Dealing With The Past

Experiences of transitional justice, truth and reconciliation processes after periods of violent conflict in Africa

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Introduction

The legacy of two decades of war between the Lord’s Resistance Army (LRA) and the Ugandan government challenges Conciliation Resources (CR) and our partners to develop an appropriate process to deal with the gross human rights violations and war crimes committed over the years. The report Dealing with the Past was written to provide our partners in northern Uganda with basic background information on issues of transitional justice¹ processes and to enable them to access the lessons learned from other post-conflict situations across Africa. Being aware of the exceptional local singularities we in northern Uganda, we expect this overview of processes from other conflict areas to inform the current debate in a society which tries to find its own way to come to terms with its violent past and find a promising way forward.

When countries recover from periods of violent conflict, political oppression, brutal regimes or genocide, soon one question emerges: How to deal with the atrocities committed in the past - whether by individuals, groups, or a former. The international community recognises that accounting for what happened during periods of violent conflict, seeking justice for those who were wronged and promoting peaceful reconciliation between perpetrators, survivors and the broader society are among the most important needs of countries in transition. Therefore, various mechanisms have been developed to address these issues.

Tribunals, which seek legal prosecution of perpetrators, are one form of retributive justice. They aim at punishment for gross human rights violations, if the state in question - for whatever reason - fails to deal with perpetrators appropriately. However, justice can be understood in a broader way as coming to terms with a violent past. It then can imply approaches other than simply prosecuting those responsible for human rights abuses. During the last three decades the idea of supporting reconciliation through institutionalised truth-seeking bodies as an alternative to tribunals has gained momentum.

While the aim of both approaches is to find a just way to deal with the past after a period of violent conflict, oppression or genocide, the processes taken around the world differ considerably due to cultural, legal and socio-political parameters.

The first chapter describes the emergence of war crime tribunals and truth commissions and stresses the dilemmas that can occur while dealing with complex concepts such as truth, reconciliation and justice. In the second part the different approaches taken in the Republic of South Africa, Sierra Leone, and Rwanda are discussed. Each case study includes a brief – necessarily simplified - history of the conflict and a short description of the transitional justice approach as well as the stakeholders involved. The case studies conclude with a critical reflection on the strengths and weaknesses of the processes. In the third part the dilemmas around seeking justice and reconciliation are narrowed down to some key issues for consideration when initiating and implementing any truth, justice or reconciliation-seeking process.

¹ Transitional justice refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights. From: http://www.ictj.org/en/tj. Accessed on 9 May 2006.
Transitional justice in context

Retributive and restorative justice
When people talk about justice in the context of coming to terms with large-scale human rights violations, crimes against humanity and war crimes, the term is usually used for retribution by legal means. It is referred to as retributive justice, criminal, punitive or penal justice. Retributive justice is primarily a matter between the official body that enforces the law, and an individual that has broken the law. It can be viewed as transferring the responsibility for apportioning blame and punishment from victims to public bodies acting through the rule of law (Minow 1998). Central to the notion of retribution is the idea that out of fairness to the victim, appropriate punishment of those who did wrong is necessary (Welschen 2001). Ideally, retributive justice can channel and satisfy the victim’s inner drive for vengeance, averting the possibility of continuous cycles of revenge by delivering appropriate means of punishment. A central feature of this concept of justice is the assumption of being innocent until proven guilty in a fair trial with the opportunity for the accused to defend herself or himself.

In contrast to retributive justice, which focuses on the punishment of the perpetrators, restorative justice goes a step further and challenges the tendency to equate justice with punishment. Its focus is on both the victims and the perpetrators and, even more important, on the relationship between them. In this concept a crime is perceived as an injury done to another person, thus a violation of people and their mutual relationship. It is not focused on fulfilling the victim’s desire for vengeance, but on enabling it to restore relationships and to forgive. Restorative justice gives victims a central place by letting them be heard for their own sake. This process of testimony and following recognition by an official body is in itself considered as a method of doing justice to victims (Welschen 2001). A second level is restoration of the dignity and humanity of the perpetrator. It is hoped that by holding the perpetrators accountable for the harm they have inflicted on people, a transformation of their moral dignity can take place; that they will come to realize the evil of their actions and will express repentance to their victims. If successfully transformed, a third level of restoration could happen: The restoration of the relationship between perpetrator and victim.

The emergence of war crime tribunals
Although the idea of having laws of war spelling out the rules of engagement has been developed over a long period, the prominent cases of the tribunals in Nuremberg/Germany and in Tokyo/Japan, set up after World War II, were the first institutionalised tribunals to address the issue of war crimes. They were established by the allied powers and aimed to try German and Japanese war criminals. The Nuremberg tribunal is considered a landmark in the development of international law for holding officials personally accountable for breaches of international law. Besides recognizing an individual’s responsibility for criminal acts during the time of war, the Nuremberg tribunal also developed the new concept of crimes against humanity (Welschen 2001).

Although the impact of the Nuremberg Tribunal was significant, it took almost 50 years before a similar tribunal came operational again. In May 1993 the United Nations Security
Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and in November 1994 the International Criminal Tribunal for Rwanda (ICTR). The tribunals are responsible for prosecuting gross human rights violations, war crimes, and crimes against humanity in both conflicts. Both tribunals have developed innovative concepts of law, such as the codifying of systematic rape and sexual violence as a crime against humanity.

The International Criminal Court (ICC) in The Hague, which was established according with the Rome Statute of 1 July 2002, is mandated to take over judicial responsibility for cases of crimes against humanity, if the affected countries are unable or unwilling to deal with the crimes themselves. The first case taken up by the ICC relates to the conflict between the Lord’s Resistance Army and the Ugandan government in northern Uganda and southern Sudan. In December 2003 the Ugandan president Yoweri Museveni invited the ICC to investigate crimes by the LRA. Other cases brought to the ICC so far are Darfur/Sudan, Democratic Republic of Congo and Central African Republic.3

The emergence of truth commissions
“Reconciliation is a journey and not an event. What truth commissions seem to be able to do is help nations to set out on the journey from a proper footing.”
Ilan Lax, South African Truth and Reconciliation Commission

A different type of justice mechanism to deal with a violent past is a truth (and often also reconciliation) commission. It focuses on restorative justice, seeks to enable broader processes of reconciliation, re-union and healing of conflict-torn societies instead of limited judicial retribution for committed crimes. Globally 27 truth commissions have been established since 1974. The first of its kind was the Ugandan Commission of Inquiry into the disappearances during the first years of the Amin government, which was established while the Ugandan dictator was still in power. It is considered one of the less successful commissions, because its findings were never followed by any judicial or political consequences (Welschen 2001).

Whereas the intention of most commissions is similar, namely to find a commonly accepted way of establishing what had happened during times of unrest and violence and record it, they differ remarkably in their approach. This relates on the one hand to the given socio-

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2 In July 1998 the 52nd UN General Assembly was held in Rome and agreed on the Rome Statute, which provided the framework for the creation of the ICC. The ICC started work in July 2002 after the necessary number of states had ratified the Rome Statute. [http://www.icc-cpi.int/index.php](http://www.icc-cpi.int/index.php) and [http://www.un.org/law/icc/htm](http://www.un.org/law/icc/htm). Access on 14 July 2005.

3 The cases of Congo (March 2004) and Central African Republic (January 2005) were brought to the ICC by their governments, the case of Darfur/Sudan (March 2005) by the UN Security Council. For further information see also the ICC homepage [http://www.icc-cpi.int/index.php](http://www.icc-cpi.int/index.php).


political setting in the respective countries, and on the other hand to the level of support (international, governmental, and popular) for, and the nature of, the body which is responsible for their establishment. Some of the existing commissions were established and promoted by multilateral organizations like the United Nations, a few by non-governmental organizations, and the large majority by national governments of the countries in question.

Choosing between retribution and reconciliation

It is important to clarify that there is no inherent contradiction between war crime tribunals and truth commissions. Both share the objective of finding a just way of dealing with atrocities committed by any party during a period of violent conflict or oppression (Robinson 2003). Nevertheless, there is a lively discussion around whether choosing the truth commission approach automatically means sacrificing (retributive) justice, and, conversely, whether implementing a judicial tribunal compromises possible openings for restorative justice and therefore fails to serve the long-term aim of restoring relationships within society.

Tribunals are often chosen to prevent impunity. While they hold individuals to account for their actions, often they are not appropriate to deal with the wider context of the conflict or its root causes. Normally they are not a welcoming forum for victims to share their experiences. But all these aspects are important for a broader transitional justice process. When the decision is taken to combine retributive and restorative approaches, truth commissions can supplement prosecution as a valuable means to give a voice to victims, to build a comprehensive record of events including patterns and causes, to provide meaningful official and societal acknowledgement to promote reconciliation, to facilitate compensation of victims, to educate the public or to make recommendations for the future. They cover a wider range of objectives, especially on a long-term perspective, and go beyond the mandate, the capability, and competence of tribunals.

Which approach is appropriate has to be decided from conflict to conflict and depends on many factors, including practical ones. Sometimes, societies recovering from a violent past are faced with a situation where prosecution of all offenders is simply not possible on a practical level or not even desirable on a strategic level. To deal with a significant section of the population through criminal procedures and possible imprisonment is unlikely to be a successful approach to rebuild a society.

Given the possibilities, it must be pointed out that the decision to adopt a particular process does not necessarily have to be an either/or choice. In most post-conflict settings, it is possible to distinguish between various degrees of crimes, between leaders and combatants following orders, those who profited from it in one way or another or just did not raise their voices against the violence. In such cases it is possible to address only the worst forms of crime by a tribunal, while referring others to a national or local truth commission.

Whichever approach is chosen, a truth commission or a tribunal is only the first step on the long journey of healing within societies. The first step into a new phase is acknowledging the past instead of ignoring it. In order to pave the way for reconciliation processes, it is important to guarantee meaningful follow-up. The last day of work for the court or the commission is never the end of the reconciliation and rebuilding process. In countries where institutions have had the greatest impact, their reports, their conclusions, and
recommendations have acted as a clear reference, signalling a society’s decision to turn over a page in its history. In this way, the society in question has shown its determination to move into a new phase in which the rule of law will prevail, democracy can be built, and human rights can be respected and promoted.

**The elusiveness of truth**

Whereas the majority of commissions seem to be united by having the word ‘truth’ in their title, it remains open how truth should be defined and whose version of truth will be accepted as the official version of history. In conflict situations, all sides have their own version of what really happened (Lerche 2000). Who is the victim and who the perpetrator? Often the answer to this question depends on who is asked. Truth can be inconvenient, for instance in cases where an oppressed minority committed crimes themselves, or a legal party like a country’s government responds to illegal non-governmental forces’ actions. Is the crime committed by an oppressed group morally equivalent to the crime committed by an oppressor?

Telling one’s version of the past is a crucial part of the effort to get to the truth. But it is difficult as well, because it always reflects the perspectives of the narrator and this itself can be the basis for continuous conflict. Nevertheless, it seems to be of great importance to question the validity of the monolithic narratives that pit one group against another and to facilitate the emergence of alternative narratives through the collection of oral histories, documents, and historical artefacts (Barsalou 2004).

**Does justice follow truth?**

The problem of justice has always dominated the discussions around truth commissions, especially among legal scholars. For many, a proper response to large scale human rights abuses, war crimes, ethnic cleansing and genocide is only possible in the form of criminal proceedings by rule of law authorised to render judicial positions – i.e. retributive justice. Truth commissions by nature cannot deliver this sort of justice. Their work falls somewhere in the morally, politically, and emotionally fraught continuum between vengeance and forgiveness and raises another important question: Are truth and retributive justice necessarily related to each other? Especially when the truth-seeking process results in immunity from prosecution, with pardon or with amnesty, the costs of truth telling may become contested by the victims themselves or by external critics (Christodoulidis 2000).

