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Justice after Conflict

Human Rights in a Dilemma

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Mänskliga Rättigheter
Vårterminen 2008

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Abstract

This essay explores the concept of restorative justice in post-conflict reconciliation environments. Through a human rights perspective the author sees a conflict between restorative justice and retributive justice. This is presented in a theoretical framework for post-conflict reconciliation. To more explicitly illustrate the advantages of restorative justice the example of South Africa is used. The transition from apartheid to democracy that was facilitated by the Truth and Reconciliation Commission in the 1990's is an example of where tribunals like Nuremburg after World War II most likely would have had severe and dire consequences in form of a racially fueled civil war.

This eventuality is something that human rights advocates must not forget when the discourse today almost entirely is focused on tribunals and particularly the International Criminal Court, in other words retributive justice.

Keywords: Post-Conflict Reconciliation, Restorative Justice, Human Rights, South Africa

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Acronyms

ANC	African National Congress
ICC	International Criminal Court
NGO	Non-Governmental Organization
PAC	Pan African Congress
SADF	South African Defence Force
TRC	South African Truth and Reconciliation Commission

1 Introduction

We live in a conflict ridden world. When a conflict has reached such a high degree of de-escalation so that a signed peace agreement has been made possible, the immense task of reconciliation begins. This part of conflict resolution very interesting because it is a broad, difficult, important, and topical subject. If the post-conflict reconciliation is successful, then, per definition, the conflict will be passed to the history books, where it will remain.

Since the end of the Cold war many things have changed and conflicts are no exceptions. The Superpower's balance of terror and proxy involvement in almost every conflict on the globe actually had the effect that these conflicts were held under control and were never allowed to escalate too far. When the conflict managing mechanisms of the Cold war eventually disappeared in the early 1990's, after gradually doing so during the 1980's, the number of armed conflicts exploded. Old resentment, hatred and ill-treatment could no longer be contained and structural changes became inevitable. Nowadays the most common kind of conflict is not that of between states but within states. Civil war or intrastate conflict have come to dominate among the conflicts we have seen during the last two decades. This development makes reconciliation even more important as the antagonists are now more likely to be found within the borders of the same state. Parallel to this development, the human rights discourse has risen on the agenda. 'Responsibility to Protect' and the establishment of various tribunals for war crimes and other atrocities, the latest being the ICC, has lead to increased demands for justice and subsequent punishment for those responsible for wrongdoings.

1.1 Statement of Purpose

This essay will look into the discussion surrounding post-conflict reconciliation and especially the role of truth commissions in reconciliation processes. With the increased focus of human rights and demands for justice there is potentially a conflict between those who are trying to reconcile former antagonists and those who are advocating human rights. Human rights are perceived as individual rights and hence we have firm belief in individual responsibility and accountability. Reconciliation in post-conflict societies, on the other hand, requires inclusive and pragmatic solutions as well as political bargaining. This conflict of

interests constitutes a very real and practical dilemma that is being neglected in the human rights discourse. I will add a human rights perspective on an already existing theoretical framework on post-conflict reconciliation to highlight this issue.

Truth commissions have gained ground as a reconciliation mechanism for 30 years now and the, so far, success story of South Africa have showed that truth commission are a credible alternative. Truth Commissions appear to be the “third way” between blanket amnesties and Nuremberg trials as Desmond Tutu phrased it. Advocates of any of the ways to reconciliation will claim that their way will lead to peace and justice in the future. So, are human rights advocates painting themselves into a corner when demanding the prosecutions of all who has violated human rights? This is what makes truth commissions an interesting subject. Is it acceptable to deny victims of oppressive regimes the right to press charges against the persons who ordered and executed atrocities that will haunt the survivors for the rest of their life? The most famous of all truth commissions is, as I have mentioned, the Truth and Reconciliation Commission of South Africa. It stands out in the literature as the paradigm of truth commissions and will therefore obviously be part of this study.

The purpose of this essay is the following:

To show the possibilities of restorative justice in contrast to retributive justice

which will be done by

Creating a theoretical framework of post-conflict reconciliation with a human rights perspective

and illustrated by

Examining how and why South Africa decided on a truth commission

1.2 Method

In order to answer my question I will begin with setting up the theoretical framework to work within. It will include small bits of different post-conflict reconciliation processes from the Second World War, illustrating different strategies for achieving reconciliation and peace. These constitute three different strategies of dealing with past atrocities and have come to influence later reconciliation processes. I will to a large extent use a theory on reconciliation by Ramsbotham – Woodhouse – Miall (2005 Contemporary Conflict Resolution ch. 10). This theory has been the major source of influence and inspiration to this subject. My focus will be

on comparing truth commissions and trials with each other. These can generally be said to represent restorative justice and retributive justice. In the literature these two are often regarded as opposites, as the former is seen as a way of granting amnesties while the latter does not. I will also add to the theoretical framework illustrations of the conflicting interests of human rights and a more pragmatic post-conflict reconciliation perspective. By adding a human rights perspective the conflicting interests, previously mentioned, will hopefully be made visible.

Each conflict and reconciliation strategy is unique and because of that a comparison can be difficult, although definitely not impossible. I will, however, not do a direct comparison with the South African conflict nor with the TRC. Indirectly comparisons will be made in the theoretical framework even though they are more of a comparison between different reconciliation strategies than with actual, factual cases. The role of the ICC is relevant to this discussion, even though I am very well aware of the fact that it did not have jurisdiction in South Africa during the period of which South Africa is of relevance to this essay.

