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Transitional Justice Mechanisms

The Interplay of Justice and Peace

Global Order Project

Cleo Meinicke – Student, University College Maastricht – i6069705

1. INTRODUCTION

International crimes stand for situations, in which thousands of people are meant to die and villages, cities and sometimes even whole societies are destroyed. Due to the scope and seriousness of those crimes they were defined during the Nuremberg Trials as being "a grave matter of international concern", which "cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances" (United States v. List, 1948). The definition implies that international crimes need some external power to step in and clear the country from vast human rights abuses by providing justice to the population. Nowadays, the United Nations (UN) is seen as the responsible external power. Next to the UN however also other international bodies such as the International Criminal Court are granted jurisdiction in some cases.

Which kind of justice should be provided to the respective country having suffered from horrible crimes? Should the external power serve justice for the victims and therefore punish the perpetrators or should it rather focus on the society and on implementing peace? Is it necessary to choose one of the two options or can we also serve justice for both the victim and the society as a whole? These questions are addressed in the following paper by looking at four different post-conflict transitional justice mechanisms.

First, the paper provides an introduction to transitional justice. Second, four main transitional justice mechanisms are presented and clarified with the use of case studies. Third, the interplay of justice and peace in post-conflict situations is discussed by proving that their implementation is not mutually exclusive. Finally, a conclusion is drawn.

2. TRANSITIONAL JUSTICE

Transitional justice is mainly concerned with a positive transformation of an affected society. This transformation can take the form of a change from conflict to peace, but also from impunity to punishment of the perpetrators. Due to the different transformations that can be enforced, one can distinguish between two theories of justice, being retributive and restorative justice. The former is the most common type of justice, which sees the proportionate punishment of the perpetrator as the best response to crime (Darley, 2002). Most societies' criminal law adheres this theory of justice, where perpetrators are punished in accordance to the seriousness of the crime they have committed. In favour of this theory are speaking its deterrent effect, the

protection of the society from the perpetrator, the decreased craving of revenge of the victims or its relatives and the possibility to change the perpetrators behaviour and socialise him after his sentence was served (Grupp, 1971).

In everyday criminal cases, such as murder, the judiciary aims at prosecuting all people involved in the murder of the victim. However, applying this theory to international crimes, the number of perpetrators often amounts to several thousands. Punishing all of them requires prison capacities, financial resources for lengthy court proceedings and knowledge on every person's exact actions during the crime, in order to decide on the scope of the punishment. These reasons among others are decisive for the punishment of international crimes, which is generally only directed to "the most senior members responsible" (Wippman, 1999, p. 481) for the crimes.

An alternative to the commonly known retributive justice theory is the restorative justice theory. In contrast to the retributive theory, this theory does not focus on the victim and the wrong done to him or her, but rather on the needs of the society, being composed of the needs of both the victims *and* the offenders. Although there is no general definition of restorative justice Desmond Tutu nicely states that restorative justice is "concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation" (Frederiksen, 2008, p. 2). It does not restore relationships by following legal norms, but rather through communication between the opposed groups and the provision of reparation for victims (Smeulers & Grünfeld, 2011).

Both theories are recognized and adhered to in post-conflict situations but mostly not at the same time and through different instruments. The four main mechanisms used for the promotion of transitional justice are presented in the following part.

3. MECHANISMS

3.1 International Criminal Tribunal

The most famous and well-known international criminal tribunals (ICT) by now are the Nuremberg Trials, held after the end of World War II and aimed at punishing the most responsible people for the killings of the Jews under the rule of Adolf Hitler (Tusa, 2003). Only after the Cold War had ended this mechanism came into force again in response to the killings in Yugoslavia and Rwanda. These two most recent tribunals are

the focus of the following part. Both tribunals are often referred to as second-generation ICT due to some differences to the Nuremberg trials (Ratner, Abrams, & Bischoff, 2009).

