Reconciliation and Transitional Justice: How To Deal With The Past And Build The Future

BY

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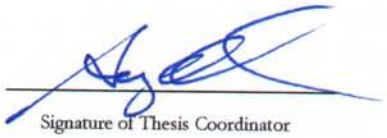
Approved:  — Signature of Thesis Coordinator — 6 Dec 09 — Date

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ACRONYMS

ANC	African National Congress (South Africa)
CONADE	Comisión Nacional sobre la Desaparición de Personas (National
P	Commission on Forced Disappearances)
DROC	Democratic Republic of Congo
ERP	Ejército Revolucionario del Pueblo (People's Revolutionary Army)
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDEA	Institute for Democracy and Electoral Assistance
IGO	International Governmental Organisation
NGO	Non-Governmental Organisation
NP	National Party (South Africa)
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner For Human Rights
PRI	Penal Reform International
RPF	Rwandese Patriotic Front
RTLM	Radio-Télévision Libre des Mille Collines
SATRC	South African Truth and Reconciliation Commission
SC	Security Council
SIDA	Swedish International Development Cooperation Agency
TJM	Traditional Justice Mechanism
TRC	Truth and Reconciliation Commission
Triple A	Alianza Anticomunista Argentina (Argentine Anti-Communist Alliance)
UN	United Nations

INTRODUCTION

Given that dealing with the past implies the re-construction of the past within a present-future-complex, a look backward as a result of collective critical self-reflection is viable only if coupled with a look forwards, i.e. if there is a commonly shared feeling that the future is guaranteed.

Lidija Basta Fleiner

Reconciliation and transitional justice have become fundamental concepts in every society's strategy to deal with the past and the key to open the door towards a more peaceful future. However, the universal support to these processes and the consensus regarding their content —mainly in the academic world and the political discourse— is not reflected in post-conflict societies which choose to follow a particular strategy that do not always satisfies the need to deal with the past.

As a first approach to the subject, I will analyse the conceptualisations of reconciliation and transitional justice to see if there is a connection between a certain notion of reconciliation and a transitional justice mechanism. This is crucial because the concept of reconciliation used will determine the road that will be followed to address reconciliation in the post-conflict phase.

The question that arises from this situation is: Why a society decides to follow a unique reconciliation and transitional justice strategy? The goal of this thesis is to answer that question. At first glance, we could say that each society has a culture, history and psychology within which it understands, copes with and overcomes conflicts, and that correlates with a certain way of making sense of the conflict and pursuing its resolution. But such complex matter is multi-causal by definition and deserves a more detailed evaluation. The hypothesis is that the choice and implementation of a specific reconciliation and transitional justice strategy in a post-conflict society is not discretional and is conditioned by many domestic and international factors that shape and influence the process.

In order to analyse this hypothesis a transitional country analysis matrix will be developed to explain the different factors that exert an influence towards the selection of the reconciliation strategy. The use of a matrix as an analytical tool does not imply that a country's social, political and economical reality is reduced or divided into separate compartments. A society, as any other complex organisation, has different elements that interact and generate results different from the sum of the parts.

After having described the matrix I will apply it to three paradigmatic cases: the South African transition from apartheid (1995), post-genocide Rwanda (1994) and Argentina's transition from the last authoritarian rule, the *Proceso de Reorganización Nacional* (Process of National Reorganisation) (1983). The analysis of these cases will explain how those factors influence the strategy and the notion of reconciliation that the national elite will undertake.

More than usual, despite having a broad and integral notion of reconciliation, the transitional government cannot implement it due to constraining factors like the abovementioned. Nonetheless, there are some ways of advancing from the possible to the ideal strategy that will be developed and outlined after the case analysis.

RECONCILIATION AND TRANSITIONAL JUSTICE

Many voices in the political arena may consider transitional justice and reconciliation as opposite asserting that transitional justice looks into the past, while reconciliation does so in the future. However, this focus is precisely what makes them substantively complementary and necessary to bring about a lasting peace and end the cycle of violence. Both concepts are intimately intertwined to a point where one cannot be completely understood or enacted without the other and coming to terms with the past appears as a pre-condition to develop a common future. Transitional justice and reconciliation can be carried out in parallel coordination because they contribute together to the overarching process of relationship-building (UN Secretary General, 2004).

The adoption of a certain notion of reconciliation or transitional justice will undoubtedly shape and condition the implementation and the outcome of the post-conflict strategy. For instance, it is not the same to include reconciliation as a part of transitional justice than consider transitional justice as a step towards reconciliation. Reconciliation, in particular, is a complex term and a very difficult one to define because it means different things to different people based on cultural and historical legacies, as well as on personal or political situations resulting from past conflicts and present political agendas. Although the definition of transitional justice might seem clearer in terms of elements and goals, its implementation is usually restrained by the same elements.

Reconciliation is a social process within which people deal with the past, acknowledge past atrocities and suffering, and at the same time change "destructive attitudes and behaviour into constructive relationships toward sustainable peace" (Brounéus, 2007:6). It includes the whole society, and it is not an end-state but a continuing process in constant development that seeks to transform conflictive relationships. Transitional justice refers to justice applied to political transitions from authoritarian rule to democracy (Argentina in 1983) or from open war to peace (Sierra Leone), as "the very first step for the establishment of the rule of law and the new, democratic government" (Thallinger, 2007:695). Taking into account these definitions, transitional justice is included within the definition of reconciliation based on the notion that it is impossible to achieve a long-standing peace and a peaceful society without addressing their legacies of human rights abuses. Ultimately, there is no possible reconciliation if justice is sacrificed to the altar of political realism.

In order to shed some light on the intimate co-relation between the notions of reconciliation and transitional justice, the points of contact between these terms will be analysed. The notion of reconciliation as an holistic concept is reflected in the International IDEA's definition which defines it as an "Umbrella term", an overarching process that comprehends different narrower conception of reconciliation including: truth-seeking initiatives, judicial proceedings, relationship building, forgiveness and institutional reform. From this perspective, these elements do not compete with each other; furthermore, they are complementary, interdependent and constitutive parts of the process (Bloomfield, 2006a). I will also consider a holistic definition of transitional justice as a...

> "need to acknowledge publicly the abuses which have taken place [truth seeking], to hold those responsible who have planned, ordered, and committed such violations [retributive justice], and to rehabilitate [restorative justice] and compensate victims [reparation] as necessary steps in

establishing accountability and trust in society [institutional reform]. This process of dealing with the past is a necessary precondition for reconciliation" (Sisson, 2007:2).

The common elements in both definitions that build on an integral and complex term will be explained herein to establish their similarities joining a one-dimension definition of reconciliation (Bloomfield (2006a) and Oduro (2007)) and its correlative transitional justice mechanism.

1. Reconciliation as the pursuit of justice and retributive justice:

Some argue that reconciliation is more than just knowing the truth; it is about justice. From their perspective, if injustices generate conflicts, justice contributes to reconciliation. Despite that, there is constant debate regarding the balance between reconciliation and justice, and whether it is possible or advisable to restrain one in order to achieve the other. International human rights literature widely considers criminal punishment as an effective deterrent and a means of establishing a link between accountability, reconciliation, peace and democracy (Olson, 2006:279). However, reconciliatory justice "aims to do more than deter. It aims to provide a systematised definition of social right and wrong, from which grows an underlying shared value: that the justice system applies to all of us, that it acts fairly, that we can trust it" (Bloomfield, 2006a:19).

The transitional justice equivalent to that notion of reconciliation is retributive justice. For their advocates, reconciliation does not mean impunity, and bringing those responsible for mass-atrocities to justice is a pre-condition to attain it. Reconciliation needs retributive justice to prevent a relapse into conflict, to generate self confidence and trust in society and to install a culture of human rights.

There are different ways of pursuing retributive justice from national courts to international justice. At a *national level*, all states are obliged under international law to prosecute war crimes, crimes against humanity and genocide and all other human rights violations in their courts. The post-conflict country has primary jurisdiction and constitutes *prima facie* the best option to deal with the past. Recently, the principle of *universal jurisdiction* emerged as an option to prosecute human rights violations. This principle allows national courts of foreign countries to prosecute the gravest crimes against humanity and war crimes even if the crimes were committed in other countries and/or perpetrated by leaders of other nationalities.

To remedy the shortcomings of the states in the prosecution of perpetrators of massive human rights violations and to assist them in the pursuit of justice, several advancements have taken place in the international justice arena including the creation of *ad hoc criminal tribunals* (ICTY and ICTR) and, later, the creation of *hybrid courts* (mixed international-local bodies that combine international and national legal frameworks, procedures and members). The establishment of the *International Criminal Court* in 1998, constituted a great step forward in the international prosecution of perpetrators of widespread human rights violations, reinforcing the international direction towards retributive justice.

In conclusion, the judicial systems at the domestic and international level should act together to assist each other in applying the necessary mechanisms for bringing all perpetrators of human rights violations to justice.

2. Reconciliation as a shared truth and truth commissions (historical justice):

Reconciliation is also about truth, about shedding light over the past, including the acknowledgement and disclosure of human rights abuses perpetrated by all parties. Hayner notes that the notion of reconciliation as truth must consider that "there is never just one truth: we each carry our own distinct memories, and they sometimes contradict each other" (Oduro, 2007:16).

The transitional justice approach for this definition are truth commissions, defined as "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years" (UN Secretary General, 2004:17). These initiatives are a necessary response to the right to the truth, "a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted" (Inter-American Commission on Human Rights, qd. in Salmón, 2006:341).

Nakla Valji (2009) distinguishes two generations of truth commissions according to their contexts and goals. The first generation was developed in Latin American transitions from authoritarian rules to democracy in the '80s and had limited mandates. These entities where rather inquiry commissions than truth commissions, they were held behind closed doors and limited to certain crimes, i.e. finding the truth about crimes against humanity committed clandestinely. The second generation was born with the South African Truth and Reconciliation Commission. This new generation's truth commissions were open to the public with hearings for victims and held institutional and thematic hearings. Their approach was unique in each context and addressed linkages with socioeconomic crimes, such as the mandate of Liberia's truth commission to investigate economic crimes (Valji, 2009). Another significant difference was that the first generation sought to clarify and make public crimes that were planned and designed to be committed in secret, while in the second generation, like in Bosnia, the truth was not hidden but there were multiple truths established along ethnic lines (Kritz, 2005:22).

