court indictees who have not pleaded guilty. This would, for the reasons given above, be wholly inappropriate. It might conceivably be permitted for an indictee whose guilty plea had been entered and accepted by the Court and by the Prosecution, but that is not this case. I have to decide how to effectuate the wish to testify of an indictee who, his counsel tell me, intends to plead "not guilty" and to vigorously defend the legality of his actions in putting down an insurrection by use of what he will contend was reasonable force. His free speech entitlement may only be restricted - like his freedom of movement - to the extent that is consonant with his present status as an indictee.
40. That status does not only restrict his speech in the interests of security. It carries with it a host of considerations about ensuring the fairness of his trial (and "fairness" includes fairness to the Prosecutor and its witnesses) and fairness to other indictees who face trial. At common law, a prisoner retains all the rights other than those taken away expressly or by necessary implication: *Raymond v Honey*;³⁶ *Ex parte Simms*.³⁷ These cases were pressed by counsel for the indictee, although they establish that convicted prisoners retain rights to urge the wrongfulness of their convictions (but not to engage a political debate).³⁸ Although the indictee here may well wish to discuss political issues, the important distinction is that he is unconvicted and may to that extent

³⁶ [1983] 1AC 6

³⁷ [1999] 3 WLR 328

³⁸ *Ibid*, p. 337.

be accorded more freedom. But that freedom is bounded, nonetheless, by the requirements to exercise it compatibly with his status as an indictee, which for present purposes means in a manner that gives rise to no real apprehension that it will disturb the fair trial process which he and others are obliged to go through. The argument, whether viewed as a free expression claim by an indictee or a concomitant claim to receive that expression by the TRC, cannot permit the applicants to dictate the manner in which the Special Court must effectuate it.

Conclusion

41. In my judgement, Chief Sam Hinga Norman is entitled to testify to the TRC upon condition that he has been fully apprised and advised of the dangers of so doing. I am satisfied that he has been expertly warned. His testimony must, however, be provided in a manner that reduces to an acceptable level any danger that it will influence witnesses (whether favourably or adversely) or affect the integrity of court proceedings or unreasonably affect co-defendants and other indictees. This in my judgement can be achieved by evidence prepared by him in writing (with the benefit of legal advice) and sworn in the form of an affidavit. I direct that if he wishes to take this course the Registrar should arrange for the swearing of the affidavit within the Detention Unit in the presence of a TRC official, and permit the original affidavit to be handed over to the TRC, on condition that it gives an undertaking not to bring or assist any other person or agency to bring a prosecution for perjury under S9(2) of its Act. What public use, if any, is made thereafter of that affidavit will be a matter for the TRC and for the detainee and his lawyers. Should counsel for the TRC have any further questions, these may be put to the indictee in writing and his answers may be sworn and delivered in the same way. There shall be no public hearing of the kind requested or of any other kind prior to the conclusion of the trial. This is without prejudice to his right, if so advised, to make unsworn written statements to the TRC. It is without prejudice to his right to meet with commissioners in the Detention Unit, if they apply for that purpose, or to his right to meet them for a confidential session, if a joint application is made for that purpose.
42. This solution means that the TRC is put in the position of receiving sworn testimony on every subject it wishes to explore, so long as the indictee is prepared to volunteer it. All that is denied is a public hearing, an event more conducive to its reconciliation work (which cannot apply to indictees who plead not guilty) than its business of constructing an historical record. So far as the indictee is concerned, he can put anything he wishes before the Commission, and on oath. Mr

Tim Owen made the point that an affidavit would not be so beneficial as a radio broadcast in getting his message across to his followers, because many of them cannot read. But this begs the question of the legitimate purpose of the TRC hearing, which must be to get information across to the Commissioners for the purpose of their report, rather than to permit indicted political leaders to get messages to their followers. What is important is that followers should know that their leaders have been given an opportunity to put forward their version of events in full detail, and this is achieved by the affidavit method. The indictee will shortly address the Court either to have the seven charges against him dismissed (if his Preliminary Motions fail³⁹) or else to refute them by his own defence which he will be given every opportunity to develop under procedures that have been scrupulously laid down to achieve fairness. The time for him to give public testimony will be if and when he exercises his right to give evidence on oath.

43. In an application for a change in conditions of detention to a form of "house arrest"⁴⁰ I note that he appreciated this point and indeed offered as a condition that he would undertake not to speak at all to the media - a position that would be undercut were I to grant a TRC application involving his speech through the media over several days. What really matters - as I pointed out in my Decision on that application⁴¹ - is that the Court should effectuate his right to a speedy trial. It would appear that he only changed his mind and volunteered testimony to the TRC at the end of August, in frustration because by that time no trial date had been fixed. At the hearing, in early November, both Prosecution and Defence claimed to be ready for trial, although the Prosecution said it wanted to apply for joinder of another defendant who was only arrested in July. The Appeals Chamber has in a recent decision emphasized the importance in this Court of speedy trial⁴², and this very application illustrates one of many reasons for that importance. The Trial

³⁹ *Prosecutor v Norman*, Case No. SCSL-2003-08, Preliminary Motion based on Lack of Jurisdiction: Lawfulness of the Court's Establishment, 26 June 2003; Preliminary Motion based on Lack of Jurisdiction: Judicial Independence, 26 June 2003; Preliminary Motion based on Lack of Jurisdiction: Child Recruitment, 26 June 2003.

⁴⁰ *Prosecutor v Norman*, Case No. SCSL-2003-08-PT, Motion for Modification of the Conditions of Detention, 23 July 2003, para. 9(f).

⁴¹ *Prosecutor v Norman*, Case No. SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 16.

⁴² *Prosecutor v Norman*, Case No. SCSL-2003-08, *Prosecutor v Kallon*, Case No. SCSL-2003-07, *Prosecutor v Gbao*, Case No. SCSL-2003-09, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003.

SCSL 2003-08-PT

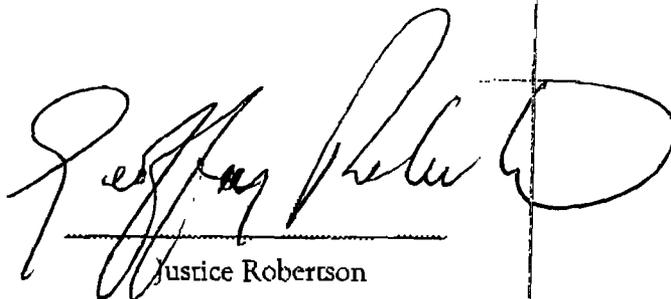
6446

Chamber will have this in mind in dealing with any application which has the consequence of delay.

44. The work of the Special Court and the TRC is complementary and each must accommodate the existence of the other. The TRC is not in a position to suspend its work once trials begin in order to issue a final report when they are over, taking the evidence and verdicts into account. It would be seemly if the report that the TRC is (I am told) to issue in February refrains from passing concluded judgement on the criminal responsibility of any person who is detained to face trial in this Court. Should comment or conclusion be passed, it will of course have absolutely no effect on the minds of the judges of this Court who sit to provide a fair trial according to international standards. That said, the Special Court respects the TRC's work and will assist it so far as is possible and proper, subject only to our overriding duty to serve the interests of justice without which there may not be the whole truth and there is unlikely to be lasting reconciliation.

Done at Freetown

This twenty-eighth day of November 2003



Justice Robertson

President