The main characteristics of second-generation tribunals are that they are ad hoc courts established by the UN, based on a resolution, seated in a different country and are of international character (Ratner, Abrams, & Bischoff, 2009). Taking the *International Criminal Tribunals for the former Yugoslavia* (ICTY) as a case study these characteristics can be easily spotted. The ICTY was established in response to the conflicts in the Balkans between Muslims, Croats and Serbs in the 1990s, which included many killings but especially large scale ethnic cleansing (About the ICTY, n.d.). Therefore, the court only focused on a specific situation in a specific country at a given time. The characteristic of only being implemented for one special situation is often referred to the term *ad hoc court* (Schwebel, 1987). The ad hoc court for the former Yugoslavia was established by the UN Security Council based on resolution 827 (Establishment, n.d.). It has a mandate under Chapter VII, which makes it binding for all member states. This aspect is beneficial for the court proceedings, as it obliges UN member states to support the court financially (Ratner, Abrams, & Bischoff, 2009). However, it also enabled the UN to impose the court on the former Yugoslavia, which engendered non-cooperation and therefore complicated and hindered the collection of evidence and the extradition of several high ranked perpetrators (McDonald, 2004).

In addition, the court was placed outside of the former Yugoslavia in The Hague (Netherlands), due to the then still on-going conflicts in the former Yugoslavia (Ratner, Abrams, & Bischoff, 2009). Although this solution is seen to be the safest, it entails several drawbacks for its reputation and popularity in the country. Due to the distance between the location where the crimes are committed and the court, several scholars are of the opinion that the satisfaction and relief of the victims is limited (Ratner, Abrams, & Bischoff, 2009). Polls have shown that the population in Yugoslavia would have preferred trials to be held in Bosnia-Herzegovina than elsewhere (Parmentier, Valinas, & Weitekamp, 2009.). Furthermore, the long distance makes it harder to gather evidence and spread trust in the society.

Lastly, the court is very international not only because it was established by the UN and is seated in the Netherlands, but also because it was solely composed of international judges and followed international law. This fact on the one hand disconnects the court from the country and the victims, which can lead to the feeling of not being represented convincingly, but on the other hand such an international setup

guarantees strong international support and well-educated staff members. The latter aspect is seen as a reason for the high amount of people indicted by the court, amounting to more than 160 people until 2014 (Key Figures, 2015). Summing up, ICT are clearly representatives of the retributive justice theory. The instruments used by the tribunals are purely punitive and concerned with ending the impunity of the "most responsible people" for the human rights abuses. Retribution is the main objective in the implementation of this mechanisms.

3.2. Hybrid Courts

The implementation of hybrid courts in the late 1990s served as a replacement for ICT. After the ICT for the former Yugoslavia and Rwanda the UN member states were displeased with the high financial burdens and were in a state referred to the "tribunal fatigue" (Kirsch, 2001, p.4). They did not support the establishment of a tribunal based on a resolution binding them to support it, wherefore the UN from then on could only propose the establishment of tribunals to the respective country and base UN support on a treaty, which implies that it is not binding for UN members. The main characteristics are that they are also ad hoc courts, established by the UN together with the respective country on the basis of a treaty, they are located in the country where the crimes were committed and they are less international than the ICT (Ratner, Abrams, & Bischoff, 2009).

Looking at the hybrid courts established in Cambodia, the *Extraordinary Chambers in the Courts of Cambodia* (ECCC), one can see those characteristics well. The courts were implemented in response to the large-scale killings during the Khmer Rouge regime from 1975 to 1979 and can therefore be labelled ad hoc courts. The establishment of the courts was initiated by the Cambodian government in collaboration with the UN in 1997 (Introduction, 2015). Due to the tribunal fatigue it was not possible to pass a resolution, wherefore this court is based on a treaty. Therefore, the UN could not impose anything on the country but needed to engage in long-lasting argumentations with the government, which only led to an agreement in 2003 when the courts could finally start operating (Introduction, 2015). Also the low number of accusations (only three high ranked people have been indicted) is a result of the necessary agreement. The government in Cambodia was composed of several past Khmer Rouge supporters who feared to be prosecuted. Therefore, the government only supported the prosecution of five high ranked leaders, of which two unfortunately died

(Who will be put on trial?, 2015). Furthermore, the fact that the courts were based on a treaty had a significant impact on the financial support of the court. Whereas the ICTY enjoyed an annual budget of US$200 million (The Cost of Justice, 2015), the ECCC could only rely on approximately US$30 million (ECCC Budget, 2015).