1.3 Material

As mentioned earlier Contemporary Conflict Resolution by Ramsbotham et al (2005) has contributed with the foundation for this essay. It elaborates the entire spectrum of conflict resolution of which reconciliation is the important last piece. I have found a significant part of my other material, both books and articles, through that book. One of them being Truth v. Justice by Rotberg – Thompson (eds 2000) that have proved to provide many interesting views on truth commission in general and on the TRC in particular. Almost all material used for the historical illustrations are from Rigby (Reconciliation after the Violence 2001) and the history of South Africa is from Ericson (The Search for a Shared Moral Landscape 2001). To complement all of this various articles have been used for views on trials, reconciliation and justice. The Final Report of the TRC is a very large piece of documentation. I have not used this material since it would neither be practical nor serve my purpose as it is not the TRC in itself that is of interest as to what it represents.

1.4 Definitions

The term '*reconciliation*' is not clearly defined and most of us have different interpretations of the word and what it exactly covers. For the purpose of this essay I use it

synonymously with '*post-conflict reconciliation*' in a very broad sense. When I refer to the '*government*' of South Africa it is the white apartheid/pre-democratic government that I refer to if nothing else is mentioned. '*Retributive justice*' is a theory of justice saying that proportionate punishment to a crime regardless of the effect it may have on the perpetrator is morally acceptable. '*Restorative justice*' is a broad and rather vague theory of justice that aims at restoring the relationship between the perpetrator and the victim by focusing on the needs of the victim and the perpetrator. '*National amnesia*' is amnesia that affects the entire nation (in this case synonymously with state) in the sense that its not talked about or referenced to publicly. '*Vengeance*' or '*retaliation*' or '*revenge*' also covers a wide range of different definitions, but is used in this essay as settling the scores by the use of force.

1.5 Limitations

1.5.1 *Transitional Justice*

All of this falls in a way or another within the concept of Transitional Justice. Transitional Justice is the concept of which a society through some form of justice changes from having a non-democratic system to a democratic one. I have decided to not explicitly discuss Transitional Justice in this essay, as it would push the essay in a direction of state-building and the forming and creation of democratic institutions. One can argue that this in away is essential for post-conflict reconciliation and for constructing a new society, and I am not claiming that it is not. But due to my intention of having a 'pure' reconciliation perspective and not to loose track of my question I will only implicitly touch the subject of transitional justice. Reconciliation and also human rights do not necessarily require democracy, even though democracy would be helpful in many ways for the fulfillment of those two objectives.

2 Post-Conflict Reconciliation

According to Ramsbotham et al. there are primarily three ways to find reconciliation. They call the three approaches for amnesia, public justice, and vengeance. Amnesia and vengeance are exactly what they say they are, public justice on the other hand is broad definition covering what Ramsbotham et al. calls for “dealing with the past publicly and collectively”. This is a term that includes all forms of trials, tribunals and truth commissions.

Since Ramsbotham et al. are concerned with not only reconciliation but also to find long-term sustainable peace they also make use of Johan Galtung’s definition of peace. The cessation of violence is as we all know not the same as living happy ever after. The cessation of direct violence is what Galtung calls for negative peace. Positive peace occurs when both the structural violence and the cultural violence have ceased as well. The definitions of these kinds of violence are very disputed and controversial. It is for example very questionable if there ever has been a society with positive peace if you take Galtung’s own definition to the extreme. The concept of positive peace is nevertheless definitely something to strive for. Ramsbotham et al. see negative peace as incompatible with the requirements of justice but at the same time, they see negative peace as a requirement for it. By (re)defining positive peace as long-term reconciliation Ramsbotham et al. utilizes justice as the way to bridge and to move from negative to positive peace (Ramsbotham et al. 2005 p 236).

However, a complete and absolute reconciliation of all with all is not desirable. Trying to create a single moral perspective for an entire society is an illiberal and undemocratic idea. Disharmony within a polity about politics and moral is more a sign of a healthy democracy than a threat to the peace (Gutmann & Thompson 2000 p 32-3). Even if it may seem redundant to look into the concepts of vengeance and amnesia since we have established that public justice, in some form, is the way to go we must remind ourselves that we do not live in a world with right and wrong and where everything is black and white. The definition of public justice is broad and parts of both amnesia and vengeance can and will, whether we like it or not, be used and have been used in reconciliation and peace processes. Therefore, these two concepts are also essential to understand reconciliation.

2.1 National Amnesia

Amnesia is not something that just happens, it's a choice and it is very closely linked to amnesties, especially blanket amnesties. In Spain things were brushed under the carpet for fears that it might destabilize the newborn democracy or even provoke a military coup if they would start to dig too deep in the past (Ramsbotham et al. 2005 p 237). This was also a stance, a reaction, against Franco's use of history as a tool to remember the civil war in a, for the Franco regime, convenient way (Rigby 2001 p 39-40).

All parties involved in the democratic transition were most concerned with looking forward and praise democracy instead of digging in the past. The transition was seen as so fragile that no attempts to seek retribution or to redress injustices were made. Journalists who had spread nationalistic propaganda and torturers within the police were allowed to keep their jobs. Files from the Franco era are still sealed to this day. Franco is hardly ever mentioned or referenced to as Spain decided to forget and move on (Rigby 2001 p 54-5).