**The problem of success**

To judge the success of any justice seeking approach is a difficult task. It depends on the different perspectives of victims, perpetrators, and other parties involved, on their initial expectations towards process and results as well as to what extent they feel their needs and interests are met. The time factor plays an important role. Both tribunals and truth commissions often operate in a very limited time frame and with limited resources. However, both the collection of information in order to investigate the truth about what happened and the reconciliation process itself are time-consuming processes that often exceed the given schedule. A further challenge is how to measure the extent of reconciliation within a society disrupted by long-term conflict. While it is possible to receive an immediate response to the question of success concerning the work of a tribunal
or a commission from individual victims, assessing the impact on a broader societal level can take decades.

Transitional justice mechanisms are faced with the challenge of striking a balance between acknowledging the individual’s grief and personal suffering on the one hand, while acting as an effective catalyst of helping to overcome the deep divisions within the society and enabling wider change on the other. Ideally, truth and justice mechanisms will have the effect of providing a framework to victims in which they can tell their individual stories, have their suffering acknowledged and hear the perpetrators confessing their wrongdoing and through that enable reconciliation and stability on a wider scale. It needs to aim at minimising harm to individual survivors while maximising the achievement for society. However, the need to consider both individual and societal needs, interests, and benefits presents an enormous task. It makes it difficult to measure the success in justice and reconciliation processes.

Identifying benefits
No truth and justice-seeking effort will ever meet every individual interest. But the establishment of either a tribunal or a truth commission prevents a conflict-torn society from developing a collective amnesia. After such institutions have finished their work, no one will be able to say they didn’t know what really happened.

War crime tribunals and truth commissions can provide an essential service by presenting concrete evidence about committed crimes. Nevertheless, their focus on either individual perpetrators, or the stories and experiences of individual victims – for whom story telling can be a way to deal with their experiences of violence and their personal trauma – does not necessarily benefit conflict-torn societies as a whole, if the process is not well thought through.

The nature and psychology of reconciliation
The term ‘reconciliation’ often refers to processes through which societies engage in community building, recover from trauma, re-establish justice, and engage in social reconstruction; but defining what exactly reconciliation means and how it is achieved remains a challenge.\(^6\)

Successful reconciliation is a challenging process that has to happen on two different levels. Both individuals – who were former enemies, victims and perpetrators, oppressors and oppressed – and the society as a whole have to go through a process, that includes acknowledging the wrongs of the past and assigning them to a proper place in history. This aims at avoiding cycles of vengeance, that are likely if the responsibility to support processes of healing and reconciliation are neglected, and a society is denied the opportunity to come to terms with its past peacefully.

However, it must be remembered that forgiveness and reconciliation are psychological processes that can never be approached forcefully. Any institution that aims at healing social relations should be aware that the assistance is limited to providing a framework to enable

forgiveness and reconciliation. There is no guarantee that the hoped-for impact will occur. It is of fundamental importance that the decision not to forgive is as legitimate as forgiveness itself. In this sense a broader understanding of reconciliation can be helpful to reduce expectations: If, after years of conflict, people manage to live peacefully side by side in one country without using means of violence to achieve goals, this alone can be appreciated as a great success and seen as a first level of reconciliation.

Some authors (e.g. Guttmann & Thompson in Welschen 2001) argue that forgiveness and reconciliation should not be the primary goals of truth commissions. Instead they plead for the development of a certain degree of respect between people, recognizing that all are fellow citizens and will treat each other as such. Truth commissions should thus enhance understanding of the value of repentance and forgiveness for the other. In the long term, this can contribute to a climate that encourages attitudes beyond mutual respect. When the time is ripe - maybe years or even decades after the commission has finished its work - forgiveness and reconciliation might take place.

**Personal forgiveness and national reconciliation**
Forgiveness seems to be a process that is accomplished on a very personal level. Through truth commissions, individuals bring their personal experiences into the public domain and it is for those individuals to forgive their perpetrators. However, not only individuals, but also entire societies can go through a process of trauma resulting from long-term exposure to violence and suffering from atrocities committed during periods of conflict. This can cause serious changes in the social pattern. And while personal forgiveness does not necessarily lead to forgiveness and reconciliation within the overall society, nation-wide reconciliation programs do not automatically have the capability to change the individual ability to forgive.

**Cultural notions of truth and reconciliation**
A matter seldom referred to in the literature is the possible influence of cultural constraints in transitional justice processes, particularly concerning the work of truth commissions. They are usually established in the country where the conflict occurred and are influenced by its specific cultural context, impacting both on the decision for or against a certain approach and on its implementation. Furthermore, the way people look at the commission’s work and value its activities and outcomes depends also on the cultural context. While some people argue that most truth commissions have worked in countries with a considerable Christian majority and hence have recourse to broadly shared Christian values that are strongly related to the ideal of forgiveness and reconciliation, others are of the opinion that notions such as justice, truth, forgiveness, reconciliation and accountability are not exclusively Christian values, but can be found in any cultural context. They have been championed by people from many different traditions, religions, and cultures, and therefore deny the existence of a strong cultural bias in dealing with concepts of justice, truth, and reconciliation.

Without referring to a specific religion it should at least be taken into consideration that such notions are always and unavoidably a product of social construction and culturally constituted. While most truth commissions are created in the conviction that an account of the past as detailed as possible will best serve the aim of clarifying history and thus promote reconciliation, there are examples where societies decided not to expose whatever crimes
were committed during the past. In some cases these societies do not want to confront themselves, their leaders, and their former oppressors with the whole truth, because it is considered too humiliating. They want to avoid loss of face and further fuelling of the conflict. In reference to the South African proverb “Truth is not always good to say” it can be stated that different cultures have different ways of dealing with the concept of truth and hence different approaches towards reconciliation. While notions of cultural relativism in terms of taking a decision on how to deal with a violent past need to be treated carefully, and different perspectives within the society in question deserve proper consideration, it remains important to question the genuine motivation and real reasons behind covering the truth.

**Case study I: The Republic of South Africa**

Probably the most prominent example of a truth and reconciliation commission is the Truth and Reconciliation Commission (TRC) of the Republic of South African dealing with the crimes of the apartheid era. During and after its active period between 1994 and 1997 it inspired comments and reflections from hundreds of authors from both within the country and abroad.

**The legacy to deal with - Apartheid**

While the term *apartheid* (from the Afrikaans word for apartness) was coined in the 1910s and used as a political slogan of the National Party (NP) in the 1930s and 1940s, the policy of apartheid itself extends back to the beginning of white settlement in South Africa in 1652 and has a solid foundation in the segregationist policies of previous white governments. After the Afrikaner nationalists came to power in 1948, apartheid was finally institutionalized as official state doctrine in 1948 and remained in place until 1992.

The implementation of the policy, later referred to as ‘separate development’, was enshrined through a series of apartheid legislation severely impacting on the daily lives of South Africans. The Population Registration Act of 1950, which placed every South African into a racial category: Bantu (black African), Coloured (of mixed race), or White. A fourth category, Asian (Indians and Pakistanis), was added later. The Group Areas Act of 1950 assigned races to different residential and business sections, and the Land Acts of 1954 and 1955 restricted non-white residence to specific areas. These and other laws led to further restriction of the already limited rights of all but the ones classified as white to own land, entrenching the white minority’s control of over 80 per cent of South African territory. In addition, other laws prohibited most social contact between the races, enforced the segregation of public facilities and the separation of educational standards, created race-specific job-categories, restricted the powers of non-white unions and curbed non-white participation in government.

The discriminating politics of apartheid also included forced removals, based on the Bantu Authorities Act of 1951 and the Promotion of Bantu Self-Government Act of 1959. Black South Africans were driven from their homes and forced to relocate to ten so-called homelands outside the cities with little or no warning beforehand. Any dissent was harshly punished. Most of those territories, lacking natural resources and infrastructure, were economically not viable and, being small and fragmented, lacked the autonomy of independent states.
Countless people suffered from serious human rights violations during the rule of the NP. A large number of individuals who tried to resist the regime or simply were in the wrong place at the wrong time spent decades in prison. An estimated 200,000 South Africans were arrested between 1960 and 1992 for political reasons.

From its very beginning the apartheid system was harshly criticized by the international community as being unjust and racist. In 1948, when apartheid rule was officially established as state policy, the end of World War II and the defeat of Nazi Germany lay only three years back. The establishment of another political system based on racial discrimination was shocking. Economic sanctions and consumer boycotts were introduced by the international community over the following decades and ruined the country economically and contributed to the consistent, well-organized domestic struggle against the regime. In 1989 Frederik Willem de Klerk succeeded Pieter Willem Botha as president. His historic speech on 2 February 1990 officially began to dismantle the apartheid system. Formerly banned organizations were legalised and the imprisoned opposition members released – among them Nelson Mandela, the leader of the African National Congress (ANC), the most powerful anti-apartheid group. In 1994 the country’s constitution was rewritten and free general elections were held for the first time in South African history. The ANC secured almost 63 per cent of the vote and Mandela was sworn in as the first black president in the history of South Africa.

**The Truth and Reconciliation Commission**

“A commission is a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.”

Mr. Dullah Omar, former Minister of Justice

Among Mandela’s first actions was to establish a commission to investigate abuses from the apartheid era. The process towards the TRC’s creation was backed by a strong civil society, organized in political parties, trade unions, churches and the like, that vibrantly engaged in politics to achieve real change. The final shape of the commission is the result of a series of political compromises. The NP demanded a blanket amnesty as a condition for political transition, whereas the ANC demanded the prosecution of those responsible for serious human rights abuses committed during the apartheid era. Providing the TRC with a mandate to extend amnesty for political crimes in exchange for full disclosure offered a middle ground. It seemed as if compromising on retributive justice was the only way to achieve real changes in the politics of the country (Asmal & Roberts 1997).

Mandela delayed the establishment of the TRC for at least one year, since the top leadership of the army and the police needed changing first, so that the new government would be fully in control of those institutions and reduce the risk of armed opposition to the transition process.

The TRC was divided into three committees:

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• The Human Rights Violations Committee (HRV), which was responsible for the

• The Reparation and Rehabilitation Committee (RR), which was responsible for the
provision of reparations for the victims of human rights violations and formulated
proposals to assist with their rehabilitation. Its task was also to provide psychological
support to the victims through the process of hearings. 13 ‘briefers’ were responsible
for this mission.

• The Amnesty Committee (AC), which considered applications for amnesty that were
requested in accordance with the provisions of the Promotion of National Unity and
Reconciliation Act. It dealt with atrocities committed between 1 March 1960 and 11
May 1994. The final date of application for amnesty was 30 September 1997.

Amnesty was only given under the condition that crimes were politically motivated and the
entire and whole truth was told by the person seeking amnesty. From all applicants 5,392
were refused amnesty, 849 were granted amnesty and 873 withdrew during the process.8

17 commissioners were appointed to oversee the three committees. The commissioners
were selected in part as a deliberate political attempt to be highly representative of South
African society, with seven black members, six white members, two coloured members and
two Indian members. Anglican Archbishop Desmond Tutu chaired the commission. At the
height of its work the South African TRC had approximately 400 staff, significantly more
than any previous commission of its kind. Its annual budget exceeded that of other
truth commissions at about $9 million per year. The work of the commission lasted for almost
three years. Its staff members travelled throughout the country taking statements,
organized public hearings in 80 communities and overall the Human Rights Committee
received testimonies from about 20,000 individuals.

Critical reflections on the South African model
Despite the worldwide praise of the South African TRC, particularly by human rights
organizations, its process and outcomes are not free of criticism, particularly among South
Africans themselves. It is impossible to get a complete picture of the level of people’s
acceptance of and satisfaction with the TRC. Depending on one’s background, the view on
the TRC differs broadly. But bearing in mind the enormous compromises that had to be
made by both parties during the bargaining over any transitional justice process to deal with
the atrocities committed during apartheid, it was obvious that its final outcome was always
likely to be criticized from various segments of society and heatedly discussed among them.