3. Reconciliation as forgiveness and relationship-building and restorative justice:

Forgiveness is considered by some as the key for reconciliation. In this vision, truth and justice will give place to forgiveness and will discard the pursuit of revenge by the victim. The precondition for forgiveness is the restoration of relations among enemies and the implementation of confidence-building measures and other related programmes. However, this notion has detractors who sustain that, although reconciliation can include forgiveness, they are not synonyms because the latter is a personal right, not a task of the state. In their view, reconciliation is a social process while forgiveness is a personal prerogative. Crocker (2000b) asserts that imposing forgiveness into the political agenda goes against individual freedoms, including the right to withhold forgiveness. This approach can also generate

resistance among victims who feel obliged to forgive past abuses without having access to some kind of justice.

Reconciliation as relationship-building can be defined as "a process through which a society moves from a divided past to a shared future" (Bloomfield et al, 2003: 12). It is a process that implies rebuilding trust, coming together after a conflict that drove parties apart and mending relationships. This "deep reconciliation" as opposed to "light reconciliation" (see Coexistence) is a long-term social process that requires a reframing of aspirations, emotions, attitudes, behaviours and beliefs.

The transitional justice approach that falls into these two definitions is restorative justice which appears as one of the best mechanisms to attain reconciliation through relationship-changing and bridge-building in post-conflict societies. This social restorative view is an answer that complements certain punitive mechanisms to reach an effective reconciliation and some of its elements can be found in truth commissions and other truth-seeking mechanisms that involve interaction between victims and tormentors, all of which produce positive advances in the restoration of the social fabric.

Restorative justice focuses on repairing the damage done, rather than punishment, on the victim and the hurt, rather than the offender and the crime (Bloomfield, 2006b:60). In this view, crime primarily causes injuries to the victim, society and the perpetrator and only secondarily is it law-breaking, so this is about restoring while repairing the injuries caused (Estrada-Hollenbeck, 2001). Estrada-Hollenbeck explains that parties "use their understanding of the conflict to identify the problem, shape the course of interaction, collectively and integratively [sic] create a settlement, and bind them psychologically to the settlement" (2001:83).

Traditional forms of justice are intimately related with restorative justice. A traditional justice mechanism (TJM) can be defined as "a non-state justice authority, which may be religious or secular, restorative or retributive" that incorporates traditional leadership, communal justice structures and rural, urban and religious justice mechanisms (Mobekk, 2006:49). The state can play a supportive role and even the people in charge of them might be state officials. These social methods use traditional forms of justice to foster reconciliation and rebuild relationships, taking into account culture, religion, customs, and the social-economic context.

It is important, on the other hand, to understand that restorative justice should be limited to less serious offenses because "while mutual 're-humanisation' of conflict protagonists is an important dimension of reconciliation, it is hard to see how the new political order can gain credibility without at least addressing the question of punishment for offenders" (Lerche, 2000b). And from a factual perspective, although this mechanism might be helpful for minor offenses, its effectiveness against decades of abuse remains an unanswered question.

4. Reconciliation as coexistence and institutional reform:

This is a more pragmatic and minimalistic idea of reconciliation understood as society's capacity to discuss and resolve conflicts without recurring to violence. It is closer to political connectedness than reconciliation and it "refers to a relatively amicable relationship, typically established after a rupture in the relationship involving one-sided or mutual infliction of extreme injury" (Louis Kriesberg qd. in

Oduro, 1998:11). Under this conceptualisation, national reconciliation can be achieved without forgiveness which —as explained above— is deeply personal. Coexistence could be a more pragmatic and modest approach at the beginning of post-conflict peace building, as a first step towards the achievement of reconciliation, followed by confidence building and empathy between parties (Bloomfield, 2006a).

At first sight, this definition has no parallel in transitional justice. However, it keeps certain connection with the term of institutional reform in that they both refer to means and mechanisms to channel political and social conflicts through peaceful means within a democratic political system. As part of the transitional justice framework, institutional reform is focused almost totally in the future and consists in judicial, legal, police, penal and military reforms that are necessary to build a peaceful and viable political system based on the rule of law and the upholding of human rights.

Judicial reform means restructuring the judiciary in terms of infrastructure, personnel, mechanisms and philosophy. The reforms depend on each country but the goal is to have a professional, fair and effective judiciary that ensures the respect for human rights and that guarantees the right of all its citizens regardless of their condition. This reform is vital for transitional societies where there is scepticism or lack of trust in the legal system.

Law enforcement and police reform is another important issue of transitional justice because security and armed forces are, in most cases, at the centre of the claims regarding human rights violations. This reform includes: police and military capacity building, human rights education; building a new relationship between the forces and the people; adoption of international policing standards and eliminating any ethnic or cultural bias in the forces.

The goal of institutional reform is related to the notion of reconciliation as coexistence and consists in the reign of the rule of law defined as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (UN Secretary General, 2004:4).

The other side of the coin: Reconciliation as forgetfulness and amnesties

In many cases, reconciliation is unjustifiably equalled to forgetting, to letting go of the past. Generally, this policy of impunity is proposed either by those involved in past abuses or those willing to sacrifice justice to "move forward". As Cassin (2006) points out, in ancient Greece, an amnesty was a decree of forgetfulness ("amnesty" and "amnesia" were synonyms) and reconciliation is, in this sense, quite the opposite; it is *anamnesis*, remembrance and full disclosure (Cassin, 2006:237).

The equivalent in political transitions is amnesties, defined as official acts "granting an individual or group immunity from criminal prosecution for crimes committed in the past" (Mobekk 2006:30). Although they are not part of the "toolkit" of transitional justice given that they seek to avoid any kind of justice, they are usually used to reach reconciliation in post-conflict societies. Their legitimacy and

effectiveness as facilitators of reconciliation are rather disputed, but their presence in many transitional societies cannot be ignored.

It must remain clear that amnesty and pardon are different concepts. Although pardons are an exemption or shortening of sentences they do not eliminate convictions. In terms of political costs, pardons are preferred because they are granted after the offense was proven and the perpetrator convicted and they do not erase the crime or the guilt. However, they are also contested because they do not constitute a satisfactory punishment for the crimes committed.

There are different kinds of amnesties according to their scope (blanket, partial or conditional), and origin (*de jure, de facto* and self-amnesties). The United Nations limit the possibility of granting amnesties and affirm that any peace agreements endorsed by them "can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights, and, where we are mandated to undertake executive or judicial functions" (Secretary General, 2004:5).

Yasmin Naqvi (2006:267) brings out an emerging doctrine of "accountable amnesties", which are valid and can be recognised under international law, and promotes the right to the truth as a legal value. This term was developed by Ronald C. Slye (See Naqvi, 2006) to describe an amnesty that: could be accorded foreign recognition, must be created by a democratic regime and does not apply in cases of serious international crimes, among other conditions.

In conclusion, reconciliation implies transitional justice but it goes beyond it in that it cannot be achieved without individual and collective healing, social justice, without human rights or a legitimate system of government. John Paul Lederach's (1997) definition of reconciliation as a meeting point, an ideal balance between justice, truth, mercy and peace coincides with the integral notion of reconciliation as an umbrella term. He asserts that although sometimes these elements seem to be contradictory, they can and should be balanced and complemented.

> "Truth is the longing for acknowledgement of wrong and the validation of painful loss and experiences, but it is coupled with Mercy, which articulates the need for acceptance, letting go, and a new beginning. Justice represents the search for individual and group rights, for social restructuring, and restitution, but it is linked with Peace which underscores the need for interdependence, well-being and security". (Lederach, 1997:29)

In his view, all these values must be satisfied in order to pave the way towards true reconciliation, while highlighting the need to achieve a broader sense of justice that includes social and economic justice. Any holistic approach to a reconciliation process needs to attain and maintain a delicate balance among relationship-building, forgiveness, truth and justice.

TRANSITIONAL COUNTRY ANALYSIS

Having analysed different elements of a reconciliation process and the holistic approach to transitional justice, there is a question that comes to mind: Why is that each transitional society applies a unique set of mechanisms to deal with the past that not always include a holistic notion of reconciliation and transitional justice? To begin to answer that question, a theoretical approach will be outlined below to analyse a transitional society, in particular the domestic and international factors that shape the conflict and the post-conflict phases.

In general, political theories consider domestic factors and the state as the main influencers in a conflict. Even if this still holds true, nowadays the nation-state paradigm is being increasingly shaped by a multiplicity, diversity and interdependence of actors within the international arena[1] (Krahmann, 2003). The mutual interaction and feed-back that takes place between domestic and international levels discards the notion that sees them as autonomous spheres. The goal of this analysis is to find out if there is a correlation between a society's particular situation and the choice of the transitional justice and reconciliation strategy. The general outline of our matrix is based on existent bibliography of conflict analysis, actors' analysis, context assessment and transitions[2].

DOMESTIC FACTORS

Domestic factors usually determine policies at both the internal and international level. For analytical purposes, three sets of domestic factors will be identified herewith: the conflict itself, the main actors involved and the context.