The use of amnesties in Latin America is another form of amnesia. Both Argentina and Chile had the best intentions for dealing with the past and prosecute those responsible, but political reality and direct and indirect threats from the military and security forces resulted in amnesties and pardons. The testimonies given before the truth commissions were not made public and evidence and the policy of moving forward into the future instead of looking back was something many of the victims had to fight against in their attempts to seek justice (Rigby 2001 p 73). In the last years amnesties have begun to be revoked by the courts in both Argentina and Chile (Graybill 2004 p 1127) which tells us that neither amnesties nor amnesia may last forever. Justice in some form seems to be necessary. New generations without any personal references or commitments to either side of the past are likely to start asking questions about what actually happened if the national trauma is not dealt with but forgotten (Ramsbotham et al. 2005 p 237).

Thomas Hobbes argued that it was an absolute necessity for societies to forget its past wrongs. He called for a dehistoricization of human beings if they were to succeed in building up a new society. Bhargava (2000) asks if this is at all possible. If we go further back in history than Chile and Argentina in 1970's to India in the 12th century we find the origins of the animosities between Hindus and Muslims. Since the Muslims came they have been perceived as a threat to the Hindus. A more recent example is Quebec that for more than 200 years ago was conquered by the British but still having a thriving nationalism. For Michael Ignatieff nationalism is about settling old scores. People are able to kill each other for no other

reason than that once upon a time one ruled over the other and this killing can go on even when it is obviously counterproductive to their own interests. It is also not necessary for personal memories to be involved. All that is required is what Ignatieff calls a Collective Myth. An inherited animosity that is passed on generation for generation and can easily be brought to life (Bhargava 2000 p 53).

We must however not forget that it is important for people and societies to move on and look forward into a hopefully more prosperous future. Hatred and grief are not helpful building blocks when constructing a new society. What needs to be remembered is, according to Bhargava, a general sense of past wrongs so that we can learn from the past when stepping into a common future but forgetting specific acts of wrongdoings so that it is possible to consolidate a society. “Therefore, to ask people to forget is not entirely unreasonable. Timing is the essence of the issue. Forgetting too quickly or without redress, by failing to heal adequately, inevitably brings with it a society haunted by its past” (Bhargava 2000 p 54).

2.2 Vengeance

Ramsbotham et al. sees vengeance (also referred to as revenge and retaliation) as the extreme opposite of amnesia. This feeling of a need to retaliate as the only way to heal is present in many forms and kinds of conflict. It can culturally be linked to a clan-based way of thinking that more or less can be traced in all of us. To personal family vendettas to the need of the United States to strike back after the horrific attacks of 11 September 2001 (Ramsbotham et al. 2005 p 242). As Ramsbotham et al. also points out this has nothing to do with reconciliation and is better described as the “antithesis of reconciliation” (Ramsbotham et al. 2005 p 242). To this I fully agree and in my point of view this kind of behavior, regardless if it is considered reconciliation or not, is not post-conflict. It *is* conflict and as such it falls outside the parameters of this essay. If reconciliation is the means by which we go from negative to positive peace, a violent act of retaliation would be a setback for the peace process and therefore only indirectly linked to the process of reconciliation.

2.3 Justice

When we start looking for justice two, what seems to be contrasting, alternatives quickly emerge; truth commission and trials. What these two alternatives usually represent are restorative justice and retributive justice.

For the victims, alive or dead, of human rights violations and their families, what they demand the most is the truth. To know what happened to their loved ones ease their sufferings and helps them to move on in their grief. In many cases this is already known as well as who the perpetrator was. What is needed is not the truth told again or the revelations of all small details but acknowledgement, public official acknowledgement of the wrongdoings that occurred (Roche 2005 p 569). The ‘control of history’ and the shaping of a collective memory is very important, as was evident in Spain, and for some the uncovering of the past and the truth is reconciliation. Michel Foucault emphasized that control over people’s memory and to have the power to decide what it contains is a very important factor in struggle. Collective memory plays an important role in both consolidating the power of a new democracy and sustaining the power of an authoritarian regime. Therefore, truth and history are essential to bits that must be confronted in a reconciliation process. History can however be excluding. History favors the victors over vanquished and seldom leaves room for more than one version of the events (Gutmann & Thompson 2000 p 33-4).

2.3.1 Trials and Retributive Justice

Retributive (or punitive) justice is commonly what is first called for when a reconciliation process begins and is generally expected as well for those that violated human rights. For this to happen in large scale, an overwhelming military victory is most likely needed, e.g. World War II (Szablowinski 2008 p 406-7).

The trials of Nazi war criminals at Nuremburg constitute the greatest leap forward for individual accountability for crimes and atrocities against humanity. Individuals were now personally responsible for their actions and could no longer escape culpability by saying that they were only following orders. Neither could heads-of-state any longer completely rely on their get-out-of-jail-free-card that is sovereign immunity. It also led to international regulation of the state’s treatment of its own citizens in war as well as in times of peace (Ratner – Adams 2001 p 6f). The peoples of Europe all faced a difficult dilemma when they found themselves under German occupation. Under occupation things that used to be personal are suddenly political. The line between collaboration and resistance is not only very thin but also blurred. Andrew Rigby explains by refereeing to historian David Thomson, that most people in the occupied states were neither “active resisters nor craven collaborators” (Rigby 2001 p 17). People in general are more concerned with survival than becoming heroic martyrs and therefore they find themselves pending between ‘semi-collaboration, acquiescence, surrender

to necessity, neutralism, and mild piecemeal resistance' (Rigby 2001 p 17). After the war when the countries began to prosecute collaborators they soon found that it was extremely difficult to distinguish between the different kinds of collaboration. Who was a traitor and who was an accommodationist, or what was profiteering and what was mere surviving? (Rigby 2001 p 35). In Norway more than 90,000 persons were investigated for collaboration and eventually 21,000 were imprisoned. That corresponds to 633 in jail for every 100,000 Norwegians, but as in the rest of Europe, by 1950 almost all collaborators had been released and/or pardoned (Rigby 2001 p 28-9). A similar course of events occurred in Rwanda where trials were abandoned for more traditional Gacaca proceedings to speed up the justice process.(Graybill 2004 p 1122). This illustrates the difficulties states are faced with when dealing with a past where the state and the entire society, more or less, was involved in wrongdoings.

