

2015

Restoring Justice: Lessons from Truth and Reconciliation in South Africa and Rwanda

Emily B. Mawhinney

Hamline University School of Law

Follow this and additional works at: <http://digitalcommons.hamline.edu/jplp>

Recommended Citation

Mawhinney, Emily B. (2015) "Restoring Justice: Lessons from Truth and Reconciliation in South Africa and Rwanda," *Hamline University's School of Law's Journal of Public Law and Policy*: Vol. 36: Iss. 2, Article 2.

Available at: <http://digitalcommons.hamline.edu/jplp/vol36/iss2/2>

This Article is brought to you for free and open access by DigitalCommons@Hamline. It has been accepted for inclusion in Hamline University's School of Law's Journal of Public Law and Policy by an authorized administrator of DigitalCommons@Hamline. For more information, please contact jneilson01@hamline.edu.

RESTORING JUSTICE: LESSONS FROM TRUTH AND RECONCILIATION IN SOUTH AFRICA AND RWANDA

EMILY B. MAWHINNEY¹

INTRODUCTION

The nature of conflict has undergone a transformation in the 21st century. As a result, the methods and strategies of conflict resolution have also been challenged to transform to meet the needs of those affected by conflict. Interstate conflict, in which two countries go to war with each other using conventional military force, is no longer common because of the oversight and intervention of international and regional organizations, and third party states.² A new type of conflict has emerged in the vacuum of interstate conflict that poses a serious challenge to traditional approaches to conflict resolution based on third-party intervention.³ Intrastate conflict, or civil conflict, is distinct from interstate conflict in several ways that have significant implications for the management and resolution of such conflict.⁴ Intrastate conflict often involves non-state actors armed with unconventional weapons and amorphous ideological or ethno-political motives.⁵ Because intrastate conflict is so complex, it is ill suited for effective management by traditional third-party intervention in the form of state-to-state diplomacy or humanitarian

¹ Juris Doctor Expected May 2015, Hamline University School of Law. Special thanks to Craig Swanson, Jack Mawhinney, and Sharon Press for their unwavering support. This article is dedicated to Hanne B. Mawhinney, an inspiring scholar, dedicated mentor, and eternal optimist who always believed in the power of forgiveness.

² *History of the United Nations*, UNITED NATIONS, <https://www.un.org/en/aboutun/history/> (last visited May 2, 2014).

³ David Carment & Dane Rowlands, *Three's Company: Evaluating Third Party Intervention in Intrastate Conflict*, 42 J. OF CONFLICT RESOL. 572, 574 (1998).

⁴ Intrastate conflict is broadly classified as sustained, armed conflict occurring within state boundaries in which there are at least 200 fatalities; it has a lower fatality threshold than war. Intrastate conflict typically arises between one or more contenders who define themselves using communal criteria, and make claims on behalf of the group's collective ethnic, religious, ideological, or political interests against the state. See Patrick M. Regan, *Conditions of Successful Third-Party Intervention in Intrastate Conflict*, 40 J. OF CONFLICT RESOL. 337, 338 (1996).

⁵ Sexual violence is one example of unconventional weapons used in intrastate conflict. See Jennifer Park, *Sexual Violence as a Weapon of War in International Humanitarian Law*, 3 INT'L PUB POL'Y REV 13 (2007), available at <http://www.ucl.ac.uk/ippr/journal/downloads/vol3-1/Park.pdf>.

intervention,⁶ Instead, intrastate conflict requires a different approach to conflict resolution; it requires an approach that is rooted in restorative justice.

What is it about civil conflict that makes it so difficult to resolve with conventional conflict resolution means? At the heart of the ethnic, religious, ideological or political motives guiding intrastate conflict lays interpersonal conflict between neighbors.⁷ Strategic NATO bombing or United Nations peacekeeping missions simply do not have the mandate to try to resolve conflict on that interpersonal level.⁸ Practices of restorative justice are better able to resolve the interpersonal conflicts that characterize intrastate conflict because they involve and empower the parties who are in conflict. For example, a truth and reconciliation commission (TRC) can give victims, offenders, and the local community a greater sense of ownership over their own conflict resolution process by promoting forgiveness and creating a forum for truth telling.⁹ In ideal terms, TRC processes offer parties hope for the effective resolution of their conflict. In practice, truth and reconciliation are not always effective or even possible, especially when the parties to the conflict are not yet ready to reconcile or when a cultural preference to forget impedes truth telling.¹⁰

In order to analyze the use and effectiveness of TRCs, it is necessary to examine several key questions. First, how does the philosophy of restorative justice shape the practice of truth and reconciliation? Second, what do TRCs do: what are their key features; when should they be implemented? Third, what are the

⁶ Ronald Fisher, *Methods of Third Party Intervention*, BERGDORF HANDBK. FOR CONFLICT TRANSFORMATION 23 (2001), available at http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/fisher_hb.pdf.

⁷ Michael et al., *Retributive and Restorative Justice*, 32 LAW AND HUM. BEHAV. 375, 384 (2008).

⁸ Fisher, *supra* note 6, at 6.

⁹ Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, U. S. INST. OF PEACE 1, <http://www.usip.org/sites/default/files/sr130.pdf> (last visited Apr. 3, 2015).

¹⁰ *Id.*

most important lessons from past TRCs, such as those used in South Africa, and Rwanda? Fourth, what recommended role should TRCs play in the resolution of future intrastate conflict? While the theory of truth and reconciliation arises from the constructive idea of restoring justice, it is clear that the practice of reconciliation is complex, and it is very difficult to evaluate whether reconciliation has been achieved.¹¹ Regardless of those challenges, truth telling and reconciliation are valuable practices that can help resolve some aspects of conflict by facilitating healing.

THE PHILOSOPHY OF RESTORATIVE JUSTICE

Restorative justice is an alternative to the retributive approach to justice through punishment.¹² Restorative justice offers an alternative framework in which the owners of the conflict themselves, the offenders, victims, and communities are empowered to resolve their own conflict.¹³ In other words, restorative justice involves the direct participation of the affected parties in the process of resolving the conflict.¹⁴ Unlike retributive justice that emphasizes punishment as a means of righting wrongs, restorative justice empowers the parties themselves to restore justice by alternative means.¹⁵ At the core of restorative justice is a dialogical triad between victim, offender, and the community, all of whom 'own' the conflict.¹⁶ As part of a restorative process offenders are encouraged¹⁷ to accept accountability for the harm they caused (as well as its

¹¹ T. A. Borer, *Reconciling South Africa or South Africans? Cautionary Notes from the TRC*, 8 AFR STUD. Q. 19, 20 (2004).

¹² Wenzel, *supra*, note 7, at 375-76.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Paul McCold, *Restorative Justice: The Role of Community*, INT'L INST. FOR RESTORATIVE PRACS. (1995), available at <http://www.irrp.edu/article.detail.php?article id=NTA1>.

