

Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions – can they work together?¹

Howard Varney*

Introduction

In recent times the global community has directed considerable efforts at preventing a repeat of the most serious international crimes, through the establishment of international tribunals. At the same time, individual countries ravaged by internal conflict have also taken steps to redress the wrongs of the past either through domestic prosecutions and, or truth and reconciliation commissions (TRCs). Such justice and truth initiatives have made significant contributions towards the beginnings of a new global culture of justice and humanity.

Most transitional justice initiatives have tended to involve a focus either on criminal prosecutions or truth, reconciliation and healing. There appears to be some merit in the view that it is not possible for retribution and reconciliation to take place at the same time, both at the level of principle and practice. Logically, retribution and reconciliation are contradictory tendencies. Retributive justice seeks to extract a measure of vengeance against those responsible for heinous crimes; whereas a truth and reconciliation initiative attempts to reconcile former warring parties and bring healing to a conflict ridden society. These objectives would seem to be mutually incompatible. At a practical level it would seem that attempts to prosecute and punish key role players would undermine attempts to bring national reconciliation and healing.

There is however an argument to be made out that countries struggling to recover from years of bitter and bloody conflict may in fact require the benefits to be derived from an integrated approach involving both punitive justice on the one hand and truth and reconciliation on the other hand.

This chapter seeks to answer two questions. First, whether in principle, retribution and reconciliation are in fact mutually destructive objectives. Secondly, even if this dilemma of principle may be resolved, is it possible at an operational level, to implement both programmes without conflict arising between the two and without the one initiative undermining the objectives of the other?

Nature of retributive justice and truth and reconciliation

Just as victims of crime in a domestic setting expect to see the due process of law take its place with a criminal investigation, prosecution and possible conviction and sanction, most victims of brutality in armed conflicts have a similar hope. A prosecution in open court, where the perpetrator has to answer to criminal charges and potentially face the consequences of his actions, must be the ‘first prize’ for most victims. Sadly, in the context of armed conflict, involving the committal of violations on a massive scale, this ‘prize’ is almost never realised. Criminal justice systems are not designed to deal with serious crime on the scale committed in the context of war or internal armed conflicts. Many justice systems,

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particularly in developing societies, struggle to deal with crime committed in peace time. No justice system would be capable of dealing with the scale of crimes committed in times of war and conflict. Indeed the justice system itself is inevitably one of the first institutions to be targeted for destruction in times of intense conflict. At the end of such conflicts the justice system often has to be rebuilt from scratch.

At an international level the global community has reacted to massive human rights atrocities in the former Yugoslavia and in Rwanda with the establishment of international criminal tribunals. Smaller hybrid courts, involving both local and foreign judges, prosecutors and investigators have been set up in Sierra Leone, East Timor, Cambodia and Bosnia and Herzegovina. In most of these cases the attempts to deliver justice have been confined to the prosecution of only those regarded to be the most responsible for the violation of human rights. This strategy is born out of necessity. World powers are only willing to devote limited resources, funds and skills to global justice. Even the most comprehensive initiative to combat impunity launched to date, the International Criminal Court, will be constrained in its efforts. In the foreseeable future it too will have to confine its cases to those few matters that will have the most impact in the countries where it exercises jurisdiction.

Thus, the vast majority of cases never receive the attention of any judicial process. It is this void that investigative and fact-finding bodies, often in the form of truth and reconciliation commissions, have attempted to fill. Even though most post conflict countries are not able to pursue justice in every case there is still a pressing need to address the conflicts of the past in some way; and in particular to combat impunity by exposing those behind the violence. In some cases the truth and reconciliation process is more than simply a fact-finding inquiry into the past. For such countries this process provides a platform from which to move forward. It is a nation-building process that becomes part and parcel of the transition from the violent past to a peaceful and democratic future. By putting up the detailed facts of the conflict a truth commission helps to build a history of the conflict, which is hopefully impartial and accurate. It is from these facts that lessons are gleaned for the future. Through a meticulous investigation of the antecedents to conflict a truth commission can determine the causes of the conflict. Understanding these causes helps the country in question to take the necessary measures to prevent the repetition of conflict.

Truth and reconciliation commissions typically focus on the larger patterns and trends and not just specific instances of human rights violations. They are often victim centred in that they provide a platform for victims to address the nation with their personal stories. Commissions organise events to promote reconciliation and tolerance between former enemies at the individual, community and national levels. A truth commission makes findings and in some cases it publicly names factions and individuals responsible. In so doing it advances the cause of accountability. A truth commission report may include recommendations aimed at addressing the underlying causes of conflict, which may include institutional reform measures. Many truth commissions have recommended the institution of a detailed reparations programme to redress the wrongs suffered by victims. Some commissions even recommend criminal prosecutions of specific role players in the conflict. Thus the mandate and objectives of typical truth commissions are considerably wider than those of typical war crimes tribunals and special courts.

