

CHAPTER ONE

The Mandate of the Truth and Reconciliation Commission

The Legislative Framework

1. Truth and Reconciliation Commissions had been established in many countries following periods of protracted internal conflict, and were widely believed to provide an important mechanism for transitional justice. Generally, they have been presented as an alternative to judicial prosecution for atrocities, especially in cases where political exigencies made this unlikely or impossible. In the case of Sierra Leone, this was quite explicit. The creation of the Commission was provided for in the Lomé Peace Agreement of 7 July 1999. Article IX of the Lomé Peace Agreement provided a pardon and amnesty for participants in the conflict. The Commission was therefore viewed as the principal means of providing a degree of accountability for human rights abuses committed during the conflict.
2. It is worthy of note that the Abidjan Peace Agreement of 30 November 1996, which initially offered the hope of an end to the conflict but which did not succeed, for reasons detailed elsewhere in this Report, made no provision for a Truth and Reconciliation Commission or for any similar process. Yet article 14 of the Abidjan Agreement granted an amnesty to members of the Revolutionary United Front, allegedly so as '[t]o consolidate the peace and promote the cause of national reconciliation'.

Legal Framework for Mandate

3. Article VI(2) of the Lomé Peace Agreement described the Truth and Reconciliation Commission as one of several 'structures for national reconciliation and the consolidation of peace'. Article XXVI of the Lomé Peace Agreement reads as follows:

ARTICLE XXVI

HUMAN RIGHTS VIOLATIONS

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

2. In the spirit of national reconciliation, the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991. This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

3. Membership of the Commission shall be drawn from a cross-section of Sierra Leonean society with the participation and some technical support of the International Community. This Commission shall be established within 90 days after the signing of the present Agreement and shall, not later than 12 months after the commencement of its work, submit its report to the Government for immediate implementation of its recommendations.

4. The *Truth and Reconciliation, 2000* ('the Act') was adopted on 22 February 2000. However, it was, strictly speaking, only 'established' on 5 July 2002, when the seven Commissioners appointed by the President were formally sworn in during a public ceremony. The word 'mandate' is used three times in the Act, in the context of references to 'fulfilment of the Commission's mandate' (sections 8(1)(b) and c), 9(1)), but nowhere is there any attempt to explain or define what the mandate actually consists of. Section 6(1) refers to the 'object for which the Commission is established' and section 6(2)c speaks of 'fulfilment of the object of the Commission', suggesting that the expression 'object' may be synonymous with 'mandate'. The Act is associated with an explanatory 'Memorandum of Object and Reasons', which was attached to the Bill presented to Parliament. Section 15(2) refers to the need 'to achieve the object of the Commission'. The Act also contains references to the 'functions of the Commission'. Part III of the Act, which includes the sections within which the 'mandate' and 'object' of the Commission are referred to, is entitled 'Functions of the Commission'.
5. For the purposes of this discussion, there does not seem to be any useful or meaningful distinction between 'mandate', 'object' and 'functions' of the Commission. It is not possible to glean any significant nuance in Parliamentary intent from the use of these three terms. They are all components of the 'mandate' of the Commission.
6. Section 6 of the Truth and Reconciliation Commission Act 2000 sets out the 'object' of the Commission:

6. (1) The object for which the Commission is established 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 Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.

(2) Without prejudice to the generality of subsection (1), it shall be the function of the Commission -

(a) 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;

(b) 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; and

(c) to do all such things as may contribute to the fulfilment of the object of the Commission.

7. Section 7(1) of the Truth and Reconciliation Commission Act 2000 discusses the 'functions' of the Commission, which it says 'shall include the following three components':

undertaking investigation and research into key events, causes, patterns of abuse or violation and the parties responsible;

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

taking individual statements and gathering additional information with regard to the matters referred to in paragraphs (a) or (b).

8. Section 7(2) of the Act lists several features of the Commission's operations:

seeking assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation;

provision of information to the Commission on a confidential basis;

taking into account the interests of victims and witnesses when inviting them to give statements, including the security and other concerns of those who may wish to recount their stories in public;

implementation of special procedures to address the needs of such particular victims as children or those who have suffered sexual abuses as well as in working with child perpetrators of abuses or violations;

decision-making by consensus, to the extent possible;

provision of information or recommendations to or regarding the Special Fund for War Victims provided for in Article XXIV of the Lome Peace Agreement, or other assistance.

9. Section 8 of the Act sets out the powers of the Commission.
10. Indications as to the 'mandate' of the Commission are also provided for in Part V of the Act, which deals with the 'Report and Recommendations'. *The Report is to summarise the findings of the Commission and 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 impartial historical record, preventing the repetition of the violations or abuses suffered, addressing impunity, responding to the needs of victims and promoting healing and reconciliation'.*
11. The Memorandum of Objects and Reasons is not, strictly speaking, part of the enacted legislation creating the Commission. Nevertheless, as an attachment to the Bill presented to Parliament, it is of considerable significance for the interpretation of provisions of the Act that was eventually adopted. It provides useful guidance as to Parliamentary intent at the time the legislation was enacted. Several phrases in the Memorandum of Objects and Reasons are of particular relevance, notably the reference to the proceedings of the Commission '*as a catharsis for constructive interchange between the victims and perpetrators of human rights violations and abuses*', and the intent that the Commission 'compile 'a clear picture of the past''. Also of interest is the suggestion that clause 6 of the Act refers to 'the principal function of the Commission' as being '*to create an impartial historical record of events in question as the basis for the task of preventing their recurrence*'. In fact, section 6 of the Act lists five distinct 'objects' of the Commission, and suggests no hierarchy between them. The Memorandum of Objects and Reasons provides a helpful perspective for the interpretation of the various components of section 6 of the Act. Here is the text in full:

MEMORANDUM OF OBJECTS AND REASONS

The object of this Bill is to establish the Truth and Reconciliation Commission proposed by Article XXVI of the Lome Peace Agreement as part of the process of healing the wounds of the armed conflict which began in 1991. By clause 2 of the Bill, the Commission is being established as a body corporate.

Section 1 of Article XXVI of the Peace Agreement envisaged the proceedings of the Commission as a catharsis for constructive interchange between the victims and perpetrators of human rights violations and abuses and from this catharsis the Commission is to compile 'a clear picture of the past'. Accordingly, by clause 6, the principal function of the Commission is to create an impartial historical record of events in question as the basis for the task of preventing their recurrence.

To best ensure the Commission's independence and impartiality, the members of the Commission are to be appointed after a selection process involving both national and international expertise as stipulated in the Schedule to the Bill and involving a Selection Panel on which all the protagonists to the conflict and other interested parties are represented; (clause 3). By clause 5, the Commission shall operate for one year preceded by a period of three months during which the Commission is to carry out all the ground work necessary for its effectiveness when operations begin. For good cause shown, the term of the Commission may be extended by the President by statutory instrument for a period of six months.