A. THE CONFLICT: This set of factors describes causes, forms of violence and characteristics of the conflict.

a. Country history: *Analysing the history of the conflict and the history of relations between communities is crucial because conflict is not only related to what happened (history) but also to how the different communities perceive what happened (mythology) (Bloomfield et al, 2003). Understanding the past is a main factor to be considered in the reconciliation strategy. Many violent conflicts arise in societies from old unhealed wounds, ancient discrimination or unaddressed grievances. A historical analysis is also essential to determine the period of time that the reconciliation process should cover.*

b. Causes of the conflict (type): *Conflicts result from multiple causes that take place in a certain context and that are useful to help us make sense of the conflict. In the post-conflict stage, they are fundamental in the design of the reconciliation strategy because they help us know where grievances and*

1 *See Elke Krahmann (2003): Multilevel Networks in European Foreign Policy. Ashgate Publishing Ltd. Hampshire, England. Multiplicity: the steady growth of political actors, agencies that communicate directly with their counterparts in other countries, transnational business interests and causes. Diversity: includes the public-private debate considering different levels of analysis. Interdependence: as a result of specialisation in production and global marketing.*

2 2 See Bibliography for further reference specially: APFO-Safeworld (2004), The World Bank (2007), SIDA (2006), Dan Smith (2004b), IDEA Handbook (2003), David Bloomfield (1998).

divisions reside and how to outline a plan to deal with them properly. Dan Smith explains the need for a mixed analysis of the social, cultural, economic and environmental background (root causes) and the political foreground (proximate causes, triggers), "both the structural causes and the factors that lie within the decision-making power of political actors" (2004:8). In his cause analysis he uses Dessler's four-part typology (Smith, 2004):

1. Background causes: Fundamental lines of political, social, economic, or national cleavage. They need political mobilisation to come into action. Azar has identified the deprivation of human needs as the underlying source of protracted social conflict (Woodhouse, 2008 and Miall, 2004). Azar's classification includes: Security needs (nutrition, housing, a safe environment and physical security); Access needs (political and economic participation); Acceptance needs (recognition, identity and culture).

2. Mobilisation strategy: This refers to the objectives of key political actors and their strategy to attain them (their political behaviour and how they conceptualise and present their cause). Smith (2004) affirms that the deprivation of needs does not necessarily lead to conflict if it is not mobilised by political action. Conflict unravels once large numbers of people are convinced that the recourse to violence is the only way of securing their needs (Smith, 2004). The sufficient cause of conflict is political mobilisation when leaders persuade the people and obtain their loyalty and commitment.

3. Triggers: Factors that set out the conflict. They are actions undertaken by a party that limit the choices of the opponents, favouring violence instead of a peaceful approach, e.g. unfair elections, the arrest or assassination of a key leader or political figure, a military coup, unemployment or a natural disaster.

4. Catalysts: Factors that affect the intensity and duration of the conflict and can be internal (military balance) or external (UN intervention), e.g. the radicalisation of conflict parties, paramilitaries, the economy, increased human rights violations and the availability of weapons.

c. Authority of the previous regime: The origin of a government (whether it is de facto or de jure), the authority in power (whether it is military, civilian or religious) and its system of ideas (whether it is communist, nationalist-conservative, nationalist-ethnic, secular or religious) have great influence upon the selection of a transitional justice and reconciliation strategy.

d. Forms of violence, crimes committed: It refers to the nature, scale and degree of past violence (Bloomfield et al, 2003). The level and quality of violence during the conflict defines the response, even though damage and suffering cannot be measured. A crude and violent past can prompt transitional societies to develop an effective and profound reconciliation strategy.

The type of crimes committed also influences the future strategy due to the international legal obligations of the state. It is not only a state's right but also its obligation to prosecute the perpetrators of war crimes, crimes against humanity and genocide. Other minor offenses and crimes can be dealt by means of restorative justice mechanisms and offenses committed for the sole fact of taking part in hostilities can be amnestied.

B. THE ACTORS: The second set of factors refers to the actors of the conflict. This analysis will take into account their needs and fears, interests, mobilisation strategy and interrelations[3].

a. Conflict parties: It can be the state itself, the security sector (military, police), a civil government, guerrillas, ethnic or religious groups, local (militia) leaders and armed groups, and traditional authorities.

b. Victims/Survivors: People who have suffered violence and whose rights have been brutally and systematically violated. Different types of conflict affect the dichotomy victim-perpetrator and each conflict draws a unique division line. Bloomfield (2003) points out that the division line between an all-powerful regime that targets the population and the opposition makes the victims easier to identify. But if there is state violence ("oppression" from the victims' perspective) and rebel violence ("terrorism" from the government' perspective) the boundary becomes more blurred.

c. Perpetrators/Offenders: People that have committed common criminal acts to human rights violations, war crimes, crimes against humanity and genocide[4]. Two issues must be mentioned in this category. First, there is a difference between state violence and non-state violence. The former is substantially different and graver because of the state's raison d'être, which is to protect all citizens with no distinction, uphold the rule of law and respect human rights. "It is a matter of the gravest concern when the state, which holds the monopoly on public force and is charged with protecting the rights of citizens, uses that force to violate these rights. The state has a whole range of powerful institutions at its disposal —the police, the judicial system, the mass media, parliament— with which it may denounce, investigate and punish human rights violations by private citizens or non-governmental groups" (AHRC, 1998: 70). Second, there are varying levels of responsibility among perpetrators between the planners that ordered gross violations and those who carried them out, even if they are all criminally responsible. The arguments that take responsibility from a personal to a collective sphere (structural violence, political indoctrination, ideology, etc.), the principle of due obedience or self victimisation do not exculpate those responsible.

d. General population: The general population is also a victim of the conflict because it suffers some of its causes and consequences. However, in some cases, indifference from the general public facilitates the spread of human rights abuses and collective inaction, when confronted with atrocities, is also a way of being an accomplice. In post-conflict societies, there can be another case of society as a perpetrator when the people favour impunity under the mantra of "moving forward".

e. Civil society: This term comprises all institutions which stand outside the public (governmental) sector as well as the private sector (business). It is conformed by social organisations (also called

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3 Needs and Fears: Needs relate to the things that motivate the parties to carry out their actions and sustain certain positions and fears are the actions that could jeopardise the achievement of one's goals; Agenda/Interests: Includes the agendas of key actors and the power to impose them; Form of Mobilisation: How do they pursue their goals? In the streets, the judiciary, the parliament, the media, etc.; Relations with other parties: the kind of interaction between actors at various levels. There can be alliances between groups that share the same goals (domestic or international connections) and there can be competition or opposition when there are contradictory objectives._

4 Mobekk (2006) asserts that in certain conflicts the distinction between victims and perpetrators becomes blurred because, in some cases, during the conflict, people play the roles of both the victim and the perpetrator.

intermediary institutions) that aim at satisfying social needs, promoting social goals, fostering political policies and other interests and actions. The civil society's development can determine the evolution and the dynamics of the transition as well as the reconciliation process.

C. THE CONTEXT: There are other domestic factors that can be distinguished from the conflict and its actors and that have to do with the overall condition of a society, its culture and psychology, its level of cohesiveness and the rule of law.

a. Culture (how to deal with conflict): Culture could be defined as a "system of both implicit and explicit meanings, beliefs, values and behaviours shared by the members of a community or group, through which experience is interpreted and carried out" (Woodhouse and Duffey, 2008). Culture is a vital force in society that tints every social undertaking making it unique and unrepeatable, thus, Kevin Avruch and Peter Black (qd. in Woodhouse and Duffey, 2008:170) developed the ethnoconflict theory, which explains the local understanding that people use to produce and interpret conflicts (the local common sense about conflict). According to this theory, there are many determinants that vary from culture to culture, including political structures, religion and folk psychology. However, as Woodhouse affirms, these determinants should not be seen as sources of conflict but as variables that influence collective thinking and behaviour.

b. Social cohesiveness: In widespread and protracted conflicts, society tends to be more fragmented, thus making it difficult to establish transitional justice mechanisms, such as truth commissions, at a national level. In this case, the alternative is to integrate local truth-seeking processes into a national process (Zupan and Servaes, 2007).

c. Status of the rule of law: This factor is essential to evaluate the real possibilities of any transitional justice strategy. It is a global concept that involves political, judicial and social values fundamental for any society; i.e. supremacy of the law, equality before the law, accountability, fairness, separation of powers, absence of arbitrariness and procedural transparency. In transition periods, the status of the rule of law and its potential reform are, simultaneously, influenced and influencing factors.

INTERNATIONAL FACTORS

As it was mentioned before, the importance of international factors in post-conflict societies is indisputable. Everyday, boundaries become more porous and the international/national division lines fade. However, the various international factors intervene in different ways, have diverse impacts and pursue varied interests.

a. International community: This is a broad concept that includes countries, International Governmental Organisations (IGOs) and International NGOs; i.e. international trade unions, multilateral organisations, regional organisations, development agencies and religious or political networks. International actors are seldom neutral (Zupan and Servaes, 2007); they intervene at different stages,

following interests, pushing political, social and economical agendas, and, usually, favouring certain types of transitional justice mechanisms.

b. Influential powers: The individualisation of this category is based on analytical purposes. Powerful states like the permanent members of the UN Security Council influence transitions immensely and their support or indifference can bend the power balance in a post-conflict society. Two contrasting examples are the role of USA in Central America in the '80s, on one hand, and the Irish-Americans contribution to the peace settlement in Northern Ireland in 1998 on the other (Bloomfield et al, 2003).

c. Historic periods: There are historical cycles that generate conflicts of similar characteristics and, therefore, their transitions have common features; e.g. transitions after post-colonial conflicts and civil wars in Africa since the '60s, Latin American transitions after military regimes in the '80s, Eastern Europe's transition after the fall of the Berlin Wall in the '90s. While it is true that transitions in a certain historical cycle share similar characteristics, the pretension of designing universal models ("one size fits all") is erroneous and may exacerbate conflicts.

d. Regional context: a transitional process cannot be fully understood without analysing the regional scenario. The region can reinforce or weaken the transition period acting as a catalyst or a counteracting force. From a strategic point of view, the spill-over effect of a crisis must be taken into account, as well as that of a transition, on one hand, and the use of neighbouring countries as bases to launch attacks or influence the conflict, on the other. The "demonstration effect" (domino effect) explains that the event in one country can have effects on another and this process can replicate in the entire region.