There have been more than two dozen national truth commissions or fact-finding inquiries into past conflict established around the world, such as in Argentina, Chile, Guatemala, South Africa, Peru, Sierra Leone, Ghana, East Timor and, more recently, Indonesia and Liberia.¹

The goals of justice

The title of this chapter suggests that the goals of justice are limited to retribution and punishment. Criminal justice clearly has greater goals than just retribution. Paul Seils and Marieke Wierda, who compiled a prosecutions tool for use in post-conflict states, caution against justice policies being driven by a desire for retribution:

‘Policymakers should also have an informed view of the goals that drive a justice policy. For example, relying on a *deterrence* argument alone may raise expectations that are difficult to sustain, whereas an overemphasis on *retribution* may be confused and manipulated by opponents as calls for vengeance and may create conditions conducive to acts of revenge and reprisal. A better rationale for prosecutions of massive human rights violations is to convey to citizens a *disapproval of violations* and *support for certain democratic values*. A strong expression of formal disapproval by State institutions committed to human rights and democratic values can help to persuade citizens as well as institutions of the centrality of those values. Trials can help draw the distinction between conduct that is condoned and conduct that is condemned by the State, which contributes to the public’s trust in State institutions. The underlying purposes of prosecutions can therefore be seen in a positive light and may offer a more realistic justification than arguments based purely on deterrence or retribution.’²

Siels and Wierda argue that even though criminal justice is essentially concerned with the role of accused persons, the trend in criminal justice is increasingly focused on victims’ needs, so describing criminal justice as retributive is an ‘outdated and unhelpful caricature, as the goal should be more meaningful participation of victims in the process’.³ The rebuilding of public trust in the institutions of state, such as the courts, and the reaffirming of faith in the values of democracy and rights is an aspirational goal of criminal justice. Post-conflict societies that are unable to rebuild faith in the rule of law and the system of justice stand a good chance of sliding back into civil strife.

Efforts aimed at bringing justice to war criminals which make no attempt to build local capacity, and simply leave a local justice system in the same dysfunctional state, do not reaffirm faith in the courts. At best, local people may be impressed with the resourcefulness of the intervention; but once the trials have been concluded, and injustice is still the order of the day, cynicism, rather than reaffirmation, will set in.

Post-conflict choices

A country emerging from the trauma of strife and war will inevitably need to address a range of questions that go well beyond the need for retributive justice. Such countries have immediate objectives that include not only justice and accountability, but also the maintenance of peace, the building of democracy, the rule of law and economic development.

The United Nations principles for the protection and promotion of human rights through action to combat impunity⁴ (referred to as the Orentlicher Principles) requires action on the part of States and the international community that go beyond the duty to pursue justice. These include the obligation to promote the right to know, inclusive of the inalienable right to the truth; and the duty to promote the right to reparation and the guarantees of non-recurrence of violations. These objectives cannot be realised through the courts alone. Indeed, the principles envisage a broad and holistic approach to combat impunity which includes the use of both the courts and commissions of inquiries and the reform of laws and institutions.

Countries devastated by years of conflict face hard choices. These include where to allocate extremely limited resources, funds and skills. In reality few post conflict countries have the means to fully comply with the Orentlicher Principles. The challenge then is to carefully balance the competing demands facing post-conflict societies and to design a transitional justice package that addresses the most pressing wrongs of the past. The approach will be determined by the history of the conflict experienced by the country and its current circumstances.

Truth commissions have been set up in different contexts. From the early 1980s, Latin American countries such as Argentina and Chile, developed truth commissions or investigative commissions into the disappeared. During these times it was not possible to bring prosecutions because outgoing military leaders remained powerful and threatening to the new orders. In some cases, outgoing dictators awarded themselves amnesties in the dying days of tyrannical regimes. Nonetheless, most of these truth commissions recommended criminal prosecutions and, or handed over evidence to judicial authorities for further investigation.

Many commissions, particularly those in Africa, have been set up because of an inability to deliver criminal justice due to a dire lack of resources and skills. This reason is sometimes combined with a decision to exclude criminal justice in order to end war and bring warring parties to the negotiating table. At other times the justice process has been curtailed in order to keep the peace. In South Africa the commission process, with its truth for amnesty formula, was designed because of the need to keep the peace process on track and because of the impracticality of taking all cases to court. In Sierra Leone, criminal justice was initially excluded in order to end the bloody conflict. Prior to the breach of the Lomé Peace Agreement, the Sierra Leone Truth and Reconciliation Commission was seen as an alternate means of holding role players accountable.

Truth commissions or similar bodies have operated without criminal justice follow up, as in El Salvador. The Commission on the Truth for El Salvador, which submitted its report to the United Nations in 1993, concluded that justice could not be done in El Salvador. In particular, the Commission found that the judicial system was incapable of investigating crimes or enforcing the law in relation to crimes in which state institutions were implicated. The Commission came to the conclusion that recommending the pursuit of justice in this context 'could revive old frustrations, thereby impeding the achievement of that cardinal objective, reconciliation'.⁵

Criminal justice initiatives have taken place without a wider truth strategy. Rwanda, which experienced some of the most horrendous atrocities committed in recent times, opted for a criminal justice approach without a national investigation of the wider truth.⁶ Aside from the international initiative in the form of the International Criminal Tribunal for Rwanda, the country itself embarked on a comprehensive programme of criminal trials through its national tribunals and the Gacaca tribunals.

