

2010

Post-Conflict Reconstruction in Transitional Societies

Larissa Fulop

Follow this and additional works at: <https://ir.lib.uwo.ca/undergradtjr>

Recommended Citation

Fulop, Larissa (2010) "Post-Conflict Reconstruction in Transitional Societies," *Undergraduate Transitional Justice Review*: Vol. 1 : Iss. 1 , Article 1.

Available at: <https://ir.lib.uwo.ca/undergradtjr/vol1/iss1/1>

This Article is brought to you for free and open access by Scholarship@Western. It has been accepted for inclusion in Undergraduate Transitional Justice Review by an authorized editor of Scholarship@Western. For more information, please contact tadam@uwo.ca, wlsadmin@uwo.ca.

POST-CONFLICT RECONSTRUCTION IN TRANSITIONAL SOCIETIES

Should societies turn to retribution or restoration, or both?

Larissa Fulop

ABSTRACT

Every post-conflict situation is unique within a given context, and must not be limited to a single path of achieving reconciliation, which includes contrition from perpetrators, forgiveness from victims, and the reintegration of reformed offenders into civil society. Despite their distinct qualities, retributive and restorative transitional justice both work towards the similar goal of managing socio-political despair to achieve reconciliation at both an individual and national level. With reference to Rwanda, South Africa, East Timor, and Sierra Leone, this paper examines the value of truth commissions and tribunal procedures in transitional societies, and explores the extent to which retribution and restoration mechanisms succeed in upholding reconciliation efforts.

Justice and reconciliation are often viewed as competing objectives in the process of sustaining peace. From international tribunals to special courts, truth commissions, and local courts, retributive and restorative justice can jointly uphold reconciliation efforts.¹ Effective resolution aims to eliminate resentments, enabling opposing actors to experience the benefits of socio-political repair.² Given alternative means of post-conflict resolution and sustainable peace building, transitional justice is not limited to retribution. Examining post-conflict situations such as in Rwanda, South Africa, East Timor, and Sierra Leone, this paper argues that successful reconciliation best transpires following a period of sustained political violence through an association of retribution and restoration. Societal conscientization of human rights abuses may prove to be beneficial; however, post-conflict societies should not be obliged to establish truth commissions.³ The decision of what types of transitional justice mechanisms to employ must consider unique contexts, as reconciliation is too great an undertaking to be limited to a single mechanism. Although retributive justice may serve an important, individual moral end, restorative justice has the greatest potential to initiate and further national reconciliation and therefore should complement criminal prosecutions and direct resolution initiatives.

Reconciliation is a shared goal amongst transitional justice mechanisms; however, it is often indistinctly defined. Elements include contrition from perpetrators, forgiveness from victims, and reintegration of reformed offenders into civil society.⁴ National reconciliation is achieved when socio-political processes advance without lapsing into their past corruption or

¹ Janine N. Clark, "The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation," *Contemporary Justice Review* 11.4 (2008): 331.

² Michael Wenzel et al., "Retributive and Restorative Justice," *Law and Human Behavior* 32 (2008): 377.

³ Eirin Mobekk, "Chapter 9: Transitional Justice in Post-Conflict Societies—Approaches to Reconciliation," in *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005), 272.

⁴ Clark, 340.

abusive practices.⁵ Individual reconciliation occurs when people feel that neither fear nor hatred restrains their lives.⁶ It is possible to achieve national reconciliation without achieving individual reconciliation, the former coming at the expense of the latter.⁷ Following violent conflict, social reform and governmental restoration may progress and flourish while victims and perpetrators alike find it difficult to live with their experiences.