¹⁶ *Id.*

¹⁷ Wenzel's use of the phrase 'offenders are made to accept accountability' is problematic because it contradicts the spirit of restorative justice. The offender should not be made to apologize, but rather, should be empowered to recognize his wrong, and should choose to apologize to the victim as an equal.

repair), show remorse, and offer an apology; victims are encouraged to overcome their resentment and offer forgiveness.¹⁸ The community may include the family members of the offender, and family members of the victim, both of whom play an important, though amorphous role in the restorative justice process.¹⁹ The precise role of the community will vary, but it is clear that communities need a mechanism to recover from the psychological injury caused by the conflict; “that mechanism involves rituals of forgiveness and release from anger.”²⁰ Community involvement is a critical pillar of the restorative justice triad because empowering local communities to respond to their own conflicts meets the needs of the offender and victim to heal the psychological injury and anger created by the conflict, and helps to nurture responsible stewardship of conflict resolution processes.²¹

Restorative justice can therefore be characterized as a process rooted in dialogue between the parties involved in a conflict, and their community.²² Through dialogue, both the victim and the offender are given a voice to express their views and emotions, and together with the community, establish a shared understanding of the harm the offense has done and the values it violated.²³ Some scholars suggest that justice is restored when the offender takes responsibility for his actions by expressing a sincere apology to the victim and the community, and the victim offers forgiveness to the offender.²⁴ More generally, justice may be restored when the social equilibrium that

¹⁸ Wenzel, *supra* note 7, at 377.

¹⁹ In a statewide conflict such as Apartheid in South Africa, and the genocide in Rwanda, the community may also include the society as a whole. The precise role of the society at large in a restorative justice process is too nuanced to address here. However, there will be a ‘trickle up’ effect in which smaller scale, community-based restorative justice initiatives influence the restoration of justice in the society at-large.

²⁰ McCold, *supra* note 15,.

²¹ *Id.*

²² *Id.*

²³ Wenzel, *supra* note 7, at 378.

²⁴ *Id.*

was damaged by the offense is restored through social action.²⁵ The goal of restorative justice is thus to bring together the estranged victim, offender, and community and restore the original trust among those parties.²⁶ Punishment, in the form of legal adjudication or informal revenge is noticeably absent from the restorative approach to justice.²⁷

The philosophy of restoring justice through dialogue is an integral component of any truth and reconciliation commission. Indeed, the idea of “dialogic morality” established by restorative justice is essential for truth and reconciliation.²⁸ Arising out of the philosophy of Habermas’ discourse ethics, ‘dialogic morality’ suggests that morality is a social product, established through dialogue between members of an interdependent community.²⁹ The practice of truth and reconciliation hinges on a social construction of morality, in which communities construct a shared understanding of right and wrong by engaging in dialogue.³⁰ Unlike retributive practices in which the offender is punished for harming the victim, TRCs involve the victim, offender, and the local community in the process of restoring justice in the shared community. TRCs embrace the restorative justice perspective that offenses are conflicts that rightfully belong to the victim and the offender.³¹ Because the victim and the offender are the ‘owners’ of the conflict, the involvement of criminal justice institutions and the imposition of legal remedies can “rob the parties of their opportunity, right, and duty to learn and grow through their conflicts.”³² To avoid this loss of opportunity, TRCs harness the restorative justice process “whereby all the parties with a stake in a particular offense come together to resolve collectively

²⁵ Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 357 (1999).

²⁶ McCold, *supra* note 15.

²⁷ *Id.*

²⁸ Wenzel, *supra* note 7, at 380.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 377.

³² *Id.*

how to deal with the aftermath of the offense and its implications for the future.”³³

The guiding principles and practices of restorative justice provide a strong foundation for TRCs. The philosophy of engaging the victim and offender in dialogue in order to construct a shared understanding of the conflict, and to resolve collectively how to deal with the aftermath of the offense is central to the work of TRCs.³⁴ Indeed, TRCs focus on the restorative principle of healing parties involved in a conflict, rather than punishing the offenders. TRCs draw from restorative practices to promote more meaningful and constructive ‘punishments’³⁵ that oblige the offender to do something for the victim, provide some service to the community, or take part in an education program.³⁶ TRCs also draw from the philosophy of restorative justice to justify the use of amnesty as a way to encourage offenders to participate in the dialogical processes of restoring justice and reconciling parties in conflict.³⁷ In principle, granting amnesty to offenders is compatible with the philosophy of healing rather than punishing.³⁸ Amnesty can also be an essential tool in getting offenders, as well as victims to the table to begin a process of dialoguing. In reality, the idea of amnesty raises a serious question about the degree to which TRCs facilitate restoring justice through truth and reconciliation, or whether TRCs merely facilitate

³³ *Id.*

³⁴ Wenzel, *supra* note 7, at 380.

³⁵ The term punishment, in reference to the consequence reached by the restorative process, is problematic. It is only used here to juxtapose the idea of the outcome of retributive processes, which do produce punishments, and restorative processes, which do not emphasize punishment.

³⁶ Wenzel, *supra* note 7, at 377.

³⁷ TRCs may provide one of three types of amnesty: Blanket, limited or conditional amnesty. Blanket amnesty absolves perpetrators of liability for all crimes; limited amnesty may only apply to certain people, certain crimes, or certain time periods; conditional amnesty requires an application and testimony. *See Truth and Reconciliation Commissions: Core Elements*, THE PUB. INT’L LAW AND POLICY GRP.17 (May 2013), http://syriaaccountability.org/wp-content/uploads/PILPG-Truth-and-Reconciliation-Memo-2012_EN.pdf.

³⁸ *Id.*

forgetting.³⁹ In order to unpack the amnesty dilemma, as well as the other challenges of truth and reconciliation, it is useful to examine the features of TRCs more closely.

TRUTH AND RECONCILIATION COMMISSIONS

ORIGINS OF TRUTH AND RECONCILIATION

TRCs emerged in the late twentieth century in response to the growing influence of restorative justice, and the challenges of dealing with conflict in transitional societies. While retributive justice called for criminal prosecution of offenses by war crimes tribunals, TRCs offered a restorative approach to justice.⁴⁰ Through a restorative approach TRCs offered a way to address crimes and offenses in the country's past through a process aimed at determining what happened, and why, in order to rebuild social bonds, rather than punishing guilty individuals.⁴¹

Since 1973, more than 30 'commissions of inquiry' and 'truth and reconciliation commissions' have been established in order to facilitate restorative justice in a variety of conflicts.⁴² Many of these

³⁹ Sierra Leone illustrates the problems inherent in the contradictory practices of 'truth telling' and 'forgetting.' Despite pressure from NGOs and human rights activists for a TRC in Sierra Leone, there was little popular support for such a commission because most ordinary people preferred a 'forgive and forget' approach, a particular kind of memory practice that was deeply ingrained in the culture of Sierra Leone. The TRC in Sierra Leone set itself in opposition to widespread local practices of social forgetting by validating verbally discursive remembering as the only road to reconciliation and peace. See Shaw, *supra* note 9.

⁴⁰ *Id.*

⁴¹ Llewelyn, *supra* note 25, at 357.