International and national tribunals have been used, in a varying degree of success, and these have been cheered on by human rights NGOs (Snyder – Vinjamuri 2004 p 5), and seen as the only way to maintain the respect of international law and of the Security Council when it has failed to protect international peace and stability and to make sure that it will not happen again (Meron 1993 p 122-3). Snyder & Vinjamuri lists three arguments that are used by the advocates of retributive justice and legal accountability. First is that it has a deterrent effect and send a strong message to the individual that he/she is responsible for their crimes, not only for people in the country in question but internationally. Second, it strengthens the rule of law and has a positive effect on the society and shows that conflicts are best solved through impartial justice. Third, by establishing who the guilty individuals are, potential ethnic conflict is defused (Snyder – Vinjamuri 2004 p 17). However, Snyder & Vinjamuri concludes that tribunals and their supporters most often “over-promise but underdeliver” and that these kinds of the institutions therefore are “designed to fail”. They also find little evidence that trials actually deter human rights violations or highly correlate to peaceful consolidations of democracy (Snyder – Vinjamuri 2004 p 42-3).

From a more philosophical perspective, if we identify ourselves as free moral agents then we also deserve to be liable and judged for our actions. If we commit a crime we should receive punishment accordingly that reflects the severeness of the crime in question (Szablowinski 2008 p 409). Reversing this argument, it's a way for the victims to see that those who did harm to them will be punished for what they did.

As a truth finding mechanism, trials can be very useful. Criminal law has a binary logic, e.g. guilty and innocent or perpetrator and victim. Before giving its verdict the court must uncover the truth. This way, contesting versions of the truth will be reduced to one truth and thereby produce an accurate record of what happened in the past. The dramaturgical effect of a trial is also said to have an effect of shaping the collective memory (Roche 2005 p 569).

2.3.2 *Truth Commissions and Restorative Justice*

Restorative justice is more focused on restoring relationships than at all costs punish perpetrators. Because of this, depending on how you see things, restorative justice is either seen as the second-best alternative, when its politically impossible to prosecute, (Minow 2000 p 237) or as the morally superior alternative that have risen above and beyond penal and retributive justice (Crocker 2000 p 103). Kiss characterizes restorative justice as a three-folded commitment. “(1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable, emphasizing the harm they have done to individual human beings; and (3) to create social conditions in which human rights will be respected” (Kiss 2000 p 79). It is about giving respect to the victims, to allow them to tell their story and listen. This victim-centered approach is a major difference compared to what would happen in a court.

The concept of restorative justice has evolved through the use and practical experiences of truth commissions during the last decades (Kiss 2000 p 71). Instead of focusing on the crime and the perpetrator it focuses on the healing of the victim and the entire country. As a venue to tell their story, truth commissions are much better for victims than a courtroom. What victims need is respect and dignity not to withstand a cross-examination by an experienced professional lawyer defending a man who tortured you 15 years ago. This example shows why trials are likely to convict only a small part of all prosecuted. Atrocities are likely to have taken place many years ago and in more or less shrouded in secrecy, which leaves us with two persons’ words against each other. In the binary world of law with only guilty and not guilty, this process can be devastating for a victim. The victim would also be limited to tell its story, only concerning the crimes committed by the defendant.

As the name Truth Commission implies, its meaning is to uncover the truth. As opposed to a court it can allow several different versions of the truth, from victims and perpetrators alike. For many within the police and military, their truth is that they are victims, victims of terrorism and all they are doing is fighting back (Roche 2005 p 571). In Chile much of the

debate circled around the general history of Pinochet's era instead of the crimes because they were trying to find *a* history and *a* truth (Rigby 2001 p 84). Also, our experience from the collaborators in World War II shows that it is a difficult and delicate task to establish guilt and intention. When oppressive regimes are allowed to endure for longer periods and creating a culture that effectively 'brain-washes' parts of or the entire population, there will be people that simply did not know that what they did was a crime or even morally wrong. When injustices are widespread and systematic it is simply not practical nor possible to prosecute individuals.

Unlike what many critics of truth commissions and restorative justice claim, they are not an alternative to retributive justice (for many the only justice). Restorative justice does not exclude retributive justice instead a truth commission can also be a precursor to trials. Hannah Arendt characterized the two as alternatives but not as opposites as they both attempted to put an end to a cycle of violence that could continue forever if not interrupted (Kiss 2000 p 80). It is also important to address that forgiveness is not the same as mercy. Forgiveness does not convert a wrong to a right (Bhargava 2000 p 62)

The granting of amnesties can however be seen as the Achilles heel of truth commissions and this critique can be traced back to the blanket amnesties in Argentina (Rigby 2001 p 72). But it is important not to mix up blanket amnesties and more conditional amnesties. If the amnesties can help to tell the truth, thus helping the victims and their families to get acknowledgment of their suffering it is justified. It is essential for a truth commission that people, the former oppressors, are willing to step forward and tell the truth of what happened and what they did. Here the Argentinean commission failed as it had neither the powers to force anyone to testify nor anything to bargain with (Rigby 2001 p 69). As we will see later the South African Truth and Reconciliation Commission invented 'truth for amnesty' which proved successful for the purpose of restorative justice.