The most fundamental part of the political compromise was probably the amnesty act for all
politically motivated crimes. By its nature, it was also one of the most controversial aspects
of the TRC’s functioning. In the words of Archbishop Tutu, who strongly supported the
compromise deal South Africans had to make, “freedom was exchanged for truth”,
following his slogan “revealing is healing” (Adam & Adam 2001: 35). More critical voices
might call it “trading retribution for truth”. Given the South African experience, the

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8 All information about the South African TRC is in detail available on its homepage:
question remains whether truth is a commodity that can be traded—and if so, for what price. Who is to define it? The victims themselves (Henderson 2000)?

In the South African case, the political compromise and the need to enable the nation to unify again and to continuously live side by side with each other led to a strong movement towards achieving reconciliation by all means. Hence the driving philosophy behind the TRC was the idea that “reconciliation is only possible if we build on the foundation of truth. Amnesia may be comforting, but in the end it will prevent reconciliation rather than promoting it.” The creators of the TRC also believed that providing victims with the opportunity to get to know the truth would facilitate the healing process. Knowing the truth about the apartheid crimes and making it public through the committee’s hearings and extensive media coverage was hoped to lead to forgiveness and finally to reconciliation. But it quickly turned out that things were not as easy. In psychological terms, knowing the truth is an elementary pre-condition for any reconciliation process—if someone wants to come to terms with the past, this person needs to know what this past was. In addition, those who wanted to close their eyes to what had happened under apartheid rule for the decades to come would not be spared from confrontation with their history either. But, as already pointed out, simply knowing the truth does not necessarily lead to forgiveness. Nor does knowing a factual truth automatically mean perpetrators will accept it as their personal version of what happened and express remorse about the wrongs of the past—which they might not even see as wrong.

In this context it is important to differentiate between the factual truth and a kind of individual, moral truth, which is created by one’s own experiences, memories, and personal interpretations. Even if the commission was able to give many victims and perpetrators the public space for their testimony and managed to collect an impressive number of stories, pieces of the factual truth of what happened during apartheid, this does not mean that everyone agrees with this view of history. While over 7,000 individuals testified before the Amnesty Committee, it is commonly agreed that the perpetrators who did not approach the TRC far outnumbered those who did, and that the majority of those who testified before the Amnesty Committee often failed to provide much new information for the over 20,000 victims who testified before the Commission.

Theoretically, the fact that amnesty was conditional upon full disclosure of crimes should have motivated perpetrators to reveal all of the salient information. However, the TRC’s investigatory department was understaffed and inefficient which limited the Amnesty Committee’s ability to determine whether or not perpetrators had completely disclosed their crimes. Moreover, the threat of prosecution was always weak given the enormous number of perpetrators and the high costs of each trial. Perpetrators thus knew that the state was unlikely to bring charges against each of them. In many cases the perpetrators did not have any awareness of their wrong-doing, and thus considered the invitation to confess in front of a commission they never really wanted, and to ask the victims for forgiveness, as humiliating.

The behavior of some of the leading political figures of the apartheid era played an important role. It was hoped that the last presidents of the regime would cooperate with

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the TRA and act as role models for others. But former presidents Botha and de Klerk, failed to officially confess their active participation in designing and implementing the discriminatory apartheid policies and to take responsibility for what they did. Both agreed that people suffered, but denied any relationship between their actions and the wide-spread human rights abuses causing this suffering. They denied the wrongness of the past until the very end and refused to take the TRC seriously. Neither one contribute to the TRC’s work and the process of reconciliation it intended to initiate. Their position was backed by a substantial majority among the white political parties and white society, and fuelled the resistance of those who did not understand at all why the TRC and any platform for forgiveness and reconciliation should be of importance.

In order to make the TRC process a successful one, all parties needed to be satisfied with its set-up and process. The reservations among a majority of the white community towards the TRC were at some points probably not taken seriously enough, although they potentially had a strong influence on the success chances of the whole process. The main white parties and the Afrikaans press expressed dislike and suspicion towards the TRC in general, and particularly in respect of its composition. It included 14 members perceived as being pro-ANC, and two who were not unsympathetic towards the NP, but no representative of the Inkatha Freedom Party (IFP)\(^\text{10}\).

Furthermore there existed serious doubts about the relationship between truth and reconciliation. Many whites did not believe that knowing the truth contributes meaningfully to any progress towards reconciliation. Since in their view criminal acts and atrocities were committed on both sides, they thought that just to forgive and forget might finally be the best way to deal with the legacy of the past. Such profound doubts about the existence and work of the TRC should have raised concern, because they prevented the Afrikaans establishment from accepting the TRC as an important element in the country’s transition and finally a tool for peace (Andries 1997).

Around the world, images were broadcast of an interaction of confession and forgiveness. The South African script for reconciliation was said to lay to rest a racially divisive past and pave the way to a joint future as the ‘Rainbow Nation’. However, the realities of transition have been far more complex and are not adequately conveyed by the myth of a reconciled South Africa. Racial prejudice and violence did not suddenly disappear in 1992 (when Apartheid officially ended, in 1994 (when the first free elections were held) or in 1998 (when the TRC presented its report), but continued throughout the period of political transformation, standing as an obstacle to substantive equality and inclusive citizenship.

Another widespread critique concerned the TRC’s narrow interpretation of its mandate to investigate gross human rights violations (Valdez 2001). It dealt solely with those individual acts of violence that occurred in the course of political conflict, but excluded the everyday administrative horrors of apartheid, which the UN declared a crime against humanity in 1973. This limited mandate was considered not to reflect accurately the experience of the majority of people and would leave unexamined one of the most important parts, the institutional violence of the apartheid system itself.

\(^{10}\) The Inkatha Freedom Party led by Mangosuthu Buthelezi came third in the 1994 elections with around 10.5 per cent the vote and thus was part of the Government of National Unity. They were particularly strong in KwaZulu/Natal and among the migrant workers in the Johannesburg area. http://www.inkatha-freedom-party-search.ipupdater.com. Accessed on 24 August 2005.
Many considered the individualization of responsibility an inappropriate approach, since it narrowed the system down to a few perpetrators with the result that the majority of ordinary South Africans do not see themselves as perpetrators (Cronin 1999). Whereas the intention behind the TRC was to avoid apportioning blame to everyone and forging gaps between communities, it in fact allowed countless beneficiaries of the apartheid system to portray themselves as being betrayed by their former government and thus being perceived as victims as well, or as Mamdani put it: “The TRC model obscured the colonial nature of the South African context: The link between conquest and possession, between racialized power and racialized privilege. In a word, it obscured the link between perpetrator and beneficiary.”

The absence of a shared history necessitated the use of other grounds for the construction of a common identity. So while the TRC is accused of having failed in its attempts to forge either a shared memory of the past or a shared identity as important elements of nation building from one side, others think that the victimisation of the whole nation fulfilled the purpose of nation-building among a deeply divided society (Valji 2003). Looking back on ten years of post-apartheid development, it becomes questionable whether the unification in the feeling of shared victim hood positively contributed to reconciliation.

Furthermore, the broad denial of any racist notion within current South African society deepens existing divisions and prevents any true movement towards reconciliation, or as Valji (2004) put it: “In the same way that one would be hard pressed to find a South African who voted for the National Party in the past, it is equally improbable that any South African would openly admit the influence of a racialized past on their own attitudes and behaviour. This is not to say that the demonization of racism is not a progression or that a common moral denunciation of such attitudes is not positive. However when coupled with a failure to address the legacy of historical racism, an unwillingness to see racism in its everyday manifestations means ironically that this legacy is only preserved through a premature celebration of reconciliation.”

Archbishop Tutu was the driving force behind the commission. He made no attempt to separate his work on the commission from his spiritual beliefs, often referred to as Ubuntu theology. Ubuntu is the traditional African notion “which affirms an organic wholeness of humanity, a wholeness realized in and through other people”. Tutu merged this traditional concept with values from Christian tradition such as forgiveness, repentance and reconciliation. His approach was often criticised as being too Christian and faith oriented. Tutu argued that reconciliation and forgiveness were human values, which did not depend on any special religion, and that they could be found in any of the world religions (Adam & Adam 2001).

This ideology led to a subtle pressure on the victims to forgive those who had committed crimes against them, since according to the Ubuntu ideology it was only through forgiveness and the recognition of the humanity of the perpetrators that testifiers could fully reclaim their own humanity. If we keep in mind that forgiveness is a deeply personal process that can be supported, but never forced from the outside, it seems questionable whether the

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Ubuntu-based approach really supports individual forgiveness and initiates reconciliation processes as intended.

Assessing present day realities in South Africa, critics point out that the country has not gone very far yet. Economic and social inequalities remain, even though laws have changed and make everyone equal as a citizen. The biggest part of the economy is still in the hands of whites. On average, white students still have access to better educational institutions. White people still live in better housing conditions. The majority of black people still live in poverty and suffer from a lack of security. Fundamental inequalities that have characterised South African society for decades cannot be overcome in a decade. While it is necessary to change this situation to achieve social healing, to reconcile these fundamental inequalities goes beyond the TRC’s mandate and capacities, and criticism of its work in relation to this issue is directed at the wrong target.

Whereas it is impossible to adequately compensate people for what they have suffered under apartheid rule, it is important at least to show recognition of what they have gone through, not only in words, but also in material assistance, thus enabling them to improve their living conditions after the end of apartheid.

In this context it is important to mention that the Reparation and Rehabilitation Committee, responsible for assisting in restoring people’s dignity and provide material compensation for past violations, was by far the worst-equipped and most resource-poor part of the commission (Adam & Adam 2001). People are still waiting for reparation payments, and a lot of those who have already received compensation have publicly claimed that it was nowhere near enough. For many the small amount felt humiliating. Hence, without any acceptable compensation for what people suffered for decades, and without any recognisable change in their current personal living situation, a majority of victims will probably wonder what the TRC process has brought for them.

To be able to value the TRC’s work people need to be realistic in their expectations. If the TRC was expected to reconcile the deeply divided nation and erase the suffering from 34 years of official apartheid policy and practice, and eliminate the divisions of economic and social well-being that characterized the nation, disappointment is unavoidable. Probably the most important, most valuable, and most unifying aspect of the TRC is the process itself, not its outcomes. The newborn post-apartheid South African nation did this together, and it did it alone, without any outsider’s intervention. This was not only a great learning process, but probably reason enough to say: The TRC was important and it was worth it.

The TRC can only be the beginning of a long process. The challenges ahead can only be overcome by a critical assessment of the past and the inclusion of every individual in continuous critical self-reflection. Long-term reconciliation is not something the state or any commission can provide. And given current perspectives on racism and inequality among South Africans, there is still a long way to go. But the first step is made.

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14 Although apartheid was officially enshrined in law in 1948, the remit of the TRC covered only the period from 1960 to 1994.
Case Study 2: Sierra Leone

Sierra Leone suffered from more than a decade of violent conflict involving various armed groups including the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) (at times in government and at times in opposition to it), the Civil Defence Forces/Kamajors (CDF), the Armed Forces of Sierra Leone, various mercenary groups, the Sierra Leonean government under both military and civilian leadership, and foreign forces such as the fighters from Charles Taylor’s National Patriotic Front of Liberia (NPFL), British troops, West African forces under Nigerian command (ECOMOG established by the Economic Community of West African States (ECOWAS)), and United Nations Mission in Sierra Leone peace-keepers (UNAMSIL).

The conflict lasted from 1991 to 2002 and was fuelled by illicit trade in the country’s rich resources, increasing circulation of small arms, and the financial, military, and political interventions of countries in the sub-region and beyond.

After the World War II tribunals of the late 1940s, Sierra Leone was the first state to host an international war crime tribunal within the borders of the country where the crimes had been committed. The tribunal – the Special Court – was also the first to deal not only with crimes committed by its own citizens but also those responsible from neighbouring countries. Parallel to the Special Court, a truth and reconciliation commission operated until 2003.