⁴² Uganda (1974, 1986-1995), Paraguay (1976), Bolivia (1982-1984), Argentina (1983-1984), Uruguay (1985), Zimbabwe (1985), Brazil (1986), Chile (1990-1991), Chad (1991-1992), El Salvador (1992-1993), Rwanda (1999), Honduras (1993), Ethiopia (1993-2000), Germany (1992-1994), South Africa (1995), Haiti (1995-1996), Guatemala (1997-1999), Nigeria (1999), Sierra Leone (1999), East Timor (1999-2000). Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOCIAL JUSTICE:

commissions were created as transitional governments in newly emerging, fragile democracies struggled to account for the violence, crimes, and civil and human rights violations of previous regimes.⁴³ Those regimes faced strong pressure from within, and from the international community to follow the tradition of prosecuting war crimes established at Nuremburg.⁴⁴ Indeed, criminal trials cater to a powerful “moral intuition, especially that of the outside spectators to the conflict, that the ‘monsters’ responsible for the acts in questions must be punished.”⁴⁵ In response to that pressure, criminal tribunals were established to deal with many intrastate conflicts, most notably in Rwanda, and the former Yugoslavia.⁴⁶ However, the desire to prosecute is a retributive desire. Critics of retributive justice such as Hannah Arendt argue that retributive prosecution does not foster social reconciliation or healing.⁴⁷ TRCs offer an alternative way to deal with the past, and address the most difficult questions that arise as a result of conflict.⁴⁸ Should human rights violators be punished or forgiven? Is amnesty permissible and necessary in the interest of peace, reconciliation, and unity? How can the victims of human rights violations be assisted to have their dignity restored? Should history be ignored or acknowledged? TRCs provide a way to address those complex questions.

WHAT DO TRUTH AND RECONCILIATION COMMISSIONS DO?

TRCs emerged in response to the limitations of war crimes tribunals to address the needs of the victims who were looking for

ANTHROPOLOGY, PEACE AND HUMAN RIGHTS 37 (2002), available at <http://humiliationstudies.org/documents/AvruchTRC.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Llewelyn, *supra* note 25, at 358.

⁴⁶ See *International Criminal Tribunal for Rwanda*, UNITED NATIONS, <http://www.unictt.org/en/tribunal> (last visited Apr. 3, 2015); see also *International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS, <http://www.icty.org/sections/AbouttheICTY> (last visited Apr. 3, 2015).

⁴⁷ Llewelyn, *supra* note 25, at 358.

⁴⁸ *Id.*

healing, rather than punishment of perpetrators.⁴⁹ In order to foster healing, TRCs reject the objectivity and neutrality favored by criminal tribunals, and created forums for truth telling that make space for the subjective and emotional dimension of being victimized.⁵⁰ Truth plays a central role in the healing process, and in the restoration of justice for both victims and offenders.⁵¹ For victims, truth telling enables the victims to know the whole truth about the crimes they suffered, and the reasons behind those crimes, and to have their suffering publicly acknowledged.⁵² For the offenders, and the affected community, truth telling reveals the circumstances surrounding and reasons for the violations.⁵³ Truth telling is therefore essential for effective healing, which is the central purpose of truth and reconciliation. However, TRCs also serve a parallel purpose.

In addition to, and in conjunction with, the creation of a forum for healing, TRCs also establish an independent, temporary commission of inquiry that investigates and reports on patterns of abuses of human rights or humanitarian law committed during determined periods of time.⁵⁴ TRCs thus make recommendations for redressing human rights violations committed during periods of conflict, and preventing the repetition of human rights violations in the future.⁵⁵ It is important that TRCs investigate abuses and make those recommendations from a restorative justice standpoint, rather than for the purpose of retributive prosecution.

In order to maintain that distinction, and do restorative rather than retributive work, TRCs are usually constructed according to several common core elements: legitimacy drawn from consultation with the public, neutrality of personnel, a tailored mandate, adequate resources and funding, and the power to fulfill the objectives of the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Llewelyn, *supra* note 25, at 356.

⁵³ *Id.*

⁵⁴ MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 11 (2006).

⁵⁵ Llewelyn, *supra* note 25, at 368.

commission through specific activities and recommendations.⁵⁶ Scholars have further specified that the legitimacy of a TRC's policy has three conditions for efficacy; the truth must be known; the policy must represent the people's will; and the policy must abide by international human rights norms.⁵⁷ The first and third criteria are widely accepted, and often achieved by most TRCs, but the condition that the policy coincide with the will of the people is often more difficult to achieve.⁵⁸ When these core elements and conditions are present, the practice of truth and reconciliation has the potential to facilitate an objective investigation of offenses, while helping victims and offenders share their subjective truths about their experiences in conflict. TRCs thus have the potential to transform conflict by providing a public platform for victims and offenders to share their personal stories, and can facilitate public debate about how to come to terms with the past.⁵⁹ By engaging the nation in a discourse of truth telling, TRCs can help parties to intrastate conflict heal their wounds, and restore justice.

WHEN SHOULD TRUTH AND RECONCILIATION COMMISSIONS BE IMPLEMENTED?

In an ideal form, TRCs represent a powerful restorative tool; in reality TRCs are not immune to circumstances that limit their potential benefits.⁶⁰ “Weak civil society, political instability, victim and witness fears about testifying, a weak or corrupt justice system, insufficient time to carry out investigations, lack of public support, and inadequate funding” all threaten to undermine the effectiveness of a TRC.⁶¹ Critics of TRCs also ask, “does anyone really know that

⁵⁶ *Id.*

⁵⁷ Jeremy Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RIGHTS Q. 767, 804 (1999).

⁵⁸ *Id.*

⁵⁹ Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. U.N. SEC. COUNCIL 17 (2004), <http://www.unrol.org/files/2004%20report.pdf> (last visited Apr. 3, 2015).

⁶⁰ *Id.*

⁶¹ *Id.*

truth commissions secure the benefits of healing, catharsis, disclosure of truth, and national reconciliation?”⁶² These challenges raise several difficult questions: When should a TRC be formed in order to promote healing and restore justice to a society in conflict? How should the effectiveness or success of a TRC be measured? Can a TRC be effective if it is implemented amidst significant political instability? Can a TRC have the legitimacy, neutrality, authority, or resources to facilitate effective restorative dialogue, if the transitional government does not yet have authority or legitimacy? Similarly, can dialogue be effective if the victims and offenders are afraid to testify because of ongoing conflict?

It is unlikely that a TRC would be effective in such situations; therefore it would be best to implement a TRC after issues of political instability and fear have been resolved. But when precisely can a TRC be implemented effectively? At what point during the process of resolving conflict is truth and reconciliation possible? Despite the uncertainty of knowing when to implement a TRC, proponents of restorative justice argue that the practice of truth and reconciliation has tremendous potential to help parties to intrastate conflict transition toward peace. Lessons from South Africa and Rwanda help illustrate the tremendous potential of TRCs as a restorative tool, as well as the challenges of truth telling, and balancing retributive and restorative justice initiatives.

TRUTH AND RECONCILIATION IN SOUTH AFRICA

ORIGINS

The context out of which the South African Commission of Truth and Reconciliation (hereafter the ‘South African TRC’) emerged provides many useful lessons regarding reconciliation during a period of substantial political change. The apartheid system of institutionalized racism fueled intrastate conflict between white

⁶² Borer, *supra* note 11, at 20.