Under clause 12, the Commission is required to raise the funds to finance its operations from both governmental and international non-governmental sources to which it is required to submit quarterly reports to account for the moneys donated (clause 13). Under clause 15, the Commission reports to the President who will then arrange to send copies of the report to the U.N. and Parliament. By clause 18, the Government is required to set up a follow-up Committee to monitor and stimulate the progress of the implementation of the Commission's findings. Under clause 19, the President is required to dissolve the Commission by notice in a statutory instrument not later than three months after the submission of the Commission's report.

12. *In the words of the President, at the swearing in ceremony of the Commissioners held on 5 July 2002, in Freetown, 'the Commission will investigate and report on the causes, nature and extent of the violations and abuses of human rights and international humanitarian law during the conflict. Of course it will create an impartial historical record of the atrocities perpetrated against innocent civilians during a ten-year period of the war. However, it is absolutely necessary that we look beyond those functions, and see the work of the TRC as a therapeutic process. It was a brutal war. It caused grievous physical and emotional damage for thousands of our compatriots. It also created divisions between families, and among neighbours and friends. To a large extent the conflict also fractured the body politic of the nation. Well, the guns may be silent, but the trauma of the war lingers on. We have a great deal of healing to do. This is why the TRC is, and should also be seen, as an instrument of national reconciliation, and another means of strengthening the peace.'*

The Context of Establishment of the Commission

13. The Commission is one of the accountability mechanisms established to deal with the human rights abuses that occurred during the armed conflict. Sierra Leone's transition from armed conflict to peace came about as a result of a peaceful negotiated settlement of the conflict between the government of Sierra Leone and the Revolutionary United Front, with the signing of the Lomé Peace Accord on 7 July 1999. The process began in the aftermath of the January 1999 invasion of Freetown. The Government of Sierra Leone proposed that the Abidjan Peace Accord should serve as a basis for negotiations. In his address to the nation, on 7 February 1999, President Kabbah called upon the nation and civil society groups to consult and build consensus around the Abidjan Peace Accord in that regard.
14. Civil society groups supported the Government's proposals for peace talks. However, while endorsing in general terms the government's decision to use the Abidjan Peace Accord as the basis for future dialogue with the rebels, the Human Rights Committee expressed reservation with regard to certain articles in the Abidjan Peace Accord, particularly Article 14, which appears to confer blanket immunity on all perpetrators of human rights violations in Sierra Leone. The Committee was of the view that while it was important to look forward rather than to the past during this critical peace process, the disturbing cycle of impunity in Sierra Leone could not be broken unless there was some form of censure or punishment to some perpetrators of gross abuses of human rights in the country.

*'Accordingly therefore, the Committee proposed the creation of a Truth, Justice and Reconciliation Commission in Sierra Leone which will, inter alia, enable the country to cope with the aftermath of the crisis by hearing the truth directly from perpetrators of gross human rights violations, help survivors of violations cope with their trauma, and recommend judicial prosecutions for some of the worst perpetrators of the violations. This Commission will be an independent structure comprising personalities of unimpeachable moral probity.'*¹

15. In preparations for the meeting in Lomé, the Sierra Leonean government also held a consultative conference on peace building on 12 April 1999. Members of civil society, students, various professional bodies as well as politicians were present at this attempt to build consensus around the content of a future peace agreement. The conference adopted a number of positions including a blanket amnesty clause. The consultative conference did not include an accountability mechanism as a component of the proposed negotiations. Nevertheless, the conference was also clearly opposed to power sharing between the democratically elected government and the RUF-AFRC. A communiqué to that effect and the summary consensus was given to the team that went to Lomé for

¹ Paragraph 3 of Recommendations adopted by the Human Rights Committee on February 19, 1999 regarding the Sierra Leonean Peace Process. Human Rights Committee is a coalition of international and local human rights NGOs. Interview with Joseph Rahall, Chairman, National Forum for Human Rights, a coalition of Local Human Rights and Development Organisations. See also Interview with John Caulker, Executive Director, Forum of Conscience and Chairman of Truth and Reconciliation Commission Working Group, Freetown 16 December 2003.

the negotiations. Commenting on the Government's position in Lomé, Hon Solomon Berewa, leader of the government delegation, has pointed out that the Government went to Lomé with two positions on which to negotiate:

- A) that there should be peace at all costs and
- B) the Constitution of the Republic of Sierra Leone should remain intact.²

16. In its desire to have human rights issues addressed as part of the peace process, civil society through the United Nations Mission in Sierra Leone (UNAMSIL) facilitated the visit of the United Nations High Commissioner for Human Rights, Mary Robinson, to Sierra Leone in June 1999. The essence of the visit was to lend the support of her office to the dialogue of peaceful negotiation, and also to add to the momentum gathered for the need to address human rights violations as well as the building of a culture of respect for human rights. During her visit, the Government, human rights, NGOs represented by the National Forum for Human Rights and the National Commission for Democracy and Human Rights,³ signed a human rights manifesto in which the parties agreed, among other things, that a truth and reconciliation commission should be established as an accountability mechanism to deal with the abuses which had occurred during the conflict.⁴
17. It was evident that the RUF would not agree to peace if there was no amnesty.⁵

In the words of Solomon Berewa: 'We needed to have an agreement with the RUF on having permanent cessation of hostilities. The need for a Peace Agreement at the time became obvious from the panicky reaction of Sierra Leoneans to a threat issued in Lome by Corporal Foday Sankoh that he would call off the talks. I had to make a radio broadcast from Lomé to assure the Sierra Leone public that there was every probability that the Peace Agreement would be concluded. This assurance was necessary to put the population somehow at ease. Most importantly, the RUF would have refused to sign the Agreement if the Government of Sierra Leone had insisted on including in it a provision for judicial action against the RUF and had excluded the amnesty provision from the Agreement.'⁶

² Interview with H E Solomon Berewa, Vice President of Sierra Leone. Freetown, 11th October 2003.

³ The National Forum is a Federation of Local Human Rights NGOs and Development Organisations.

⁴ See Article 4 of the Human Rights Manifesto.

⁵ Berewa, Solomon: 'Addressing Impunity using divergent Approaches: The Truth and Reconciliation Commission and the Special Court' Truth and Reconciliation in Sierra Leone a Compilation of Articles on the Sierra Leone Truth and Reconciliation Commission, UNAMSIL, Freetown 2001; Interview with H E Solomon Berewa, Vice President of Sierra Leone. Freetown, 11th October 2003; see also testimony of H.E. Alhaji Ahmad Tejan Kabbah, TRC Public Hearing, 5th August 2003 where he explained why his government granted amnesty to the RUF.