The greatest accomplishment for a truth commission is not to punish, it is to heal by acknowledging the crimes of the perpetrators and the suffering of the victims. With this approach it can focus on overall patterns and institutional context and reveal the everyday discrimination in e.g. health care, media, and business rather than only being concerned with specific cases of atrocities. This way it can produce a bigger and hopefully more complete picture of what actually happened, than would be possible in a courtroom (Crocker 2000 p 101). Thus it can do more to address the victim's emotional and psychological loss, lack of self-confidence, feeling of security, and sense of self-worth instead of primarily focusing on

physical injuries and material loss (Roche 2005 p 572). This argument goes hand in hand with the fact that what victims want the most are true signs of repentance from their oppressors than a verdict sending them to prison (Szablowinski 2008 p 419), something that is more achievable with a truth commission than a trial.

2.4 Human Rights and Justice

Human rights do not explicitly take side on questions like democracy and justice. What human rights are concerned with is that the rights are being implemented regardless of system. However, implicitly it is often quite clear where the wind is blowing.

2.4.1 *Retributive Justice*

One of the long-lasting human rights struggles is against impunity. When it was clear that national tribunals very rarely managed to successfully prosecute human rights violations the matter had to be lifted above the national arena. Universal jurisdiction began to be implemented and the state parties were obligated to bring the suspect before a criminal court (Nowak 2003 p 292). After the ad-hoc tribunals for Yugoslavia and Rwanda, came the establishment of the permanent ICC. As mentioned, this development was driven by the fight against impunity (Nowak 2003 p 300). There is in other words a well-established linkage between criminal justice and human rights. This is way there is strong opposition to amnesties within the human rights community and why retributive justice seems to be the preferable choice.

2.4.2 *Restorative Justice*

Restorative justice hits human rights on a sensitive spot. Can it be accepted to ignore some rights at the present moment for the greater good of rights in the future or to sacrifice some individuals' rights for the rights of others? Clashes of rights are not new and can be found in many human rights documents, e.g. in the Universal Declaration of Human Rights of 1948. More recent developments like the 'Responsibility to Protect' report of 2001 and other arguments justifying humanitarian interventions are not that different from arguments for restorative justice. Theory of the just war is once again seen as acceptable as war and justice have become compatible with each other through law (see discussion in Kennedy 2006 ch 3). Also relevant to this is the discussion of individual vs. collective rights and if there are individual responsibilities. First of all collective rights do exist and is not that controversial.

Human rights are not solely individual (Nowak 2003 p 5). In Africa this is very clear as the African Charter of Human and Peoples' Rights of 1981 is the only regional human rights instrument to recognize collective solidarity rights. However, the charter enjoys very little political support and has a very weak enforcement system but nevertheless accepts collective rights (Nowak 2003 p 68). Logically, collective rights mean that individual rights have to surrender. This, in turn, results in individual responsibility. Human responsibilities have been widely debated, especially from religious perspectives (see Runzo – Martin – Sharma 2003). It is a critique of the secular, Western/European perception of rights and justice, a perception that is not always shared by other people in other parts of the world, and that this perception have become the universal norm.

Retributive and restorative justice both aim at preventing human rights atrocities in the future. What restorative justice has the potential of doing is to focus more on structural and institutional changes that are needed to prevent future atrocities rather than to focus on individual perpetrators (Brahm 2007 p 26-7).

2.4.3 *Truth Commissions, Justice, and the ICC*

In 2002 the Rome Statute entered into force and created the International Criminal Court. The preamble of the statute clearly declares that the signatories affirm 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation' (Roche 2005 p 566). According to the statute the purpose of the ICC is to be a complement to national proceedings and not a replacement. According to Article 17 (2) a case is admissible before the ICC if the national proceedings have the purpose of shielding a person from criminal responsibility, if there is an unjustified delay in the proceedings, and if the proceedings are conducted impartially and/or the intention is not to bring the person to justice (Roche 2005 p 568). This boils down to a question of definition. What is adequate justice and what is not? This question remains unanswered (as of 2005) and Roche's conclusion is that it is up to the ICC prosecutor to cooperate or not with a national truth commission. Such cooperation could be very fruitful as it could force offenders to cooperate with truth commissions as they otherwise would have to face the risk of being charged by the ICC (Roche 2005 p 579). Once a person has been charged by the ICC no amnesty or impunity can be used to protect the person from prosecution as the ICC is completely independent from all states (Nowak 2003 p 301).

3 South Africa

3.1 From Apartheid to Democracy

3.1.1 *Early History*

The first permanent white presence on the Cape was a Dutch station for servicing ships enroute to the East. After its establishment in 1652 Dutch settlers began to arrive and it is from these settlers that the Afrikaner population of today has its roots. The Dutch also brought with them slaves from other parts of the Dutch empire, mainly from India and other parts of Asia. After the Cape Colony was conquered by the British the Afrikaners felt uneasy with their new rulers. In 1836 the Afrikaners felt they have had enough of British rule and 15,000 Afrikaners left in the Great Trek in search of new land in the east. They established two independent Boer republics, the Transvaal and the Orange Free State in which only whites could be citizens. When diamonds and gold were found in the Boer republics the tension with the British grew stronger and in 1899 the Anglo-Boer war broke out. To fight the Boer guerillas the British burned down their farms and settlement and forced the Afrikaners and their servants into camps. When the British had won the war in 1902 more than 26,000 Afrikaners and 14,000 Africans had died in these camps (Ericson 2001 p 147-9).