TRANSITION TOWARDS RECONCILIATION

Domestic as well as international factors and the balance of power between them influence the transition period. These elements will condition a great deal of the reconciliation strategy. Power is the capacity to do things, having the potential to affect the context (resources, access, social networks and constituencies, other support and alliances) (Bloomfield, 1998). Therefore, the balance of power and the actors' capability to exercise it in order to attain their goals will be determinant in the development of the transition.

Power is energy that flows constantly, but it is important to describe where it lies in society. Who is in a stronger position? Who has or have more support? Is it possible to make changes in the balance? Can one party achieve a definitive victory? SIDA (2006) has created a tool for power analysis with which the key actors' power base and resources are studied, considering formal and informal power relations, hidden power, interest groups and structures. Directly related to power is the capacity to spoil the process; in other words, to block any attempt at transitional justice. A classic example is a transition where perpetrators remain in positions of authority, are able to block reform processes and promote a culture of impunity. IDEA has a three-type classification of transitions (Bloomfield et al, 2003):

1. Abrupt transition: A formerly oppressive regime has been violently and completely overthrown or a civil war has ended with a decisive military victory for one side. Probable reconciliation

mechanism: retributive justice. These transitions can promote retributive justice and reconciliation, or can transform previous perpetrators in new victims. Example: Rwanda, 1994.

2. Smooth transition: The regime in power initiate a process of reform to manage transition under their terms. If an authoritarian regime implements reforms towards democracy and admits some of its wrongs, population may have leniency. Probable mechanism: self-protecting measures like amnesties. Example: Brazil in 1985.

3. Negotiated transition: Transition is the result of a settlement between the former government and opposition groups. There is a balance of power by which the previous regime retains some degree of power and the opposition does not exert total control. Therefore, everything must be negotiated, from the reconciliation strategy to the bargain of amnesties for peace. "If such a negotiation simply gives the victory to one side, the lingering resentments, however deeply they appear to be buried, will almost certainly come back to haunt and hinder reconciliation at a later stage –and ultimately that path leads back to conflict and to renewed violence" (Bloomfield et al, 2003:43). Example: South Africa's transition from apartheid.

Besides the fundamental importance of the type of transition, its chronological progress and evolution does also play a role in the establishment of the reconciliation process. Bleeker (2004) describes three phases of the transition:

1. Conflict phase: it develops during the conflict and before negotiations.
2. Negotiation phase: it is a key period that allows transition to develop.
3. Post-conflict phase: it is focused on dealing with the past and reconstruction.

To analyse the historical development of transitions, Pierre Hazan (2006:28) describes a wider arc for the implementation of transitional justice. In his view, the transition period reaches far beyond the end of open conflict and the formal transition. After the repression phase (conflict) and the post-conflict period which takes place during the first five years, there is a time continuum in which transition is far from finished. Transitions include the medium term (five to twenty years) during which society goes under major (political, economic, social) reconstruction and looks for new points of reference; and the long term that begins twenty years afterwards, when the new generation starts to be willing to overcome divisions.

CASE ANALYSIS AND COMPARISON

In this section, I will use the matrix described above to analyse and compare three different transitions: the end of apartheid in South Africa in 1995, reconciliation in Rwanda after the genocide in 1994 and the Argentine transition from the last authoritarian rule in 1983. The main goal is to see whether each domestic and international factor favoured a certain approach over another and how that influenced the final choice of the reconciliation strategy. This analysis will also show that, while in some cases, factors might call for a restorative approach, in others they might tend to a retributive or truth-seeking mechanism.

INFLUENCE OF DOMESTIC FACTORS

THE CONFLICT

History

In the case of South Africa and Rwanda, the long history of segregation and ethnic divisions, respectively, made the adoption of a restorative justice and truth seeking mechanisms possible and even recommendable. This included the possibility for South Africans and Rwandans to address their past grievances and to shed light over their darkest times from a restorative perspective. In South Africa, the goal was to end the cycle of violence and segregation, while retributive justice, given its confrontational nature, could have deepened divisions. In Rwanda, this factor in particular called for a restorative approach. Since its independence, political parties were created a long ethnic lines and the pursuit of political agendas through violent means, an established political practice, was the main option to suppress the opposition.

Argentina was a totally different case because the history of the country asked for a retributive justice approach in that the repeated regressions into dictatorial rule had to do more with an utter disrespect for the law and the constitution —on the part of the political elite— than with political divisions among the population. The de facto government that ruled Argentine between 1976 and 1983 was the last stage of an alternation between democratically-elected governments and dictatorships that labelled the country as an "intermittent democracy".

Causes

Background causes in Rwanda included physical, security and access needs that required a broad solution that a retributive approach alone could not give. Economic reconstruction, equal access to land and resources, political participation and reconciliation were fundamental to achieve success in the Rwandan transition. South Africa also demanded a solution that could reach beyond a guilt sentence. Apartheid had created a regime of exclusion and condemned the black community to underdevelopment and chronic poverty. This had to be acknowledged and amended through an array of measures that ranged from legal justice to social and economic justice. These financial and material urgent needs in South Africa demanded that resources were destined to undertake the reforms necessary to implement the new constitution and promote a unified South Africa, instead of implementing massive and expensive judicial proceedings.

In the case of Argentina, the path that led to the 1976 coup in particular and the brutal system of domination by the military regime required a more comprehensive approach of justice and truth due to the unprecedented level of political violence and the crimes committed. In this last particular aspect, the limited mandate of the CONADEP fell short to address that issue. The retributive approach was necessary to address the fact that all the main political actors had ignored the "game rules" to channel political disputes and adopted strategies that disregarded its destructive consequences upon other groups and the whole society (Cavarozzi, 1994: 41). However, looking at the same factor from a sociological perspective, society cannot be fully reconciled without looking into the reasons that led to authoritarianism from a truth-seeking and restorative approach.

Taking into consideration the incommensurable differences between the Argentine and Rwandan conflicts, they coincide in the effectiveness of the mobilisation strategy implemented by the parties' leadership to carry out despicable crimes. In Rwanda, this policy of mobilisation included the fostering of ethnic confrontation and the creation of a poisoned political environment through direct means (use of militias and execution of massacres) and indirect means (ethnic propaganda) (Sellström, 1996). The fact that the victims of the genocide were not only Tutsi but also Hutu opposed to the regime reinforced the idea that there was a well-organised plan of political mobilisation with the sole purpose of perpetuating Hutu power. For this kind of criminal and racial act, the punitive approach was appropriate and even necessary. This approach was also the most convenient in Argentina were the Montoneros guerrilla and the military promoted social violence and justified it in the name of justice (Montoneros) or order against the "communist threat" (the armed forces). The utilisation of Sorelian myths on the part of the parties' leadership, in their attempt to dissuade and rally support based on violence and false antinomies, had to be dealt with through a retributive justice approach.

Triggers are the last link in a chain of unsatisfied needs and unresolved conflicts that escalate the conflict to the next level, initiating a new dynamic with unforeseen and unexpected consequences. Although their influence as factors is stronger regarding the escalation of the conflict in terms of violence and complexity, they are an indirect influence in the reconciliation strategy due to the abovementioned unforeseen consequences. In the cases of South Africa and Rwanda, there were many identifiable triggers although their impact in the conflicts varied, mostly, according to their power of mobilisation and not their inherent graveness.

From an overall perspective, triggers are important to establish the beginning and end of conflicts and the time-frame that will be analysed via transitional justice mechanisms. For example, in Rwanda, there was a fundamental difference between the national dimension of transitional justice mechanisms (national courts and modernised gacaca) and the international (ICTR). From a national perspective, the trigger of the conflict was the RPF intervention (1990) and the cut-off date was December 31st 1994. For the international community, the conflict began in 1994 with the final escalation that led to the genocide. This is not a minor detail, because it establishes a different context and explanation of the genocide and recognises that it was the result of multiple causes and not only of ethnic tensions, bringing to the foreground the civil war and the struggle for power. This broader time-frame asks for and gives place to a more holistic approach that seeks to deal with past grievances, find the truth and rebuild relationships.

Catalysts are important to analyse the life cycle of the conflict and characteristics of the conflict and, as a consequence, the best transitional justice strategy to address the issues. They also help to establish responsibilities regarding other secondary crimes connected to the main conflict, i.e. arms trafficking, media manipulation, target massacres, etc. In South Africa, catalysts were centred in the policies enacted to deepen apartheid as well as the targeting of the ANC movement. This called for a restorative approach due to its intimate relation with the history of white rule in South Africa.

In Rwanda, on the other hand, the main catalyst was the use of the media as a persuasive weapon of hate propaganda that generated an anti-Tutsi sentiment among Hutu Rwandans. The creation of the Radio-Télévision Libre des Mille Collines (RTLM) and the newspaper "Kangura" both commanded by the akazu —Habyarimana's entourage of Hutu extremists— played a crucial role in inciting to genocide and opposing the Arusha process. This demonstration of power and influence was another proof of the growing capacity of the media to manipulate and mobilise people behind an idea or political project. These actions demanded a combined approach of restorative justice (restore relationships and media education) and a retributive approach to those responsible of manipulating information to incite to collective violence.

In Argentina, the power that the military held over the population through the use of state power prolonged the conflict and served as a catalyst. There were other two key catalysts: the initial economic success of the government's economic policy (domestic) and the bureaucratic-authoritarian wave of military-conservative dictatorships in South America (with the exception of Colombia and Venezuela). The last catalyst in particular called for a regional restorative and truth-seeking mechanism because there were joint actions among different dictatorial regimes to terrorise and control de political and social life in the subcontinent (Plan Cóndor is the main exponent of this tacit alliance).

Authority of the previous regime

None of the governments analysed had legitimacy due to their de facto nature as a result of the massive disenfranchisement of the black majority (South Africa), the denial of access to political participation (Rwanda) or a military coup (Argentina). Although the main approach to deal with illegitimately-constituted governments is retributive, the fact that their illegitimacy was connected to deeper conflicts required a combined approach —truth-seeking and restorative.