Afrikaner settlers, and black South Africans from 1948 to 1990.⁶³ Following a period of international economic and diplomatic pressure, the government under F.W. De Klerk agreed to negotiate with the African National Congress party, led by Nelson Mandela in order to negotiate a transition away from the Apartheid system.⁶⁴ In 1994, following that period of negotiation, democratic elections were held, and an interim constitution was passed that legally ended the system of Apartheid.⁶⁵ In 1995, the newly elected Government of National Unity, led by Nelson Mandela, set up the South African TRC with the mandate to “investigate gross human rights violations that were perpetrated by both state and liberation movements during the period of the Apartheid regime, including abductions, killings, and torture, to allow victims to tell their stories, to grant a historical record of the past, to grant amnesty where appropriate, and to draft a reparations policy.”⁶⁶

To accomplish that mandate, the South African TRC was divided into three committees; the Human Rights Violations Committee, the Amnesty Committee, and the Reparations and Rehabilitation Committee.⁶⁷ The Amnesty Committee of the TRC was empowered to grant amnesty to perpetrators who confessed their crimes truthfully and completely to the commission, but the TRC also recommended that prosecution be considered in cases where amnesty was denied.⁶⁸ The TRC heard testimony from approximately 22,000 victims, received approximately 7,000 amnesty applications, and granted amnesty in approximately 1,000.⁶⁹ The final report of the TRC was fully endorsed by the government,

⁶³ *Truth Commission: South Africa*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-south-africa> (last visited Apr. 6, 2015).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Truth Commission: South Africa*, *supra* note 63.

⁶⁹ *Id.*

and President Nelson Mandela apologized to all victims on behalf of the state.⁷⁰

CORE ELEMENTS

For many scholars, the South African TRC is considered effective because it met the core elements and conditions that facilitate truth and reconciliation.⁷¹ The South African TRC had legitimacy, or at least the illusion of legitimacy because it was established by a democratically elected government, and more importantly, because it drew legitimacy from an “exceptional degree of public participation.”⁷² Mandela made an effort to keep the commissioners neutral by appointing a committee to oversee a public nomination, selection, and interview process, and encouraged civil society groups to make nominations.⁷³ The commissioners selected for the TRC included both men and women, and came from a range of backgrounds, and different parts of South Africa, although whites were over-represented.⁷⁴ The mandate was clear, and was based on the normative idea that “a complete and truthful disclosure of past human rights abuses can guarantee lasting reconciliation.”⁷⁵ The TRC commissioners were given considerable power, discretion, and resources to do their work, and did ultimately produce a substantial 3,500 page final report that included recommendations for the future.⁷⁶

IMPLEMENTATION

⁷⁰ *Id.*

⁷¹ *Truth and Reconciliation Commissions: Core Elements, supra* note 37.

⁷² Sarkin, *supra* note 57, at 804.

⁷³ University of Witwatersrand, *Truth and Reconciliation Commission Background*, TRACES OF TRUTH, http://truth.wvl.wits.ac.za/cat_descr.php?cat=1 (last visited Apr. 06, 2015).

⁷⁴ *Id.*

⁷⁵ Borer, *supra* note 11, at 22.

⁷⁶ *Id.* at 28.

The South African TRC was implemented at an opportune time when the factors that can undermine implementation were in the process of being resolved.⁷⁷ Some of the factors that can undermine the effective implementation of a TRC include weak civil society, political instability, victim and witness fears about testifying, a weak or corrupt justice system, insufficient time to carry out investigations, lack of public support, and inadequate funding.⁷⁸ The South Africa TRC was implemented in 1995, one year after Mandela became President in the first democratic election in South African history. Although civil society, political stability, and judicial institutions were still weak, they were undergoing a period of transformation, and were significantly more stable and viable than they had been under the Apartheid system.⁷⁹ More significantly, the public support for truth and reconciliation was very strong.⁸⁰ The South African TRC was largely effective because it was implemented at a timely moment when there was substantial support in favor of truth and reconciliation from civil society institutions and the general public.⁸¹

SUCCESS

It is clear that the South African TRC was implemented at a good time, and that it met the core elements of an ideal TRC. Effective implementation of the core elements of truth and reconciliation implies some degree of success, but it does not guarantee successful reconciliation from a restorative standpoint.⁸² To judge the success of the South African TRC it is necessary to consider whether it fulfilled a restorative justice purpose. Proponents of the South African TRC suggest that it did facilitate restorative justice by enabling perpetrators to relieve themselves of the burden of guilt by disclosing the truth, enabled families of victims and survivors to discover the truth, and facilitated the process of “healing

⁷⁷ University of Witwatersrand, *supra* note, 73.

⁷⁸ Report of the Secretary-General, *supra* note 59, at ¶ 51.

⁷⁹ University of Witwatersrand, *supra* note 73.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

the wounds of the past, and transforming anger and grief into understanding, thereby creating the climate essential for reconciliation and reconstruction.”⁸³ In other words, the South African TRC created opportunities for dialogue between victims, offenders, and community members, and thus facilitated the construction of a shared understanding of the conflict, and a shared morality.⁸⁴ Much of that dialogue occurred through storytelling, which victims described as a healing and therapeutic process.⁸⁵ That emphasis on dialogue and ownership of the reconciliation process by the parties themselves is indicative of a restorative justice purpose. Proponents of truth and reconciliation process in South Africa point to the use of storytelling as evidence of the TRC’s ultimate success as a restorative justice endeavor.⁸⁶

Critics of the South African TRC argue that the TRC did not successfully achieve the lofty goal of restorative justice because it confused justice with therapy.⁸⁷ Human Rights Watch criticized the South African TRC’s use of amnesty as “condoning major justifications for the repression and violence committed by the apartheid state.”⁸⁸ The South African TRC, and TRC’s in general, have also been criticized for constructing selective historical records that merely reflect compromises and concessions made in the name of transitional progress.⁸⁹ These criticisms raise two serious questions. Does truth telling actually achieve the transformative, healing ‘dialogic morality’ advocated by restorative justice? Does truth telling involve the kind of dialogue that that is necessary to achieve reconciliation? The answer to both questions is no. Truth telling implies that each party has the opportunity to tell their truth, but it does not necessarily involve dialogue between parties, nor does

⁸³ Borer, *supra* note 11, at 22.

⁸⁴ *Id.*

⁸⁵ Borer, *supra* note 11, at 24.

⁸⁶ *Id.*

⁸⁷ Bronwyn Leebaw, *Legitimation or Judgment? South Africa’s Restorative Approach to Transitional Justice*, 36 *POLITY* 23, 46 (2003).

⁸⁸ *Id.* at 47.