⁶ Interview with H E Solomon Berewa, Vice President of Sierra Leone. Freetown, 11th October 2003; see also Berewa Solomon: 'Addressing Impunity using divergent Approaches: The Truth and Reconciliation Commission and the Special Court' Truth and Reconciliation in Sierra Leone a Compilation of Articles on the Sierra Leone Truth and Reconciliation Commission, UNAMSIL, Freetown 2001

He described the TRC as a 'balm' to heal the deep wounds of the Sierra Leonean society that have been occasioned by the conflict.⁷ It should be noted that the Lomé Peace Agreement granted amnesty or pardon not only to the RUF combatants, but to all '*combatants and collaborators*', with specific reference to those of the RUF, ex-AFRC, ex-SLA or CDF. Thus – and in contrast with the Abidjan Agreement, which granted amnesty only to the RUF – the political leaders at Lomé appear to have amnestied themselves as well as their adversaries.

18. It can be said that the philosophy of the Lomé Peace Agreement is to hold perpetrators accountable to the truth and restore the dignity of victims by way of truth telling as opposed to trials and prosecutions. Although there might be technical arguments about the scope of the amnesty in the Lomé Peace Agreement, the Commission could realistically expect that its constituency – victims and perpetrators alike – would be immune from criminal prosecution for all practical purposes. In this respect, its mandate was therefore significantly different from that of other similar commissions, such as the South African Truth and Reconciliation Commission, where the threat of prosecution hovered over the TRC proceedings, and where amnesty was used to induce cooperation with the TRC process.
19. The philosophy of the Lomé Agreement was modified somewhat in 2000, when the Government of Sierra Leone called upon the United Nations to establish a tribunal. In a letter dated 12 June 2000, President Kabbah asked the United Nations Security Council '*to initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone. The purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.*'
20. The letter noted that, in the Lomé Peace Agreement, the Government of Sierra Leone had agreed to a total amnesty as 'a price' for peace, adding that the RUF had subsequently 'reneged' on the Lomé Peace Agreement. Although President Kabbah's letter did not make clear whether the Government of Sierra Leone contemplated prosecutions for pre-Lomé offences, thereby repudiating the amnesty provision in that agreement, this subsequently became clear. On 16 January 2002, the Government of Sierra Leone reached agreement with the United Nations for the establishment of a Special Court with jurisdiction over pre-Lomé offences, irrespective of amnesty or pardon. The agreement was subsequently endorsed by Parliament in March 2002, when it adopted The Special Court Agreement, 2002, Ratification Act, 2002.
21. In May 2002, the Government of Sierra Leone proceeded with the establishment of the Commission. The seven commissioners were named by President Kabbah and duly sworn into office in July 2002. The Government subsequently provided financial assistance to the Commission. Accordingly, the Commission was born under a bit of a cloud, generated by the ambiguity surrounding the attitude to be taken to the Lomé Peace Agreement and its

⁷ Berewa Solomon, 'Addressing Impunity using Divergent Approaches: The truth and Reconciliation Commission and the special Court', in Truth and Reconciliation in Sierra Leone, *A compilation of Articles on the Sierra Leone Truth and Reconciliation Commission*, UNAMSIL, Freetown, 2001. Pg. 55. Also available at www.sierra-leone.org/trc.html (last visited 01/12/03)

underlying philosophy. Clearly, both the Government of Sierra Leone and Parliament had repudiated at least one element of the Lomé Peace Agreement, in the recognition of the legitimacy of prosecution for at least part of the period of the conflict (the temporary jurisdiction of the Special Court begins with the adoption of the Abidjan Agreement, on 30 November 1996).

22. It is important to consider to what extent these subsequent developments influenced the mandate of the Commission, if at all. The Commission might have viewed the creation of the Special Court as a factor that transformed its own *raison d'être*. Faced with prosecution of some perpetrators, the Commission might then have seen fit to recommend that immunity from prosecution be granted in exchange for cooperation with the truth and reconciliation process, as was the case in South Africa. Alternatively, it might have sought a close and synergistic relationship with the Court, operating to some extent as a pre-trial investigative body, somewhat along the lines of commissions in Timor Leste and Peru.
23. In fact, the Commission, although it recognized and was forced to contend with the practical consequences of parallel prosecutions, did not view these subsequent developments as having any effect whatsoever upon its mandate. The Commission's attitude towards and its relationship with the Special Court for Sierra Leone are fully discussed elsewhere in this report. For the purposes of the discussion here, it should be sufficient to note that the Commission has viewed its mandate as being derived from the Lomé Peace Agreement and the legislation adopted in February 2000, irrespective of the subsequent change in philosophy of the Government of Sierra Leone and of Parliament. Parliament was, of course, always free to do so, if it had believed that adjustments to the Commission's mandate were required, in the light of the establishment of the Special Court for Sierra Leone and the, at least, partial repudiation of the covenants reached in Lomé.

Creation of an Impartial Historical Record

24. The statutory definition of the 'object' of the Commission, in section 6(1), consists of an enumeration of five distinct elements. But these are separated by a semi-colon into two groups. The first comprises only one element, *'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 Lome Peace Agreement'*. The second comprises the other four: 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. No ranking or hierarchy is established in the legislation among the five elements or the two groups. But the Statement of Objects and Reasons, which was attached to the Bill when it was enacted by Parliament, says that *'the principal function of the Commission is to create an impartial historical record of events in question as the basis for the task of preventing their recurrence'*. There can therefore be no doubt that the creation of an impartial historical record lies at the core of the Commission's mandate.
25. On the other hand, the Lomé Peace Agreement implies somewhat different priorities: 'A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the

victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.' Here, the only implication of the mission of the Commission as historian is the rather colloquial suggestion that it 'get a clear picture of the past'. The incontestable conclusion is that the historical component of the Commission's mandate was strengthened by Parliament, and that it is of central importance to the fulfilment of its solemn mission.

26. Given the resources available to the Commission, in terms of professional researchers and investigators, not to mention its very short lifespan, Parliament was surely ambitious in thinking that the Commission could create anything resembling a comprehensive historical record of the conflict in Sierra Leone. In any event, the proximity of the events to the writing of the historical record makes any aspiration to a thorough study troublesome and possibly unrealistic. While it may be illusory to think that bodies like truth commissions can establish a complete historical record, they can nevertheless discredit and debunk certain lies about conflicts. If they can accomplish only this, their work may contribute validly to the rebuilding of a stable social environment on the ruins of conflict and war.
27. There is no shortage of examples of this historical mission being fulfilled by quasi-judicial bodies, like truth commissions, and judicial ones, like courts. The Nuremberg tribunal, for example, which was convened within months of the end of the Second World War and which rendered its judgment less than a year later, clarified much of the historical truth about Nazi atrocities. To take a more contemporary example, a recent judgment of the International Criminal Tribunal for the former Yugoslavia notes that the institution was established by the United Nations Security Council so that 'the truth about the possible commission of war crimes, crimes against humanity and genocide [would] be determined, thereby establishing an accurate, accessible historical record. The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression.'⁸
28. It is to be hoped that this report will clarify and resolve debates about the conflict. Possibly the Special Court for Sierra Leone will find that the impartial historical record established by the Commission is of value in its own proceedings.⁹

The historical record is based upon a variety of sources, including testimony in public hearings, private interviews and the examination of documents and other sources. Where available and relevant, existing historical accounts of the conflict and the period that preceded it have been consulted.