South Africa's apartheid was a regime of institutionalised segregation developed under a facade of democracy that demanded historical truth and restoration of relationships in order to, in Desmond Tutu's words, "turn human wrongs into human rights". Habyarimana's regime in Rwanda was based in a nationalist-ethnic ideology that contaminated the political system and deepened divisions in society, making a retributive approach an insufficient answer. Argentina's Proceso, a quintessential son of the national security doctrine, used repression to suppress the "communist threat" and blatantly acknowledged their crimes as legitimate war actions. They established a regime of liberal economics and social exclusion to close the gap generated by what they called populist regimes.

These authorities were civilian in the cases of Rwanda and South Africa and military in the case of Argentina but, in every case, there was an intimate relationship between the political leadership and the security sector (intelligence services, armed forces, security forces, civilian police, etc.) in the planning

and perpetration of the crimes and in securing the perpetuation of the oppressive regimes. This last common feature, the connivance between top-leaders and the security sector, required not only a retributive approach but also a truth commission to establish the patterns of abuse, modus operandi and strategies of extermination, as well as institutional reform to redefine the role of the security sector in society.

Forms of violence, crimes committed

The post-conflict process in South Africa remained controversial in terms of prosecuting apartheid as a crime against humanity. Apartheid, the deprivation of rights based on a biological factor as the colour of the skin and its political corollary of separate development, was not instituted as a crime against humanity until the Rome Statute in 1998 (which entered into force in 2002), three years after the end of apartheid, when the TRC mandate had already been settled. This reference is very important to establish the state of international law at the time of the TRC. On the other hand, the TRC's mandate comprehended the investigation of crimes that happened as a consequence of experiencing apartheid in every day life (killings, necklacing, torture, disappearances, arbitrary detention), but it recognised that there was a much larger pattern of human rights violations that was not being contemplated. The main parties decided in favour of a conditional amnesty —amnesty in exchange of full disclosure— that ruled out prosecutions in the name of national unity and reconciliation, the desire of looking ahead overruled the right to justice.

In Rwanda and Argentina, the nature of the violence and the crimes committed left little space for negotiation; they demanded a punitive method rather than any other transitional mechanism or, even less, an amnesty. This is because crimes against humanity and war crimes generate a state's obligation (based on international positive law and in international customary law) to prosecute. In the African nation, the international community supported the retributive approach with the creation of the ICTR and the recognition that what had happened in Rwanda was genocide. The TRJ (2000) backed this action explaining that, due to Rwanda's history of impunity, it was necessary to send a strong signal to the society and to establish a potent deterrent.

In Argentina, the democratic government was strong enough to deny amnesty and follow a more aggressive punitive approach through national courts to judge those responsible of illegal arrests, torture, forced disappearances, kidnapping of adults and babies, and rape. However, when the military leaders regained some leverage, there was a setback in the judicial procedures against the military that ultimately would lead to the impunity laws ("Due Obedience" and "Full Stop").

THE ACTORS

Conflict parties, victims and perpetrators

The nature of apartheid resulted in the violation of human rights of the great majority of the population in South Africa (black and indigenous) and the main parties in the conflict, the National Party (NP) and the African National Congress (ANC), were established along racial cleavages despite their evolution as political entities. The historic political domination of the white minority was challenged by

the progressive organisation of the demographically stronger but politically disenfranchised black majority. This posed a great challenge in the post-conflict transition because most of the population had been victims and it was not possible to reconcile and reintegrate South Africa with a mere retributive approach. All directions pointed to a restorative and truth-seeking mechanism.

The TRC allowed the victims to demonstrate the crimes committed by the apartheid regime and also by the ANC, tacitly legitimising the deal between De Klerk and Mandela that endorsed a restorative justice (Hazan, 2006:38). The TRC considered that there were victims from both sides that deserved the same justice. In this respect, the application of human rights principles to judge the actions of a non-state entity (ANC) was an innovation. The TRC asserted "the importance of understanding the Commission as but one of several instruments responsible for transformation and bridge-building in post-apartheid South Africa" (SATRC, 1998:64). This truth commission was not a moral second best but an advance from retributive justice to restorative justice in the view of their ideologists; it was a chance to build an inclusive social fabric (inclusion in economic and social aspects remains a pending subject).

However, as mentioned above, abuses committed by the state and by the liberation movement should always be differentiated because they are qualitatively and legally different. When the state exercises power abuse, not only it violates the law and human rights, but also leaves citizens without avenues of escape and totally defenceless.

In Rwanda, the long history of ethnic divisions and struggles developed in a context with no accountability or justice and generated a cycle of violence in which the victims of the past became the offenders of the present. What for many may have been "victor's justice", for the new government was a means of ending the "culture of impunity" that had prevailed in Rwanda for decades and stopping the vicious cycle of violence that was its main consequence (Uvin, 2003). Nevertheless, the implementation of a purely retributive approach, favoured by popular demand, would have been insufficient to address past grievances and attain reconciliation. The establishment of modernised gacaca, a restorative initiative, closed that reconciliation gap.

The status of the main actors (armed forces and guerrilla) in Argentina, their penal responsibility and the fact that they were clearly differentiated from the populace facilitated a punitive approach. This notion does not imply that this conflict was a war, because the military did not only initiated an illegitimate war but also demolished all democratic institutions, destroyed the opposition and committed massive violations of human rights.

Other issue pertaining to the levels of responsibility of the perpetrators and to retributive justice in particular is the concept of selectivity. In the cases of Rwanda and Argentina, the principle of selectivity was implemented for the sake of reconciliation and to avoid a long period of trials in the former, and to reaffirm democracy and the success of the transition in the latter. By applying this principle, judicial proceedings would be held only against the most responsible actors that participated in the planning and implementation of a systematic pattern of human rights abuses. Nevertheless, this should not be used as a means of "delegitimisation of the role of prosecution or punishment in dealing with past crimes" (Paul Van Zyl qd. in Mobekk, 2006:27).

In Rwanda, the complexity of this conflict and the different levels of responsibility among the perpetrators demanded a multi-approach strategy for practical and political purposes. It was unfeasible to

prosecute all the accused and it was politically impossible to put a divided country on its feet without any reconciliation that included members of the general population that took part in the genocide. For that purpose, the transitional government separated those who planned and organised the genocide (the akazu —"little house"—, Habyarimana's entourage; rural organisers from the communal and prefectural cadres; militias (Interahamwe) and the Presidential Guard) from the general population that committed abuses (Sellström, 1996). As a result, the perpetrators that were most responsible would be judged in international courts (if they were outside Rwanda) or in national courts (if they were in the country) and other perpetrator would be dealt with in the gacaca.

Several political implications led the Argentine newly-elected government to prosecute only the highest commanders and to enact the concept of "due obedience" to superior order for the lower-level officers (Wilke, 2004). Massive proceedings would have affected many low-rank officers in active duty and Alfonsín wanted the armed forces morally integrated in the new democracy, even at the price of impunity (Wilke, 2004). Although the government insisted that the military had not pressured them, the need to preserve democracy overturned a vaster notion of justice.

General population

The role of the general population through conflicts is not evaluated to determine criminal responsibility, but to design a reconciliation strategy capable of addressing the collective behaviour of the populace, determining the forces that promoted it and building new relationship to prevent a renewed conflict.

In South Africa, most of the population was involved in the injustice that apartheid embodied — as a victim, perpetrator or silent bystander— due to the government's action of projecting their racist policy into everyday life. As in Rwanda, there was a need to reconcile and to build a new social contract between estranged communities. Furthermore, some racist sentiments prevailed after the transition that needed to be addressed through reconciliation and truth, because prosecution would have deepened the confrontation.

In Rwanda, due to the participation of a great part of the general population in the genocide, judicial proceeding would have fell short to deal with the past. Restorative justice, on the other hand, allowed perpetrators and victims to come together and confront each other in a secure space, to acknowledge, confess, repent and repair the damage done or the sufferings caused to the community. The gacaca was a social restorative process as much as an individual one.

For Morene Ocampo, in Argentina, social responsibility did not resided in killing people but in letting it happen, and then not controlling what had happened (1996:251). In his view, political leaders, top businessmen and journalists, magistrates and bishops had a different and graver responsibility and, although they could not be equalled to the actual perpetrators, they had a moral mandate that was not fulfilled.

The idea of "social responsibility" must not be understood as a generalisation because many white South Africans fought against apartheid, many Hutu Rwandans protected the Tutsi and many Argentineans defended human rights in the darkest hours. However, this notion reflects the idea that no crime is committed without the tacit and/or explicit consent of a great majority of the population. There is

always a social responsibility in those kinds of conflicts that should be addressed in the reconciliation strategy from a holistic point of view.

The civil society

Civil society's influence in the transition period varied according to their composition, development and capacity to mobilise the population and to pressure political leaders. Nevertheless, civil society organisations in South Africa, Rwanda (once it was rebuilt) and Argentina had a fundamental role in the implementation and monitoring of the transitional justice and reconciliation strategies. They pressured governments, demanding accountability and the elimination of secrecy clauses, informed the population, audited the mechanisms and made recommendations.

Most of South African civil society sector was more committed to achieve political transition and the public disclosure of the past regime's crimes than individual punishment. This commitment prompted NGOs and churches to favour the disclosure of crimes and abuses from all parties and not only the apartheid regime, and made a vow to protect the rights of all victims. Although the TRC was more a consequence of political party negotiations, the civil society was able to remove "secrecy clauses" promoted by the major parties in the TRC legislation, play a key role in the election of TRC commissioners and monitor its work.

The decimation and fracture of the civil society after the Rwandan genocide made it impossible to start a collective reconciliation process right away and the pressure for justice pushed the retributive approach. Without strong grassroots movements, a truth-seeking mechanism seemed improbable and would have been resulted ineffective. The growth and development of civil society organisations during the years after the genocide allowed them to become part of the transitional justice strategy. Some NGOs and international human rights organisations favoured the punitive approach at the national level and initiated training-programmes for lawyers and judges and workshops focused in human rights and the rule of law.