There are examples where countries in post-conflict transition have attempted to carry out both truth and justice initiatives simultaneously. In South Africa a transitional justice package was designed which envisaged perpetrators applying for amnesty on the basis of full disclosure. State authorities were meant to pursue criminal investigations and prosecutions against those offenders who declined to apply for amnesty or who were denied amnesty. Ad

hoc criminal trials took place in the domestic courts while the truth commission conducted its activities.

East Timor also adopted a transitional justice programme that involved the simultaneous pursuit of truth, reconciliation and justice. In the East Timor arrangement serious crimes were prosecuted by the Serious Crimes Unit ('SCU') under the Deputy General Prosecutor for Serious Crimes and tried by the Special Panels for Serious Crimes (collectively referred to as the 'Serious Crimes regime or process'). While these prosecutions were ongoing, the East Timor truth commission⁷ conducted its truth and reconciliation activities, which included the Community Reconciliation Procedures (CRP). The CRP involved a process whereby people accused of minor crimes and who complied with certain obligations acquired immunity from prosecution. The commission was required to refer serious human rights violations to the Office of the General Prosecutor with recommendations for prosecution.

While the Sierra Leone experience also involved the simultaneous pursuit of truth, reconciliation and justice, in contrast to South Africa and East Timor, this scheme was not created as part of a grand design. The simultaneous operation of the Truth and Reconciliation Commission and the Special Court for Sierra Leone was the product of events that transpired in the aftermath of the conflict.

There are examples of countries which have not pursued justice or truth and reconciliation. Mozambique, which experienced several years of intense strife, chose not to engage in criminal trials or the pursuit of truth and reconciliation programme.⁸

Justice and reconciliation

On one side of the criminal justice versus reconciliation debate is the proposition that justice and reconciliation processes make for uncomfortable bedfellows. According to this view the simultaneous operation of judicial and reconciliation processes serve to undermine each other's objectives. The former President of the Special Court for Sierra Leone, Judge Geoffrey Robertson even suggested that the Sierra Leone TRC should exclude the most serious perpetrators from its reconciliation initiatives because such persons may be on the court's suspect list.⁹ It has also been argued that the fact-finding process of the investigations into the truth, which leads to findings of individual responsibility, clashes directly with the judgment making functions of courts.¹⁰ These are not compelling reasons for abandoning the dual-model approach.¹¹

In support of the proposition that the pursuit of justice and reconciliation should not happen in tandem is the widely held view that there can be no lasting reconciliation unless the need for justice is effectively satisfied.¹² Put differently, the delivery of justice is a prerequisite for reconciliation.¹³ This approach essentially means that there are few things that can be done to promote reconciliation outside of justice-related goals.

While the effective and impartial delivery of criminal justice will serve the cause of national reconciliation, we should be slow to put up this deliverable as a strict precondition for reconciliation. This approach represents an extremely narrow and unimaginative view of the possibilities of reconciliation. Its major shortcoming is that it disempowers the very people it is meant to benefit. They are disempowered because justice is achieved essentially through the rigours of legal procedures and the courts, to which most people have little or no access or involvement. Reconciliation is then left to a small band of investigators, lawyers, prosecutors,

judges and experts to deliver. The associated risks of resting the achievement of reconciliation on the outcome of the justice process require little elaboration.

Delivering justice and addressing impunity are difficult enough tasks. There are huge uncertainties inherent in criminal trials. Prosecutions fail as often as they succeed. To rest reconciliation on the successful outcome of a legal process is a risky endeavour. This point was made forcefully in a unanimous decision of the South African Constitutional Court in 1996. The applicants in the matter contested the denial of their rights to judicial redress under the conditional amnesty provision of the truth and reconciliation process:

‘Most of the acts of brutality and torture [that] have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. ... Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act [that created the Truth and Reconciliation Commission] seeks to address this massive problem.

[...] The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones; to leave their yearning for the truth effectively unassuaged; to perpetuate their legitimate sense of resentment and grief...’¹⁴

Based on the practice of other countries, it does not appear to be accurate to say that criminal trials are a prerequisite for reconciliation. Mozambique, which experienced one of the bloodiest civil wars¹⁵ in the second half of the twentieth century, enjoys a measure of reconciliation even though there were no criminal trials, or for that matter a truth and reconciliation commission.² South Africa, which deprived many victims of judicial redress through its ‘truth for amnesty’ formula, also enjoys a measure of reconciliation notwithstanding its bitter and divided past.

Waiting for the effective delivery of justice, the setting out of the impartial truth, the issuance of adequate reparations and the meaningful reform of institutions in order to produce the

² Jeremy Armon, Dylan Hendrickson and Alex Vines, *The Mozambican peace process in perspective*, 1998. See in particular the remarks of the authors in the preface at <http://www.c-r.org/our-work/accord/mozambique/preface.php>: “While little pressure has been exerted on the warring parties to account for their past political blunders and human rights atrocities, ‘reconciliation’ in Mozambique seems to have proceeded remarkably well.”

desired reconciliation assigns the responsibility to government, its agencies and in many cases the support of the international community. However, acts of reconciliation have taken place even in the absence of justice, truth, reparations and institutional reform. These acts, big and small, occur at different levels. They range from genuine acts of leadership at national and community levels to meaningful acts and deeds between individuals. Most of these acts go unnoticed. Their cumulative effect, however, is to build reconciliation. Such actions can go a long way towards building tolerance and acknowledgement and respect for human rights.