While the active work of the TRC is finished, the Special Court continues with its trials. A lot still remains to be done to achieve true reconciliation, if it can ever be reached at all, and the final version of the TRC report is still not published.

In view of the present situation within Sierra Leonean society, this case clearly illustrates that a transitional justice process is only a first step on a very long road of recovery and restoration of a nation emerging from war.

The legacy to deal with – civil war

Financial crisis, corruption, civil unrest and war have marked Sierra Leone’s short post-colonial history. 14 coups d’état, failed and successful, have taken place since independence in 1961, and even during times of civilian government the military has always played a crucial role in Sierra Leonean politics.

The latest conflict in Sierra Leone began in 1991 when the Revolutionary United Front attacked the country from Liberia. This contributed to the overthrow of decades of one-party rule under the All People’s Congress (APC) a year later, in a coup by the National Provisional Ruling Council (NPRC) led by junior army officers. At that time, the country was economically and politically on the verge of collapse (Lord 2000). 24 years of manipulation and misrule under President Siaka Stevens and his chosen successor, General Joseph Saidu Momoh, had left the country heavily dependent on foreign aid and loans. Mismanagement and corruption were all-pervading, and the state was deeply divided between the clientele of the APC regime, a growing number of embittered opponents in
politics and business, and millions of people, in particular youths\textsuperscript{15}, living in poverty and frustrated by their limited prospects in life.

Rural Sierra Leone’s rich natural resources were exploited mainly by and for the benefit of a handful of ‘big men’ and their networks. Access to resources for redistribution was granted only to supporters of the APC, which undermined any attempt to satisfy broader national needs.

The stated intention of the RUF, which had strong support from Liberian President Charles Taylor, was to overthrow the corrupt APC government, revive multi-party democracy, and end exploitation. However, its lack of programmatic focus for social change and increasingly cruel practices alienated possible supporters.

To sustain the strength of their fighting forces and forge loyalty, the RUF abducted and forced young people to fight on their side, looted food, drugs, and other goods, and indiscriminately raped, mutilated, and otherwise abused unnumbered civilians. Borrowing a tactic used by NPFL fighters in Liberia, RUF commanders forced captives to murder or mutilate officials, community elders or family members in order to isolate them from their communities and prevent them from being accepted back home in the future.

Some of the main events of the decade-long violent conflict are outlined below:

**March 1991:** Under Foday Sankoh, a former corporal of the Sierra Leonan army, the RUF crosses the border from Liberia into the south-eastern part of Sierra Leone, occupying the border town of Bumaru in Kailahun district. A few months later, the RUF already controls one-fifth of the country’s south-eastern region.

**April 1992:** Captain Valentine Strasser and a group calling itself the National Provisional Ruling Council (NPRC) overthrow President Joseph Saidu Momoh who is sent into exile to Guinea.

**January 1996:** After several years of fighting between the RUF, who holds several parts of the country, and the NPRC, who controls the Sierra Leonan military, negotiations seem possible. Strasser is replaced as the head of the NPRC and under his former deputy, Brigadier Julius Maada Bio, the NPRC reluctantly agrees to national consultations and multi-party elections which lead to the inauguration of Ahmed Tejan Kabbah of the Sierra Leone People’s Party (SLPP) as president on 29 March 1996. Kabbah pledges to continue peace talks, which appear as a new sign of hope for an end to the conflict.

**November 1996:** Kabbah’s government and the RUF leadership finally sign a peace agreement in Abidjan, which provides the RUF with legitimacy as a political party.

**Early 1997:** The peace process fails when the RUF leader Sankoh is arrested for arms trafficking and many RUF combatants do not accept the terms of the peace agreement. Hostilities continue and increasingly pro-government Civil Defence Forces are used against the RUF.

\textsuperscript{15} Over half of the population of Sierra Leone is under 15 years old.
May 1997: President Kabbah’s government is ousted by the Armed Forces Revolutionary Council. Former Sierra Leone army Major Johnny Paul Koroma, jailed for a failed coup attempt, is released from prison and installed as chairman of the AFRC and head of state. Following initial stand-offs, the AFRC invites the RUF to join the government. International refusal to recognise the AFRC/RUF is unanimous.

In the following months, some of the worst state-sponsored atrocities are committed in Sierra Leone, including widespread extra-judicial executions, mutilations and acts of sexual violence, looting and burning-down of houses and whole villages.

February/March 1998: The AFRC/RUF junta is forced out of the capital Freetown by Nigerian-led ECOMOG troops and beaten back by CDF units across wide parts of the country. In March the democratically elected government of President Kabbah returns to Freetown.

October 1998: The RUF calls on the government to participate in peace talks mediated either by the UN or the Commonwealth, but meanwhile continues fighting against the CDF, capturing villages and attacking civilians.

January 1999: The AFRC/RUF reach the peak of their activities, entering Freetown, and in less than 24 hours capturing the entire east and most of the central parts of the city. Beaten back by ECOMOG forces and CDF units, the RUF still poses a serious threat after it eventually leaves the capital. In the process over 6,000 people have died, 150,000 are left homeless, and hundreds of people have been subjected to rape and mutilation.

July 1999: The Lomé Comprehensive Peace Agreement is signed. Despite increasing international knowledge about, and outlawing of, the widespread use of child soldiers by all parties to the conflict, and serious abuse of children in forced labour by the RUF in particular, the agreement grants amnesty to Sankoh and other members of the RUF and provides a framework for turning the RUF into a political party. Sankoh is made chairman of the Strategic Mineral Resources Council and given the title of Vice-President. The Lomé Agreement also contains the framework for the creation of the Truth and Reconciliation Commission (TRC).

Early 2000: In April, UN peace-keepers begin moving into eastern Sierra Leone, the location of several RUF-held diamond mines, and are promptly attacked.

May 2000: RUF troops begin holding up to 500 UN peacekeepers hostage, capturing their arms and ammunition. Many of them are later freed or escape by themselves.

The RUF shoots and kills 20 people who are demonstrating outside Sankoh’s home against violations of the Lomé Agreement. Sankoh is arrested and stripped of all political positions.

After a peace deal had broken down and rebel forces were scoring successes against government forces and the UN peacekeepers British troops enter Sierra Leone.

June 2000 onwards: The intervention of British troops, increasing pressure on the RUF’s economic basis and constraints put on Taylor’s support for them by the international community, lead to a gradual decline in the RUF’s cohesion and fighting power. Sankoh’s successor Issa Sessay engages in negotiations with the government about the Disarmament,
Demobilisation and Reintegration (DDR) process, but no agreement is reached and the fighting continued.

**May 2001:** An agreement is reached in Abuja and leads to a significant reduction in hostilities, a disarmament process, and enables the government to reassert authority throughout the country.

**January 2002:** The armed conflict is officially declared over. 11 years of war have left over 75,000 people dead and over two million people displaced. The UN dispatches 17,000 troops, the largest peace-keeping force in its history. In May 2002, Kabbah is re-elected as president of the Republic of Sierra Leone with 70 per cent of the vote. The RUF sent a candidate to run for president and contested as a political party for parliament, but fails to obtain a single seat.\(^\text{16}\)

**The Truth and Reconciliation Commission and the Special Court for Sierra Leone**

Sierra Leone is a unique example of an approach that simultaneously embraces the concepts of retributive and restorative justice alike. Whereas the Truth and Reconciliation Commission was established on the basis of the Lomé Comprehensive Peace Agreement of 7 July 1999, the decision to establish the Special Court was taken later, on 14 August 2000, by the UN Security Council. Partly driven by serious concerns among UN officials and human rights groups about the limitations of the peace agreement, which excluded accountability for perpetrators for some of the most serious atrocities committed during the war, the international community pressed for the Special Court.

**The Truth and Reconciliation Commission**

The Truth and Reconciliation Commission for Sierra Leone was an independent institution established on the basis of the Lomé Comprehensive Peace Agreement of 7 July 1999 and endorsed by an Act of Parliament on 10 February 2000. The mandate of the Commission was 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 acts of violence.

The general function of the TRC was to report and document the causes, nature, and extent of human rights violations and war crimes, and on the context in which abuses occurred. It also had to report on whether or not the human rights violations were the result of deliberate planning, policy or authorization by any government, group or individual. In this context the TRC had to investigate the role played by both national and foreign groups and governments (Adongo 2003).

There were seven commissioners, four of them Sierra Leonean citizens. As stipulated in the act establishing the TRC, all the members were appointed by the president.\(^\text{17}\)

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\(^\text{16}\) The overview of the history of conflict in Sierra Leone was written with the kind and thoughtful assistance of Michael Hammer, West Africa Programme Manager at Conciliation Resources, London.

\(^\text{17}\) The members were: Rt. Rev. Dr. Joseph Christian Humper (Sierra Leone) – Chairperson; Hon. Justice Laura Marcus-Jones (Sierra Leone) – Vice-Chairperson; Professor John Kamara (Sierra Leone); Mr Sylvanus Torto
The TRC went through a preparatory phase from May to October 2002. This time was devoted to the establishment of the interim secretariat for the commission and to the recruitment process. A caretaker committee, composed of representatives from UNAMSIL, the United Nations Development Programme (UNDP) in Sierra Leone, and the commission, was charged to manage the recruitment. During the three-week pilot phase in early December 2002, 70 statement takers and three regional coordinators engaged with victims and collected a total of 1,371 statements of gross human rights violations. A review session was conducted at the beginning of January 2003, followed by further training. The statement taking continued until 31 March 2003. From the beginning of April until the end of June 2003 the TRC proceeded with the hearing phase.

Due to the high number of children involved in the conflict, both as civilian victims and among the ranks of all warring parties, the TRC elaborated a framework in cooperation with the Child Protection Agency Network, facilitated by the United Nations Children Fund (UNICEF). In essence this framework aimed at facilitating the taking of statements from children in a way safeguarding the best interest of the child. The TRC offered children a platform to talk about their experiences as victims, but also as perpetrators. For former child soldiers this provided an opportunity to confess the atrocities they committed during the war, to ask for forgiveness, and hence to support their reintegration into their former communities. The TRC also aimed to create a historical record of what happened to children during the armed conflict. One of the results of this cooperation is a child-friendly version of the TRC's report, which is intended to allow children to follow the whole process in an easier way (UNICEF 2004).

The Special Court for Sierra Leone

The establishment of a Special Court for Sierra Leone was based on an agreement between the UN and the Government of Sierra Leone, pursuant to Security Council resolution 1315 (2000) of 14 August 2000. In October of that year, the Secretary General presented a model for the court, which was neither a UN body along the lines of the International Criminal Tribunals established for the former Yugoslavia and Rwanda (ICTY and ICTR) nor a domestic tribunal. Rather, it was designed as a mixed tribunal jointly administered by the UN and the Government of Sierra Leone. Many diplomats were hopeful that the Special Court for Sierra Leone would provide a new template for the prosecution of war crimes.

It is the first court of its kind established within the borders of the country in which the crimes it deals with were committed, and the first one with the mandate to try individuals who are citizens of foreign countries, such as former Liberian President Charles Taylor.

The Special Court’s mandate includes the prosecution of the main actors in the Sierra Leonean conflict who committed war crimes and crimes against humanity. Its mandate

(Sierra Leone); Professor William A. Schabas (Canada); Mr. Santang Ajaaratou Jow (The Gambia); Mrs. Yasmin Louisa Sooka (South Africa). In addition, professional support staff managed the day-to-day programmes and activities of the Commission. They were: Ozonnia Ojioelo – Chief, Information Management; Daniel Adekera – Chief, Public Information and Education; Greg Casey – Chief, Administration and Programming; Martien Schotsmans – Chief, Legal and Reconciliation.