In Argentina, the civil society did also pursue a punitive approach but it also made its contribution to the CONADEP with their documentation and information regarding forced disappearances. In this sense, the role of some NGOs and Human Rights Organisations during the Proceso was remarkable because not only did they collect information but also denounced many cases in international forums like the OAS and the UN. These brave and risky initiatives were carried out while the military held a tight leash on public liberties. The role of some the civil society in the transition was fundamental to support the punitive justice approach although there were differences with regard to the method and form it should take.

THE CONTEXT

Culture

Bloomfield (2003) explains that some cultures have a necessity to forgive while others tend to be inclined towards punishment. Some cultures may prefer traditional or community-based mechanisms to achieve restorative justice and truth instead of conventional approaches.

In South Africa, culture had an important role in the implementation of a restorative justice approach. Then again, this transition involved the task to reconcile a history of discrimination and estrangement and required forgiveness and building new bridges between alienated communities. The role of the church —incarnated in the figure of Desmond Tutu— and the development of the idea of ubuntu, built a cultural and psychological meeting place for communities.

The churches influenced the process and set the central idea of the TRC which was restorative justice. Tutu considered "'social harmony' or 'communal harmony' as the summum bonum, or highest good" (Crocker, 2000b). The other value of this reconciliation process was the concept of "ubuntu". Graybill (2007) explains that ubuntu derives from the Xhosa expression "Umuntu ngumuntu ngabanye bantu", which means "people are people through other people". People should recognise their own humanity in the other and that their destinies as people are intertwined. The main idea is that the individual only achieves its greatest development and happiness in the community and one cannot exist without the other. The idea of forgiveness and ubuntu, manifested the superiority of restorative justice compared with the Western retributive approach and legitimised the agreement that reflected the balance of power. Moreover, ubuntu was an African concept that added a sense of ownership and an element of inclusion for non-Christian indigenous communities.

Despite the fact that the majority of Rwandans are Christians (63% Catholic and 23% Protestant), the active role of the churches during the Habyarimana regime and the genocide (Graybill, 2004), discarded their possibility of acting as facilitators or bridge-builders. The South African idea of ubuntu and the role of the church could not be replicated, especially in a social environment that favoured justice over reconciliation.

Given the need to complement the judicial approach, a unique cultural element necessary for reconciliation was provided by an ancient Rwandan tradition of conflict resolution, the gacaca. This conflict resolution process dates back to the pre-colonial times and had been functioning for centuries. Gacaca means "grass" and refers to "a meeting of neighbours seated on the grass (the gacaca) to settle a dispute between people, it is a grassroots institution that traditionally dealt with minor offenses (Graybill, 2004:11). The goal of the gacaca was to "restore social order through the reintegration of the offender back into the community. Traditional gacaca was less focused on punishment [...] than on restoring harmony by reintegrating the one who was the source of disorder" (Graybill, 2004:11). The "modernised Gacaca" adapted this community-based method culturally familiar to all Rwandans. This mechanism broadened the scope in terms of dealing with past abuses and gave a wider legitimacy to the proceedings. Besides, it had a healing element while serving reconciliation and justice (Bloomfield et al, 2003). Above all, the gacaca empowered people to deal with the past in their own cultural terms.

The Argentine cultural approach to conflict resolution fit into the Western model of punitive justice and the principle that the rule of law is liable to settle societal conflicts. This approach to conflict resolution was altered by the lack of democratic stability that dominated the Argentine political scene prior to the 1983 transition. The people had never dealt with past abuses and justice had been set aside by factual power. Argentina had recurred repeatedly to violence in order to solve its political disputes, mainly under the form of coups d'état. This behaviour created the idea that a political project could gain

legitimacy of exercise to make up for the lack of legitimacy of origin; in other words, efficiency and capacity to get things done was preferred to the rule of law and justice.

In 1983, the brutality of the "technology of horror" demanded effective mechanisms to deal with the past in order to assure democracy for the future generations and to create a "cultural deterrent", a collective idea that de facto shortcuts, the violation of the Constitution (the social contract that governed the political life) and communal indifference were not the elements that would build a democratic and peaceful society. This last point was crucial because the proceedings could act as a deterrent but would also reaffirm the notion that no group or corporation is above the law and the fact that "trials would contrast the openness and fairness of liberalism with the secrecy and impunity of authoritarianism, thus building support for democracy" (Grandin, 2005).

Social cohesiveness

In South Africa as well as in Rwanda, the lack of cohesiveness in society and their divisions along ethnic and racial cleavages made it impossible to attain reconciliation through retributive justice. In South Africa, judicial proceedings could have been seen as a black "witch hunt" if it ended in guilty sentences or "white impunity" if it ended otherwise. The only way of achieving a degree of justice, easing ethnic pressures and thwarting new racial confrontation was a truth commission which implemented a restorative approach. The added value of restorative justice would help to cross-ethnic relationship building.

In societies that lack cohesiveness, reconstruction through local initiatives can build the reconciliation block from the base to the top. Therefore, the Rwandan gacaca system took reconciliation to the communal level which helped to overcome the ethnic differences through a bottom-up approach. However, the fracture that persisted in society after the genocide was prolonged by the initial punitive approach and the desire of vengeance of many Tutsi

In Argentina, despite the cohesiveness in terms of national identity, the political cohesion and the different views regarding the "national project" continued to endanger any possibilities of social concord. The brutality, destruction and disrespect for human dignity during the Proceso promoted the idea that peace and democracy were dramatically needed and they could only be achieved by a retributive approach. This was true in the sense that those responsible had to be judged for their crimes. However, that analysis failed to address the core of the problem which was the lack of will to attain national reconciliation and to build from the past towards the future. In this case, national reconciliation became reduced to a judiciary sentence.

Status of the rule of law

Pursuing criminal prosecution after a civil conflict can be impossible because, most of the times, the system is not prepared, procedural guarantees are hard to sustain and new violence can arise from such implementation. Retributive justice in national courts is a complex undertaking that presupposes the participation of multiple systems liable to cooperate with the process: judiciary system, political institutions, security sector (intelligence for the gathering of evidence, law enforcement, penitentiary

system, etc.). In some cases, it is advisable to create a special or ad hoc chamber that deals exclusively with war crimes, terrorism and organised crime, equipped with the required personnel and resources (Kritz, 2005:19). This will take away the burden from other courts in the country and allow the chamber to prosecute its cases properly.

In South Africa, the possibility of establishing an international criminal court or other judicial body was disregarded by all parties. In order to be effective in the eyes of South Africans, trials would have to take place inside their country and that was not an option at that time. The status of the judiciary during transition also prevented the ANC from pursuing a retributive approach because courts were the NP's domain. Before going in that direction, they needed a strong and impartial judiciary. Furthermore, the existence of a powerful security sector had a strong influence upon the transition. If a retributive justice approach was to be used to prosecute members of a still powerful security sector, justice would have been limited and, in some cases, rhetorical as a result of bargaining between peace and justice (Mobekk, 2006).

The rule of law in Rwanda was decimated after the genocide, the judicial infrastructure had been destroyed, there were scarce human resources available, the military had been carrying out police work and the rights of the victims and the legal guarantees of the defendants could not be upheld. Nevertheless, the government's will and desire to follow the punitive approach led to organise the national courts and prepare the system despite the limitations mentioned above. In 2009, the Government of Rwanda asserted that the lack of prosecutors, judges and lawyers delays the deliverance of justice and that it would take over 200 years if Rwanda relied totally in the conventional court system. Moreover, the lack of judicial guarantees of the accused could bring renewed discredit to the judicial system. As Mobekk explains, "by violating rule of law norms it continues to set a negative precedent for the domestic justice system, not enhancing trust but undermining it and not instituting change in the justice system [...] [the judicial system must] draw a line between past abuse and present accountability" (2006:16).

The normalisation of the judiciary and the rule of law in Argentina and the preparation and professionalism of the personnel allowed the democratic-elected president to initiate judicial proceedings that were not regarded as "victor's justice" by the general public or the international community. The reform of the military justice code gave the High Military Court the chance to judge the cases and improve the reputation of the armed forces, but their inaction prompted the Federal Appeals Chamber to assume jurisdiction (Wilke, 2004).

INTERNATIONAL FACTORS

The international community

As mentioned above, the role of the international community was important in the initiation and development of the conflict in South Africa, Rwanda and Argentina, but their involvement in those transitions depended on its actions or omissions during them. Overall, their influence was more decisive in the cycle of the conflict than in the selection of the reconciliation strategy.

In the case of South Africa, the international community intervened in two ways: it pressured to end the apartheid era (with actions like the Harare Declaration and embargos) and fostered the

transnational mobilisation of the civil society by sponsoring NGOs in South Africa and other non-violent demonstrations around the world.

During the transition, the international community was adamant about the establishment of any kind of transitional justice, while human rights movements and international NGOs pressured for a retributive justice approach and saw the truth-seeking mechanisms as a timid response. They even posed the question of whether the TRC had violated the international law obligation of punishing crimes against humanity with its negative to prosecute and the provision of amnesties. Despite this international outcry, the transitional justice and reconciliation strategy followed another path guided by the national parties.

Unlike in South Africa and Argentina, in Rwanda, the international community was substantially involved in the whole arch of the conflict, from its escalation to its end. The failure of the international community to foresee, prevent or stop the genocide, generated a sense of guilt and responsibility that prompt it to compensate its original omission with a strong intervention in the transition and post-conflict phase. The creation of the ICTR by the UN and its punitive approach is a consequence of that involvement.

In Argentina, the international community did not have a transcendental weight in the determination of the transitional justice mechanisms. The OAS and the Inter-American Commission on Human Rights (IACHR) in particular played an important role in denouncing the crimes that were being committed and recollecting data for future indictments and inquiries. The IACHR visit during the Proceso, generated the closure of detention centres, although many documents that proved human rights violations were destroyed. This mission did not only inspect and interview officials of the regime but also opened offices to receive claims in situ and received thousands of people, making the OAS one of the main recipients —if not the main one— of cases of disappeared people during the dictatorship (Moreno Ocampo, 1996).