There is a natural tendency in post-conflict situations on the part of most people to yearn for and to work towards peace and stability. This tendency can be described as the willingness and capacity to adjust to attitudes that support the values that underlie peace and stability, such as tolerance and respect for human dignity.¹⁶ The challenge is how to provide a framework for such willingness. The challenge is clearly greater in the context of societies whose institutions, including those meant to enforce rights, are largely dysfunctional. Nonetheless, there is much that can be done to build a new consensus around such values. This process will contribute to a culture in which people, including those who wield public power, are less likely to conduct themselves at the expense of others.

For most countries emerging from years of violent conflict the building of reconciliation and tolerance is a precious commodity that cannot be left to a balance sheet type approach. Ultimately there should be no 'preconditions' placed in the path of reconciliation, many, or all of which will never be met in the lifetimes of those struggling to maintain the peace and reconstruct shattered institutions.

Commissions and courts

Even when there is a robust judicial response to crimes of the past, it does not necessarily do away with the need for a detailed examination of the wider facts, which truth commissions can offer. Truth commissions are generally enjoined to provide the broad historical and political context of the conflict under investigation. It is arguable that courts ought to be able to do this, particularly courts adjudicating over international crimes such as crimes against humanity, where a widespread or systematic pattern of abuse has to be shown. It would however be risky to rely solely on the criminal justice process to provide the detailed contexts of conflict and to illustrate the patterns and trends of abuse. One court may take the time and effort to examine these aspects, but another court will not. It is the meticulous examination of the facts of the full conflict and its antecedents, the nature and characteristics of the conflict and its trends and patterns that permits the making of authoritative findings relating to the causes of the conflict and recommendations to prevent its repetition.

Court proceedings and judgments are not designed for these purposes. Much depends on what prosecutors put before the courts. In adversarial systems a court will only consider what one side or the other has placed before it. In courts little judicial notice is taken of context and background unless it can be shown to be directly relevant to the proving or disproving of an element of the crime. It is only these findings of fact which courts tend to regard as binding. Remoteness will always be an issue and is the reason why most courts will prefer to paint the context in broad sweeps rather than in detail. Courts generally deal with a very small number of cases and in those cases, a relatively small number of counts. Dealing with a small number of incidents makes it difficult for a court, constrained to apply a stringent standard of proof, to draw conclusions on patterns of violations.

Prosecutions cannot be relied upon to supply the impartial historical record of a conflict. While prosecutions ought to be strategic in that they should illustrate patterns of violations and expose the chain of command, we should look to other mechanisms, not constrained by the uncertainties of the legal process to provide the full context, history and patterns. Thus, a post-conflict country that confines its measures to address the legacy of the past to criminal trials runs the risk of delivering justice without reaching the wider truth.

It should be noted that impunity is not only addressed through the courts. A truth commission that engages in thorough research and investigation can play a significant role in tackling impunity. A truth commission can do this by assigning responsibility for abuses and violations through a meticulous process of ‘naming names’. When the public and indeed the world are aware of who did what in the conflict it will have a major impact on the standing and reputation of those implicated. Pressure will be placed on senior perpetrators to relinquish or not to assume positions of authority. Their room for manoeuvre will be substantially limited. Their ability to travel freely throughout the world will be severely curtailed.

While there is no doubt that the most effective means of addressing impunity is through the courts, we should recognise the severe limitations under which they operate. The delivery of justice has become a cumbersome and expensive affair. The donor community has reached something of a funding fatigue after pouring a great deal of money into international justice. The limitations associated with criminal justice are reasons to locate prosecutions within a broader transitional justice arrangement.

Justice without the wider truth

Rwanda, which has experienced comparatively intensive international and domestic justice programmes, may be an example where a measure of justice is achieved without the benefits of a wider examination of the truth. Rwandan spokespersons would argue that their approach to transitional justice more than adequately incorporates the objectives of truth seeking and national reconciliation through the Gacaca tribunals, the National Unity and Reconciliation Commission and the Rwandan Demobilisation and Reintegration Commission.¹⁷

Rwanda has firmly placed justice as the key pillar upon which reconciliation rests. According to Antoine Rutayisire, the Vice-President, National Unity and Reconciliation Commission, the peculiar circumstances of the Rwandan conflict explain why a truth and reconciliation programme would not be of benefit to Rwanda. :

‘... the South African Truth and Reconciliation Commission was hailed as a great success by the whole world, it became like a trend ... Many have even been asking why Rwanda is not adopting the same approach as it proved expedient and effective for South Africa. ... One great mistake people make in apprehending the Rwanda problem is to look at it, as just another genocide, and equate its solutions to the solutions that have been used for other mass crimes and genocides. But the Rwandan situation presents some specific particularities that make it unique.