18 Following the UN Convention of the Rights of the Child, all people under the age of 18 are considered children.

covers all acts committed after the first Lomé Peace Agreement of 30 November 1996, and also human rights abuses committed in defiance of Sierra Leonean law after 7 July 1999, the date of the Lomé Comprehensive Peace Agreement. Under this provision, the number of persons liable to prosecution was limited to those most responsible for the atrocities committed.

The push to prosecute high-ranking individuals for their part in the conflict became stronger in May 2000 when the RUF took some 500 UN peacekeepers hostage. It was clear that the RUF had no intention of allowing the UN to take control of the country’s diamond-rich areas, which were the main source of financial support for its war activities and whose control was a critical component of the Lomé Comprehensive Peace Agreement of 1999. In response, the British government, which had long advocated a tougher line towards the RUF, drafted a UN Security Council resolution calling for the expansion of the UN peace-keeping mission in Sierra Leone, an embargo on Sierra Leonean diamonds, and the prosecution of war criminals such as Sankoh and dispatches British troops to the West African country.

From the very outset, it was clear that the Sierra Leonean government would require international assistance to prosecute those responsible for the atrocities. First, the country’s existing penal code was not up to date regarding international human rights and humanitarian law, including crimes against humanity and war crimes. Second, and more importantly after a decade of war which had devastated the economy and governance system of the country, the country simply did not have the financial and technical resources to effectively and fairly try any accused in line with international standards. Third, and perhaps the most important reason for the UN Security Council pushing the process, was the need to establish a court with high credibility (Sieff 2001). This mixed tribunal should be accessible to the people concerned but not be seen as dispensing victor’s justice. The international support for the court was supposed to prevent this.

The Special Court was established and does its work with the voluntary financial and personnel support from 30 nations. Sierra Leone provided the land for the building and nominated a large proportion of its staff including at the level of judges. The court is made up of three chambers: The Appeals Chamber, the Trial Chamber I and the Trial Chamber II. The Trial Chambers consist of three judges, one nominated by the Government of Sierra Leone and two by the UN Secretary General. The Appeals Chamber consists of five judges, two nominated by the Government of Sierra Leone and three nominated by the UN Secretary General. The Chief Prosecutor for the Special Court is Desmond de Silva, QC, appointed by the UN Secretary General in May 2005 after the resignation of David Crane.

Currently eleven people associated with all three of the country’s former warring factions stand indicted by the Special Court. They are charged with war crimes, crimes against humanity, and other serious violations of humanitarian law. Originally two more were indicted but have died since: the former RUF leader Foday Sankoh, who died of ill health on 29 July 2003 in hospital in UN custody, and Sam Bockarie, a RUF general, who was reportedly shot dead in north eastern Cote d’Ivoire on 6 May 2005 when Liberian government forces were allegedly trying to arrest him (Dukuly 2005).

Nine detainees, three of each involved group, are still waiting for the final decision in their pending judgement. Johnny Paul Koroma’s whereabouts are unknown and Charles Taylor was granted asylum in Nigeria in August 2003, but was recently arrested and transferred to
Sierra Leone to answer 11 charges of war crimes and crimes against humanity at the Special Court. All of the accused have pleaded not guilty.

**Critical reflections on the Sierra Leonean way**

Sierra Leone sets a precedent for a transitional justice and reconciliation process implemented by two different bodies addressing two different issues, namely the Special Court for enforcing retributive justice and the TRC for delivering restorative justice. In theory this sounds like a profound and promising approach that is meant to address all important issues around the difficult task of dealing with the legacy of an 11-year long brutal conflict. However, in reality things are often not as easy.

Since the trials opened on 3 June 2004, the Special Court has received both criticism and praise. Some of its supporters see it as an innovative, path-breaking institution that might function as a precedent case for other international criminal courts in future. Others question its functionality and are afraid that it has already lost credibility. Since Sankoh and Bockarie already died and others bearing great responsibility for the violence are out of reach for the Special Court, it has lost much of its reason for being in the eyes of many people in Sierra Leonean.

The location of the court in Sierra Leone was meant to enable the whole population to follow its proceedings. However, this requires a constant effort to keep the population and the media fully informed, which has proved difficult. While efforts have been made, further work is required to inform a population that is 80 per cent illiterate. Local journalists have accused the court of being distant and insufficiently attentive to opportunities to involve them in informing Sierra Leone’s citizens (International Crisis Group 2003).

Human rights organizations have expressed strong reservations about the model of financing used for the Special Court. They point out that the Court’s funding relies entirely on voluntary contributions by member states of the UN, and fear that donations will not be sufficient for the Special Court to run properly throughout the full period of its mandate. They also fear that the current funding framework entails the risk that the Special Court might not be, or appears not to be, fully independent. Worries are high that donor states use the Special Court as a platform for promoting their own political interests rather than delivering meaningful justice for Sierra Leone. According to some NGOs, it is in particular the U.S. government as the main donor, that wishes the Special Court to succeed in demonstrating that a mixed tribunal can handle war crimes and crimes against humanity, in order to reduce wider calls for involvement of the International Criminal Court (ICC) in future war crime/crime against humanity cases (International Crisis Group 2003).

The TRC has competed with the Special Court for funds and attention since the court’s creation, and considers the court as an obstacle to national healing. In the first version of its final report issued in early October 2004 and made widely available the following month, the TRC all but condemned the Special Court, asking how tribunals and truth commissions can work together in Sierra Leone or in neighbouring countries. It accused the court of promoting instability throughout the region by running roughshod over the amnesty principles that underlie the TRC. “The international community has signaled to combatants

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20 All information about the structure, the work and the state of the trials is available from the Special Court homepage: [http://www.sc-sl.org](http://www.sc-sl.org). Accessed on 24 August 2005.
in future wars that peace agreements containing amnesty clauses ought not to be trusted and, in doing so, has undermined the legitimacy of such national and regional peace initiatives” the commission concluded (Nichols 2005).

This is strongly contested by the Special Court, where the TRC’s final conclusions were not well-received. David Crane, the court’s former chief prosecutor said: “The Sierra Leone model is the right model. A plus B equals C. Truth plus justice equals sustainable peace.”

But at the Sierra Leone TRC, a countervailing view has emerged. Truth and justice might not be compatible values, say the commissioners, and the court’s dogged pursuit of justice has had a chilling effect on its pursuit of social truth. Nichols (2005) considers two matters as being responsible for the obviously difficult relationship between the TRC and the Special Court. First, the decision taken by the UN and the Sierra Leonean government that for the first time in the history of international tribunals, every faction involved in the war should be charged, even the winning fraction. This led to the indictment of former Deputy Defense Minister Sam Hinga Norman, leader of the CDF and a hero to many Sierra Leoneans, who credit him with beating back the RUF. Second, the fact that the Special Court is funded by voluntary bilateral contributions, which has led to a feeling of constant competition between the court and the TRC for funding and attention at both national and international level. In addition many Sierra Leoneans felt unfairly treated by the fact that the TRC with a far smaller budget and far less international support has had to deal with the entire Sierra Leonean society, whereas the Special Court only has nine individuals currently on trial. One of the authors of the TRC report put it more bluntly: “They got what? Over $90 million. We had a budget of around $6 million.”

The fact that the TRC already existed and was given its mandate when the Special Court was created caused some major challenges to the proceedings of the Commission, and required re-thinking of some aspects of the commission’s concept to ensure that the two institutions operated in as mutually supportive a manner as possible. Many questions remained unanswered, for instance how to handle the judicial relationship between the TRC and the court. Questions if the TRC has the obligation to provide information given through testimony of victims immediately to the Special Court and how to guarantee that the activities of the TRC do not impede the discretion of the Office of the Prosecutor of the Special Court to prosecute any particular individual remained unanswered?

A closer cooperation earlier on, when the TRC was still active and the Special Court was about to be established, could probably have helped to avoid some of the major tensions in the difficult relationship. Both still have, despite all their differences, a similar mission: bringing justice to war-torn Sierra Leone. As already pointed out, retributive and restorative justice do not necessarily contradict each other, but implementing both side by side remains a challenge and deserves a particularly high level of attention to the problems associated with it.

In the case of Sierra Leone both institutions carried legitimacy, but were driven by different motivations. Given the timing of the implementation of activities of both institutions, certain
problems, like the TRC’s feeling of competition, were likely to occur and could have been avoided. If statements about the importance of the TRC as a platform for ordinary Sierra Leoneans are not to be mere lip-service, and if victims are not to feel as though they are receiving second-class treatment, statements of goodwill must be followed by action. So far, no victim has received compensation of any kind, and it is very unlikely that this is going to happen in the near future. Many civilians therefore have the feeling that in the end the rebels are better off thanks to the support they have received through DDR programmes, whereas many civilians lost everything during the war.

The TRC’s and the Special Court’s work are probably best seen as the starting point of a very long process. Only if their commitment is followed by profound changes in the social, political, and judicial system of the country can long-lasting peace and reconciliation be achieved.

Case study 3: Rwanda
In 1994 genocide happened in front of the world’s eyes in Rwanda. Within 100 days more than 800,000 people were murdered, while the entire world community watched and failed to prevent the worst from happening. This dramatic failure of the global security system is also seen as the biggest failure of the UN since its creation in 1945. In recognition of the scope and the serious of the crimes committed in Rwanda and some neighbouring countries and in awareness of the lack of capacity of the Rwandan legal system to adequately deal with high-ranking perpetrators, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR). To deal with the incredibly high number of suspected perpetrators (130,000 accused) who were detained in Rwandan prisons, the Rwandan government also established community-based tribunals. However, more than ten years after the genocide, all judicial bodies are still facing tremendous problems. Still less than six per cent of all perpetrators have received their final judgement, while thousands of people are still held in detention without proper trial. Hence, the ten years of experience with the Rwandan approach offer many lessons to learn from.

The legacy to deal with – genocide
Since spring 1994 Rwanda has been the synonym for the horrific slaughter of about 800,000 people in one of the largest genocides ever. Often ethnic resentments and centuries of tribal warfare were evoked as underlying causes for the massacres of Tutsi and moderate Hutu. A closer look at the conflict reveals a different, far more complex dynamic. In order to understand how such an atmosphere of hatred between Tutsi and Hutu could develop, one has to look back at Rwanda’s colonial and post-colonial history.

While Hutu and Tutsi are often referred to as two separate ethnic groups, scholars point out that the division is based more upon social class than ethnicity. Members of both groups speak the same language, share the same culture, and have a history of intermarriage. The Belgium colonial power turned existing social differences into racial identities and then constructed the Hutu as indigenous and the Tutsi as alien. These categories were further enforced through introducing identity cards in 1933. All Rwandans

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had to carry their cards indicating their ethnicity at all times. Those cards later played a calamitous role in the organization of the 1994 genocide.

In the later years of their colonial rule the Belgians changed their strategy and encouraged the Hutu majority, whom they considered as being more simple minded and thus easier to control, to gain political power. Civil war forced many Tutsis into exile. The country became the independent nation of Rwanda on 1 July 1962 under Hutu–rule. Hutus remained in power for the following decades.

In 1973 a military coup d'état brought Juvenal Habyarimana into power, promising national unity. He tried to reach this goal by establishing a one-party state, totalitarian in nature. During the same time, Rwanda suffered from a deep economic crisis, due to the collapse of the cash crops and natural resources, particularly coffee. The sudden drop in income for small farmers resulted in widespread famine. The consequence for the Rwandan state elite was devastating since the money required to maintain their position had mainly come from coffee, tin, and foreign aid. With the first two gone, foreign aid became even more critical, so that the Rwandan elite needed to maintain state power more than ever in order to maintain access to these funds (Shah 2003).

In October 1990 the Rwandan Patriotic Front (RPF) – Tutsi rebels in exile in Uganda – invaded Rwanda in an attempt to overthrow the Hutu-led Rwandan government. The state was confronted with crisis from two directions: economic collapse precipitated by the fall in coffee prices, and military attacks from Tutsis who had been forced out of the country by ethnic rivalries arising from the colonial policies.