29. Although this surely goes without saying, the Act specifies that the historical record is to be 'impartial'. In any case, 'truth', including 'historical truth', must

⁸ Prosecutor v. Momir Nikolic (Case no. . IT-02-60/1-S), Sentencing Judgment, 2 December 2003, para. 60 (references omitted).

⁹ In this respect, see the remarks of President Goeffrey Robertson in *Prosecutor v. Norman* (Case no. SCSL-2003-08-PT), Decision on Appeal by the Truth and Reconciliation Commission of 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, 28 November 2003, para. 7. According to Judge Robertson, the TRC Report 'might provide considerable assistance to the Court and to all parties as an authoritative account of the background to the war'.

by definition be impartial. A 'partial' truth is no truth at all, merely the distorted version of events tailored to suit one of the parties. In this regard, the selection of Commissioners and the process of arriving at decisions and determinations were crucial to its work. The Act envisioned a Commission composed of four nationals and three non-nationals to enhance the credibility of this process. The three non-nationals were selected by the United Nations High Commissioner for Human Rights, whose integrity is beyond question. The nationals were chosen as part of a transparent selection process overseen by the Special Representative of the Secretary-General of the United Nations to Sierra Leone. Commissioners were provided with terms and conditions of employment, as well as various legal immunities and protections, to further assure their independence and impartiality.

'Violations and Abuses'

30. The concept of 'violations and abuses' (or 'abuses and violations') lies at the core of the TRC's mandate. Section 6(1) of the Act focuses the content of the historical record on 'violations and abuses'. The concept of 'violations and abuses' re-appears in other subsections of section 6. Thus, subsection 6(2)(a) says that without prejudice to the generality of subsection (1), *'the function of the Commission'* shall be *'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'*.
31. Furthermore, it is also among *'the functions'* of the Commission, according to subsection 6(2)(b), *'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'*.
32. Section 7 also refers to this concept of *'violations or abuse'*. Accordingly, in subsection 1, the *'operating procedures and mode of work'* of the TRC are to include *'investigation and research into key events, causes, patterns of abuses or violation and the parties responsible'*, holding public and non-public sessions *'to hear from the victims and perpetrators of any abuses or violations or from other interested parties'*, and *taking of individual statements and gathering of additional information with regard to these matters'*.
33. Section 7 also refers to the concept of *'past violations or abuse'* and to *'child perpetrators of abuses or violations'*. The Report of the Commission, in accordance with section 15, is to include recommendations directed to *'preventing the repetition of the violations or abuses suffered'*.
34. The 'Memorandum of Objects and Reasons', which is attached to the TRC Act, notes that the Peace Agreement *'envisaged the proceedings of the Commission as a catharsis for constructive interchange between the victims and perpetrators of human rights violations and abuses'*.

35. It should be noted that, in the Lomé Agreement, the references (art. XXVI) are to 'human rights violations', and not to 'violations and abuses'. The word 'abuse' appears nowhere in the Lomé agreement. Thus, Parliament somewhat enlarged the scope of the TRC from what had been originally contemplated in the Lomé Peace Agreement.
36. The mandate of the South African TRC – a model familiar to the Parliament of Sierra Leone when it created the Commission - spoke only of 'gross violations'.¹⁰ This is clearly a much narrower concept than 'violations and abuses'. According to Priscilla Hayner, the South African TRC was criticised for this narrow perspective, in that this presented a 'compromised truth' that excluded a large number of victims from the Commission's scope.¹¹
37. The TRC Act does not define what constitute violations and abuses with regard to international human rights law and international humanitarian law. The term 'violations and abuses' does not appear to have any recognised technical meaning within either human rights law or international humanitarian law. Obviously, there is a literal meaning of the two terms which should require no further explanation.
38. Of some interest within the field of international human rights law is the frequent use of the term 'abuse' in a very recent instrument, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted in July 2003. It uses the term 'abuse' in several provisions (articles 5(d), 12(1)(c), 12(1)(d), 13(m), 22(b), 23(b)). The context suggests that the term is used particularly with reference to acts committed by individuals against other individuals, rather than by States.¹²
39. There does exist within human rights and international humanitarian law a number of more specific terms to describe certain types of violation or abuse. These include: breaches, grave breaches, serious violations, gross and systematic violations, and so on. For example, in 2000, when the United Nations Human Rights Committee found that Sierra Leone had violated the *Optional Protocol to the International Covenant on Civil and Political Rights* for proceeding with twelve executions on 19 October 1998 despite an interim measures request from the Committee that it stay the executions pending consideration of a petition, the Committee described this as a 'grave breach' of the *Optional Protocol*.¹³ In fact, nowhere does the *Optional Protocol* speak of 'grave breaches', referring instead to 'violation'; the *Covenant* itself refers cautiously to 'not fulfilling' and 'not giving effect to' obligations.

¹⁰ 3(1) a. of the South African TRC Act provides: 'Establish as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents circumstances, factors and context of such violations, as well as the perspectives of the victims and motives and perspectives of the conducting investigations and holding hearings.'

¹¹ Priscilla B. Hayner, *Unspeakable Truths, Facing the Challenge of Truth Commissions*, (Routledge: New York & London, 2002), pp. 74-75.

¹² The same expression appears in an earlier instrument, the *Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, art. 2(a) and (b). The Vienna Declaration and Programme of Action of 1993 also refers to 'gender-specific abuses' and 'human rights abuses particular to women' (para. 42), 'abuse of children' (para. 48).

¹³ *Mansaraj et al., Tamba et al., Sesay et al. v. Sierra Leone* (Nos. 839/1998; 840/1998 and 841/1998), 16 July 2001, UN Doc. CCPR/C/72/D/840/1998, para. 6.2.