Despite their distinct qualities, retributive and restorative transitional justice mechanisms work towards the similar goal of repairing socio-political situations in post-conflict societies. Retribution is largely accepted as the administering of justice through ‘hard’ treatment in response to wrongdoing.⁸ Trials and tribunals serve as evidence-based means for prosecuting offenders’ wrongdoings both nationally and internationally. Still developing and widely contested, restorative justice is defined as a process whereby all parties implicated in a particular offence unite to deal with its aftermath and to preclude future threats.⁹ Key features of the restorative mechanism include diplomatic discourse between perpetrators and victims, as well as a victim-oriented repair process (as opposed to punishing the perpetrator), with the ultimate goal of reconciliation.¹⁰ This kind of justice is essential for helping transitional societies overcome the various limitations posed by the traditional, retributive approaches of international criminal tribunals.¹¹

Both justice and reconciliation are major goals that need to be addressed in order to successfully build peace in post-conflict situations, in particular in the aftermath of genocide. Three main factors determine a society’s suitability for different approaches to reconciliation: the

⁵ Mobekk, 263.

⁶ Ibid.

⁷ Ibid.

⁸ Lucy Allais, “Social Justice and Retributive Justice,” *Social Dynamics* 34.2 (2008): 129.

⁹ Ibid., 130.

¹⁰ Allais, 131.

¹¹ Joanna R. Quinn, “Are Truth Commissions Useful in Promoting Restorative Justice?” in *Crosscurrents: International Relations*, 5th ed., ed. Mark Charlton, (Toronto: Nelson Canada, 2009), 394.

conflict's historical roots, support for transitional justice from the international community, and how the country's culture influences rule of law and attitudes towards perpetrators.¹² In the case of human rights abuses, it is difficult to say whether the justice process should focus on victim reparation or offender accountability. Focusing more on the perpetrator, such as is the case in retribution, may lead to re-victimization and an individualization of wider societal crime.¹³ Yet, although prosecution in a court of law is often associated with Western methods of conflict resolution, many post-conflict, developing societies insist that without formal trials, tensions are perpetuated.¹⁴ Depending on the socio-political context, these local trials may in fact be what the victim wants; punishment may reduce fear and bring about change, and a disappearance of impunity and an acknowledgement of violations by a court of law may lead to reconciliation.¹⁵

As illustrated by the International Criminal Tribunal for the former Yugoslavia (ICTY), retributive justice is revenge-oriented, working to establish a historical record and to punish individuals; this individual prosecution stands for the condemnation of a much larger group of war criminals.¹⁶ A serious limitation of retribution is the amnesty given to subordinates or accomplices not directly implicated in the formal trial procedure. The post-World War II Nuremberg trials resulted in many subordinate criminals going free as their authorities stood trial and received punishment.¹⁷ Amnesties can benefit a greater national reconciliation process by dismissing past hardships. Both perpetrators and their victims will pardon the past to work towards a more productive and socially harmonious future. However, on an individual level,

¹² Mobekk, 273.

¹³ Daniel Pascoe, "Are truth and reconciliation commissions an effective means of dealing with state organised criminality?" *Cross-sections* 3 (2007): 107.

¹⁴ David E. Guinn. *Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice*. International Human Rights Law Institute, DePaul University College of Law, 22 November 2005. <http://ssrn.com/abstract=854488>, (accessed January 24, 2010).

¹⁵ Mobekk, 280.

¹⁶ Clark, 332.

¹⁷ Quinn, 397.

victims may still be aggrieved.

The retributive justice dispensed by tribunals such as the ICTY or the International Criminal Court (ICC) is not consistently an appropriate means of promoting reconciliation. Although many thousands of people may have been directly involved in human rights abuses, it remains an impossible feat for all to stand trial in societies affected by war and conflict. The 1994 genocide of 800,000 Rwandans left upwards of 120,000 perpetrators awaiting trial in the Gacaca court system.¹⁸ Such a volume of trials would immobilize the judicial system and theoretically take centuries to hear. Additionally, this retributive system distinguished between genocide and war crimes, trying only those guilty of genocide; the process consequentially perpetuated ethnic divisions and promoted insecurity.¹⁹ Therefore, a major downfall of national or international criminal tribunals is their incapacity to prosecute each individual implicated in mass atrocity and to account for every atrocity committed.