The Habyarimana government was able to use the invasion by the RPF to justify requests for more foreign aid. The French began providing weapons and support to the Rwandan government, and the army grew from 5,000 soldiers in October 1990 to 40,000 by mid 1992. A French military officer took command of the counter-insurgency operations. Habyarimana used the incursion by the RPF to arrest 10,000 political opponents, and permitted the massacre of some 350 Tutsis in the countryside (Shah 2003).

In spite of increased state oppression and the French-supported build-up of the armed forces, 50,000 Rwandans marched in a pro-democracy demonstration in the country's capital Kigali in January 1992. Hutu extremists in the government wanted to eliminate the opposition. But instead, Habyarimana introduced democratic reforms and allowed members of the opposition to assume government posts, including that of prime minister. At the same time he also authorised the establishment of death squads within the military – the Interahamwe – who were trained, armed, and indoctrinated with racial hatred towards their Tutsi compatriots (Robbins 2002).

In April 1994, the plane with the presidents of Rwanda and Burundi was shot down, killing both. This incident sparked the genocide. The presidential guards began murdering Tutsi opposition leaders and the Interahamwe (a 30,000 member militia group by then) began large-scale killings aimed at eliminating the entire Tutsi population. The Interahamwe led the

26 Who is responsible for shooting down the plane remains unclear. One theory suggests it was Hutu extremists who rejected the Hutu-Tutsi power-sharing plan proposed by President Juvenal Habyarimana, a Hutu moderate. In 2004, a French judge asserted that it was the current Tutsi president, Paul Kagame, who has vehemently denied the charge.
genocide but, goaded by radio propaganda, ordinary Hutus soon joined in massacring their Tutsi and moderate Hutus neighbours. In only 100 days, Hutu extremists rampaged through the country killing an estimated 800,000 Tutsis and moderate Hutus. Most killings were carried out with cheap imported machetes. Although the genocide seemed to be a spontaneous eruption of hatred, it has been carefully prepared in advance and orchestrated by the Hutu government (Shah 2003).27

Despite horrific reports of mass killings, no country came to the victims’ assistance. The UN had 300 soldiers in Rwanda when the killings started, but their mandate prevented them from stopping the genocide. The international community withdrew completely after ten of its soldiers were killed. In response to the UN’s failure to stop the massacres, the Tutsi RPF under Paul Kagame swept across the country, seized Kigali and finally put an end to the killings.

In the aftermath of the genocide, an estimated 1.7 million Hutus fled across the border into neighbouring Zaire (now the Democratic Republic of Congo (DRC)) and Tanzania. 28 Although Tutsis took control of the government, they permitted a Hutu, Pasteur Bizimungu, to serve as president, attempting to deflect accusations of a resurgence in Tutsi elitism and to foster national unity. Paul Kagame became vice-president. In April 2000, President Pasteur Bizimungu resigned and Paul Kagame became the first Tutsi president of the Rwanda.

In May 2003, 93 per cent of the voters approve a new constitution that instituted a balance of political power between Hutu and Tutsi. For example, no party can hold more than half the seats of the parliament. It also outlawed the incitement of ethnic hatred. In the 26 August 2003 presidential elections, Paul Kagame won a landslide victory. In June 2004, former president Pasteur Bizimungu was sentenced to 15 years in prison on charges of inciting civil disobedience, associating with criminals and embezzling public funds. Many consider the trial politically motivated (Shah 2003).29

The international tribunal, the national courts and the Gacaca system

The Rwandan approach is a unique example of the combination of international, national and local legal means, namely the ICTR created and run by the UN, the Rwandan national courts, and the village-level Gacaca tribunals. This innovative three-way division was partly born out of necessity and due to the high number of perpetrators and the fear that a culture of impunity will continue if the accused were not put on trial within an appropriate time span.

The people accused of genocide were divided into four categories:

Category 1: The planners, organizers, and leaders of genocide, those who acted in a position of authority, well-known murderers, and those guilty of rape and sexual torture.

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28 Many of the Hutu extremists that fled to neighbouring countries in the aftermath of the genocide returned during the following years to their communities and lived door to door with survivors of the genocide.

Category 2: Those guilty of voluntary homicide, of having participated or being complicit in voluntary homicide or acts against persons resulting in death, of those having inflicted wounds with intent to kill or who committed other serious violent acts which did not result in death.
Category 3: Those who committed violent acts without intent to kill.
Category 4: Those who committed crimes against property.

Those belonging to category 1 are referred to the ICTR, whereas people from category 2, 3, and 4 are referred to both the national courts and the Gacaca tribunals.

The International Criminal Tribunal for Rwanda (ICTR)
Recognizing the enormous scope of the crimes and human rights violations committed committed in Rwanda, and acting under chapter VII of the UN Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994. The ICTR was established for prosecuting people responsible for genocide and other crimes against humanity committed in the territory of Rwanda and the territory of neighbouring states between 1 January and 31 December 1994. It delivered the first-ever judgement on the crime of genocide by an international court and defined for the first time the war crime of rape, which was frequently used as an instrument of harassment during the genocide.

The tribunal consists of three organs: The chambers and the appeal chamber; the office of the prosecutor, in charge of investigations and prosecutions; and the registry, responsible for providing overall judicial and administrative support to the chambers and the prosecutor. The UN Security Council decided that the Tribunal would be located in Arusha, Tanzania and would be staffed with over 1,000 employees.

The guilty plea and subsequent conviction of Jean Kambanda, former prime minister of Rwanda, set a number of precedents. This was the first time that an accused person acknowledged his guilt for the crime of genocide before an international criminal tribunal. It was also the first time that a head of government was convicted for the crime of genocide.

As of May 2005, the ICTR has handed down 19 judgements involving 25 accused. Another 25 accused are on trial. The first trial at the ICTR started in January 1997, following the arrival of the first accused to Arusha in May 1996. The trials conducted during the first mandate of the ICTR (from May 1995 to May 1999) led to six judgments involving seven accused. The trials conducted during the second mandate (from May 1999 to May 2003) led to nine judgements involving 14 accused.

At the present point in time, there are still nine trials in progress, involving a further 25 accused. They include eight ministers, one parliamentarian, two prefects, three bourgmestres, three military officers, and others who held leadership positions at the time of the genocide.

The detainees whose cases are already closed were arrested in Tanzania, Cameroon, Kenya, Benin, Cote d'Ivoire, Namibia, Togo, Zambia, Burkina Faso, Mali, Democratic Republic of Congo, South Africa, Belgium, Switzerland, the Netherlands, and in the United

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States of America. Those who are still awaiting trial are under arrest in Arusha, where a new prison was built specifically for this purpose.

The national court system
Out of the large number of accused individuals that were arrested in relation to the genocide, it was decided that the ICTR should only deal with the highest-ranking organizers of the massacres or those who played an important role in the propaganda machinery, whereas the national judicial system of Rwanda should be responsible for those tens of thousands of lower-ranking accused. However, soon it became clear that the Rwandan legal system was neither prepared for the delivery of fair processes nor for the detention of the huge number of accused. The pre-genocide national judicial system was weak, possessing limited resources, insufficiently trained personnel, and a lack of judicial independence. The judicial system hence collapsed completely in 1994, when court buildings were ruined and the very few qualified professional lawyers and judges were either killed, had participated in the genocide themselves or had fled the country. The Rwandan government, with considerable assistance from various UN agencies, foreign governments and non-governmental organizations, implemented provisions contained in the Arusha accords dealing with the reorganization of the judiciary. The principal objective was to materially reconstruct the judicial system’s infrastructure and train the judicial personnel. Courts hearing civil and criminal cases not related to the genocide became operational in September 1996. Special genocide chambers established within each of the national courts of first instance/magistrates' courts began hearing cases involving the crime of genocide, war crimes, and crimes against humanity in December of the same year.

The establishment of the special genocide chambers marked a significant step towards attaining retributive justice and ending a culture of impunity, but serious problems remained. Prior to 1994, the capacity of Rwanda’s 19 prisons was said to be 18,000 detainees. New prisons and extensions to existing prisons could not keep up with the tens of thousands of new arrests and detentions. Between mid-1994 and mid-1996, the population in Rwandan detention facilities rose to more than 90,000. This population peaked at around 124,000 in 1997 and 1998 with approximately 70 per cent held in the country’s 19 prisons and the remaining 30 per cent in district detention facilities, named cachots. The prison population has remained high, despite significant reductions in the rate of arrest and detention of alleged genocide perpetrators and a functioning criminal justice system, because of the transfer of tens of thousands of detainees from district detention facilities to prisons. In early 2003, the Rwandan government announced that it would close four of its 19 prisons because of the risks they posed to the health of inmates and the surrounding population. It was able to do so because of the provisional release of detainees, approximately 20,000 in early 2003 and 30,000 in April 2004, and the construction of a new model prison (Amnesty International 2004). In July 2005, another 36,000 prisoners were freed from jail to face the Gacaca tribunals in their home communities instead. The number of suspects still held in state prisons thus remains around 40,000 (Vasagar 2005).

Preventable diseases, malnutrition and the debilitating effects of overcrowding resulted in a reported 11,000 prison deaths between 1994 and 2001. There have also been reports of deaths in custody resulting from the physical abuse of detainees by prison officials. At the end of 1999, 17 out of 19 prison directors were dismissed, and 15 of them were jailed for corruption and ill-treatment of prisoners. While there has been a consistent amelioration of prison conditions in the last few years, the severe overcrowding and unsanitary conditions
Within Rwandan prisons continue to constitute cruel, inhuman, and degrading treatment and provoke continuous protest from human rights organizations (Amnesty International 2004).

The Gacaca tribunals

In light of the immense problems the Rwandan judicial system was facing in relation to the tens of thousands of people accused of participation in the genocide, the government came to the conclusion that a conventional European-style justice system could not be the only solution to Rwanda’s problem and that additional means of jurisdiction were needed. In 1999, this led to the proposal of establishing so-called Gacaca courts, an adapted system of participatory justice, based on traditional community conflict resolution mechanisms. The government engaged in discussions with civil society representatives and the international community, published a paper on the Gacaca jurisdictions in July 1999, and passed legislation establishing the Gacaca tribunals in early 2001. Later this year, 260,000 respected adults with integrity were selected by local communities to serve as magistrates on the more than 11,000 planned Gacaca tribunals, each of which has 19 magistrates.

The main principle of the Gacaca courts is to bring together all of the protagonists at the actual location of the crimes and massacres, i.e. survivors, witnesses, and the accused. All of them share their story of what happened in order to establish the truth, draw up a list of victims, and identify the guilty. The debates are chaired by the newly-trained magistrates.

According to the Rwandan government, the advantages expected from the Gacaca courts are:

• The process will be sped up and neither the victims nor the suspects will have to wait for years for justice to be done.
• The cost to the taxpayer for the upkeep of prisons will be reduced, enabling the government to concentrate on other urgent needs.
• The participation of every member of the community in revealing the facts of what happened in 1994 is the best way to establish a comprehensive account of events.
• The Gacaca courts will end the culture of impunity that prevailed in the first years after the genocide by enabling communities to deal with the genocide and other crimes against humanity.
• The new courts will put into practice innovative methods in terms of criminal justice in Rwanda, in particular sentencing people to community service to aid the re-integration of criminals into society.
• The application of law should aid the healing process and national reconciliation in Rwanda, which is seen as the only guarantee of peace, stability, and future development of the country, as well as obliging the Rwandan people to take political responsibility.