40. Within international humanitarian law, reference is made to ‘violation’ of the *Geneva Conventions*¹⁴ as well as to the more serious concept of ‘grave breach’ of the *Conventions*.¹⁵ The *Hague Convention* of 1907 refers both to ‘abuse’¹⁶ and to ‘violation’¹⁷ in its provisions. It is of some interest to note that the mandate of the Special Court for Sierra Leone is limited to ‘serious violations of international humanitarian law’.
41. Human rights and international humanitarian law treaties are meant to bind sovereign states to various obligations. In principle, an individual cannot ‘violate’ a human rights treaty, as this is a form of contract or undertaking between sovereign states. Nevertheless, the *African Charter on Human and Peoples’ Rights*, for example, establishes a list of ‘duties’ that apply to ‘every individual’. Some violations of international humanitarian law, known colloquially as ‘war crimes’, are in effect – but by exception – applicable directly to individuals.
42. Under certain circumstances, a State may be held responsible for acts or omissions that constitute violations or abuses of human rights when committed by an individual or group under its control, or over which it has some responsibility. A State is expected to exercise due diligence in preventing individuals from violating the human rights of other individuals. The term ‘*horizontal violations of human rights*’ is used in this context. An example would be the duty upon State authorities to ensure that a prisoner under their care is not victim of abuse by other prisoners.
43. There is a growing body of law to support the idea of the involvement of ‘non-state actors’ in violations or abuses of human rights. ‘Non-state actors’, be they individuals, groups or organisations, are neither parties to international human rights or international humanitarian law treaties nor are they, as a general rule, bound by national constitutions. Nevertheless, it may be possible to impute certain violations and abuses of human rights and international humanitarian law to them.
44. This would indeed seem to be the implication of the *Act*, with the reference to ‘perpetrators of human rights *violations and abuses*’ in the Memorandum of Objects and Reasons. That individuals and not only states or state-like bodies are contemplated is confirmed by the reference to ‘child perpetrators of *abuses or violations*’. This is also suggested by section 6(2)(a), which asks ‘whether those violations and abuses were the result of deliberate planning, policy or authorisation by any government, group or individual’.
45. Individual perpetrators may be both natural persons and corporate bodies, such as transnational companies or corporations. But this leads to other difficulties. For example, let us consider the case of a transnational mining company operating in Sierra Leone but whose head office is in another country, say, South Africa. Although described colloquially as ‘transnational’, the company will in fact have the nationality of the State where it has its head office. Can

¹⁴ e.g., *Geneva Convention (IV) Relative to the Protection of Civilians*, (1950) 75 U.N.T.S. 287, art. 149.

¹⁵ *Ibid.*, art. 146.

¹⁶ *Convention Concerning the Laws and Customs of War on Land (Hague IV)*, 3 Martens Nouveau Recueil (3d) 461, art. 33.

¹⁷ *Ibid.*, arts. 40, 41.

South Africa be blamed for human rights violations committed by the company in Sierra Leone, for failing to regulate the activities of its company, in the same way that it might be blamed for human rights violations committed by the company in South Africa itself? Objections to the imputation of such liability may come not only from South Africa, but from Sierra Leone itself. Sierra Leone might consider attempts by South Africa to regulate the behaviour of South Africans within Sierra Leone as an infringement on the latter's sovereignty. Yet the TRC might well conclude that violations and abuses of human rights were committed in Sierra Leone not only by the hypothetical South African mining company, but also by both Sierra Leone and South Africa for failing to regulate it.

46. In the light of the reference to 'violations and abuses', the Commission has decided that its mandate is a very broad one. It is not limited by use of adjectives such as 'gross' or 'serious'. The addition of the term 'abuses', which may be taken to encompass human rights violations committed by individuals rather than States or governments, enlarges rather than restricts the mandate. Accordingly, the Commission's mandate is not confined to violations of human rights that might constitute crimes, under either national or international law, nor is it limited to violations committed by States or governments.

'Human Rights and International Humanitarian Law'

47. According to section 6(1) of the Act, the 'violations and abuses' must be of 'human rights and international humanitarian law'. This is a reference to two distinct, although related, bodies of international law. The distinct scope of each body of law, as well as the relationship between the two, shall be considered in turn.
48. 'Human rights' is a term used to describe a broad spectrum of rights that may belong to individuals, groups (such as ethnic and religious minorities) and 'peoples'. Human rights are those basic standards *inherent* to the human being without which a person cannot live in dignity. Human rights are *entitlements*, which every human being possesses by virtue of his or her humanity. Guarantees of human rights are expressed in both international and national law.
49. The 1991 Constitution of Sierra Leone devotes a lengthy section, Chapter III, to 'human rights and fundamental freedoms'. The formulation is awkward and unduly complex, making it inaccessible to the average citizen. Many of the provisions are devoted more to exceptions to human rights than to their affirmation. There is an exhaustive provision dealing with the use of emergency powers and the suspension of constitutional protections. The language is consistent with that in the constitutions of many other former British colonies, and reflects an historic unease of English lawmakers with the constitutional entrenchment of fundamental rights. For the purposes of the TRC's work, there is no significance in the distinction between 'human rights' and 'fundamental freedoms'; both terms can be subsumed within the expression 'human rights'.
50. The Lomé Peace Agreement attempts a definition of the term 'human rights' that is probably more helpful than that of the 1991 Constitution in this respect. It makes a useful reference to international legal sources, such as the Universal Declaration of Human rights and the African Charter of Human and Peoples'

Rights. The list of fundamental rights is not an exhaustive one, and serves merely to provide examples.

ARTICLE XXIV

GUARANTEE AND PROMOTION OF HUMAN RIGHTS

1. The basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of Human Rights adopted by the UN and OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights, shall be fully protected and promoted within Sierra Leonean society.

2. These include the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of ones country.

51. The sources of international human rights law are in treaties, bodies of principles and customary international law. The Government of Sierra Leone is legally bound by many of the most important international human rights law treaties, by virtue of its ratification or accession. This is the case with such instruments as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *African Charter of Human and Peoples' Rights*. But Sierra Leone is also subject to various other standard-setting instruments of which the most important is the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on 10 December 1948.
52. Human rights are sometimes classified into civil, political, economic, social and cultural rights. They range from rights which contemplate the core values of human dignity, like the right to life and the prohibition of torture, to the right to housing and medical care. Efforts to separate human rights into categories of 'civil and political' as opposed to 'economic and social', which have characterised human rights law in the past and which reflected geo-political conflicts, have been rejected in favour of a more holistic approach sometimes described as 'indivisibility' of human rights. Thus, human rights are acknowledged as being universal, interrelated, indivisible and interdependent. The preamble to the *African Charter on Human and Peoples' Rights* states '*that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as the universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights*'. The *Universal Declaration of Human Rights* contains civil, political, economic, social and cultural rights, and makes no distinction between them. In any event, human rights violations and abuses will often have both civil or political and economic, social and cultural dimensions. Moreover, certain specific rights, such as the right to a fair trial, which are usually categorised as 'civil', have an economic dimension too. Indeed, although wartime atrocities usually involve the 'core' human rights, like the right to life and the protection against cruel and inhuman treatment, the conflict in Sierra Leone may also have involved, and have been caused by,

violations of such economic and social rights as the right to food, to housing and to medical care.