In contrast to the ICT the ECCC are located in the country, in this case in Phnom Phen the capital of Cambodia (Abrams, Ratner & Bischoff, 2009). This aspect entails several advantages. Due to the victims' proximity to the court, they are more aware that justice is served. The population's opinion is far more positive towards the court than in Yugoslavia, where only 7% of the Serbian citizen was convinced that the court was unbiased and even perceived the ICTY as "the greatest danger to national security" (Klarin, 2009, p.1). In Cambodia two thirds believe that the ECCC are fair and are helpful for victims and their families (Pham, Vinck, Balthazard, Hean, & Stover, 2009). In addition, the proximity to the court makes it easier for victims to travel to the court in order to testify. The ECCC also introduced the possibility for victims to participate in the courts proceedings as Civil Parties and thereby hold the same participatory right as the prosecutors (Victim Participation, 2015). The opinions of the court amongst those victims who participate in it are very high (ECCC at a glance, 2014).

Lastly, hybrid courts including the ECCC are often referred to *mixed tribunals* due to not being purely international. Hybrid courts are composed of both international and national judges and guided by a mixture of international and national law (Ratner, Abrams & Bischoff, 2009). The exact mixture depends on the agreements the UN has reached with the respective country. In the case of Cambodia, it was ruled that in each chamber there is one more national judge than international judge. However, every decision must be supported by at least one international judge (Ratner, Abrams & Bischoff, 2009). Concerning the law, the ECCC can prosecute crimes defined in the Geneva Conventions, but also crimes put forward in the 1956 Penal Code of Cambodia (Ratner, Abrams & Bischoff, 2009). The mixture of both the judges and the laws has strong advantages. The ECCC provides training for local judges in international criminal law and human rights, which does not only educate local judges and thereby supports the establishment of a well-educated judiciary system, but can also have a positive influence on the general perception of human rights and fair trials in the country (Legacy, 2015).

Summing up, as hybrid courts deal as replacements for ICT their main objective is to serve retributive justice and thereby use purely punitive measures. However, the

mixture of international and national judges and law can have long-term influences on the country and can contribute to the establishment of peace. In order to maintain peace it is necessary to uphold human rights and provide the country with an educated and professional judiciary system, which is supported by hybrid courts.

3.3. International Criminal Court

The International Criminal Court (ICC) is an independent intergovernmental institution, which was established in 2002, when its legal basis the Rome Statute also entered into force. The ICC is in comparison to the two above explained courts a permanent court. This is advantageous, as it is not necessary to set up a whole new court for every new crime, but rather use a permanent institution with trained staff members (Scheffer, 1999). It is seated in The Hague and prosecutes not only one specific crime but several crimes in different countries at the same time. The court is independent of the UN and can therefore start investigations into crimes themselves or on request of the respective country facing a conflict. In some cases it is also possible for the UN to refer cases to the ICC, while the ICC's independence still maintains (Ratner, Abrams, & Bischoff, 2009).

The Rome Statue, which is the underlying treaty upon which the ICC was established, clarifies the jurisdiction and structure of the court. As it is a treaty and not a resolution it does not have universal jurisdiction. The court is dependent on countries to support it by signing, ratifying and providing financial assistance. Up until now 123 states have signed the Rome Statue (The State Parties to the Rome Statute, 2015). However, a main problem the court is facing is the resistance of several great powers to ratify the treaty, such as the United States and Russia. Due to the low support of those countries and the fact that the court is still in its infancy the number of prosecutions is low. In the past 12 years only two people were prosecuted (Prosecutions, 2015). A further characteristic of the ICC is the possibility for the victim to participate in the court proceedings not only as a witness but also as an active people, who voluntarily want to raise an issue or ask for reparations (Victims before the ICC, 2015). This grants the victim more attention and is beneficial in their healing processes, as they know that the international community is concerned about them and their concerns.

