Memorandum

Reconciliation as a sentencing goal in International Criminal Justice

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Introducing Reconciliation

Defining Reconciliation

The aim of reconciliation is to bring about an end to violence thereby promoting peace within fractured national societies (Murphy, 2005). However, Hamber and Kelly (2004) argue that its larger purpose is to re-establish the authority of the state, more particularly, reinstating the liberal state based on the social contract between civil society and the state. They also view reconciliation as moving from the premise that relationships require attention to build peace. Reconciliation can be understood as the process of addressing conflictual and fractured relationships and this includes a range of different activities. Reconciliation may involve a range of measures including developing a shared vision of an independent and fair society, acknowledging and dealing with the past, building positive relationships, significant cultural and attitudinal change, and substantial social, economic and political change (Community Relations Council, 2008). Nabudere (2004) argues that the African philosophy Ubuntu (humanness) underscores the concept of reconciliation. This philosophy is at the base of the African way of life and belief-systems in which peoples' daily-lived experiences are reflected. Ubuntu is used to settle disputes and conflicts at different levels on the continent and is therefore central to the idea of reconciliation (Nabudere, 2004).

The rather vague definitions of reconciliation have caused scholars concern. A call for "greater efforts to discuss and refine what is meant by and involved in the process of peace and reconciliation and to adopt effective and imaginative ways of monitoring the impact of reconciliation programs in supporting this process" was made by many (Hamber & Kelly, 2004). Whether or not – and to what extent reconciliation is feasible depends from conflict to conflict.

Criticism of Reconciliation

The concept of reconciliation has received much criticism both on a theoretical and a practical level. Some argue that reconciliation is still not well developed and no agreed upon definition exists despite its increasing common usage in a range of diverse contexts (Hamber & Kelly, 2004). Reconciliation is arguably context bound and what is meant by the concept may vary between voluntary groups, communities, policy-makers, politicians and funders (Hamber & Kelly).

Reconciliation is a term that is commonly loosely used and often underlined with religious connotations (Hamber & Kelly). Bar-Tal (2000) argues that reconciliation only becomes relevant to

those intergroup conflicts that last for a long time (at least two decades) and involve extensive violence. He also argues that the different types of conflicts require customized reconciliation strategies. For example, some conflicts may take place within a society divided on ideological issues (e.g. in Spain, El Salvador, or Chile), whereas other conflicts may take place within society on the basis of interethnic, interracial, or interreligious schisms (e.g. in Northern Ireland, South Africa, Turkey, or Israel). Yet other conflicts may involve two separate states (e.g. France and Germany, Israel and Egypt, or India and Pakistan) (Bar-Tal, 2000). The outcome of the conflict essentially determines how reconciliation ought to be approached. In some instances the formally warring parties may still have to co-exist in one political system (e.g. South Africa, Bosnia, El Salvador). In this case reconciliation should be treated differently in comparison to a conflict which sees one or more-formerly warring parties return to their home state(s) (e.g. Israelis and Palestinians, French and Germans and Poles and Germans). In the former scenario, there is a need to establish a political, societal, economic, legal, cultural and educational system that will incorporate the two past rivals. IN the latter scenario this is not the case as the two past rivals live in two separate states (Bar-Tal, 2000).

In light of the above, it is understandable why scholars emphasize different aspects of reconciliation, depending on the type of conflict. The fact that there is no authoritative definition of reconciliation complicates matters further and makes it difficult to apply the concept in practice.

Reconciliation as a Sentencing Principle

Domestic Sentencing

The rationales and trends in sentencing vary not just over time but also between different states and depend greatly upon the specific penal culture of that time and place (Hall, 2005). According to Hall (2005), the purposes of legal punishment by domestic courts are typically retribution, incapacitation, rehabilitation, deterrence and public education. Certain states do focus on reconciliation, whereas others disregard it completely and view punishment as having a predominately correctional role. Although there are not many states that do place a strong emphasis on reconciliation post-conflict, Rwanda has placed it high on its priority list (Ingelaere, 2008).