53. It might be argued that the human rights dimension of the Commission's mandate is narrower than has been proposed above, and that it should be defined essentially with respect to the Constitution of Sierra Leone and the human rights treaties ratified by Sierra Leone. This might suggest a somewhat narrower approach. However, the Commission's mandate extends well beyond an examination of the compliance of the Government of Sierra Leone with its legal obligations. The Act requires the Commission to consider a range of non-state actors, including armed groups, as well as 'external factors', which may even involve consideration of the role of foreign governments and international organisations. Thus section 6(2) of the Act refers to '*the question of whether those violations and abuses were the result of deliberate planning, policy authorisation by any government*'. For these reasons, it would be incorrect for the Commission to confine its examination of human rights to those that find expression in the Constitution of Sierra Leone and those international instruments to which Sierra Leone is a party.
54. For the purposes of its work, the Commission decided to adopt a broad view of the concept of human rights, using as its touchstones the *Universal Declaration of Human Rights* and the *African Charter on Human and Peoples' Rights*. It does not confine its approach to the legal obligations imposed upon the government of Sierra Leone by international or national law. Violations of economic, social and cultural rights as well as of civil and political rights have been examined, as well as other categories of rights such as the right to development and the right to peace.
55. The conclusion that a broad approach to human rights is required, also finds support in the reference in the TRC Act which mandates the Commission to pay '*special attention to the subject of sexual abuses and to the experiences of children within the armed conflict*'. Such issues might not be subsumed within a mandate focussed only on the 'core' civil and political rights listed in article XXIV of the Lomé Peace Agreement or the Constitution. To supplement the basic international human rights instruments referred to in the preceding paragraph, the Commission has sought guidance from specialised instruments in the area of the rights of women and children, such as the *Convention on the Rights of the Child*, the *African Convention on the Rights and Welfare of the Child*, the *Convention on the Elimination of Discrimination Against Women*, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* and various United Nations and African Union declarations concerning sexual abuse of children and violence against women.
56. Section 6(1) of the Act also instructs the Commission to prepare an impartial historical record of violations and abuses of 'international humanitarian law'. The term 'international humanitarian law' has been described as a 'more recent and comprehensive' term for what in the past was referred to as the 'international law of armed conflict', or even earlier, the 'law of war'. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in the authoritative statement on the subject, the term 'international humanitarian law' emerged 'as a result of the influence of human rights doctrines on the law of armed conflict'.¹⁸

¹⁸ *Prosecutor v. Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87.

57. In principle, 'international humanitarian law' applies only during armed conflict, as opposed to human rights law, which applies during peacetime as well as wartime. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, '*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*'¹⁹ With regard to its work the Commission has assumed the existence of armed conflict throughout the time frame defined in section 6(1) of the Act. It seems appropriate to consider that international humanitarian law continued to apply within Sierra Leone subsequent to the Lomé Peace Agreement and probably until 18 January 2002, when the conflict was officially declared to have come to an end.
58. The norms and principles of international humanitarian law have been codified in several quite complex international treaties, of which the 1949 *Geneva Conventions* and their two *Additional Protocols* stand at the centre. To a large extent, these principles are similar to those contained in the main human rights treaties, with the important distinction that the international humanitarian law instruments apply only during armed conflict. Given that the mandate of the Commission is concerned essentially with violations and abuses related to the conflict, the relevance and application of international humanitarian law can be taken as a given. Sierra Leone is a party to the main international humanitarian law treaties. But for the same reasons discussed above with respect to international human rights instruments, whether or not Sierra Leone is legally bound by a particular treaty or body of norms does not define the mandate of the Commission, given that it is to report on violations and abuses committed by non-State actors as well as by the Government of Sierra Leone and other governments.
59. 'International humanitarian law' makes an important distinction between international armed conflict and non-international armed conflict. This is explained by the historic reluctance of States to assume the same obligations with respect to civil wars, and their treatment of rebel armed groups, as they would undertake in the case of war with another State. For example, under the applicable treaties there is no concept of 'prisoner of war' in an internal armed conflict. Clearly, most of the conflict in Sierra Leone was of an internal nature. As a result, a somewhat more limited set of international humanitarian legal norms and standards applies than would have been the case had the conflict been international in nature. In practice, however, the distinction may not be all that important. The fundamental principles of international humanitarian law are much the same, whether the conflict is international or non-international. The International Committee of the Red Cross (ICRC) has attempted to summarise these principles as follows:
- a. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and

¹⁹ *Ibid.*, para. 70.

- physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
- b. It is forbidden to kill or injure an enemy who surrenders or who is hors de combat.
 - c. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports, and equipment. The emblem of the red cross or the red crescent is the sign of such protection and must be respected.
 - d. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights, and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
 - e. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment, or cruel or degrading treatment.
 - f. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods of warfare of a nature to cause unnecessary losses or excessive suffering.
 - g. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.²⁰
60. The mandates of the Commission and the Special Court for Sierra Leone overlap somewhat, as they are both to address issues of 'international humanitarian law'. In the case of the Commission, its attention is directed to 'violations and abuses', whereas the Special Court's jurisdiction is confined to 'serious violations' of 'international humanitarian law'.²¹ The concept of 'serious violations of international humanitarian law' is a technical one whose definition has been developed in judgments and decisions of the International Criminal Tribunal for the former Yugoslavia. It should be pointed out that the Special Court does not have jurisdiction over all 'serious violations of international humanitarian law', but only those listed in articles 4 and 5 of the Statute. The jurisdiction is limited principally to crimes committed within internal armed conflict. In addition, the Court has jurisdiction over three crimes that may be committed in international armed conflict, namely indiscriminate attacks on civilians, attacks on United Nations personnel and installations, and recruitment and use of child soldiers. Consequently, a broad range of serious violations of international humanitarian law, to the extent these are committed in international armed conflict, do not fall within the jurisdiction of the Special Court. For example, while the Special Court has jurisdiction over the 'serious violation' of 'intentionally directing attacks against the civilian population', it does not have jurisdiction over the 'serious violation' of 'intentionally directing attacks against civilian objects'. Such serious violations of international humanitarian law when committed in international armed conflict are not, in contrast, excluded from the work of the Commission.

²⁰ Basic Rules of the Geneva Conventions and their Additional Protocols (ICRC, 1987) (hereinafter, ICRC Basic Rules' as cited in Kittichaisaree Kriangsak: *International Criminal Law*, Oxford & New York: Oxford University Press, 2001, pp. 129-130.

²¹ Statute of the Special Court for Sierra Leone, art. 1(1).