In order to illustrate the court's proceedings one can have a look at its involvement in the Democratic Republic of the Congo, more specifically in the Ituri Conflict. The conflict, which lasted from 1999 to 2003 between the two main ethnic groups in this region and killed several thousands of people, was referred to the ICC by

the government of the DRC. The ICC investigations amounted to an arrest warrant against Thomas Lubanga Dyilo. Lubanga was the leader of one of the group's armies and engaged in the conscription of child soldiers for which he was found guilty in 2006 and sentenced to 14 years of imprisonment (The Prosecutor v. Thomas Lubanga Dyilo, 2015). This case is not only revolutionary due to the fact that someone was prosecuted, but also because the ICC recently for the first time reacted to victims' requests for reparation and directed the Trust Fund for Victims (TFV) to draft a plan for providing those reparations (Lubanga case, 2015). This step is very important for the victims, who often lost all their property during the crime and need financial reparation to start a new life again. Summing up, the ICC is mainly concerned with retributive justice, focussing on the punishment of the victim. However, the possibility of the victim to participate in the court proceedings together with the plan to provide reparations can strongly influence the victim's healing process and thereby contribute to the establishment of peace.

3.4 Truth and Reconciliation Commission

Truth and Reconciliation Commissions (TRC) can have three different functions, they can aim at finding out who should be prosecuted, they can run alongside criminal proceedings and they can be used as an alternative mechanism to criminal proceedings (Smeulers & Grünfeld, 2011). The following part focuses on the last function of TRC, being concerned not so much with criminal proceedings but rather with the creation of dialogue and communication in order to achieve long-lasting peace between the victim and offender group. This mechanism is not typically initiated by the international community but rather by the governments with support of the international community, be it through the UN or Non-Governmental Organizations (NGO) (Smeulers & Grünfeld, 2011). Not all perpetrators are deeply evil but followed instructions and suffer themselves under what they have done (Hinson, 2010). Dialogues give them the opportunity to apologise to the victim and ask for forgiveness, which is shown by several scholars to be essential for the healing of victims (Taft, 2000; Engel, 2002). Furthermore, the TRC also often support the idea that perpetrators help their victims in everyday work, such as harvesting the land or taking care of the children, in order to facilitate the victim's start in a new life (Hinson, 2010).

There is no universal definition of a TRC, wherefore this part uses the South African case study as an illustration of TRC. The TRC in South Africa is the first and most successful TRC by now (Balia, 2004). It was established in Cape Town as a response to

the discriminations during apartheid system in cooperation of the government and several NGOs in 2000. President Mandela signed the founding legislation in 1995, which made the establishment of the commission possible (Balia, 2004). The main aim of the commission, as stated by the Minister of Justice at that time, was "to enable South Africans to come to terms with their past on a morally acceptable basis and to advance the cause of reconciliation" (Omar, 1995, p. 7). In order to achieve those goals the commission was composed of three committees, being the Human Rights Violations (HRV) Committee, the Reparation and Rehabilitation (R&R) Committee, and the Amnesty Committee (The committees of the TRC, 2009). The HRV Committee was responsible for listening and investigating victims' testimonies. By that, underlying causes of the conflict could be understood, which is beneficial on the one hand for the victims but on the other hand also for the rest of the world. Obtaining knowledge on reasons or patterns of conflict can help preventing those in the future. In case the victim was identified by the committee as a victim of gross human rights violations he or she is referred to the R&R Committee, which is concerned with giving the victims back their dignity and making sure that those crimes do not happen again (A summary, 2009). Depending on the situation the committee makes different recommendations to the government concerning reparations, which should be granted. In some cases the victim should be granted financial support, but in others also the whole village or nation can be recommended to be supported. In addition, the committee can recommend the government to grant the victims or the society mental or physical health care, education and housing (A summary, 2009).