Influential Powers

Influential powers conditioned the domestic policy of the countries under analysis, which ultimately affected their type of transition. Those powers' pressure in the post-conflict phase was focused in their demand of results in terms of rule of law and political and economic reforms than with the collaboration to reach national reconciliation.

In the case of South Africa, influential powers had to do more with the end of apartheid than with the transitional justice strategy. Progressively, the increasing internal pressure of the civil society and the changing of balance in the East-West dispute modified the policy of the Western powers — initially allied to the apartheid regime. From tacitly accepting apartheid, they began to condemn it explicitly.

In Rwanda, France had a controversial role during the civil war and the transition, in particular with *Opération Turquoise*, a unilateral intervention under national command which was legitimised by the UN Security Council (Adelman, 1996). On the other end, the United States government erroneously saw Rwanda as a new Somalia (Adelman, 1996) and refrained from taking active part in that conflict's resolution. This negligence, however, did leave a space of manoeuvre that allowed Rwandans to carry out their own transitional strategy besides the ICTR.

In the case of the Argentina, the influential powers played a role in setting the conditions for the instalment of the bureaucratic-authoritarian regime in 1976. During the 60s, the US-led military academy *Escuela de las Américas* (School of the Americas) in Panama, trained generations of military men from all Latin America to combat the "intern communist threat", who were indirectly motivated to insubordinate against their national governments in the pursuit of this goal (Moreno Ocampo, 1996). Interestingly enough, the most brutal stage of the military Junta was during Carter's administration. His policy on human rights prompted the US to abandon their support to dictators in the Americas and even started to denounce the crimes committed. In the military front, the Malvinas War debacle against the United Kingdom accelerated the democratic transition and, by debilitating the armed forces' legitimacy before the people, helped the implementation of a retributive justice strategy.

Historical period

The Cold War, the Decolonisation Period and the Third Wave of Democratisation impacted the conflicts in South Africa, Rwanda and Argentina and prompted their end more than determining their transitions. It can be said that, their influence in transitions was indirect as a result of the impact that these processes had in the balance of power between the conflicting parties.

The Cold War influenced the spiral of violence in Argentina while its end accelerated the transition in South Africa. In Argentina, the pre-conflict stage that had started in 1955 and the escalation that ended in the 1976 *coup* can be described as a classical Cold War scenario where the US sought to maintain control over their natural zone of influence. On the other hand, the changes originated in the post-Cold War era —which focused the main powers' attention in other regions— gave more space for manoeuvre to the post-apartheid South African leadership.

The decolonisation process that started in 1948 in India, affected both South Africa and Rwanda, although in different ways. The decolonisation policy in South Africa's neighbours (mainly Namibia and Angola) altered the country's geographical isolation barrier, its *cordon sanitaire*. On the side of Rwanda, the way in which Belgium left the country, exacerbated a conflict already latent between Hutu and Tutsi and created conditions for the establishment of an authoritarian regime. Although the post-decolonisation power struggle is not a sufficient cause to explain the genocide, it is a key element that increased ethnic tensions and allowed the development and growth of extremist groups like Habyarimana's *akazu* and the Tutsi RPF that ultimately led to a civil war and genocide.

Huntington called the "Third Wave of Democratisation" to a global process of transitions from authoritarian regimes that started in the '70s in Spain, Portugal and Greece, continued in the '80s in Latin America and ended in Eastern Europe and Asia in the '90s. Argentina was one of the first countries to undertake the transition from dictatorship to democracy in 1983, while Chile, Brazil and Uruguay were still governed by the military. This could have been dangerous for the new-born democracy but fortunately, by that time, those countries were already starting to envision their own negotiated transitions towards democracy.

Regional context

The regional influence upon the post-conflict strategy is connected to the leverage that neighbouring countries or regional organisations had domestically and regionally, their actual power as arbitrators, and their governmental ties with the country in conflict. In the cases analysed in this thesis, the regional context acted as influencers that affected the cycle of the conflict more than the choosing of the transition strategy. This was due, in part, to the fact that the neighbouring countries were undergoing similar political and social conflicts and transformations.

In South Africa, certain changes in the regional context helped to unravel the events that would end apartheid, i.e. the independence of Angola, Mozambique and Zimbabwe which destroyed South Africa's isolation; the independence of Namibia originated by the UN Resolution 435 (1978); and South Africa's failed incursion in Angola's civil war (Maharaj, 2008).

In Rwanda, the OAU was ineffective during the genocide due to its internal divisions and the regional implications of the Tutsi-Hutu struggle. Rwanda's conflict did not end within its territory and the confrontation between the Hutu and the Tutsi spilled-over into other countries (Uganda, Zaire (now DROC)) even during Rwanda's transition. In this case, the regional context spawned the conflict and did not bring about peace.

In Argentina's transition, the presence of authoritarian regimes in its neighbouring countries could have generated a more passive strategy of transitional justice, but two main reasons prevented that from happening: the weakened position of the Argentine armed forces after Malvinas and the fact that other neighbouring dictatorships had started or were starting to implement their strategies for a settled transition.

Type of transition

The type of transition and the balance of power among the main parties appear as one of the main factors influencing the decision of the transitional justice and reconciliation strategies in the short term. In simpler words, initially, the decision between prosecution and pardon is political.

In South Africa, a truth commission with a conditional amnesty was the result of a *negotiated transition* after which the ousted regime retained grip on some of the political and judicial structures. It was a middle-ground between prosecution and blanket amnesty. The fact that the idea of an amnesty was brought up as a reconciliation tool before the truth commission was a proof of the equivalent power that the parties held. From the very start, that meant the abandonment of any retributive justice approach and the common decision to implement a truth commission mechanism with a conditional amnesty and restorative characteristics.

In Rwanda, the nature of the genocide and the position of the regime generated a zero-sum game in which the winner would take all. After an *abrupt transition* and without constraints, the victor

(the RPF) could impose the punitive model that gained the upper-hand from the beginning with the judgement of *genocidaires* in international and national courts.

In Argentina, the Malvinas defeat, the catastrophic economic situation and the international pressure lessened the leverage that the military would have had in any other transitional scenario. All the attempts of the armed forces to control the transition were rejected. However, according to Grandin (2005), the transitions in Argentina was *negotiated*, it was a middle ground between the people's demand for justice, the wish to avoid provoking the still-powerful military command, and their own understanding of the role of criminal jurisprudence in society.

As it was mentioned above, there are political reasons why transitional governments decide not to prosecute the heads of the old regimes or to apply an alternative transitional justice mechanism. However, a *realpolitik* approach that favours a pragmatic transitional justice strategy without taking into consideration a holistic notion of reconciliation, is bound to deepen society's divisions and exacerbate social resentment. In Argentina, for example, the retributive approach was a strong step forward, but it was later reversed by the same political power that had carried them out when the military regained some leverage and could halt the democratic transition. In Rwanda, on the other hand, the continuation of this asymmetric distribution of power in the post-conflict government allowed it to sustain a combined approach of retributive and restorative justice chosen in the first place.

POST-CONFLICT PHASE AND RECONCILIATION

After having analysed the domestic and international factors that shaped South Africa's, Rwanda's and Argentina's transitions, I will describe the transitional justice approaches that resulted from those experiences.

Sequencing

Transitional societies face substantially complex processes that intervene in multiple sectors of the social and political life, exercising pressure on key actors and institutions. These actions could put strain on the transition and, therefore, applying a sequenced strategy appears as a useful option that allows the government to build on the previous stage and broaden its support base while eroding the power base of the spoilers of the process. It is fundamental to design a strategy where each step prepares and enforces the success of the next. It is not convenient to rush an ambitious reconciliation process if the society is not prepared, if it does not have strong institutions and public support to carry it out.

The Rwandan and the Argentine cases are examples of sequenced strategies, although they have an important difference: the Rwandan strategy is a descendent sequence from punishment (retributive justice) to reconciliation (restorative justice); the Argentine is an escalating sequence from truth commission (historic justice) to judicial proceedings (retributive justice).

Rwandan's *post-conflict phase* was determined by a two-stage transitional strategy to deal with the past and initiate reconciliation. The first stage had a purely punitive approach with the ICTR and the national courts proceedings while the second had a restorative one with the implementation of the *gacaca*. The first stage was the classic result of an abrupt transition, during which the victor imposed the transitional justice mechanism. Nevertheless, the *gacaca* was implemented to advance from punishment to reconciliation and to solve the material limitations of the retributive justice approach.

Argentina, on the other hand, applied an escalating sequencing, fundamentally to strengthen the process of democratisation and gradually limit the power that the outgoing military regime retained. The first phase was a truth-seeking mechanism, the CONADEP, which, despite criticisms regarding its mandate and conformation, gave factual knowledge about the atrocities and the horror of the dictatorship and gathered essential documentation for the trials. The retributive phase was built on the evidence found by the CONADEP and on the public effect that this commission had had. After the CONADEP people knew what had happened and this widened the support base of the democratic regime to pursue punitive justice and assign responsibilities for those crimes (Wilke, 2004). The case of Argentina showed that truth-seeking mechanisms can cooperate with a strategy of punitive justice and that investigatory bodies can serve diverse objectives: gathering evidence to present cases before the courts, establishing institutional responsibilities, finding out the fate of the disappeared and, fundamentally, rallying people's support by showing them the hidden truth. Based on the Argentine case, Crocker affirmed that those countries that choose to make a just transition by means of official investigatory bodies need not forgo the additional tool of trial and punishment (Crocker, 2000a:8).

South African truth and reconciliation commission: historical and restorative justice

The *post-conflict phase* included the implementation of mechanisms to deal with the past. The chosen approach was a Truth and Reconciliation Commission (TRC) that would grant conditional and individual amnesties in exchange for full public disclosure of the crimes committed before an impartial tribunal and public repentance. Those who refused would be tried in a court of law. These conditional amnesties were an innovation, because the formula "truth for amnesty" gave space to justice without jeopardising the transition (Cassin, 2006).