One, the genocide was not just a political or military system that was turned against the victims like in the case of the Holocaust in Germany or the Khmer Rouge in Cambodia. The Rwandan genocide was so well organised and turned neighbours against neighbours, husbands against wives and parents against their own children. This complicates the matter of justice and reconciliation. The second particularity is that the genocide was

stopped not by external forces as in most of the other cases but by part of the Rwandese population. The RPF was primarily made up of a majority of Tutsi and their victory was not hailed and celebrated by the world but was rather criticised The third great particularity is that the family of the killers and even the killers themselves have to live next to the survivors ...'¹⁸

While there is no doubt that the Rwandan experience demands an entirely different response to that adopted in South Africa it is debatable as to whether the peculiarities of the Rwandan experience completely exclude a wider truth-seeking exercise. The Rwandan approach has been criticised for failing to advance the cause of national reconciliation by not exploring the wider truth behind the appalling atrocities of the early 1990s. It has been pointed out that the 1994 genocide was a culmination of structural violence and cyclical strife that started as early as 1959. Indeed, some point to the roots of the violence starting in colonial times.¹⁹ The justice initiatives are unlikely to cover these periods in any detail, if at all.

There is the practical consideration of the sheer scale of the genocide. With approximately a million fatalities there is simply no prospect of bringing meaningful justice in the vast majority of cases. Of most concern is the fact that it does not appear that the international or domestic justice programmes will deal with the waves of violence perpetrated by Tutsi led forces against Hutu targets. Such perceptions have seriously eroded efforts to reach national reconciliation.²⁰

It appears then that key aspects and periods of the wider story will not be interrogated and tested by a formally constituted inquiry. In short, the full story will not be told. As a result the Rwandan approach does not provide for a comprehensive public accounting of the truth and the acknowledgment of harm suffered by all sides.²¹

The integrated approach

The integrated approach or strategy involves the employment of criminal justice and truth and reconciliation mechanisms to redress the wrongs of the past. Such an approach may involve the simultaneous operation of the post-conflict bodies or their deployment in a phased or sequenced approach. The integrated approach works best when the different mechanisms are designed and synchronised to operate in a symbiotic manner. There are different models and formulas that can be explored involving demarcating areas of responsibility along mandated periods of time or categories of crimes. By design, courts and truth commissions have operated side by side in South Africa and East Timor; and by historical mishap in Sierra Leone. There are important lessons to be learnt from all three experiences.²²

South Africa

The South African experience has much to show on the truth front, but very little to show on the front of justice.³ While the logic and design of the South African approach required a focus on both truth and prosecutions it was only the former that received consistent attention through the establishment of the South African TRC. In theory those perpetrators who were

³ Ronald Slye argues there was some form of accountability provided by the process of granting amnesty. See [Ronald C. Slye](#) (2000). *Amnesty, truth, and reconciliation: Reflections on the South African amnesty process* In *Truth v. justice: The morality of truth commissions*, eds. Robert I. Rotberg and Dennis Thompson, 170-188. Princeton, NJ: Princeton University Press.

denied amnesty or who did not apply for amnesty should have been investigated and prosecuted. There was no strategic plan to investigate and prosecute crimes of the past in South Africa notwithstanding the truth for amnesty formula which demanded that there be a coordinated criminal justice response.

While the design of the South African approach was innovative and it has been credited with assisting the country through its successful transition, the compact with the nation, and in particular with victims, has not been kept. Not only have very few cases that emerged from the TRC process been prosecuted, but the South African government has recently amended its prosecution policy to permit a backdoor amnesty to be given to perpetrators under the guise of prosecutorial discretion. The amended prosecution policy undermines the very basis of the South African TRC which provided a truth for amnesty formula for a specific and limited time period. The failure of the state to act against perpetrators has added considerably to the trauma of victims. It stands as a lamentable postscript to South Africa's groundbreaking truth and reconciliation process. In promoting impunity, it represents a dangerous precedent for Africa.²³

South Africa's truth for amnesty formula was perhaps its least successful aspect. The South African model should not be followed unless there is in fact the capacity, and the most serious intention, to prosecute those who do not qualify for amnesty.

East Timor

The design behind the approach in East Timor probably represents the most carefully considered integrated strategy put in place to date. Although the Serious Crimes Unit (SCU) and the CAVR (the truth commission) focused on the same temporal mandate, the CAVR's reconciliation procedures, which allowed for the issuance of an amnesty or immunity, only dealt with crimes not regarded as serious. Cases involving serious crime, such as war crimes and crimes against humanity, had to be referred to the Serious Crimes Unit for possible prosecution. However, the CAVR's fact-finding mandate included an examination of all serious crimes and these findings are reflected in its comprehensive report.

This careful design, which clearly demarcated responsibilities, ensured that a cooperative relationship existed between the CAVR and the SCU which was free of conflict. However, the design did pose some difficulties and challenges for the two post-conflict organisations. The two bodies operated apart from each other, with different timetables and with little central coordination and planning. By the time the CAVR had compiled its full list of serious cases for further investigation by the SCU, the SCU had closed its doors.²⁴

Another significant shortcoming was the failure of the scheme to deal with the middle ground crimes, namely those crimes which were too serious for the CAVR to handle but were not serious enough for the SCU. Thus, the lowest level perpetrators of serious crimes were ineligible to participate in the reconciliation procedures, but they were ultimately left outside the serious crimes regime as a result of time and resource constraints. Since only small numbers of those involved in more serious crimes became subject to any justice process, some resentment resulted amongst victims and amongst those who volunteered to submit to the CRP process.²⁵ It is unfortunate that the serious crimes process and the CAVR were not established at the same time and after a more careful consideration of how an 'impunity gap' between the two schemes might have been avoided.²⁶

Sierra Leone

Post-conflict Sierra Leone experienced a truth commission and a hybrid international justice initiative in the form of the Special Court for Sierra Leone. However, unlike the integrated approach of East Timor, the approach in Sierra Leone was not planned or designed, it happened rather as a result of historical mishap. Given the amnesty provisions of the 1999 Lomé Peace Agreement which brought the warring parties to the negotiating table, the Commission was envisaged as an alternative to criminal justice in order to establish accountability for the atrocities that had been committed during the conflict. The Special Court was not under contemplation at this time. Steps to create the Court only occurred following breaches of the peace accord in the year 2000.