⁸⁹ *Id.*

it necessarily lead to reconciliation. In the South African case, critics argue that by offering offenders amnesty in exchange for truth telling, the TRC pursued truth at the expense of restorative dialogue and reconciliation, and thus created a false sense of reconciliation.⁹⁰

At the time the South African government established the TRC, the government argued that amnesty was necessary in order to achieve the difficult, sensitive, even agonizing balancing act between the need to provide justice to victims of past abuses, and the need for reconciliation and rapid transition to a new future.⁹¹ The South African government sought to limit the use of amnesty by passing legislation outlining the measures and procedures of the amnesty process, including linking amnesty to specific criteria such as full disclosure.⁹² However, the practice of granting amnesty in exchange for truth telling remained highly controversial.⁹³ “Many victims and survivors opposed the granting of amnesty because it allowed the offender to choose to disclose selectively, about the specific matter for which the individual was applying for amnesty.”⁹⁴ Victims and scholars alike criticize the practice of allowing limited disclosure in exchange for amnesty because it frustrated the South African TRCs ability to fulfill its mandate to ‘establish as complete a picture as possible.’⁹⁵ It is plausible to suggest that the South African TRC would not have achieved as much as it did without the use of amnesty. Nevertheless, there is a nuanced distinction between the kind of reconciliation achieved when victims, offenders, and the community participate in full, honest truth telling, followed by apology and forgiveness, versus reconciliation achieved when the government grants offenders amnesty for limited disclosures.⁹⁶ Reconciliation through amnesty lacks catharsis for the victims and

⁹⁰ Borer, *supra* note 11, at 22.

⁹¹ University of Witwatersrand, *supra* note 73.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *Truth and Reconciliation Commissions: Core Elements*, *supra* note 37; see also Borer, *supra* note 11, at 22.

⁹⁶ University of Witwatersrand, *supra* note 73.

the community, and is thus not as restorative as reconciliation achieved through meaningful dialogue.⁹⁷

The use of amnesty to reconcile parties highlights one of the central problems with the South African TRC. The amorphous idea of reconciliation plagued the South African effort to resolve the conflict.⁹⁸ Despite the widespread use of the term ‘reconciliation’ by the TRC, it was never clearly defined, nor was the image of what reconciliation would look like in the minds of different parties after the truth telling process.⁹⁹ One of the central problems regarding reconciliation in the South African case was the emergence of two contrary forms of reconciliation, and the failure of the TRC to clarify the distinction between the two models of reconciliation.¹⁰⁰ The TRC sought to promote a religious concept of ‘interpersonal reconciliation’ between victims and perpetrators by creating a forum for truth telling, and facilitating interpersonal dialogue leading to apology.¹⁰¹ However, the South African TRC also pursued a political form of reconciliation, ‘national unity and reconciliation’, which was more concerned with reconciliation on an institutional level.¹⁰²

Twenty years is likely too short a period to judge the success of the South African TRC in terms of interpersonal or national reconciliation; however, there is evidence to suggest that it did succeed to a limited degree on both levels. There are powerful stories of interpersonal reconciliation between victims and perpetrators, as in the case of the widow who found out through the TRC process that her activist husband had been kidnapped and killed;¹⁰³ after the hearing she declared, “don’t we want peace for South Africa? How are we going to find peace if we don’t forgive?”¹⁰⁴

⁹⁷ Borer, *supra* note 11, at 22

⁹⁸ *Id.*

⁹⁹ *Id.* at 23.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 25.

¹⁰² *Id.* at 23.

¹⁰³ Borer, *supra* note 11, at 33.

¹⁰⁴ *Id.*

There are other stories of victims unwilling or unable to achieve reconciliation with perpetrators. For example, one mother proclaimed that she would never forgive the police officers that killed her child; “I want to see them dead, like our children.”¹⁰⁵ Despite substantial challenges and shortcomings, it is clear that the South African TRC did facilitate healing for some parties, especially those who were able to forgive and apologize, and thus successfully facilitated restorative justice at the interpersonal level.¹⁰⁶ The South African TRC also achieved a degree of successful restorative justice at the national level by dismantling the institutional structures that made human rights violations in South Africa not only possible but inevitable.¹⁰⁷ If reconciliation in South Africa is measured in the absolute terms, the success of the South African TRC is limited. If, on the other hand, reconciliation is viewed as a cycle, an ongoing process of dialogue about the past that achieved some degree of healing for some participants, the South Africa TRC did achieve success from the restorative justice standpoint.

LESSONS

There are many lessons to draw from the South African endeavor to pursue truth and reconciliation. First, it is important to implement a TRC after some political stability has been established, preferably by a democratic election, which will give a TRC greater legitimacy. Second, it is important to ensure that truth telling involves actual dialogue between offenders, victims, and the community in pursuit of reconciliation; it is problematic to grant amnesty. Third, it is important to define reconciliation as precisely as possible, and to distinguish interpersonal reconciliation and national reconciliation. Although South Africa struggled to find the right approach to truth and reconciliation, and continues to struggle to live peacefully with the past, the South African TRC represents a

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 32.

model for the tremendous potential of TRCs as a tool of restorative justice.

TRUTH AND RECONCILIATION IN RWANDA

Both South Africa and Rwanda illustrate the challenges facing countries emerging from periods of great political turmoil, particularly turmoil associated with gross violation of human rights.¹⁰⁸ However, Rwanda illustrates the particular challenges of pursuing truth and reconciliation after genocide.¹⁰⁹ “How does a society return to any sort of normality when two neighbors living side by side are, respectively, victim and perpetrator of heinous crimes?”¹¹⁰ Rwanda also illustrates the problems inherent in pursuing retributive justice in a criminal court before restorative truth and reconciliation, and the complexity of using pseudo-judicial community-based Gacaca Courts to carry out restorative justice.¹¹¹

ORIGINS

After a period of mounting tensions, hostilities erupted in Rwanda in October 1990, when the Tutsi Rwandan Patriotic Front (RPF) invaded Rwanda from Uganda in an effort to overthrow the Hutu-run government.¹¹² In response to the invasion, government-controlled forces attacked minority Tutsi populations and moderate Hutus; in turn, the RPF attacked Hutu civilians.¹¹³ A ceasefire agreement was reached in July 1992, and the civil war officially ended on August 4, 1993 with the signing of the Arusha Accords.¹¹⁴

¹⁰⁸ Borer, *supra* note 36, at 20; *see also Truth Commission: Rwanda 99*, U.S. INST. OF PEACE, [http://www.usip.org/publications/truth-commission-rwanda-99_\(last visited Apr. 29, 2014\)](http://www.usip.org/publications/truth-commission-rwanda-99_(last%20visited%20Apr.%2029,%202014).).

¹⁰⁹ Sarkin, *supra* note 57, at 767.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Truth Commission: Rwanda 99*, *supra* note 108.