61. The concept of 'violations and abuses' of 'international humanitarian law' is also considerably broader than that of 'serious violations' (the term used in the Statute of the Special Court for Sierra Leone), or, more colloquially, 'war crimes'. Criminality attaches to certain serious violations of international humanitarian law (of which the authoritative list appears in article 8 of the *Rome Statute of the International Criminal Court*; there are a few war crimes that are not listed in the *Rome Statute*, so the enumeration should not be taken as an exhaustive one). Nevertheless, many violations and abuses of international humanitarian law do not incur individual criminal liability. In this regard, the Commission's mandate is very significantly broader than that of the Special Court.
62. An illustration may be helpful to show how these distinctions were of relevance to the work of the Commission. The participation of mercenaries in the conflict (Gurkhas, Sandline, Executive Outcomes) has been widely documented. The use of mercenaries is not a 'war crime', and as such it is clearly outside the jurisdictional purview of the Special Court. But the use of mercenaries is condemned by international declarations and treaties, and is clearly discouraged by the relevant international humanitarian law instruments.²² It may arguably be described as an 'abuse' of 'international humanitarian law', but perhaps one that is confined to international armed conflict. The use of mercenaries would not therefore seem to fall within the remit of the Special Court, but it is a matter that can be fully examined by the Commission (at the very least, to the extent that it is determined that an international armed conflict exists).

'Related to the Armed Conflict in Sierra Leone'

63. Section 6(1) of the Act limits the scope of the impartial historical record to be prepared by the Commission to those violations and abuses of human rights and international humanitarian law that are 'related to the armed conflict in Sierra Leone'. In other words, not all violations and abuses of human rights and international humanitarian law fall within the ambit of the work of the Commission. This reference has consequences in terms of the time frame and territory addressed by the Commission, as well as the actual substance of the violations and abuses.
64. With respect to the time frame considered by the Commission, more specific language addresses this aspect of the mandate and will be dealt with later in this chapter. With respect to the territory to be considered, it is significant that section 6(1) does not confine the work of the Commission to the geographic boundaries of Sierra Leone. Moreover, section 6(2)(a) of the Act requires the Commission to consider *'the role of both internal and external factors in the conflict'*. In this respect, a useful comparison can be made with the jurisdiction of the Special Court for Sierra Leone, which is confined to the 'territory of Sierra Leone'.²³ Violations or abuses committed outside the territory of Sierra Leone are relevant to the work of the Commission, to the extent that they are *'related to the armed conflict in Sierra Leone'*. The report, and particularly the historical narrative, refers to many violations and abuses committed elsewhere in Africa,

²² *Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3, art. 47.

²³ Statute of the Special Court for Sierra Leone, art. 1.

and even on other continents. Those countries that border upon Sierra Leone are especially relevant to the impartial historical record. Some of them contributed to the violations and abuses. Other countries and international organizations also bear some responsibility. All of this is germane to the work of the Commission.

65. The reference to a relationship to the armed conflict also has a substantive limitation on the mandate of the Commission. Obviously, not all violations of human rights committed within Sierra Leone during the 1990s can be considered to be '*related to the armed conflict*'. For example, the practice of female genital mutilation is and has for many years been widespread within Sierra Leone. It continued to be practiced during the period of the conflict. The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* refers to female genital mutilation as a harmful practice which violates the rights of women and which must be prohibited (art. 5(b)). It is probably unreasonable, however, to refer to female genital mutilation as a human rights violation or abuse that was '*related to the armed conflict*'. Nevertheless, it might well be argued that the practice of female genital mutilation contributed to a context of oppression and marginalisation of women that was manifested in violations and abuses that were unquestionably related to the armed conflict, such as gang rapes and sexual slavery.
66. In other words, the line between violations and abuses in general and those related to the armed conflict is not always an easy one to trace. It therefore seemed safe for the Commission to presume that violations and abuses committed in this period within Sierra Leone probably have some sort of relationship with the armed conflict. At the onset of the Commission's work, statement takers were instructed to record information of violations and abuses that might not initially appear to be related to the armed conflict. Subsequently, any doubtful allegations have been considered by the Commission, and either included or excluded on a case by case basis.
67. Human rights law applies in both peacetime and wartime, whereas international humanitarian law's application is confined to wartime alone, as a general rule. The two bodies of law are largely complementary. There is some authority for the proposition that international humanitarian law represents a kind of special law (or *lex specialis*) that in effect takes the place of human rights law during armed conflict. However, the international human rights conventions clearly contemplate their application during wartime, subject to the possibility that certain rights are limited or suspended because of the emergency situation.
68. International humanitarian law has always represented a compromise between the protection of the rights of non-combatant civilians and the requirements of military necessity. It recognizes that, under some circumstances, civilian lives may be taken where this is necessary for the attainment of military objectives, subject to the criterion of proportionality. But, under human rights law, there is virtually no situation where the killing of an innocent civilian can be tolerated. If the view were to be adopted that human rights law is, in a sense, superseded by the special rules of international humanitarian law, the Commission would be required to be considerably more tolerant of the killing and injury of innocent civilians than were in the case where the two bodies of law are viewed as providing two complementary but distinct levels of protection. In practice, given the nature of the conflict in Sierra Leone and the low level of humanitarian principles followed by the combatants, there were no situations where the Commission might be required to address a potential conflict between conduct

authorized by international humanitarian law yet prohibited by international human rights law.

The Time Frame

69. According to section 6(1) of the Act, the Commission is to provide an historical record *'from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement'*. With specific reference to the historical record, the Commission is instructed to examine the antecedents of the conflict (s. 6(2)(a)).
70. This reference to the time frame of the conflict applies to the first element of the 'object' in section 6(1), and not to the second. In other words, although the 'historical record' of the Commission is time-limited, there is nothing in section 6(1) to prevent the Commission from looking back prior to 1991 and forward beyond the Lomé Agreement in terms of the responsibility 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. Aside from being justifiable on a literal reading of section 6(1), this interpretation is reasonable and helpful. Indeed, it would be futile for the Commission to attempt *"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"* while remaining blind or indifferent to events since the Lomé Peace Agreement. In this sense, the Commission does not have any temporal jurisdiction, in contrast, for example, with the Special Court for Sierra Leone.
71. For all of these reasons, the Commission has not felt itself to be particularly constrained by the time frame set out in section 6(1). The reference to the outbreak of the conflict in 1991 and to the Lomé Agreement serves to define 'the conflict', and the Commission's mandate is to consider the 'conflict'. It could not do this in an accurate and faithful manner if it were to begin mechanically with 23 March 1991 and to conclude in an equally mechanical manner with 7 July 1999.