Besides contributing to justice, the Gacaca system, is also regarded as a key means of establishing a record of the events of the genocide, and of forging renewed trust and solidarity amongst the Rwandan people. Thus, the Rwandan government views the system not exclusively as a means of practically accomplishing and speeding-up the delivery of justice to the thousands still awaiting trials, but also as a key restorative mechanism in post-genocide Rwanda, one of the principal means by which their goal of national reconciliation can be achieved.
Critical reflections on the Rwandan way

When the ICTR was established in 1994, it was supposed to be a milestone in the establishment of political and legal accountability by delivering the first-ever verdicts in relation to genocide by an international court. The tribunal was intended to spread the lesson of the Rwandan genocide in order to avoid a repetition of the ultimate crime. This aim was related to the fact that weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships. It was hoped that the ICTR’s work would send a strong message of ‘Never again!’ Furthermore the Tribunal was intended to contribute to the process of national reconciliation in Rwanda and to safeguarding peace in the region.

However, the fact that the ICTR is located outside of Rwanda makes it impossible for the majority of Rwandans to follow its proceedings. Many people do not feel that its work has had any impact on their personal life so far. Even those who know more about the ICTR’s work or have been invited to give testimony as witnesses before the court, report their disappointment (Madre 2004). More than ten years after the ICTR was established it has processed such a limited number of cases that people have started to question the ICTR as such and the enormous financial resources that have been spent on it so far. The first two periods of the ICTR’s mandate resulted in 15 judgement out of 21 accused. Another nine trials covering 25 suspects are currently in progress.

In comparison to the hundreds of perpetrators that are still awaiting their trials and the $1 billion cost of the ICTR process so far, this number remains incredibly low and has provoked strong criticism not only from Rwandans themselves, but from various human rights organizations, donors, and politicians from different countries within and outside of Africa, who doubt the effectiveness and quality of the ICTR’s work.

The ICTR explains and justifies the slow pace of its proceedings with several reasons. First, the cases are invariably complex. Second, they rely on testimony from witnesses, most of whom are residents of neighbouring Rwanda. Third, many witnesses testified in Kinyarwanda, the language of Rwanda, and not in English or French, the two official languages of the court. The ICTR had to employ and train some 20 interpreters and finally switched to using simultaneous translation to speed up proceedings. Furthermore the tribunal claims that it runs far better now, and that the criticism and the poor image stem mainly from problems in the early stages, when the ICTR was still plagued by a fundamental lack of infrastructure. Given that the media, according to an ICTR spokesman, has barely followed the workings of the tribunal since then, its reputation has remained tarnished (Carmichael 2003). In contrast, the war crimes author and researcher Peter Maguire pinpoints the court’s conduct as symptomatic of the double standards that apply to the international community’s prosecution of such crimes. He argues that language and infrastructure are no excuses for poor procedure. They are technical problems that can be overcome provided there is enough political will and international support. The very fact that such excuses are used by the ICTR to explain its poor performance so far goes to the heart of the tribunal’s problems (Carmichael 2003).

One of the ICTR’s most serious shortcomings is its lack of witness protection. Since its inception, people perceived to be cooperating with the ICTR have been harassed,

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threatened and, in several cases, assassinated. Over 200 genocide survivors were killed in 1996, in attacks that many Rwandans see as attempts to prevent them from testifying. Despite these dangers, the ICTR’s witness protection program is largely fictional. For instance, there is only one person assigned to the entire city of Kigali. It is an impossible task for a single individual to protect the thousands of assumed victims and potential witnesses in this city alone.

A corollary to the physical danger is the lack of psychological support for witnesses. Despite the advice from victims’ advocates and mental health workers involved in the South African TRC process the ICTR does not provide this essential service to the witnesses who relive the horror of brutal assault, rape, and murder during their testimonies. Rwandan women also tell of renewed nightmares, hallucinations, and emotional breakdowns after testifying before the tribunal. Given these major shortcomings, the whole process risks doing more harm than good to the victims who are willing to come forward to give their testimony.

Another focus of serious criticism is the way the court regards human rights violations particularly aimed at women, specifically the crime of rape and sexual abuse. Human rights and women’s rights organizations point out that so far the ICTR has hardly brought any perpetrator of rape to justice. Despite the fact that during the genocide unnumbered girls and women became victims of gross sexual violence, the ICTR has initially neglected to investigate, much less prosecute, sexual violence. In June 1997, after international pressure from a coalition of women’s groups, the ICTR finally amended a single indictment to include charges of rape. During the trial, ICTR staff discovered that two of the witnesses had testified before, but had omitted evidence of rape because no investigator had asked them about sexual violence.

The ICTR itself argues that it would like to investigate cases of rape, but that the victims have failed so far to bring their reports of these cases to the court. However, Rwandan and international women’s rights organizations say the victims would gladly co-operate if they only had some indication that the tribunal would actually punish rapists and provide witnesses with a minimum of respect, safety, and psychological support. Survivors have also repeatedly made clear that they are uncomfortable describing their ordeals to men. Yet there are very few female investigators or translators. None of the investigators is properly trained to work with rape survivors. Instead, they rely on the standard human rights model of documenting testimony. Specific, intrusive, and repetitive questioning might guarantee the validity of the evidence, but it is not an approach conducive to enabling a rape survivor to speak about her experience. Even women who might be willing to endure such questioning are challenged by the ICTR’s method of gathering witnesses. Ignoring criticism from Rwandan women’s organizations, teams of foreign, male UN investigators travel throughout the country, publicly inquiring whether anyone there has been raped. This practice completely ignores the fact that anonymity is a necessity for women who, if publicly identified as rape survivors, are likely to be banished by their communities and to lose their homes and livelihoods.32

Similar criticism affects the Rwandan national court system. It is said to be slow, ineffective and inefficiency. So far, Rwanda’s special genocide chambers have tried less than six percent of those detained for suspected genocide offences. The problems faced by the post-

The genocide judicial system in Rwanda have proved insurmountable. The majority of the arbitrarily arrested 130,000 suspects who have been held in detention since 1994 have never seen a lawyer or a judge, or even got access to information about the state of their trials. Despite the release of tens of thousands of detainees during the last two years, about 40,000 Rwandans still remain in the country’s overcrowded and unsanitary detention facilities. The Rwandan government tried to justify arbitrary arrests and unlawful detentions, arguing that it needed to eradicate a culture of impunity. It claimed that individuals suspected of involvement in the genocide had to be detained, even though the state lacked the infrastructure and personnel to investigate the validity of the allegations or try them in a court of law. With the re-opening of the Rwandese courts in 1996 those arbitrary arrests and unlawful detentions were legalized, but Rwandan human rights organizations and legal practitioners estimate that as many as one-third of current arrests and detentions still violate legal safeguards contained in the Rwandese Code of Criminal Procedures (CCP).

Another problem related to the parallel existence and practise of the ICTR and the national court system is the fact that they operate according to different legal standards. Whereas the ICTR operates under UN jurisdiction, which prohibits the death penalty and stipulates that detention should be in facilities that meet international standards, the national courts follow Rwandan jurisdiction, which allows the death penalty. This leads to the paradoxical situation that the ones most responsible for the genocide on trial before the ICTR are likely to face far better treatment than those minor perpetrators dealt with by the Rwandan legal system – a fact that causes strong sentiments and disappointment among many Rwandans.

At the time of their establishment, the Gacaca tribunals were celebrated as an innovative approach of delivering justice with local means. It was believed that these institutions, implemented at village level and with the compulsory participation of the entire community, would contribute to reconciliation at the national level. However, since the legislation establishing the Gacaca tribunals was enacted in early 2001, implementation seems limited so far. The ambitious goal of 11,000 functioning tribunals with 260,000 non-professional judges in charge has not been met as yet. And those courts already working have failed to meet expectations concerning their procedure and the immediate effects. First, they do not solve the problem of the sheer quantity of suspects. Designed to relieve the workload of the national court system, the Gacaca tribunals seem to struggle with similar problems of slow proceedings, ineffectiveness and lack of capacity to deal with the high numbers of accused. Furthermore, the relatively few Gacaca tribunals that have been working have also identified thousands of new genocide suspects. This number will undoubtedly grow when the remaining Gacaca tribunals become operational. These numbers pose a logistical nightmare that the Gacaca system in its current form cannot handle. Second, with non-professional judges who received just six days of training, human rights organizations have serious doubts about the courts’ professionalism and fairness. There is no control mechanism to avoid abuse. It might be that magistrates have to sit in judgment on their own friends and relatives, or even that they themselves were perpetrators during the genocide. There are also cases reported where people falsely denounced other members of their community in order to harm them or to take revenge for offences unrelated to the genocide. Furthermore, the weekly meetings that are the basis of all tribunals are suffering from decreasing attention from community members. In many villages people have become impatient about the long time the procedure takes.

A key complaint of many community members is that the Gacaca system is perceived as being biased. In people’s views only those who acted on behalf of the former government
are being tried and convicted. Others, who have committed equally horrendous acts but are supporters of the current government are spared by the Gacaca tribunals. Simply being a member of the official victim’s side does not necessarily free individuals from guilt and wrong-doing. Many Gacaca tribunals fail to address this matter sufficiently.

The Gacaca courts are meant to catalyse reconciliation among the traumatised Rwandan society, but at this point in time it seems impossible to already analyse any long-term impact. However, the idealised picture of villages listening to the confessions of former perpetrators, accepting their plea for forgiveness, and hence re-welcoming them within their communities seems in many cases far from reality. Some Rwandans say that they are glad the Gacaca courts exist for the reason of their own security: “If someone like […] is your neighbour, now that it’s been pointed out that he contributed to the genocide, you can take care of yourself, you can be safe, if something like that happens again. Now you know which of your neighbours are the killers.” (Quoted in Asiinwe, in The Independent, 30 July 2005). This statement reminds us that forgiveness and reconciliation are deeply psychological processes that cannot be enforced from the outside. It is worth thinking about providing guidance and psychological support to the magistrates as well as to entire communities that follow the weekly testimony sessions on a compulsory basis. Again, the incredibly high number of perpetrators might make such an idea impossible to realize. But given the amount of money allocated to the ICTR for the very few individuals on trial and the efforts of the Gacaca system to deal with the bulk of perpetrators the need for additional funding for the latter is obvious.

A recent increase in the number of Rwandans fleeing to neighbouring countries raises serious concerns. In the months of April and May 2005 approximately 7,000 people have fled Rwanda to seek asylum in Burundi. Ruud Lubbers, the former UN High Commissioner for Refugees (UNHCR) indicated on 13 May of this year that people are fleeing their country because of fears over the Gacaca tribunals. This matter deserves careful investigation in order to find out more about their motivation for leaving Rwanda. Do they expect inappropriate treatment of their case by their fellow community members who are now functioning as their judges? Do they fear social exclusion after giving testimony about the committed atrocities? Are they afraid of revenge? Or do they simply not know what to expect because no-one has told them in detail?

Rwanda’s three-pronged approach combining the ICTR, the national court system and the community-based Gacaca tribunals is a unique example of a transitional justice process. While trying to address the past through different channels, it also gives evidence of the huge gap between good intentions and difficult realities. Being aware of the situation that Rwanda faced right after the genocide, it seemed a priority to create a means to prevent a culture of impunity. The fact that the global community, as represented by the UN, felt guilty for not preventing the genocide, contributed to the strong international commitment to the creation of a tribunal. However, given the huge number of supposed perpetrators, it was clear that the long-term impact of the ICTR would rather lie in its role as a signal and precedent-setting institution, than in its practical implications for Rwanda.

In the Rwandan case, it might have helped to clarify the objectives of and the expectations from the process from the very beginning – not only among the international community and those from outside enforcing the process of transitional justice, but also among Rwandans themselves. Punishing all perpetrators was an unrealistic goal from the very beginning and it is questionable whether imprisoning such a significant proportion of the
country’s population will support efforts to re-unite and reconcile Rwandan society. In order to enable trust-building and forgiveness at community-level, profound support and professional guidance need to be given sufficiently. To support the overall aim of transitional justice in Rwanda, local mechanisms like the Gacaca tribunals are encouraged, but need proper planning and implementation. They were meant to catalyse reconciliation and trust-building, but such ambitious goals will not be achieved as mere side-effects. They need to become an objective. Instead the motivation behind the creation of the Gacaca tribunals was a problem-solving one in relation to the logistical nightmare of tens of thousands of suspects awaiting trial in the country’s detention facilities and a national court system not having the capacity to deal with it. Given the Rwandan challenge, which is without parallel in recent world history, a combined approach that embraces entire communities seems to be the right approach, but with significant weaknesses in design and implementation so far. Both the Rwandan government and the international community have to learn from the bitter experiences of the last decade. Current changes, like the increasing attention given to local-level reconciliation efforts, are promising, but must not be limited to lip-service. They need continuous support and efforts from all sides.