It is, however, worth mentioning that reconciliation is not mentioned as a sentencing goal/principle in any of the Criminal Codes of Yugoslavia, Rwanda or Sierra Leone. Instead, specific instruments such as the National Unity and Reconciliation Commission (Rwanda), the Truth and Reconciliation Commission (Sierra Leone), and Yugoslav Truth and Reconciliation Commission

(Yugoslavia) were set up in order to promote unity, reconciliation and social cohesion (National Unity and Reconciliation Commission).

As the victor of the war in Rwanda, the RPF was able to establish the post-genocide agenda without any constraints. President Paul Kagame often stated that his aim was to build a new country. Reconciliation is a fundamental corner stone for his goals (Ingelaere, 2008). In order to achieve this outcome, certain mechanisms had to be set in place to ensure that home-grown traditions replace imported practices (Ingelaire, 2008). The possibility of refereeing back to the traditional Gacaca courts arose in the immediate wake of the genocide, as a United Nations High Commissioner for Human Rights (UNHCHR) report reveals (UNHCHR 1996). Given that ordinary justice systems barely existed after the genocide, the Gacaca Courts received much support, both on the national and international level. Reconciliation is not mentioned as a sentencing principle/goal in domestic systems, yet it is mentioned as one of the sentencing goals of the Gacaca Courts. The Gacaca courts were installed to prosecute and try the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 0ctober 1990 and 31 December 1994. In the Gacaca system, communities at the local level elected judges to hear the trials of genocide suspects accused of all crimes except planning of genocide. Those that sought reconciliation with the community received lower sentences by the courts. Moreover, the Gacaca courts fostered reconciliation by providing a means for victims to learn about the truth about the death of their family members and relatives (Outreach Programme on the Rwanda Genocide and the United Nations, Retrieved on October 3). The Gacaca process has five goals: to establish the truth about what happened; accelerate the legal proceedings for those accused of genocide crimes; eradicate the culture of impunity, and reinforce their unity; and to use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom (Schabas, 2005).

Although the National Unity and Reconciliation Commission Act (1996) does exist in Sierra Leone, it fails to define reconciliation and merely states that the Act sets out to establish a Commission to promote national unity and reconciliation. It does not outline how reconciliation can be achieved. No references are drawn to reconciliation in the criminal code of the Former Yugoslavia.

International Sentencing

The ad-hoc Tribunals were set up by the United Nations' Security Council with the aim to "contribute to the restoration and maintenance of peace" and "the rule of law" in the Former Yugoslavia and in Rwanda (Security Council Resolutions 827 and 955). The Special Court of Sierra Leone was established by the Government of Sierra Leone and the United Nations in 2002 with the goal of "bringing an end to impunity". Amidst the establishment of the ad hoc tribunals and the court, judges themselves developed sentencing goals. Some judges also mentioned reconciliation as a sentencing goal. However, in order to achieve restoration of peace, the traditional (retribution and deterrence) sentencing goals must be achieved first. As demonstrated in the Erdemovic judgment, the extent to which each sentencing goal is relevant largely depends on the individual circumstances of the cases. Paragraph 60 of the Erdemovic judgment highlights that "the importance and appropriateness of each of the sentencing goals changes with time and from one legal system to another. In addition, punishment often appears to serve several purposes, the relative weight of which depends on the nature of crime and the individual circumstances of the perpetrator".

There is only limited literature available regarding the principles applied in international sentencing. Drumbl (2005) indicates that the tribunals maintain a strong focus on the traditional sentencing goals (retribution, deterrence, rehabilitation and prevention), and questions whether the simplicity of these sentencing principles may in fact impact the effectiveness of the tribunals. Based on interviews he conducted with perpetrators and survivors in Rwanda, he concluded that "the structural simplicity avidly pursued by the prevailing paradigm of prosecution and punishment may squeeze out the complexity and dissensus central to meaningful processes of justice and reconciliation" (Drumbl, 2005). Moreover, he points out that other sentencing goals are sporadically mentioned, ranging from reconciliation to reintegration, but these are neither patterned nor consistent (Drumbl, 2005).