¹¹³ *Id.*

¹¹⁴ *Id.*

Despite the efforts of domestic and international diplomats to negotiate a power sharing agreement between Hutus and Tutsis, tensions persisted between those ethnic factions.¹¹⁵ In the spring of 1994, the Tutsi Rwandan Patriotic Front (PRF) invaded Rwanda from Uganda, and shot down a plane carrying President Habyarimana, the Hutu president of Rwanda.¹¹⁶ In retaliation for that perceived assassination, Hutu extremists launched their plans to destroy the entire Tutsi population, and initiated a genocide in which an estimated 500,000 to 1,000,000 people were killed over 100 days.¹¹⁷ The victims of the genocide were mostly Tutsis, although Hutus who had demonstrated support for governmental power sharing between Tutsis and Hutus were also targeted.¹¹⁸

The Arusha agreement of 1993 had established the mandate for a Commission of Inquiry and a National Commission on Human Rights to investigate human rights violations committed by all parties in Rwanda during the civil war.¹¹⁹ However, because of the intervening violence, a formal truth and reconciliation commission was not established until 1999, when the new Transitional National Assembly established the Rwandan National Unity and Reconciliation Commission (NURC).¹²⁰ The newly elected government of national unity established the NURC with a mandate to “organize national public debates aimed at promoting reconciliation, foster tolerance and a culture of peace and human rights, denounce any ideas aimed at disunity, draft laws to foster reconciliation, and monitor whether authorities and the people in general ‘respected and observed the policy of national unity and reconciliation.’¹²¹ In November 2002, the NURC was established as a permanent organ of the government of Rwanda. ** A council of twelve Rwandan commissioners who form an Executive Committee, and a permanent secretariat with three departments, the Department

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Truth Commission: Rwanda 99, supra note 108.*

¹¹⁸ *Sarkin, supra note 57, at 767.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

of Civic Education, the Department of Peace Building, and Conflict Management, and the Department of Administration and Finance now staffs it.¹²² The NURC has not yet issued a final report, but did publish reports from 2000-2001 on reconciliation activities.¹²³ In one such report, the NURC reported that:

Rwandans discovered, to their surprise, that the ethnic differences, which have been so much magnified in the past, are not the real differences. The issue in Rwanda was bad governance, the culture of impunity and social injustices by successive ruling cliques. These have affected almost every Rwandan in one way or another.¹²⁴

From a restorative justice standpoint, the establishment of the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council in November 1994 significantly complicated prospects for reconciliation in Rwanda.¹²⁵ Between January 1997 and December 2012, the ICTR completed the trial phase of its mandate by prosecuting 92 people indicted for genocide.¹²⁶ The ICTR produced several significant retributive judgments. The tribunal issued the first judgment by an international court on genocide in a decision convicting mayor Jean-Paul Akayesu of nine counts of genocide and crimes against humanity.¹²⁷ The ICTR's conviction of Prime Minister Jean Kambanda also constitutes the first time a head of government has been convicted for the crime of genocide.¹²⁸ The ICTR continued to do important retributive work until 2014, when a new Mechanism for International Criminal Tribunals took over the remaining tasks of the ICTR.¹²⁹ An analysis of the retributive work of the ICTR is beyond the scope of this paper;

¹²² *Id.*

¹²³ *Sarkin, supra* note 57, at 767.

¹²⁴ *Id.*

¹²⁵ *Background Information on the Justice and Reconciliation Process in Rwanda*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> (last visited Apr. 7, 2015) [*hereinafter Background*].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

however, it is important to consider the impact of a simultaneous, parallel process of retributive justice on attempts to carry out restorative justice through truth and reconciliation in Rwanda.

CORE ELEMENTS

The complex and particularly tragic nature of the conflict in Rwanda raised many questions about how best to resolve tensions among the parties to the conflict.¹³⁰ Proponents of retributive justice argue that prosecution is necessary in order to bring the violators of human rights to justice, and to hold them accountable for their particularly egregious crimes.¹³¹ However, critics of retributive justice argue that criminal prosecution resulting in retributive punishment can be ineffective in fragile democracies where new regimes may not be able to survive the destabilizing effects of politically charged trials.¹³² In lieu of potentially destabilizing retributive trials, proponents of restorative justice argue that the practice of truth and reconciliation can be more effective in helping parties transition toward peaceful resolution of conflict.¹³³ This was certainly the ideal goal of the Rwandan NURC when it was established in 1999. When implemented, the NURC was confronted with the challenge of reconciling a profoundly divided population without certain core elements and conditions that support effective reconciliation.

As previously identified, the core elements of a TRC include legitimacy drawn from consultation with the public, neutrality of personnel, a tailored mandate, adequate resources and funding, and the power to fulfill the objectives of the commission through specific activities and recommendations.¹³⁴ Scholars have further enumerated three conditions of legitimacy that are necessary for a

¹³⁰ *Background, supra* note 126.

¹³¹ Jeremy Sarkin, *The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with Genocide*, 45 J. AFR. L. 143, 147 (2001).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Truth and Reconciliation Commissions: Core Elements, supra* note 37.

TRC to work effectively: the truth must be known, the policy of the TRC must represent the people's will, and the policy must abide by international human rights norms.¹³⁵ In Rwanda, the NURC's tailored mandate, the power, and resources available to the commission are not in dispute.¹³⁶ The central problems in Rwanda are a lack of legitimacy, neutrality, and lack of popular support.¹³⁷ The government undermined the legitimacy of the NURC by failing to appoint neutral commissioners and thus alienated the public will.¹³⁸

In order for a TRC to be legitimate, it is important for commissioners to be chosen from a "wide cross-section of society, and not be perceived as one-sided or oriented to a certain outcome; otherwise the commission will be considered biased and therefore illegitimate."¹³⁹ Because of the ethnic component of the conflict in Rwanda, the inclusion of all ethnic groups, including Hutus and Tutsis, was vital to the legitimacy of the commission. Since the overthrow of the Hutu government in 1994, Tutsis excluded Hutus from positions of power, including positions on the NURC commission.¹⁴⁰ "It is not realistic to expect reconciliation as long as an unelected minority rules. Majority rule must be respected."¹⁴¹ Although Rwanda has tried to democratize by holding multiple elections since 1994, those elections have been plagued by corruption; democracy in Rwanda remains elusive today.¹⁴² The government continues to demonstrate a lack of interest in establishing a broad base of support.¹⁴³ A lack of popular support for the governments' initiatives grew out of fundamentally different objectives of the Tutsis and Hutus following the 1994 genocide.¹⁴⁴

¹³⁵ Sarkin, *supra* note 57, at 804.

¹³⁶ Sarkin, *supra* note 131, at 154.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Sarkin, *supra* note 57, at 804.

¹⁴⁰ Sarkin, *supra* note 131, at 169.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 150.

¹⁴⁴ *Id.*

“After 1994, the Tutsi wanted justice above all else, and the Hutu wanted democracy.”¹⁴⁵ Without democracy, power sharing, and the inclusion of all ethnic groups in government, the government sponsored truth and reconciliation commission lacked the legitimacy, neutrality, and popular support to be effective.

IMPLEMENTATION

The lack of popular support for the government and the NURC in Rwanda grew out of the government’s choice to pursue retributive justice before restorative reconciliation.¹⁴⁶ The timing of the implementation of the NURC created a major obstacle to efforts to achieve truth and reconciliation in Rwanda.¹⁴⁷ The United Nations established a criminal tribunal in 1994 to address the crimes committed during the genocide, but the government of Rwanda did not seek restorative justice by establishing the NURC until 1999.¹⁴⁸ “For five years, the government of Rwanda refused to talk about reconciliation until justice was achieved through retributive means.”¹⁴⁹ As a result of the emphasis the international community and the Rwandan government placed on retributive justice, the process of restorative reconciliation in Rwanda was significantly compromised.¹⁵⁰

The use of Gacaca Courts illustrates one of the ways in which restorative justice was compromised in Rwanda. Historically, a ‘gacaca’ was a community-based informal arbitration convened by the parties to a civil dispute to sit down and discuss an issue, with the goal of achieving a settlement that was accepted by both parties.¹⁵¹ Post-genocide, the practice of gacaca was manifested in the

¹⁴⁵ Sarkin, *supra* note 131, at 149.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 169.