In 1910 the Union of South Africa was formed as a dominion in the British Commonwealth. The British now tried to improve the relations with the Afrikaners and Dutch was recognized as an official language and jobs requiring skilled labor were for whites only. In 1913 a Land Act made it illegal for any black person to own land outside specially designated Native Reserves and in 1923 municipalities were given the right to enforce racial segregation. Black persons were only allowed to live in the cities if they were employed and salaries were approximately 10 times lower for a black person compared to a white (Ericson 2001 p 150-2).

3.1.2 *The Policy of Apartheid*

It was after the National Party came to power in 1948 that the policy of apartheid began to be implemented. Mixed marriages and sexual contact between blacks and whites were forbidden, and the enforcement of the Population Registration Act of 1950 classified all

people in South Africa into four different racial categories: White, Coloured¹, Asiatic/Indian, and Native/Bantu/African. The Race Classification Board examined every person's ancestry and when there was doubt the person's hair and whites in the eyes were checked by investigators to establish which race the person belonged to. This could have bizarre consequences and members of the same family could sometimes be classified into different categories and were therefore not allowed to live together. A separate education system for blacks was introduced in 1953 that was more suited to their culture and level of development and during the 1950's this separation spread into higher education. For Asians and Coloured separate education systems were not introduced until 1960 (Ericson 2001 p 152-3).

The Promotion of Bantu Self-Government Act of 1959 created eight homelands, Bantustans, which the white government had decided were the historic homelands of the African population. Africans without employment (i.e. not needed by the whites) were forced to move into these homelands. 1960, South Africa became an independent republic and left the British Commonwealth. In 1970 every African received a homeland citizenship and were no longer technically South Africans. This meant that 75 % of the South African population had to live on 14 % of the land. Already before this, all Africans were required to have a passport with them when travelling outside their hometown. It was illegal for blacks and whites to travel on the same bus, visit the same restaurants, and use the same beaches etc (Ericson 2001 p 153).

3.1.3 *The Resistance*

The ANC was founded in 1912 as a response to tougher British legislation. The first organized campaign against apartheid was held in 1952. Thousands were sentenced to prison for civil disobedience for up to 5 years. In 1959 a group left the ANC and founded the PAC. They believed that South Africa was not a country for all but primarily for Africans and not for whites. A joint ANC and PAC demonstration in Sharpsville, 1960, ended in disaster as the police opened fire and killed at least 69 people. This led to the banning of the ANC and PAC as organizations and leaders from the organizations were arrested. ANC and PAC drew the conclusion that armed struggle was now inevitable (Ericson 2001 p 154). Attacks were at first limited to security-related installations and personnel but eventually white civilians were also targeted. The government quickly managed to involve itself in a war against these

¹ According to the definition in South Africa (and in Southern Africa in general), Coloured people are of a mixed race with some degree of African (sub-Saharan) and white and/or Asian heritage. For practical reasons the racial categories are still used in the South African society.

communists terrorists fighting them as far as up in Angola. Finally, international and national pressure, economic sanctions, the costs of the war and the apartheid apparatus, and opposition against the war, made change inevitable. The end of the cold war made the fight against communist argument unconvincing. F.W. de Klerk replaced P.W. Botha as Prime Minister and the ANC, PAC, and many other organizations were unbanned. Political prisoners, among them Nelson Mandela, were also released as a part of deal to start negotiating with the black community (Ericson 2001 p 160).

3.2 The Truth and Reconciliation Commission

3.2.1 *The Politics*

The TRC was tasked with the investigation of gross human rights violations committed between 1960 and 1994 and make a as complete picture as possible of the apartheid era. Its mandate, stated in the Promotion of National Unity and Reconciliation Act of 1995, defined gross human rights abuse as ‘killing, abduction, torture, or severe ill treatment’ (Graybill 2004 p 1117). This was a much wider definition of victim than had been used by earlier commissions, e.g. in Chile. The TRC was to establish the location and fate of the victims, give the victims an opportunity to relate of the violations they suffered, and provide for the granting of amnesties (Ntsebeza 2000 p 158). The granting of amnesties and the Promotion of National Unity and Reconciliation Act evolved from the post amble of the Interim Constitution of 1993. This was a political settlement after four years of negotiation between the South African government and the ANC. At first the white government wanted blanket amnesty for all crimes committed but eventually they settled for individual conditional amnesties for politically related crimes. This suggestion actually came from the ANC, also accused of human rights violations in its struggle against Apartheid. However, trials similar to Nuremburg were strongly supported by parts of the ANC, particularly by ANC members in exile. Stronger forces within the ANC realized that if a peaceful transition was to be at all possible a compromise would be necessary (Boraine 2000 p 143-4).