Lastly, the Amnesty Committee is the most controversial one. Often evidence for crimes is destroyed by the responsible people, wherefore it is complicated to figure out what exactly happened in the past. Therefore, especially testimonies of perpetrators are important to get more insight knowledge and grant the victims a coherent report of what happened. In order to make it easier for perpetrators to come forward and reveal the crimes they have committed, the TRC granted amnesties for perpetrators who "make a full disclosure of relevant facts" (Promotion of National Unity and Reconciliation Act, 1995, p.6). As perpetrators are unlikely to cooperate and reveal the crimes they have committed out of fear for criminal prosecution, these amnesties make them feel safe enough to come forward. Although amnesties were denied to several people due to not having disclosed all relevant information, unfortunately very few trials were held (Truth Commission: South Africa, n.d.). Not even the president of the Apartheid state Botha was

tried, who refused to speak out in the TRC. In addition, the granting of amnesties can be an incentive for the perpetrators to tell lies or tell the stories without showing any remorse, which has negative effects on the victim's healing process. Movements, such as the one led by the Asian Peoples Organistion (Azapo), also tried to challenge the constitutionality of the granting of amnesties and would have wished to see the perpetrators punished (Smeulers, Grünfeld, 2011). In addition, Wilson (2010) claims that the level of violence still present in Africa is due to the lack of accountability of the criminals.

Looking at the situation in South Africa nowadays however one can say that the TRC was successful in decreasing the conflict and reconciling the people to a certain extend. It is also often stated that the TRC was an influential factor in the development of democracy in South Africa (Grange, 2014). Summing up, TRC follow the restorative justice approach and are mostly concerned with establishing peace in the long-term in the country. For their goal of reconciliation they also sacrifice the possibility to punish the perpetrators.

4. INTERPLAY OF JUSTICE AND PEACE

Having presented different mechanisms to be implemented after the occurrence of international crimes, it is now the question which of those should be enforced in the case of an international crime; which of those mechanisms is most desirable. Although at least the ICC and Hybrid Courts do also touch upon parts of restorative justice, all mechanisms are primarily concerned with either peace *or* justice. In most cases until now, the people responsible for choosing the mechanism decided to choose *one* of the two options. Either international courts are implemented, be it nowadays the ICC or also Hybrid Courts, *or* truth and reconciliation seeking commissions. In Cambodia it was chosen to implement a court, whereas in South Africa it was decided to establish a TRC.

There is no straightforward answer to the question which of the two options is more desirable, as every crime is different in its nature. The perpetrators can be the state or a rebel group, they can be still in power or already in exile, they can be a minority group or a majority group. The crime could have lasted several years or only a few month and the scope of the human rights abuses also varies. In addition, the effect on the country differs from crime to crime. Some countries do not have a functioning judiciary anymore, whereas others do. Depending on the context of the conflict, one of the two is chosen. However, the large amount of those influencing factors makes it hard

to do so (Smeulers & Grünfeld, 2011). Another way to choose among the two is by looking at their past successes. However, this approach is not very helpful as well. One can never know for sure how a country's situation would have turned out if a different mechanism was installed. In addition, success is always relative to the goals of the mechanism. The ICTY followed the goal of prosecuting the most senior perpetrators and reached their goal by indicting more than 160 people and prosecuting over 70 people and could therefore be labelled to be successful. However, also the ECCC, which only prosecuted three people, can be seen to have been successful. The maximum number of people to be prosecuted was five, of which two people died. Therefore, the courts can be said to have reached their goals and therefore labelled successful. Now looking at their success in achieving reconciliation, both the ICTY and the ECCC failed to succeed. Therefore, it is important to decide the goal oneself values higher, whether it is pure justice or rather justice, which in the long run can lead to peace.