In critical reflection of the lessons learnt from Rwanda, it is important to bear in mind that there are situations where the legacy and burden of the past cannot be dealt with sufficiently by any approach. The genocide of Rwanda is such a case, where about 800,000 people out of a population of 4.5 million were killed in just 100 days. Any approach must necessarily reach its limits when trying to address such an enormous number of crimes followed by broad societal trauma. Even if well implemented, no approach can meet the expectations resting on it. It is therefore important to differentiate between practical shortcomings that could be overcome with sufficient political will and united efforts, and the personal and societal wounds that will need far longer to heal, whatever approach is chosen.

Putting it all together – challenges for transitional justice processes
Before concluding with some key issues for consideration in relation to the initiation and implementation of any truth, justice, and reconciliation process, it needs to be pointed out that there is no universal recipe, no check-list, and set of instructions for rendering justice and reconciliation, neither at the individual nor at the societal level. The challenges in relation to the difficult task of dealing with a violent past vary from case to case, thus experiences cannot be generalised to ultimate lessons learnt. But despite the need of a case to case assessment, there are certain factors that greatly influence the success chances of tribunals and commissions.

The need for popular commitment to the process
Probably the most important condition is the necessity of popular commitment to the transitional justice process. Widespread support is needed if the past is to be investigated. Even if total consensus is impossible, an attempt should be made to reconcile the various versions of the past and at the same time to acknowledge and respect the different views of all parties participating. Reconciliation in this context means reconciliation of memories. All
sections of society can contribute to the creation of a framework in which this attempt for consensus can take place. (Example: South Africa)

In all three case studies elaborated above, there was an agreement that crimes of the past should be investigated and that transitional justice mechanisms had the potential to support a reconciliation process and hence should be supported.

**Clarifying the objective and the level of support in advance**
It is vital to clarify the objective of the process and assess the level and quality of national and international support the process is likely to receive in advance. Those two factors contribute to determining both the structure and the mandate of the justice and reconciliation-seeking body, and its likely chances of eventual success.

An in-depth enquiry must be done of what people need most, what they expect, and what will help them to improve their situation and to come to terms with their past as best as possible. However strong the urge for vengeance in the first instance, and the wish to see the perpetrators pay for the grief they caused, what people initially want and what a certain situation demands for the best long-term benefit might be of different nature and compromises have to be negotiated openly. Drawing on the experiences from the case studies it seems questionable, whether imprisoning large parts of the society in question will render justice and contribute to reconciliation.

A realistic assessment is demanded in terms of financial, personal, and professional resources needed. Case study experiences varied from strong international backing and the provision of enormous resources, to cases where hardly the minimum of support needed was made available. Hence, the availability of resources determines the possible options to a strong extent. (Example: Rwanda)

**Co-operation of different approaches**
As the case of Sierra Leone shows, a combination of approaches with different objectives runs the risk of interference and competition between them while aiming at delivering justice. In such cases, it is tremendously important to clearly define the objectives and resulting mandate for each institution. This helps to identify strengths and potential limitations. International tribunals have capacities that national or community-based mechanisms do not have, and vice versa. Frustration can be avoided if all institutions involved work co-operatively to combine their capacities and to serve different aspects of the same goal, namely to deliver justice. (Example: Sierra Leone)

**Keeping expectations realistic**
It is essential to keep expectations realistic, both in terms of the process itself and its outcomes. This can help to prevent serious disappointment and an erosion of trust and commitment. From a practical perspective, it might be advisable to start small and let the spark spread later on, if first successes are visible. It seems preferable to work upward from the basis of a single successful pilot-project, rather than working downward from an overambitious master-plan that faces enormous obstacles becoming a reality.
From the victims’ perspective it might even be impossible to avoid disappointment to some extent, since no punishment for the perpetrator and no truth commission hearing can undo their traumatic experiences and compensate for their loss. It is therefore important to clearly distinguish between failures of process and lack of political will to succeed on the one hand and the inherent limitations of any process to deal with large-scale human rights violations, war crimes, and genocide on the other hand, in order to enable continuous focused improvement and to allow a fair judgement about the institution’s performance. (Examples: South Africa, Sierra Leone, Rwanda)

**Transparency and civil society involvement**
Since it is the sum of individual reconciliation that contributes to community and national reconciliation, as many people as possible should be encouraged to become involved in any kind of official attempt of dealing with the past. Thus, the chosen approach should be one favoured by a majority of the population on the one hand in order to gain broad acceptance, while it needs to put the interests of the victims in the centre as to build a strong basis for social healing.

The case studies demonstrate that a high level of transparency during the process and widespread media coverage encourage and enable civil society participation. Both increase the meaning of the process for the individual. In the case of South Africa the high level of media attention at national and international level and the public hearings, helped people to identify with the work of the TRC and encouraged them to contribute. It seems to make a big difference to the success of any approach if people regard themselves and their contribution as being the centrepiece of the process, rather than just a by-product of official legislation and procedures. (Examples: South Africa, Rwanda)

**The importance of practical matters**
The importance of practical considerations is often under-estimated in the choice of process and location. If a tribunal or a commission is placed out of reach for the average citizen – as in the case of Rwanda – interest in, contribution to, and identification with the process is likely to be very low.

Furthermore it might be worth asking people first what level of resources, in terms of time and effort, they are able to invest in the process – be it as active testifiers or as passive witnesses. Attending weekly meetings or whole days in court is often simply not compatible with people’s other tasks and responsibilities. A failure to participate in such demanding or time-consuming processes does not necessarily indicate a lack of interest, as is sometimes misinterpreted. (Example: Rwanda)

**Avoiding victor’s justice**
Another serious matter requiring consideration is the character of the conflict in question. Reflection is needed on both its root causes and on the motives of the conflicting parties for perpetuating it. Is there a moral victim, a moral perpetrator? A process of transitional justice does not mean to equalise both sides, nor to wipe away wrong-doings of the past. All sides have a right to their own perspective, and so all views need at least to be heard, in order to avoid simple victor’s justice. In most conflicts there is a tension of power-bias often between different ethnic or religious groups or between the official governmental and
a rebel group. It is important to question the images of the ‘good’ and the ‘bad’ guys, as any explanation along lines of simple duality is likely to have serious shortcomings. Furthermore, reconciliation is a process that ideally embraces everyone in the society, thus including also former perpetrators. Stigmatisation of a particular group might alienate them from contributing to the transformation process and excludes them from the achievement of dealing with the violent past. (Example: South Africa)

**Political implications**
As all three case studies in one way or another show that many causes of and contributing factors to violence and oppression are rooted deep in history. In order to create a basis for reconciliation it is important to end cycles of vengeance through a clear break with the past. At the same time, those root causes – if still relevant – need to be analysed and dealt with in the plan for further action. Significant economic disparities, for instance, are beyond the remit of any court or commission, but should be placed high on the wider political agenda to avoid long-term societal grievances. (Examples: South Africa, Rwanda, Sierra Leone)

**Addressing the involvement of children in conflict**
A particular challenge in the choice of an appropriate approach to dealing with the past is often the involvement of children in the conflict. Under international legislation children are people under the age of 18. They deserve special treatment as witnesses, victims or perpetrators. The use of children as combatants is a war crime. The case of Sierra Leone is a valuable example of an approach that pays high regard to the important role that children play in a conflict as well as in a process to deal with the legacy of a violent past. It shows that prosecution is not necessarily the only approach of dealing with perpetrators, and that the decision does not need to be one between bringing them to court and impunity. It can contribute to the recovery and the re-integration of those children to give them the opportunity to confront themselves with the grief and suffering they have brought on others, and to confess their acts of violence. However, children need support and guidance in this process – the younger they are the more intensive a support is demanded. They need a clear understanding of where this process is going to lead them. (Example: Sierra Leone)

**Timing and security aspects**
Timing can be another important factor. In some cases it is wise to wait until key position in politics, in the security organs, and the civil service are no longer controlled by followers of the former regime. But experience also shows that the period between the end of the conflict and the implementation of any institutional response should not be too long. It is impossible to formulate any clear advice on when best to start with a transitional justice process that is applicable to all conflict situations. Conflicts are no linear processes with a clearly marked starting point and a clearly defined end, and first steps towards truth-telling, justice, and reconciliation do not necessarily require a clear-cut cessation of fighting as a pre-condition. However, whatever process is undertaken needs careful thought, and the more uncertain the general situation is, the higher is the need for special security efforts. Security for witnesses and confessors should thus be a high priority. (Examples: Sierra Leone, Rwanda)
Material and financial restitution and reconstruction

It is obvious that there are certain experiences, psychological and physical violations, and losses that can never be compensated for by material or financial means. However, victims from all three different case studies have highlighted how important compensation is for their self-perception. On the one hand, it can support the victim in building up a new life (re-building of a house, buying animals, setting up a small business, etc.). On the other hand, it can be seen as a sign of acknowledgement of their suffering. Those who have received compensation they consider inadequate, or who have not received any compensation at all, feel humiliated and not taken seriously as victims. (Examples: South Africa, Sierra Leone, Rwanda)

In many cases, a comprehensive policy of compensation is difficult to implement. For instance, if it remains unclear who is personally responsible for violations, or if those who should be made to pay simply do not have the means to do so. However, in any case the issue should not just be brushed aside, but should be publicly discussed with all involved parties. It might not always be financial or material compensation that is demanded by the victims and symbolic acts are often highly appreciated. For example, physical help from perpetrators in the re-building of destroyed houses and public facilities could be one possible alternative for compensating victims and showing remorse.

Promoting capacity-oriented approaches

Any society that has been through a period of violent conflict will undoubtedly have suffered from serious physical and psychological wounds. Nevertheless, it is not just trauma and violent experiences that constitute the minds of people living in conflict-torn regions. Any attempt towards post-conflict development and reconstruction should avoid general victimization of the society, but instead seek to identify and focus on the sources of resilience and the strengths within the community.

Just as important as providing the means for justice and reconciliation processes is continuous support in re-building and improving the livelihoods and the security of people. Thus, any approach should not exclusively focus on the past, but also work to create a better future. What people need most, next to attention to their personal story, is support in continuing their lives. In short, approaches should be capacity- and not deficit-oriented.

Final remarks

Despite the many lessons still to be learned, recent developments in the field of transitional justice are promising. Many efforts have been made to address widespread human right abuses, war crimes, and crimes against humanity with the intention of bringing to an end a culture of impunity. This paper has shown that a lot can be done to pave the way for a process that benefits the survivors of violence and contributes to the rebuilding of a conflict-affected society. Certainly, all steps have to be considered seriously, since justice and reconciliation processes do not allow for continuous trial and error. But the experiences of the case studies show that many problems are avoidable with careful thought and concerted action. Finally, we must remember that far worse than making mistakes might be failing to deal with the legacy of the past at all.
References

Adam, Heribert & Adam, Kanya. 'The Politics of Memory in Divided Societies', in James, Wilmot & van de Vijver, Linda (eds.) After the TRC – reflections on truth and reconciliation in South Africa. (Athens: Ohio University Press, 2001)


Welschen, Saskia. ‘Coming to terms with the past – Trials and truth commissions on the road to reconciliation’, MA dissertation, handed in at the University of Amsterdam/The Netherlands in May 2001.

**General websites on transitional justice:**