¹⁵⁰ *Id.*

¹⁵¹ Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, WASH. COLL. OF LAW, <http://www.wcl.american.edu/hrbrief/14/2lemon.pdf> (last visited Apr. 7, 2015).

formation of ‘Gacaca Courts’ in which hearings were held at weekly meetings in villages across the country, often outdoors in marketplace, or under a tree.¹⁵² The hearings achieved a restorative purpose by giving victims, offenders and their communities a chance to face each other and give evidence about what really happened during the genocide and how it happened.¹⁵³ However, the Gacaca Courts confused that restorative purpose by using pseudo-legal mechanisms and a retributive framework.¹⁵⁴ Elected community members lacking legal qualifications served as ‘judges’ and hear cases.¹⁵⁵ Approximately 65 percent of offenders were found guilty, and sentenced to long jail sentences and hard labor.¹⁵⁶ In contrast to their historically conciliatory purpose, the Gacaca Courts became forums for administering retributive punishments.¹⁵⁷

Proponents of the Gacaca Courts argued that the courts offered the best possible mechanism to achieve Rwanda’s transitional justice goals because they coupled traditional community-based justice processes with modern judicial practices.¹⁵⁸ However, critics argued that by prosecuting offenders in a structure designed to achieve a restorative purpose, the Gacaca Courts merely lowered the standard of justice, and scarified the possibility of societal reconciliation.¹⁵⁹ The government of Rwanda constructed Gacaca Courts as a mechanism of reconciliation; however they did not achieve reconciliation in a restorative sense.¹⁶⁰ “Instead of healing the rift between Hutus and Tutsis, the operation of the Gacaca Courts reinforced the rift by affirming the personas of innocent or guilty, victim or perpetrator.¹⁶¹ The use of the Gacaca

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Le Mon, *supra* note 151.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Le Mon, *supra* note 151.

Courts merely reinforced the atmosphere of retribution that clouded post-genocide efforts to restore peace in Rwanda.¹⁶²

By establishing the ICTR first, the government of Rwanda set a retributive tone that permeated all future efforts to resolve the conflict. The ICTR pursued truth, and sought to acknowledge past human rights abuses, but it did so in order to establish culpability and punishments, rather than to open dialogue.¹⁶³ The criminal trials held in the Gacaca Courts aired the ‘truth’ about crimes committed during the genocide, but did so in order to punish the offenders, rather than to reconcile and heal the victims and the community. When the NURC was finally established in 1999, the so-called truth about the genocide had already been established, and the perpetrators already punished; except it was truth according to the Tutsi victors, not the real victims.¹⁶⁴ “Those promulgating the genocide trials [were], for the most part, not the same people whose families were killed during the genocide.”¹⁶⁵ From 1994 until 1999, the surviving victims of the genocide were largely excluded from the retributive justice process and lacked access to restorative options.¹⁶⁶ Even after a restorative outlet was established by the NURC, opening channels for dialogue between offenders and victims, victims were confronted with the challenge of telling truths that did not necessarily fit into the previously constructed truth about the genocide.¹⁶⁷ By seeking retributive justice before restorative justice, Rwanda left victims feeling unfulfilled by the retributive process and alienated from the restorative process.

SUCCESS

When the work of the NURC is evaluated from a restorative justice standpoint, the complexity of achieving successful truth and reconciliation becomes evident. Rwandans have been working to

¹⁶² *Id.*

¹⁶³ Sarkin, *supra* note 131, at 147.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 149.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

move past the 1994 genocide for twenty years; however, the capacity of the NURC to promote restorative dialogue and healing has been quite limited.¹⁶⁸ One problem is that the NURC has not produced a final report, despite the fact that it has been functioning since 1999.¹⁶⁹ The NURC did produce annual reports until 2001, and did draft a history book for public schools aimed at reforming ethnic tensions between Hutus and Tutsis.¹⁷⁰ A final report, and recommendations are only a small measure of the success of a TRC; however, the absence of such products point to the inefficaciousness of the NURC. Beyond that inefficiency, critics of the NURC argue that it has not facilitated substantial justice, restorative or otherwise.¹⁷¹ That is because the ICTR has controlled the process of collecting truths since 1994, and the forum created by the Gacaca Courts in 2001 muddled the restorative justice process in Rwanda.¹⁷²

The Gacaca Courts likely emerged to fill the void created by the lack of opportunities for restorative justice under the NURC.¹⁷³ However, instead of providing a parallel track to aid the work of the NURC, the Gacaca Courts usurped power from the NURC to become the centerpiece of Rwanda's truth and reconciliation process.¹⁷⁴ The work of the Gacaca Courts, rather than the NURC, should therefore be evaluated in measuring the success of the truth and reconciliation process in Rwanda in facilitating restorative justice.

In theory, the idea of the Gacaca Courts should have successfully brought about reconciliation in a restorative sense. "Gacaca required people within the communities to work together as witnesses, tribunal personnel, and jurors, and in doing so replaced the divisive experience of the genocide with the cohesive experience of

¹⁶⁸ Le Mon, *supra* note 151.

¹⁶⁹ Sarkin, *supra* note 131.

¹⁷⁰ *Id.*

¹⁷¹ Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. INT'L L. & POL. 355, 365 (2002).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

securing justice.”¹⁷⁵ This is certainly a restorative purpose, and suggests that the Courts facilitated some successful reconciliation from a restorative justice perspective, in the form of dialogue between some victims and offenders.¹⁷⁶ However, the retributive model of the Gacaca Courts undermined their capacity to promote healing or forgiveness, which are vital to the restoration of justice.¹⁷⁷ The Gacaca Courts became an odd manifestation of inadequately legal retributive justice pursued for an inadequately restorative purpose.¹⁷⁸ The Courts were set up to clear the backlog of hundreds of thousands of people accused of involvement in the killings who were awaiting prosecution at the ICTR.¹⁷⁹

The Gacaca Courts certainly achieved results, however those results look more like punishment than the healing advocated by proponents of restorative justice.¹⁸⁰ The Gacaca system could be deemed a success from a restorative standpoint because it opened channels for dialogue between victims, offenders, and communities by creating opportunities for those parties to sit down and talk to one another. Yet, it is unlikely that an offender would experience healing if he or she enters into dialogue under threat of punishment. Victims and community members may have experienced some restorative healing thanks to the opportunity to participate in the Gacaca Courts; however the Courts provided offenders very limited possibilities for healing. Because the Courts imposed serious legal punishments rather than forgiveness, they were not widely successful in achieving restorative outcomes for complex genocide cases.¹⁸¹ Given the decidedly retributive nature of the work by the Gacaca Courts, the limited restorative work of the NURC, and the extensive retributive work of the ICTR, it is evident that retributive justice rather than restorative justice was more commonly achieved in Rwanda.

¹⁷⁵ *Id.* at 367.