A primary concern with punitive justice in transitional societies is deciding which laws apply to conviction. The laws of a corrupt regime during the time of conflict may have contradicted international human rights law, but it would be unreasonable to convict individuals if their crimes were not covered under national law at the time of their offence. A retributive approach to such a discrepancy may be to clarify that international law is “binding on all states.”²⁰ This would mean that offenders could be tried for crimes that violate international law regardless of local law. Alternatively, post-conflict societies could introduce a transitional law until a stable regime legislates new, egalitarian laws.²¹ A restorative approach may be to omit the question of legal discretion and instead focus on exposing wrongdoings or even granting

¹⁸ Ibid., 398.

¹⁹ Allison Corey and Sandra F. Joireman, “Retributive Justice: The Gacaca Courts In Rwanda,” *African Affairs* 103 (2004): 73.

²⁰ Mobekk, 276.

²¹ Ibid.

amnesty. These solutions are of course context-dependent.

In many post-conflict societies, not only do the military, police and other government agencies require reform, but so too does the judicial system.²² The judicial system may have been corrupt, decimated, or non-existent.²³ It is extremely unlikely that any post-conflict society will be able to conduct impartial trials immediately following mass violence and political unrest due to corruption or abuse, or a lack of prosecutors, infrastructure, resources, or funding; this is where international efforts may be applicable.²⁴ Assessing the appropriate balance between domestic and international actors is difficult. Ultimately, the international community should supply the necessary resources and assistance to enable a post-conflict nation to manage its own questions of justice and accountability.

Sustainable peace ideally comes from the mutual will of actors to cooperatively make amends in a transitioning society. An exchange of truths is a step towards restorative justice on a more victim-oriented, national level. Yet, without support from other processes, truth commissions, like methods that emphasize retribution, may not be in-and-of-themselves sufficient for national reconciliation. Retributive justice is often equated with vengeance, and restorative justice with healing.²⁵ In truth commissions, each side is given an opportunity to uprightly and democratically exchange stories.²⁶ This non-judicial approach to reconciliation may promote both retribution through public shame of those who committed past atrocities and restoration through acknowledgement. The Truth and Reconciliation Commission (TRC) following apartheid in South Africa was established in 1995 in light of discriminatory human

²² Guinn, 24.

²³ Mobekk, 274.

²⁴ Wendy Lambourne, "Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation," *Peace, Conflict and Development* 4 (2004): 14.

²⁵ Wenzel et al., 379.

²⁶ Pascoe, 95.

rights abuses.²⁷ The Commission was enormously successful in revealing to most South Africans that all sides of the conflict both held responsibility for and had suffered from violations.²⁸ Following public exposure of their past transgressions, perpetrators were officially pardoned and larger society was made aware of their entitlement to proper rights and freedoms.²⁹ The TRC's emphasis on forgiveness acts to reconcile disputing groups and direct the establishment of socio-political equality.

As previously mentioned, the role of the international community in judicial reform should be to support equitable trials in local courts, if this is the method of reconciliation a society wishes to pursue. In East Timor, for example, a hybrid of international and local judges formed special panels to address gross human rights abuses during Indonesian administration.³⁰ More convenient and less costly than a full international tribunal, this process empowered local government to take charge of accountability for its citizens. In 2001, a Commission for Reception, Truth and Reconciliation (CRTR) was instituted in East Timor to complement criminal proceedings and to direct the reintegration of less serious offenders back into civil society.³¹ Unlike retribution, reintegration is an important aspect of national reconciliation that is uniquely achieved through a successful sharing of truths.

Approaches to post-civil war resolution in Sierra Leone featured several methods of transitional justice concurrently: a retributive UN-funded Special Court and a non-punitive Truth and Reconciliation Commission (SLTRC) emulating that of South Africa.³² As stated by the

²⁷ Quinn, 399.

²⁸ Lyn Graybill and Kimberly Lanegran, "Truth, Justice and Reconciliation in Africa: Issues and Cases," *African Studies Quarterly* 8.1 (2004): 5.

²⁹ Graybill and Lanegran, 6.

³⁰ Mobekk, 275.

³¹ Carsten Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor," *The American Journal of International Law* 95.4 (2001): 953.

³² Abdul R. Lamin, "Building Peace Through Accountability in Sierra Leone: The Truth and Reconciliation Commission and the Special Court," *Journal of Asian and African Studies* 38.2-3 (2003): 310.