3.2.2 *Ubuntu and Forgiveness*

Even if the mandate of the commission was a political construct, the actual work undertaken by the commission was very influenced by its chair archbishop Desmond Tutu. By promoting Christian values and the traditional African notion of ubuntu, Tutu was a strong

supporter for pardon and forgiveness over punishment. The word ubuntu is derived from a Xhosa¹ expression, translated as ‘people are people through over people’. This notion of a collective humanity where individual duty trumps individual rights can be found elsewhere in Africa as well. When something happens to an individual it happens to the whole group, and what happens to the whole group happens to the individual. Without a collective humanity there is no individual. This made forgiveness easier as it helped heal the society, humanity and also the individual (Graybill 2004 p 1118). This message was not only spread by Tutu but also by the first fully democratically elected President Nelson Mandela. Despite being a victim of the horrors of the apartheid policy Mandela promoted reconciliation over retribution. Again the preamble of the Interim Constitution proclaimed “a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimization” (Kiss 2000 p 81). Mandela and Tutu actively propagated this message and wanted South Africans to surrender their rights to litigate and face up to the duties of ubuntu. The main reason for this was, at all cost, to avoid a possibly devastating confrontation between the black and white communities or more precisely between the ANC and SADF. The whites still had complete control over the security forces and the risk of a violent escalation to civil war was present throughout the transition period (Boraine 2000 p 143). Tutu effectively combined the traditional notion of ubuntu, the notion of forgiveness in Christianity, and the secular notion of reconciliation and could therefore reach, practically, every South African regardless of race (Gutmann – Thompson 2000 p 29). Luckily for the TRC practically all churches in South Africa more or less opposed the Apartheid system. Otherwise it would probably have been impossible to combine reconciliation with a Christian message. The churches involvement of the genocide in Rwanda resulted in that Tutu’s attempts to spread the message of forgiveness in Rwanda were rejected in favor of tribunals (Graybill 2004 p 1121).

The TRC was also aware of its limitations and concluded in the Final Report that their role in the reconciliation process should not be overestimated. The commission could only be a part of a long-term reconciliation process that would require much more from the society. The reparations proposed by the TRC included payments to individuals and symbolic, collective, reparations in form of monuments, schools, and clinics etc. The most difficult was that, even if the TRC promoted forgiveness and remorse, this was two things that could not be demanded. The decision to forgive and repent could only come from the victims and

¹ Xhosa is an ethnic group living in South Africa. Both Nelson Mandela and Desmond Tutu are Xhosa.

perpetrators themselves. All the commission could do was to provide a venue and a opportunity for victims and perpetrators to face each other (Kiss 2000 p 82).

3.2.3 *Amnesties*

To be granted amnesty an application had to be made. The application was then reviewed by a committee. To be granted amnesty three requirements had to be fulfilled: “(1) that the applicant make ‘full disclosure’; (2) that the act for which the applicant is applying for amnesty be ‘associated with a political objective’; and (3) that the act for which the applicant is seeking amnesty was not committed for personal gain or out of personal malice, ill-will, or spite” (Slye 2000 p 175). As with all other testimonies the full disclosures were televised so that all South Africans were included in process.

What is seen as the big advantage of the amnesty hearings compared to a regular trial is the role of the accused. In a criminal trial the accused only participate passively as his/hers presence is demanded by the state or the victim. It is the interest of the accused to say as little as possible or to try and challenge the story of the victim and/or the witnesses. In the amnesty hearings the role of the accused was almost the opposite. To be active and to speak out was now in the interest of the accused and it was also the accused who initiated the proceedings (Slye 2000 p 173).

The most famous opponents to amnesties and the TRC were the families of Steven Biko and Griffiths Mxenge. Biko and Mxenge, well known anti-apartheid profiles, were assassinated by the apartheid regime and they have come to personify the sacrifice of criminal justice. Their families’ attempts to appeal were rejected by the South African Constitutional Court. (Kiss 2000 p 68). The purpose of amnesties, to “make a clean break with the past” (Slye 2000 p 183) has historically not been so successful, e.g in Chile and Argentina. Whether or not the South African conditional amnesties will be challenged in the future is yet to be seen.

3.2.4 *Different truths*

Was the policy of apartheid a good or bad system? For us the answer is simple. In the foreword to the TRC’s Final Report Tutu did however make a striking remark. When trying to find out what motivated the supporters of the apartheid system he discovered that they were not intrinsically malicious human beings but people who genuinely believed that apartheid was the best solution for a complex, multiethnic country like South Africa. Even if Tutu believed that the system was evil, the people supporting it were not (Kiss 2000 p 74). There

are speculations that groups previously exposed to atrocities tend to commit atrocities themselves later on. Apartheid would thus be explained by what happened to the Afrikaners in the camps during the Anglo-Boer war only a couple of generations ago. A similar reasoning can also be applied to the situation with Israel and the Palestinians. True or false, this is an argument for attempting to create an as inclusive remembering of the past as possible and it strengthens Tutu's assertion "that there is no 'healing without truth'" (Kiss 2000 p 72). Tutu hoped that representatives from the British community one day would ask for forgiveness for what it did to the Afrikaners in the Anglo-Boer war. Tutu wrote in the Final Report: "It was not the upholders of Apartheid who introduced gross violations of human rights to this land" (Kiss 2000 p 90). ANC was also investigated for human rights violations and the ANC even unsuccessfully tried to challenge the Final Report in court (Kiss 2000 p 81).

3.2.5 *Criticism of the TRC*

The TRC's Final Report contained more than 20,000 testimonies and over 7,000 applied for amnesty. However, South Africa is a large country with more than 43 million people. Many have used these figures to illustrate that the TRC in fact was not all as inclusive and far-reaching as it claimed to be. That only 7,000 felt obliged to apply for amnesty in a country which had a functional apartheid system for more almost 40 years and racial discrimination pre-dating the apartheid policy by several decades if not centuries. Figures estimate that 18,000 were killed, 80,000 detained and of them some 6,000 were tortured (Graybill 2004 p 1117, 1119). A lot of attention was also focused on the televised TRC hearings which critics claimed were conditions not at all helpful for the victims. The TRC was nick-named the "kleenex¹ commission" (Kiss 2000 p 72) for all the broadcasted pictures of crying victims. And in a sense it can be compared to reality TV programs of today, only that this was completely involuntarily for the participants. Criticism was also directed at Tutu and his Christian message, claiming that this excluded persons of other faiths and those without a faith and that it was inappropriate for a democratic society to use religion this way in the public sphere (Kiss 2000 p 85).