Intuitively many people would support the peace solution, as it aims at affecting the society and country positively in the long run. It improves the relationships between victims and offenders and thereby also the atmosphere in the whole society. It decreases conflicts and violence and helps the population to understand what happened in order for them to come to terms with the crimes. The dialogue enables perpetrators to apologise and victims to forgive, which are essential steps in the healing of the wounds of both (Balia, 2004). On the other hand, through the granting of amnesty the possibility of punishing those perpetrators who are not regretting their actions go missing, as it was experienced also in South Africa. Often these perpetrators even profit from the R&R committees of the TRC, which can be very problematic for the victims, as many would like the perpetrators to be punished for their actions. Therefore, looking from the victim's perspective, the approach of promoting pure justice is also justifiable. If ones family member were killed one would like the perpetrator to get a punishment and be locked away for as long as possible. The perpetrator has done a wrong, which should be compensated through punishment.

Both justice and peace have their advantages and are lacking important features if only implemented on their own, wherefore the best solution would be to combine both to provide the country with the best support. At first sight the two concepts seem mutually exclusive. How can justice be enforced if perpetrators are granted amnesties for disclosing their crimes? If perpetrators are given the chance to either be punished

for their crimes or be granted amnesty for disclosing them, there is no doubt that most of them will not testify, which would make the implementation of courts redundant.

A solution for combining the two seemingly exclusive concepts of justice and peace in post-conflict situations is served by the Sierra Leone Civil War. In response to the Civil War, which was raging from 1991 to 2002 in Sierra Leone and led to over 50,000 deaths, both a truth and reconciliation commission and a hybrid court were implement shortly after each other (Wierda, Hayner, & Van Zyl, 2002). Although not intended to be established as a complementary design, the combination of the two in Sierra Leone sets an example of how to solve the problem of combining amnesties with justice.

The Special Court for Sierra Leone was restricted to only prosecuting those who "bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996" (Doughtery, 2004, p. 317). Those who qualified for bearing the greatest responsibility amounted to about a dozen people and were consequently exempt from the amnesty granted by the TRC to the lower ranked perpetrators. Local reaction to the prosecution of only the few people was very positive, as they believed it "was the big, big ones" (Shaw, 2005, p. 11) who were responsible for the doings. These prosecutions were therefore in favour of the population, set a sign that such crimes are no longer accepted and decreased the possibility of future upraising of the rebel group due to the prosecution of its leaders.

On the other hand, the TRC commission cared for the population, which had suffered strongly under the eleven-year war. Their mandate was "to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered" (Shaw, 2005, p. 2). The commission highlighted in the final report amongst others their recommendation to create a new Bill of Rights, the establishment of a reparations program for the victims and improve and stabilize the government (Truth Commission, 2002). These recommendations were legally binding, and led to the enactment of the "National Human Rights Commission Act" in 2004 and in 2008 to the establishment of the UN sponsored "National Commission for Social Action", which had as its goal the implementation of the recommendations, especially concerning reparations (Truth Commission, 2002).

The case of Sierra Leone shows that it is possible and beneficial to feed the quest for the promotion of both justice *and* peace in post-conflict situations. The concepts do

not necessarily have to be mutually exclusive. The only decision, which has to be taken, is between the establishment of Hybrid Courts or the use of the ICC. The decision depends on the one hand on the ratification status of the respective country and on the other hand on the countries' situation. Nevertheless, it is recommended to implement both retributive and restorative justice mechanisms in post-conflict situations, in order to support the country in the best way.

Conclusion

The paper has elucidated four different post-conflict transitional justice mechanisms, which can come into action in countries that experienced gross human rights violations. The mechanisms either promote retributive justice via punitive measures or restorative justice aiming at the establishment of peace. The three above explained types of courts are mainly concerned with the promotion of retributive justice, whereas Hybrid Courts and the ICC also touch upon some features of restorative justice. Truth and Reconciliation Commissions on the other hand are solely focussed on the promotion of restorative justice and thereby give up the possibility to punish the perpetrators. In most cases either retributive or restorative justice are promoted in those countries. However, it has been shown that both address different aspects beneficial for the society and the victims, wherefore it is proposed to no longer choose between the two types of justice but rather implement both. It is shown in Sierra Leone that the implementation of both a Truth and Reconciliation Commission and courts or tribunals works out well, and thereby serves both the desire for justice *and* peace.

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