To Address Impunity

72. The second limb of the 'object' of the Commission consists of four elements, the first being 'to address impunity'. Article XXVI of the Lomé Agreement listed this as the first of the functions of the proposed the TRC. The reference to impunity is somewhat enigmatic, given that the Lomé Agreement, in granting pardon and amnesty to the perpetrators of human rights and international humanitarian law violations and abuses, constitutes one of the more striking grants of impunity in recent history. The paradox of the Lomé Agreement, and of the Truth and Reconciliation Act 2000 that was adopted to give effect to certain of its provisions, is that it both enshrines impunity and seeks to address it.
73. According to one of the world's experts on the subject, Louis Joinet, who was the Special Rapporteur of the United Sub-Commission for the Promotion and Protection of Human Rights, *"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their*

victims'.²⁴ Louis Joinet devised a 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity'.²⁵ These served as an extremely useful set of guidelines for the Commission in the interpretation of its mandate to address impunity.

74. The principles developed by Louis Joinet are grouped into three categories: the victims' right to know; the victims' right to justice; and the victims' right to reparations. The Commission can make significant contributions in all three of these areas.
75. According to Joinet, the right to know comprises what he calls '*the inalienable right to the truth*'. He says: '*Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.*'
76. This 'right to the truth' includes a duty to remember: "*A people's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.*" Joinet also specifically recognises the right of victims to know, their families and dear ones to know the circumstances of violations and, if death or disappearance is the result, the fate of the victim.
77. In the context of the right to the truth, Joinet recognises the special role of 'extrajudicial commissions of inquiry', of which truth and reconciliation commissions are certainly the most significant manifestations. Here, then, the mandate and functions of the Commission fits squarely within the perspective outlined by Louis Joinet for combating impunity. It is with this component of the struggle against impunity that truth and reconciliation commissions excel. Indeed, they can generally respond to the needs of truth-seeking better than the alternatives, such as criminal prosecutions.
78. With respect to the second category, 'the victims' right to justice', the Commission cannot make as significant a contribution. According to Joinet, the right to justice

'implies that any victim can assert his rights and receive a fair and effective remedy, including seeing that his oppressor stands trial and obtaining reparations. There can be no just and lasting reconciliation without an effective response to the need for justice; as a factor in reconciliation, forgiveness, a private act, implies that the victim must know the perpetrator of the violations and that the latter has been able to show repentance. If forgiveness is to be granted, it must first have been sought.'

This may be overstating the point. There are valid examples of post-conflict societies where victims were denied access to traditional justice mechanisms, and yet where reconciliation is indeed possible, such as Mozambique and

²⁴ 'Question of the impunity of perpetrators of human rights violations (civil and political), Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20.

²⁵ *Ibid.*

South Africa. Justice is not always a reliable option, if only because the perpetrators are dead or cannot be identified, and those responsible may be indigent and unable to provide compensation. If criminal or civil justice is seen as a *sine qua non*, inevitably many will be frustrated and disappointed.

79. With respect to amnesty, Joinet declares bluntly: '*Amnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy.*' This view is widespread in international justice circles. But amnesty cannot always be excluded. Sometimes it may simply be an unavoidable political reality, dictated by the need to bring an end to conflict. To be sure, many amnesties given to tyrants in recent decades are vulnerable to severe criticism. But it is too absolute to rule them out altogether.
80. In terms of addressing impunity in the context of this 'right to justice', the Lomé Agreement is unquestionably deficient. The amnesty was criticised by the United Nations, and left bitterness among many Sierra Leoneans who believed that terrible crimes were to go unpunished. The Commission is without power to change this situation. It can, however, within its mandate, make observations and recommendations about the wisdom of the amnesty provision in the Lomé Agreement, of the objection formulated at the time by the United Nations Special Representative of the Secretary-General to Sierra Leone, and of the subsequent initiatives that rescinded the legal effect of the amnesty and established the Special Court for Sierra Leone. Just as the Commission may address the 'right to truth' component of the struggle against impunity better than the Special Court for Sierra Leone, the contrary may be the case with respect to the 'right to justice' component. The Special Court responds, but only to a limited extent, given the limitations on its own mandate and its resources. The findings of the TRC in this respect are discussed in the Findings Chapter.
81. The third category is the 'right to reparation'. Louis Joinet sees this as being composed of a number of elements, namely restitution (seeking to restore the victim to his or her previous situation), compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs), and rehabilitation (medical care, including psychological and psychiatric treatment). In this area, too, the Commission has much to contribute, although it is not authorised to actually adjudicate or award reparations in any specific form. According to section 7(6) of the Act, the Commission is empowered to '*provide information or recommendations to or regarding the Special Fund for War Victims provided for in Article XXIV of the Lome Peace Agreement, or otherwise assist the Fund in any manner the Commission considers appropriate but the Commission shall not exercise any control over the operations or disbursements of that Fund*'. The Commission is also instructed 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 impartial historical record, preventing the repetition of the violations or abuses suffered, addressing impunity, responding to the needs of victims and promoting healing and reconciliation*' (s. 15(2)). The Government is required by the Act to implement these recommendations. Many of the Commission's recommendations are intended to give effect to the 'right to reparation'. This matter is addressed in detail in the Recommendations Chapter.

Promoting Healing and Reconciliation

82. In addition to enabling the Commission to prepare an impartial historical record of the conflict, its principal activities – statement-taking and hearings – provided the people of Sierra Leone with a forum for private and public acts of reconciliation. These included public confrontations between victim and perpetrator that led to various expressions of contrition and a desire on both sides to put the past behind them. These concretely vindicated the interpretation given to section 6 and to its mandate in general by the Commission.
83. The setting up of district support committees and the partnership of the Commission with the Inter-Religious Council to continue working on reconciliation up to late 2004 are expressions of the Commission's interpretation of this component of the mandate.
84. Article XXVI of the Lomé Peace Agreement of 7 July 1999 obliges the Commission to, *'among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations'*. While the Commission's enabling legislation did not explicitly mention the term 'reparations', the Commission has considered the matter within the context of the portion of its mandate instructing it to *'promote healing and reconciliation'*.

Preventing a Repetition of Violations and Abuses Suffered

85. The mandate of the Commission is focussed on both the past and on the future. Obviously, the historical dimension of its work looks to the past. But, in instructing the Commission to consider the question of prevention of a repetition of violations and abuses, Parliament has given it an authorisation to peer into the future.
86. For this reason, the Commission has made a large number of recommendations that target institutional and other reforms. Many recommendations are directed to the government for administrative action, and to Parliament which must repeal certain legislation and introduce new measures. In many cases, these recommendations are deemed mandatory by the Commission. The TRC Act 2000 directs that the Commission's recommendations be implemented. In order to ensure this implementation, the Act provides for the establishment of a follow-up committee, which is to report on government compliance with the recommendations of the Commission.
87. Prevention of a repetition also involves a change in the way the people of Sierra Leone behave with each other, on individual and collective levels. It also concerns their attitude towards themselves, to their own country and to their public institutions. The Commission has taken up this aspect of its mandate through a project called the National Vision for Sierra Leone. The National Vision attempted to provide Sierra Leoneans with a platform to reflect on the conflict and to describe the future society they wish to see in Sierra Leone.