¹ A brand of tissues.

4 Discussion and Conclusion

4.1 South Africa

Whatever way South Africa had decided upon, its reasons for it, and the way it would be conducted are not universally applicable. All of the choices were heavily depending on the context of the country and the conflict. In order to establish the reasons for South Africa's choice I had to take a look at South Africa's past, the apartheid system, and obviously the events leading up to the fall of the old regime. The TRC was clearly a product of political bargaining but its success in preventing a violent confrontation and peacefully introduce democracy can mainly be attributed to a belief in forgiveness and ubuntu that was present in the South African society and in the South Africans themselves. The adversarial environment in and outside of a court room would most likely have resulted in a bloody and painful end of apartheid for all South Africans. Amnesties were in a sense the price that had to be paid for a peaceful success. And by also acknowledging the suffering of the Afrikaners the commission managed to please both sides with its Final Report without risking to be blamed of victor's justice. Restorative justice was the only possible choice for the South Africans. What is interesting is that it actually has seemed to work. From a human rights point of view it is particularly interesting as the legitimating source of the TRC was not a human rights document. Ubuntu and Christianity predate any human rights document and even human rights itself. The experiences of South Africa have influenced restorative justice, even though it is still a very undeveloped and vague form of justice.

History have taken us from the ruins of a war torn Europe with retributive justice at its most extreme, with retroactive use of the death penalty (Rigby 2001 p 26), to the use of amnesia in Spain, to the embryos of truth commissions and failed prosecution attempts in Latin America, to the paradigm of truth commissions, the Truth and Reconciliation Commission in South Africa. Finally, it is easy to see that behind all good reasons and philosophical arguments about justice and reconciliation, in the end it is a matter of politics. Amnesties, pardons, and prosecutions are the result of political bargaining influenced, but not controlled by human rights. If war and conflict is a continuation of politics by other means than so is post-conflict reconciliation. Politics decided how the reconciliation process in South Africa was to be conducted, but it was the TRC and its chair Tutu's belief and legitimizing

that pulled it through. What this tells us is that we cannot lock ourselves into one alternative. We must be open to different solutions to these kinds of problems. South Africa tells us that in some post-conflict environments we are all victims where the truth is not simply black and white.

4.2 Human Rights and the Monopoly of Justice

Prosecution of all does not seem to be practically possible. The need for truth in the reconciliation process suggests that a truth finding commission of some kind is needed anyway to establish what happened and why. But if reconciliation is dependent on a truth commission why prosecute? Supporters of trials and prosecution must be aware of that justice made in a courtroom is ultimately arbitrary. The legal rights of the individual, gathering of tenable evidence, finding witnesses, the right to appeal, and potentially an overwhelming burden on the legal system will result in many acquittals and closed investigations. The truth of what happened, what can really help to heal a divided society, is sacrificed for the rule of law. That is a scenario that does not help to restore the trust of the legal system. I do not suggest that truth commission and restorative justice are flawless, but I see them as less likely to fail and they have the advantage of providing a bigger picture of the truth, being inclusive, and healing the society. When an entire society has suffered from injustices, it is reasonable to think that the justice and reconciliation must address the entire society and not only individual victims.

What at first glance seems to be a conflict between human rights and what I have called pragmatic post-conflict reconciliation can be found in the discussions and debates within the human rights field. The notion of justice and how it is obtained must be allowed to be discussed more openly by human rights advocates when we are talking about post-conflict situations. I believe that this narrow-minded view of justice is part of the human rights heritage dating back to the Enlightenment. It can also be seen as a typical west-centered problem. In many parts of the world the idea that the rights of the individual can be subordinated to what is best for the society is not at all controversial. In South Africa it was Christian and traditional beliefs that to large, if not decisive, extent allowed for a peaceful transition from apartheid to democracy. Both of these notions have however been ‘discarded’ in the West since the Enlightenment in favor of beliefs in science and progress. This is what I see as the underlying issue of the conflict of restorative and retributive justice. Restorative justice legitimizes itself from other sources, thus competing with human rights’ ‘self-

proclaimed' monopoly of justice. However, human rights have lately moved in direction of allowing a just war to stop human rights violations so there is an ability to choose pragmatic solutions to human rights problems. To sum up, this conflict of justice is multi-faceted. It is a question of human rights and human responsibilities, individual rights and collective rights, the question of the universality of human rights and especially the Western universality of human rights and justice. An adequate question we can ask ourselves is if human rights are means or an end in complex post-conflict situations.

4.3 The Future

The unclear stance of the ICC on how it will cooperate or not with future truth commissions is interesting as it might be a sign of a possible pragmatic attitude towards restorative justice. Questions for the future are if it will be possible for countries to handle reconciliation processes on their own and how much world opinion will influence the position of the ICC. Common for South Africa and the countries in Latin America is that the strongest voices for retributive justice and punishment came from people in exile, a typical example of a diaspora. It will be interesting to see how this will affect future reconciliation processes as the signatories of the Rome Statute have given the ICC such powers that involvement of some kind seems to be inevitable. If the ICC is the perfect solution for human rights the world will definitely be a better place. Otherwise the prospects for a real human rights dilemma are looking good.

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