Regardless of whether or not reconciliation is viewed as a principle of sentencing or as a goal of the penitentiary, the current system of enforcement of international sentences may in fact hinder its achievements of the multiplicity in goals the international tribunals claim to achieve, such as retribution, deterrence, rehabilitation of reconciliation (Hola & van Wijk, 2013).

Reconciliation in the Sentencing Judgments of the ICTY, ICTR and SCSL

How often is Reconciliation mentioned?

All three International Criminal Tribunals mentioned reconciliation as a preferred outcome in determining the sentence. The judges did so in 56.9% of the sentencing judgments (Figure 1). The number of times reconciliation is mentioned as a preferred outcome did not vary much between the ICTY (52.1%) and the ICTR (56.5%), however within the SCSL judgments, reconciliation was mentioned in 80% of the judgments.

	Total number of cases	Reconciliation mentioned as a principle of sentencing
ICTY	91	12 (52.1%)
ICTR	61	13 (56.5%)
SCSL	9	4 (80%)
Total	161	29 (56.9%)

Figure 1: Number of times reconciliation is mentioned as a sentencing principle.

Definitions and Explanations of Reconciliation

ICTY

The judgments in which reconciliation is mentioned fail to a) define it and b) go into any detail about reconciliation as a sentencing principle. Instead, they simply refer to it as the Security Council's broader aim of maintaining peace and security in the former Yugoslavia (para.58, Erdemovic).

It was anticipated that through criminal proceedings, the Tribunal would contribute to peace and reconciliation in the former Yugoslavia, and beyond, through the establishment of the truth and the promotion of the rule of law (para.45, Obrenovic; para.28, Cesic; para.76, Jokic; para.292, Nikolic). This reappearing statement points towards the suggestion that reconciliation is likely to be an automatic outcome of the proceedings carried out by the tribunals. The judgment do not precisely indicate how reconciliation can be achieved through criminal proceedings and only go as far as stating that it is the duty of the tribunals to contribute to reconciliation (see e.g.para 46, Obrenovic; para 58. Erdemovic). In paragraph 53 of the Obrenovic judgment, the judges draw a link between rehabilitation and reconciliation. It is stated that in cases where the crimes were committed on a

discriminatory basis, the process of coming face-to-face with the statements of victims, if not the victims themselves, can inspire tolerance and understanding of "the other". The process continuous after the return of a convicted person to society and makes an active contribution towards reconciliation.

Throughout the sentencing judgments, establishing the truth and justice are presented as the two fundamental stepping stones towards reconciliation. There is no discussion of other factors that may impact reconciliation nor are any criteria outlined which ought to be taken into consideration by the judges to determine whether reconciliation is a suitable sentencing principle.

ICTR

Also in ICTR case law explanations regarding reconciliation in the sentencing judgments are non-existent. Nonetheless, the ICTR judgments more frequently point out that the aim of the establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation (para 26 &27, Kambanda; para 94, Akayesu; para 19, Serushago; para 455, Rutaganda) . Much like it is indicated in the ICTY judgments, the ICTR judges seem to draw a direct link between punishment and reconciliation. That said, like the judgments of the ICTY, the ICTR judgments do not provide detail regarding the aims, methods or factors influencing the success of reconciliation.