No guidelines for the simultaneous conduct of the two bodies were ever laid down. Indeed, there is not a single reference²⁷ to the TRC in any of the enabling instruments²⁸ that established the Special Court. Once the two bodies had been established neither took any steps to enter into an arrangement or memorandum of understanding to regulate their relationship. It is perhaps not surprising then that the relationship between the two bodies was at times problematic at an operational level.²⁹ Ultimately the relationship between the two bodies faltered on the question of the right of the Commission to conduct confidential interviews with detainees held in the custody of the Court; and the right of the detainees to appear before the Commission in public hearings. The Special Court refused to permit either confidential interviews or public hearings to take place.³⁰ The final report of the Sierra Leone TRC summed up the relationship between the two bodies as follows:

‘It is the view of the Commission that the practical problems that afflicted the “dual accountability” model stemmed from the creation of the two institutions separately from each another. These problems were compounded by the subsequent and mutual failure of the institutions to harmonise their objectives.

Having outlined the problems involved with the parallel operation of the two institutions the Commission does not hold that justice and truth bodies should never work simultaneously in the future. Indeed, there may be good reason to have two such bodies working in tandem. However, there is clearly a need for greater thinking and planning before such a strategy is adopted.

Much of the difficulty lies in the fact that the two mechanisms represent different approaches to addressing impunity. Operational difficulties are likely given that they also share many objectives: both seek truth about a conflict, although in different forms; both attempt to assign responsibilities for atrocities; both work with similar bodies of law; both are aimed at establishing peace and preventing future conflict.

Ultimately where there is no harmonisation of objectives a criminal justice body will have largely punitive and retributive aims, whereas a truth and reconciliation body will have largely restorative and healing objectives. Where the two bodies operate simultaneously in an ad hoc fashion, conflict between such objectives is likely. Confusion in the minds of the public is inevitable.³¹

Harmonisation of objectives

Harmonisation of objectives means that a post-conflict body pursuing justice and another body pursuing truth and reconciliation cannot operate in a manner that is oblivious of the other. On the face of it, it seems to be incongruous for one body to engage in truth seeking and reconciliation exercises involving former participants in the conflict, while another body is pursuing punitive measures against the same individuals. Harmonisation requires the developing of an operational model that permits the different objectives to be reached in a symbiotic manner.³²

It is likely that in the future there will be more truth commissions that work alongside domestic and international judicial bodies. This will particularly be the case as the International Criminal Court commences operations in different post-conflict countries. Future experiences of joint operations need not be troubled ones. The Rules of Procedure and Evidence of the International Criminal Court which makes provision for communications made in the context of a class of ‘other confidential relationships’ are not subject to disclosure.³³ This provision is likely to permit the confidential communications provided for in typical enabling statutes of truth commissions and should prevent discord on this issue.³⁴

When post-conflict bodies operate simultaneously or in a phased approach there should be recognition from the outset that there are certain primary objectives shared by both organisations. These goals are the creation of lasting peace and stability, and the building of democracy and the rule of law. In the pursuit of these objectives both bodies are equal partners.³⁵ According to recommendations made by the Sierra Leone TRC where post-conflict bodies operate in tandem a model should be developed that is sensitive to local conditions and which harmonises the objectives of the two bodies in a symbiotic fashion. A consensus, on matters of important principle, should be reached between the organisations. This consensus should be reflected in a written agreement or enshrined in law to provide enforceable protection.³⁶ Matters of fundamental principle should establish the basic rights of individuals in relation to each body in different circumstances. In particular, the rights of detainees and prisoners in the custody of a justice body, to participate in the truth and reconciliation process should be enshrined in law. Provision should be made for binding dispute resolution.³⁷

Transitional justice models

Assuming that circumstances in a post-conflict society permit the integrated approach, involving the combined pursuit of justice, truth and reconciliation, there are several models that may be considered. Timing is one of the first questions to consider. The options include the simultaneous, overlapping or sequenced operations of the institutions. Practical and resource considerations will be a major determinant in this regard. The East Timorese experience with its problems of synchronisation and the fact that the ‘transitional moment’³⁸ has a limited lifespan supports the simultaneous approach. The transitional moment may be a moment for both reconciliation and criminal justice.

Where conditions do not permit the simultaneous or tandem approach, a phased or sequential model can be considered as was the case in Peru. In Peru, prosecutions recommended by the TRC are following the truth and reconciliation process.³⁹ The danger to guard against in the phased approach is that the effluxion of time can seriously erode the appetite of a country to pursue with prosecutions, as is the experience of South Africa.