¹⁷⁶ Susan Dominus, *Portraits of Reconciliation*. N. Y. TIMES, Apr. 26, 2014.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Rwanda 'Gacaca' Genocide Courts Finish Work, BBC (June 18, 2012) <http://www.bbc.com/news/world-africa-18490348> (last visited Apr. 7, 2015)

¹⁸⁰ *Id.*

¹⁸¹ Rwanda 'Gacaca' Genocide Courts Finish Work, *supra* note 179.

LESSONS

Rwanda offers important lessons about the truth and reconciliation process. It is vital for a TRC to include parties who fairly represent the population, especially ethnic groups who are parties to the conflict. It is also important for the TRC to draw legitimacy from a democratically elected regime. However, the most important lesson from Rwanda is the necessity of implementing a clearly restorative truth and reconciliation process before undertaking retributive punishment. Lessons from Rwanda reveal the problem of pursuing retribution before restorative justice, and retribution in the guise of restorative justice.

LEARNING FROM THE PAST: LESSONS FROM SOUTH AFRICA AND RWANDA

The practice of promoting truth and reconciliation in order to achieve restorative justice is complex, but it is nevertheless a worthwhile endeavor. In order to more effectively implement a TRC and successfully achieve the healing that restorative justice can offer, it is useful to draw lessons from South Africa and Rwanda. The most important lessons from the South African and Rwandan conflicts can be summarized broadly to include the following: democratization, authentic dialogue, utilization of neither amnesty nor threat of punishment, a restorative process clearly defined and distinguishable from retributive justice, and restorative intervention at a moment when the conflict is ripe for resolution.

Both cases illustrate the importance of democratization as the first step toward restorative justice, and the formation of a legitimate TRC. The need for truth and reconciliation often arise at a time when a society is undergoing a significant political transition. The post-apartheid period in South Africa illustrates the complex political environment in which many restorative justice endeavors must operate. As the South African example demonstrates, it is important for the government establishing the TRC to be democratically

elected, and representative of the population, for a TRC to have the legitimacy necessary to be effective,¹⁸²

The restorative justice initiatives undertaken in South Africa and Rwanda also illustrate the importance of dialogue in the truth telling stage of the truth and reconciliation process. In order for truth telling to create an opportunity for offenders, victims, and the community to construct the ‘dialogic morality’ that lies at the heart of restorative justice, it is necessary for truth telling to involve an authentic dialogue between parties.¹⁸³ It is important for the parties involved in the conflict to actually be involved in that dialogue, and not excluded because of their identity, or position as a victor or loser of the conflict.¹⁸⁴ One of the most challenging questions that any TRC must address is ‘who is invited to the table?’ This was a question asked in South Africa and in Rwanda. Only when all the relevant parties in the conflict were invited to the table were South Africans and Rwandans able to engage in effective reconciliation.

Another difficult question facing any community seeking to implement restorative justice is whether perpetrators will be completely forgiven, and crimes will be forgotten? South African style amnesty is not the ideal way to promote that dialogue, nor is a punitive Rwandan style ‘gacaca’ court the right forum in which to hold restorative dialogue.¹⁸⁵ Rather, the restorative justice endeavors in South Africa and Rwanda illustrate the need for dialogue emerging from authentic, inclusive interaction between all the parties involved in the conflict (offenders, victims, and the community), without the incentive of amnesty or the threat of punishment.¹⁸⁶ Truth and reconciliation does not successfully resolve conflict if all is forgotten and the slate is wiped clean by amnesty, nor is conflict resolved if perpetrators are punished after engaging in truth telling.

It is also important to have a clear idea and understanding of the kind of reconciliation that parties are working toward, whether

¹⁸² *Truth Commission: South Africa*, *supra* note 63.

¹⁸³ Wenzel, *supra* note 7, at 380.

¹⁸⁴ *Id.*

¹⁸⁵ *See Truth and Reconciliation Commissions: Core Elements*, *supra* note 37; *see also* Sarkin, *supra* note 131.

¹⁸⁶ Wenzel, *supra* note 7, at 380.

interpersonal or national reconciliation.¹⁸⁷ Before a community can effectively implement a TRC or similar restorative justice efforts, they should understand the relationship between interpersonal and national reconciliation, and the order in which each form will be pursued. Interpersonal reconciliation between individuals is an important part of the truth and reconciliation process, but it is insufficient if not coupled with national reconciliation.¹⁸⁸ Although it may be difficult to define, it is important for all parties to understand what constitutes reconciliation and which type of reconciliation they are working toward, so that moments of successful reconciliation at each level can be recognized and celebrated.

In addition to distinguishing the type of reconciliation sought, the restorative justice endeavors in South Africa and Rwanda reveal the need to distinguish restorative versus retributive processes.¹⁸⁹ The relationship between restorative and retributive processes is highly complex, and is made more so by the occasional need to employ both processes.¹⁹⁰ Idealists may advocate for an entirely restorative, healing approach, but pragmatists recognize that it may be necessary to use both restorative and retributive processes in order to help societies effectively move past conflict.

Most importantly, lessons from the truth and reconciliation processes in South Africa and Rwanda reveal the importance of timing and ripeness for effective conflict resolution.¹⁹¹ Restorative justice practices do not work effectively when the conflict is not ripe for resolution. In South Africa, the conflict only became ripe for truth and reconciliation following the democratic election of Nelson Mandela.¹⁹² In Rwanda, the moment of ripeness was delayed because of ongoing violence, and did not fully manifest until a new

¹⁸⁷ *Id.*

¹⁸⁸ Borer, *supra* note 11, at 19.

¹⁸⁹ Daly, *supra* note 171, at 365.

¹⁹⁰ *Id.*

¹⁹¹ Fisher, *supra* note 6, at 25.

¹⁹² *Truth Commission: South Africa*, *supra* note 63.

transitional authority was in place.¹⁹³ Future truth and reconciliation endeavors should heed these lessons about ripeness carefully. If democratization has not taken place, or conflict is ongoing, then a formal truth and reconciliation initiative will likely be ineffective. Societies in conflict must be ready to resolve the conflict before victims can sit down and engage in authentic dialogue with perpetrators.

These lessons gathered from South Africa and Rwanda, two of the most prominent examples of large-scale truth and reconciliation processes, can provide useful insight into effective and ineffective restorative justice strategies. Future truth and reconciliation efforts should heed the lessons learned from these restorative justice efforts in order to be successful.

CONCLUSION

A paradigm shift has occurred that has fundamentally changed the nature of conflict in the 21st century. Conflict is no longer predominantly a clash between states, but now involves highly complex intrastate conflicts that harms individuals and causes national discord. The complex nature of intrastate conflict requires a new approach to conflict resolution. That approach is rooted in restorative justice, which gives parties to a conflict ownership over their own conflict resolution process. While lessons from South Africa and Rwanda reveal significant challenges with the implementation and use of truth and reconciliation commissions, the phenomenon of truth and reconciliation has emerged out of the restorative justice tradition to become a viable, and hopeful model for effective conflict resolution. Nelson Mandela once said, “if you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.”¹⁹⁴ Restorative justice in the form of truth and reconciliation offers a hopeful way to transform enemies into partners and conflict into peace.

¹⁹³ *Truth Commission: Rwanda* 99, *supra* note 108.

¹⁹⁴ NELSON MANDELA, *LONG WALK TO FREEDOM* (1990).