Registrar for the Special Court, the system will “[punish] the few masterminds, and [forgive] the many foot soldiers”.³³ The 1999 Lomé Peace Accord established the SLTRC to address impunity, break the cycle of violence, provide a forum of expression for victims and perpetrators of human rights violations, and to confront the past (Final Report of the SLTRC). Through attributing responsibility for the causes of the conflict and human rights violations, the Commission existed to create accountability although it could not grant individual amnesty.³⁴ Conflicting mandates between the two processes, however, may create problems as to which information falls under the jurisdiction of the Special Court versus the SLTRC.³⁵ Although a combination of justice methods may work to cover an entire range of accountability, both institutions must resolve potential problematic overlaps to be successful.

The spectrum of context-dependent, judicial responses to human rights abuses runs from the United Nations’ International Criminal Tribunals and the International Criminal Court, to the UN-funded special courts for Sierra Leone and East Timor, and to domestic processes including South Africa’s truth commission and Rwanda’s Gacaca courts. There is no place for unrestricted amnesty for mass human rights abuses in international legal order. However, retribution is only one facet of transitional justice. Retributive and restorative justice can coexist during a transition to peace. Truth commissions can augment the work of prosecutions in establishing accountability for widespread human rights abuses, while trial procedures can provide factual evidence to enhance the value of truth exchanges. It is simultaneously true that the rule of law is the foundation of safety and stability in civil society, and that acknowledgement and forgiveness best advances national reconciliation. With the help of the international community, a great effort must be made to reform domestic judicial systems and support truth and reconciliation

³³ Graybill and Lanegran, 10.

³⁴ Lamin, 304.

³⁵ *Ibid.*, 311.

commissions in transitional societies; a harmonization of retribution and restoration is the universal ideal for post-conflict resolution.

Bibliography

- Allais, Lucy. "Social Justice and Retributive Justice." *Social Dynamics* 34.2 (2008): 128-139.
- Clark, Janine N. "The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation." *Contemporary Justice Review* 11.4 (2008): 331-350.
- Corey, Allison and Sandra F. Joireman. "Retributive Justice: The Gacaca Courts In Rwanda." *African Affairs* 103 (2004): 73-89.
- Graybill, Lyn and Kimberly Lanegran. "Truth, Justice and Reconciliation in Africa: Issues and Cases." *African Studies Quarterly* 8.1 (2004): 1-18.
- Guinn, David E. *Human Rights Education: The Third Leg of Post-Conflict/Transitional Justice*. International Human Rights Law Institute, DePaul University College of Law, 22 November, 2005. <http://ssrn.com/abstract=854488> (accessed January 24, 2010).
- Lambourne, Wendy. "Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation." *Peace, Conflict and Development* 4 (2004): 1-24.
- Lamin, Abdul R. "Building Peace Through Accountability in Sierra Leone: The Truth and Reconciliation Commission and the Special Court." *Journal of Asian and African Studies* 38.2-3 (2003): 295-320.
- Mobekk, Eirin. "Chapter 9: Transitional Justice in Post-Conflict Societies—Approaches to Reconciliation." In *After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership*, Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005.
- Pascoe, Daniel. "Are truth and reconciliation commissions an effective means of dealing with state-organised criminality?" *Cross-sections* 3 (2007): 93-115.
- Quinn, Joanna R. "Are Truth Commissions Useful in Promoting Restorative Justice?" In *Crosscurrents: International Relations*. 5th ed. Edited by Mark Charlton. Toronto: Nelson Canada, 2009.
- Sierra Leone Truth & Reconciliation Commission. *The Final Report of the Truth & Reconciliation Commission of Sierra Leone*. 2007. <http://humanrightsdoctorate.blogspot.com/2009/11/sierra-leone-truth-and-reconciliation.html> (accessed January 26, 2010).
- Stahn, Carsten. "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor." *The American Journal of International Law* 95.4 (2001): 952-967.

Wenzel, Michael et al. "Retributive and Restorative Justice." *Law and Human Behavior* 32.5 (2008): 375-389.