Prosecutions and other transitional justice mechanisms can work side by side dealing with all matters over the same time period if their objectives are properly harmonised. For example, a truth and reconciliation process that is victim oriented and which closely examines the roles of perpetrators can produce deserving cases that are ripe for prosecution. The process can also identify cases where a prosecution would be inappropriate.

Challenges arise when there are resource constraints which prevent an all-embracing justice approach or when fragile political conditions on the ground militate against substantial retributive justice. Unless there is significant international intervention and support, most post-conflict countries will be unable to embark on ambitious justice programmes into the past. Where support and capacity is scarce, countries have to select their transitional justice strategies carefully. It may be that a date line has to be drawn, possibly along the date of a peace agreement or ceasefire. While a truth and reconciliation process could, within its temporal mandate, deal with all events occurring on either side of the date line, prosecutors may wish to focus initially on pursuing those who break the ceasefire or peace agreement. A truth commission can then play a role in helping prosecutors prioritise cases of the past for prosecution. Where a perpetrator has committed himself to the peace; where he has disclosed a full account of his story in which he has acknowledged his role; where he has engaged with the victims; where his offence was not a serious international crime and where he is willing to cooperate in further investigations is an example of a case where a truth commission might recommend that a prosecution is inappropriate.

Such an approach helps to protect the peace, encourages genuine involvement in the truth and reconciliation process, promotes nation building, reduces the workload of prosecutors and helps them to identify the most important and appropriate cases for prosecution. There is less room for territorialism as the two bodies will not be competing for cases and witnesses. Discord between the truth and justice bodies is minimised because their objectives are not inconsistent.

Conclusion

There is room for the responses of justice, truth and reconciliation in virtually all post-conflict circumstances. Post-conflict societies stand to benefit considerably from the delivery of justice, truth and reconciliation measures. Where it is possible to combine these measures into a single transitional justice package it should be done. We need however to be alive to the limitations of the truth and justice options and to employ them in a way that best meets the needs and demands of the country in question. Simply to drop both into the mix without careful planning and preparation is to invite failure. The combined or integrated approach calls for a considered approach to ensure that the objectives and functions of the different mechanisms are harmonised.

Truth commissions and justice tribunals are ultimately established to create the conditions for lasting peace and stability, in which a new society may be built based upon respect for human dignity, democracy and the rule of law. Given this higher objective, the individual goals of justice, truth and reconciliation cannot be mutually destructive. Those charged with implementing such measures are duty bound to devise strategies that promote the harmonisation of their objectives in line with the greater goal. Conflicts of interest that take place in such programmes are not because the objectives are not capable of harmonisation; but rather because those designing and managing such initiatives failed to recognise the greater goal.

Notes

- * The author is indebted to Mark Freeman, Neil Boister, Marieke Wierda, Nahla Valji, Ronald Slye and Jonathan Klaaren for their insightful comments. However, any errors and inaccuracies are the responsibility of the author alone.
1. Only half of all truth commissions have incorporated a reconciliation component. See more generally, Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press 2006.
 2. Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States, Prosecution Initiatives*, United Nations, New York And Geneva, 2006 at p 4.
 3. *Ibid*, note 9.
 4. The principles for the protection and promotion of human rights through action to combat impunity was submitted by Diane Orentlicher during February 2005 to the 61st session of the Commission on Human Rights of the United Nation's Economic and Social Council.
 5. Recommendations, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador* released on 15 March, 1993 at the United Nations.
 6. While there have been several local and international ad hoc fact-finding investigations into the Rwandan genocide there has been no national truth and reconciliation type exercise.
 7. The East Timor truth commission was known as the Commission for Reception Truth and Reconciliation (in Portuguese the *Comissão de Acolhimento, Verdade e Reconciliação*, or 'CAVR').
 8. Spain, Angola and Algeria are also examples of countries which have declined to pursue any formal transitional justice measure.
 9. See paragraph 13, of the Decision of the former President of the Special Court for Sierra Leone, Judge Geoffrey Robertson in Case No SCSL-2003-08-PT dated 28 November 2003 dealing with the appeal of the TRC against the decision of the trial chamber to deny the TRC's request to hold a public hearing with Chief Samuel Hinga Norman JP. See also paragraphs 189–191 of the chapter 'The TRC and the Special Court' in the Final Report of the Truth and Reconciliation Commission for Sierra Leone at <http://www.trcsierraleone.org/>.
 10. See paragraphs 7, 13, 15, 30 and 31 of the Robertson Decision. See also paragraph 184 chapter 'The TRC and the Special Court' in the Final Report of the Truth and Reconciliation Commission for Sierra Leone.
 11. See Neil Boister, 'Failing to get to the Heart of the Matter in Sierra Leone?: The Truth Commission is Denied Unrestricted Access to Chief Hinga Norman', *J Int Criminal Justice* 2004 2: 1100–1117. See also paragraphs 189–191 and 209 of the chapter 'The TRC and the Special Court' in the Final Report of the Truth and Reconciliation Commission for Sierra Leone
 12. See the preamble to the Orentlicher Principles.
 13. See the introduction to the brochure entitled 'Special Court for Sierra Leone'; published by the Special Court for Sierra Leone in March 2003.
 14. Judgement of Mahomed DP in *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others* (CCT17/96) 1996 (8) BCLR 1015; 1996 (4) SA 672; [1996] CC 16 (25 July 1996); at paragraphs 17 and 18.
 15. In 1988, the US Deputy Secretary of State for African Affairs accused RENAMO of carrying out 'one of the most brutal holocausts against human beings since World War II'. (Reported in the *Natal Mercury*; 28 April 1988). A report published in 1988 by the US State Department's Bureau for Refugee Programmes held RENAMO responsible for the deaths of some 100,000 civilians in Mozambique.
 16. See Pablo de Greiff, 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted', to be published in *The Age of Apology: The West Confronts its Past*, Mark Gibney and Rhoda E. Howard-Hassmann (eds) (forthcoming).
 17. The Unity and Reconciliation Commission was established to build unity and reconciliation and the Gacaca courts were established to facilitate the search for truth and justice.