SCSL

Like the ICTY and ICTR, the SCSL also does not provide much information about the aims and methods of reconciliation. It also does not distinguish between cases, outlines generalised goals regarding reconciliation and fails to indicate which factors make a population more suitable for the process of reconciliation. None of the judgements provide a definition of the term, and the only guidance regarding the aims and purpose of reconciliation comes from Kamara, Fofana, Kondewa, and Taylor Trial Chamber Judgement which state that "in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there, would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace". Interestingly, Sesay's Defence had submitted an argument to the contrary by mentioning that given he had the foresight to lay down his arms, he could be used as an example both within Sierra Leone and abroad. They furthermore highlighted that a lenient sentence for Sesay would also help towards the collective peace and reconciliation of Sierra Leone (para. 75).

Relative Importance of Reconciliation as a Sentencing Principle

Despite reconciliation being mentioned in 56.9% of the cases, Judges at times argue that reconciliation is less important than the sentencing principles of retribution and deterrence. As seen in the Erdemovic Judgement (para. 58), the International Community's objective as seen by the Security Council –i.e. general prevention (or deterrence), reprobation, retribution, as well as collective reconciliation – fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. "These purposes and functions of the International Tribunal as set by the Security Council may provide guidance in determining the punishment for a crime against humanity" (para 58, Erdemovic). However, the final judgments at the Tribunals did not seem to focus on reconciliation as a sentencing principle and repeatedly stated that "sentences imposed must be directed mainly at retribution and deterrence" (para 8, Tadic). The final judgment of Delalic, Mucic, Delic and Landzo was in this sense exceptional, since it was the only judgement which the ICTY judges highlighted the importance of reconciliation and pointed towards the fact that by merely focusing on retribution, the goal of reconciliation could be compromised. Para.1231 states that "a consideration of retribution as the only factor in sentencing is likely to be counter- productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice."

Para. 19 of the ICTR Serushago judgment states that "the objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace." In the other 61 ICTR cases in which reconciliation is mentioned, the wording is much the same. In most instances it is also indicated that in order for the promotion of reconciliation to occur retribution and deterrence must have been achieved.

Much like the ICTY and ICTR, the judgements of the SCSL also highlight the fact that a strong focus is placed on retribution and deterrence. Reconciliation is merely regarded as a process and the hopeful outcome of handing out a retributive sentence.

It is likely that judges of the international criminal tribunals do not strongly focus on reconciliation due to inability to conceptualise it, and the fact that reconciliation as a sentencing principle is not provided for in the Statues. Whilst other sentencing principles such as retribution and deterrence are based on punishment, and therefore practically achievable, reconciliation is regarded as a process which may or may not occur depending on the circumstances of each case and situation. As it is presented as merely a hopeful outcome, its relative importance is presented as smaller than the main sentencing principles, namely retribution and deterrence.

Reconciliation and the Guilty Plea

According to Clark,the ICTY trial Chambers have on numerous occasions claimed that when defendants enter a guilty plea it is an important stepping stone towards ascertaining the truth, which in turn fosters reconciliation (Clark, 2009). And indeed, some of the judgements suggest a link between a guilty plea and reconciliation. Para. 234 of the Deronjic Judgement, for example highlights that a guilty plea may further promote reconciliation. Moreover, a guilty plea contributes to establish the truth about a conflict, which again may facilitate reconciliation in the affected communities (para. 236,Deronjic). The link between a guilty plea and reconciliation also appeared in the Jokic Judgement. Para. 76 & 77 highlight that judges believed that his guilty plea contributed to the establishment of the truth which in turn contributed to reconciliation. The ICTR also draws links between a guilty plea and reconciliation. In the Rutaganira case, the Chamber stated that when an accused pleads guilty, he is not only taking an important step towards rehabilitation and reintegration, he also contributes to finding the truth, thereby contributing to reconciliation (Para. 114). A connection between guilty pleas and reconciliation is never made in the SCSL judgements.