18. Antoine Rutayisire, 'Achieving Justice: Truth and Reconciliation', paper presented at the Seminar for Journalists organised by the United Nations Foundations and Quest Limited at the Intercontinental Hotel, Kigali, 26 June 2004.
19. Joseph K. Sebarenzi, 'Rwanda: The Fundamental Obstacles to Reconciliation', GSC Quarterly, No 3, Winter 2002.
20. Nelson Alusala, 'Disarmament and reconciliation: Rwanda's concerns', Institute of Security Studies, Occasional Paper 108, June 2005. Alusala observes that the gacaca courts, in trying only crimes connected to the genocide, ignore the many documented war crimes attributed to the Rwandan Patriotic Army (RPA), responsible for bringing an end to the genocide. The failure to broaden the jurisdiction of gacaca courts to include other war crimes has resulted in the widespread impression that the courts represent little more than 'victor's justice', and have thus led to demoralisation amongst those whose participation is fundamental to the courts.
21. Sebarenzi, above.
22. It should be noted that there are also important lessons to be learned from the experiences in domestic jurisdictions where commissions of inquiry and courts work side by side on a routine basis. In this regard see more generally: Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press 2006.
23. See International Bar Association press statement: 'IBA Critical of Amendments to South Africa's Prosecution Policy', 29 March, 2006 at http://www.ibanet.org/press/Press_home.cfm; See reports: 'World lawyers criticise SA prosecution amendments', *Mail & Guardian*, Pretoria, South Africa, 30 March 2006 at <http://www.mg.co.za/>; 'South Africa; 10 Years After the Truth Commission, Survivors are Frustrated,' 4 August, 2006, UN Integrated Regional Information Networks at <http://allafrica.com/>.
24. Megan Hirst and Howard Varney, 'Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor', co-author, Occasional Paper, International Center for Transitional Justice (New York), June 2005.
25. JSMP, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process', August 2004, at pp 15–17.
26. Hirst, above.
27. There was only passing reference to the use of 'truth and reconciliation mechanisms' in the case of juvenile offenders in the Statute of the Special Court for Sierra Leone.
28. Agreement between the United Nations and the Government of Sierra Leone for the establishment of a Special Court for Sierra Leone, 16 January 2002; Statute of the Special Court for Sierra Leone; The Special Court Agreement (Ratification) Act, 2002.
29. See the chapter 'The TRC and the Special Court' in Volume 3b, Chapter 6 of the Final Report of the Truth and Reconciliation Commission for Sierra Leone at <http://www.trcsierraleone.org/>
30. Ibid, paragraphs 71–211.
31. Ibid, paragraphs 224–27.
32. Ibid, paragraph 228.
33. Rule 73(2), Privileged communications and information, International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000).
34. TRC and Special Court chapter, Sierra Leone TRC Report (above), paragraph 230.
35. Ibid, paragraph 232.
36. See the Institutional Cooperation Agreement reached between the Peruvian Truth and Reconciliation Commission and the Prosecutor's Office. This agreement can be viewed at: <http://www.cverdad.org.pe/ingles/lacomision/cnormas/convenio25.php#up>. This agreement has been criticised as one that was carried out in the absence of 'a common strategy' and which was 'too generic to address the problems raised by the existence of an ad hoc independent commission'. See more generally Eduardo González Cueva, 'The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity', published in *Transitional Justice in the Twenty-First Century Beyond Truth versus Justice*, edited by Naomi Roht-Arriaza, Cambridge University Press 2006, Part 1, Chapter 3
37. See paragraphs 474–77 in the chapter 'Recommendations' in Volume 2, Chapter 3 of the Final Report of the Truth and Reconciliation Commission for Sierra Leone at <http://www.trcsierraleone.org/>

38. See the reference to the 'transitional moment' in Mark Freeman, 'Reconciliation in Times of Transition: The Role of Parliaments and Inter-Parliamentary Bodies', International Centre for Transitional Justice Policy Briefing Paper, March 2004. According to Freeman, successor governments should generally endeavour to make the most of transitional 'moments' when significant international resources and attention are focused on the country and when political and social backing for transitional justice measures is often at its peak.
39. See the discussion on the difficulties in the relationship between the Peruvian TRC and the Prosecutor General and the tactics employed by the TRC to encourage prosecution in Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*.