Clark (2009) believes that the direct correlation that the ICTY and ICTR make between truth and reconciliation to be problematic for at least two reasons. Firstly, truth is a contested concept, and therefore has no inherent positive value; and secondly, the Tribunals' practice of charge bargaining means that the 'truth' is established is often an incomplete truth. Clark raises the broader question of "whether tribunals can realistically be expected to contribute to reconciliation, particularly when as in the case of the ICTY and ICTR, they are physically, conceptually, and linguistically removed from the intended beneficiaries of their work, namely, the local communities" (Clark, 434).

Reflection

The extent to which reconciliation can be seen as a sentencing principle of the ICTY, ICTR and SCSL is a debate which requires further discussion and analysis. Although the Security Council has indicated that the Tribunals' objectives do include reconciliation, and despite the fact that it is addressed in a large proportion of the sentencing judgements, it is merely considered to be a process, which may or may not be fostered by retribution and deterrence. Given that the term is still poorly conceptualized, it is assigned less meaning than other sentencing principles. More consideration needs to be given to how the aims of reconciliation can best be achieved. Several factors must be determined, including how to create an appropriate environment for reconciliation; how to assess whether a population has been able to reconcile; whether reconciliation can be achieved in the same

manner in each population and so forth. As reconciliation is not directly provided for in the statutes, one may conclude that reconciliation is a problem best left to national organizations. The fact that the Tribunals are far removed from the affected populations makes it difficult to contribute to reconciliation, which happens over time and within the impacted groups. Given that the international criminal tribunals do address reconciliation in many of the sentencing judgements, efforts should be put into further conceptualizing the term and developing more outreach programmes supported by the tribunals in order to assess whether their work actually does foster reconciliation.

References

A sustainable peace? (2008). *Community Relations Council*. Retrieved from: http://www.healingthroughremembering.org/images/j_library/lib/Sustainable%20Peace%20-%20Research%20as%20a%20Contribution%20to%20Peace-Building%20in%20Northern%20Ireland.pdf#page=21.

Bar-Tal, D. (2000). From intractable conflict through conflict resolution to reconciliation: psychological analysis. Political Psychology, 21(2).

Clark, J.(2009). Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation. *The European Journal of International Law*. 20(2).

Drumbl, M.(2005). *Atrocity, Punishment, and International Law*. Cambridge University Press.

Hamber, B. & Kelly, G. (2004). A working definition of reconciliation. *Democratic Dialog.*

Hola, B. & van Wijk, J. (2013). Life after Conviction at International Criminal Tribunals – Empirical Overview. Unpublished Manuscript.

Hall, J.(2005). *General Principles of Criminal Law*, The Lawbook Exchange, United States: New Jersey.

Ilic, D. (2004). *The Yugoslav Truth Commission*. Retrieved from: http://www.eurozine.com/articles/2004-04-23-ilic-en.html.

Ingelaere, B. (2008). *The Gacaca courts in Rwanda*, International Institute for Democracy and Electoral Assistanct. Retrieved from: http://www.idea.int/publications/traditional_justice/upload/Chapter_2_The_Gacaca_Courts_in_Rwanda.pdf.

James-Allen, P., Lahai, B.S & O'Connell, J.(2003). Sierra Leone's Truth and Reconciliation Commission and Special Court: A Citizen's Handbook. Retrieved from: http://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Handbook-TRC-2003-English.pdf.

Nabudere, D.W(2004). *Ubunto philospophy. Memory and Reconciliation*. Retrieved from: https://repositories.lib.utexas.edu/bitstream/handle/2152/4521/3621.pdf?sequence=1.

National Union and Reconciliation Commission. Retrieved from: http://www.nurc.gov.rw/index.php?id=84.

Outreach Programme on the Rwanda Genocide and the United Nations. Retrieved from: http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml.

Schabas, W.(2005), Genocide Trials and Gacaca Courts, *Journal of International Criminal Justice*, (3), 1-17.

Van Zyl, D. & Mulgrew, R.(2012). *Handbook on the International Transfer of Sentenced Persons*. Retrieved from: http://www.unodc.org/documents/justice-and-prison-reform/11-88322_ebook.pdf.