The TRC mandate was to investigate and record gross human rights violations occurred between March 1st 1960, before the Sharpeville massacre, and the May 10th 1994, when Mandela came to power. The focus was neither on the effects of apartheid laws or on the general policies of the government, but on those crimes that were consequence of experiencing apartheid in every day life. The mandate was centred in "bodily integrity rights"[5] and not in fundamental rights (SATRC, 1998:64). Adding to this investigation limitation, it must be mentioned that the disclosure was far from full, because the applicants revealed as little as possible leaving aside chains of command and orders.

5 "Bodily integrity rights" include the right to life, to be free from torture, from cruel, inhuman, or degrading treatment or punishment, and the right to security of the person (freedom from abduction and arbitrary detention) (SATRC, 1998:64).

Impartiality of the TRC

For Desmond Tutu, the claim of many South Africans that considered the TRC as a "witch hunt" against Afrikaners and biased in favour of the ANC, was far from the truth (SATRC, 1998). In fact, Tutu opposed a potential self-amnesty for the ANC, threatened with his resignation and, thus, helped to sustain the credibility of the TRC and its commitment with the victims.

Some argue that the impartiality of the TRC was unquestionable, especially considering the opposition to its final report by the whole political arc (Lewis Herman, 2002; Kisiangani, 2004). Judith Lewis Herman (2002) stresses the importance of the impartiality of the TRC when it came to investigate past abuses and, especially, those committed by the ANC. The ANC believed that, because of the inherent justice of their cause, their crimes were justified and they did not have any responsibility. Regarding the justification of violence due to "just cause", Tutu affirmed that the higher moral ground does not mean *carte blanche* regarding the methods used in the struggle for liberation; it means to "assert that we move in a moral universe where right and wrong and justice and oppression matter" (SATRC, 1998:13-14). There is thus legal equivalence (Lewis Herman, 2002) although not equal gravity or responsibility among all perpetrators.

Rwanda's combined approach

Retributive approach: ICTR and national courts

After its controversial role before and during the genocide in Rwanda, the Security Council created the *ICTR* in November 1994, with the mandate of prosecuting acts of genocide, crimes against humanity, and violations of the Geneva Conventions committed between January and December 1994. The co-operation of the Rwandan government with the ICTR was fundamental to prosecute the masterminds of the genocide at a time in which some people doubted if there had been genocide (Hazan, 2006). Nonetheless, Hazan (2006) affirmed that, when the ICTR put some members of the regime under risk of prosecution, the government initiated a systematic obstruction. In fact, the ICTR never indicted anyone for the crimes committed in revenge or retaliation for the genocide. This and the internal problems of the ICTR weakened its credibility in the eyes of the Rwandans and the world.

The cases tried in *national courts* were heard in special courts of three judges. The role of the judiciary was criticised because it did not fulfil international standards and lacked effectiveness and fairness. Moreover, there was little political will and insufficient professional and legal personnel (most of them had been killed or were implicated) to remedy those shortcomings.

Restorative justice: the *gacaca*

Once the Rwandan government had attained more stability and society's reconstruction was underway, the government implemented a restorative justice approach that seemed impossible in 1994 (Graybill, 2004) when the government and the people demanded the punishment of those responsible

for the genocide. The restorative mechanism chosen was the *gacaca*, a mechanism based on the principle that the offenses committed must be recounted, disclosed and tried before the community (Kritz, 2005:27). This mechanism was able to achieve a double purpose of ending the cycle of impunity while making it compatible with reconciliation. Even more, the complementarities of justice and reconciliation enhanced the effect of both over the local population and fostered the idea of promoting TJMs in other post-conflict societies.

As Graybill (2004) explains, the ICTR was mainly directed at a Western audience very few Rwandans of the rural communities got to see its convictions, while the *gacaca* was in every community, available for anyone who wanted to take part in it, ensuring the participation in the reconciliation process at a local level (PRI, 2000). In the *gacaca,* victims must come face to face with their attackers, tell their stories and lay out all their emotions in a secure environment (Graybill, 2004); it reintegrates the perpetrator and foster apologies and forgiveness, promoting reconciliation and reconstructing relations in the community.

There is also a truth commission element in the gacaca, because perpetrators and victims are given the chance to recount history and reconstruct it before and with the community. At the cell level, the adult population "participate[s] in clarifying the facts and establishing a comprehensive record of the genocide as it transpired in their village" (Kritz, 2005:27). Through the *gacaca*, the community has a chance to tell the story from their position and without the mediation by the government or pressure groups. However, there were variables that could affect the *gacaca* (Uvin, 2003): distrust or dislike of the government (and their actions post-genocide), the memories of the soldiers' behaviour immediately after the genocide, and the economy.

Argentina's escalating strategy

Truth commission phase: the CONADEP

Five days after assuming as president, Alfonsín created the CONADEP, with a limited mandate of clarifying the acts related to forced disappearances and the location of the remains and leaving aside crimes like temporary disappearances, staged killings, forced exile, acts of violence from the opposition and crimes prior to the 1976 *coup* (Hayner, 2006). This last item was contested because it left aside from the inquiry members of the Peronist party which had initiated the "state terrorism" with the creation of the Triple A and the authorisation (by decree) to "annihilate" the subversive groups.

The military pressure regarding investigations of the past and Alfonsín's necessity to strengthen a young democracy and to tackle other issues generated a restrained commission and the governmental support to the "theory of the two devils" that held the military and the guerrilla equally responsible for Argentina's violence in the '70s. Despite those limitations, the CONADEP had a fundamental role in Argentina's history. It gathered over 50,000 pages of evidence and complaints and its report *Nunca más* (Never Again) was a best-seller for many years. Furthermore, it demonstrated that a cooperative action between the government and human rights organisations can "take important steps toward establishing

the painful truth about repression which took place just a few years earlier, provided that the political will is available to investigate and report that truth" (Americas Watch, 1991:19).

Retributive phase: judicial proceedings

The decision to prosecute the members of the three Juntas for the crimes committed in their "war against subversion" was very much applauded. Alfonsín also ordered the prosecution of seven guerrilla leaders (of *Montoneros* and the ERP) another sign of the "theory of the two devils" (Americas Watch, 1991). Although the decision to prosecute all the parties involved was correct, there should have been a clear differentiation between "violence from the state" and "violence against the state".

These trials were a hallmark in the history of Argentina and the world and an example of the positive effects of applying this kind of approach after an authoritarian regime. As Wilke affirms, if courts recognise killings or torture as crimes, they delegitimise public discourses justifying these crimes and spread the message: "this should not have happened" (2004:5).

Impunity

Carrying out an ambitious retributive approach without the proper social and political safeguards, or a holistic view of reconciliation, generated political instability and prompted the government to take a huge step backwards in the search for justice and reconciliation. The great number of judicial claims presented to the courts by victims and relatives provoked a military reaction and campaign against the trials that pressured the government into passing the *Ley de Punto Final* (Full Stop Law) in 1986, which established a deadline for initiating criminal proceedings against the perpetrators of human rights abuses. The Easter rebellion of 1987 proved that the military had the power to halt the democratic transition forcing the government to pass the *Ley de Obediencia Debida* (Due Obedience). These impunity laws where further complemented by Carlos Menem's presidential pardons that stopped proceedings against almost 400 persons and freed all of the convicted perpetrators (Wilke, 2004).

To overcome the limitation of the impunity laws, a series of procedures were enacted mainly by the relatives of victims and human rights organisations, i.e. trials for crimes related to the abduction of babies and the alteration of their identity, which were not covered by the impunity laws; the enactment of "truth trials" in foreign courts (Wilke, 2004) and before the Inter-American Human Rights system (Commission and Court); the pursuit of a declaration of unconstitutionality of the "impunity laws" from the national courts. This last initiate was finally achieved in 2005 when the Supreme Court invalidated the amnesty laws confirming the Law 25.779 of 2003 that had declared them null and void.

GETTING TO THE BEST RECONCILIATION STRATEGY

The conditioning domestic and international factors described above may incline transitional governments to implement a certain approach to reconciliation that do not necessarily satisfy society's need to deal with the past. Taking this into account and, in order to implement a holistic approach to reconciliation and transitional justice, there is a need to potentiate to the fullest the social forces that favour such approach.

Drawing from the cases analysed above as well as the literature regarding reconciliation, there are a few selected measures that can cooperate to create a strong support constituency that helps the nation to further on its quest towards justice and reconciliation without conflict regressions:

1. Proper sequencing. This is an interesting tactic for escalating the reconciliation and transitional justice strategy without overstretching the society's capability to deal with past. Sequencing consists in implementing a holistic approach in a progressive manner, where the results of the first phase could affirm society's commitment to defend the process. There are no rules as to which mechanism —retributive, restorative or truth-seeking— should be implemented first, because that it conditioned by the factors explained in the previous chapter. Sequencing allows the government to build on the previous step and improve its negotiating position against the parties that want to annihilate the process or secure their impunity. This tactic carries many benefits:

a. It addresses the essential issue of building legitimacy of exercise to complement the legitimacy of origin, which widens the room of manoeuvre to implement all the phases and safeguard the process.
b. It considers the complexity of the process, including whether the prerequisites for specific measures are in place, whether the mandate, objectives and implementation strategy are coordinated and whether sufficient consideration is being given to complementarity and synergies (Zupan and Servaes, 2007). It prevents the overlapping of tasks and resources.
c. It establishes a feasible process in political terms and responds to the real possibilities of reconciliation.
d. It addresses the demands of different parties without disrupting the process.
e. It allows the government to tackle other urgent socio-economic issues like physical and housing security in the short-term. It cuts the classical division lines in society —may they be ethnic, racial, national or religious— by creating new types of relationship among the people.

2. Create or strengthen the reconciliation constituency: One fundamental step towards reconciliation is creating a broad-based social coalition that favours negotiations and transitional justice and organising formal forums to discuss the process. As Bleeker points out, the emergence of multiple actors in society represents a demilitarisation of culture and a pluralistic society which is essential to neutralise the supporters of violence (2006:158). This diversity should be complemented with a legitimate internal

leadership that considers justice and reconciliation as national interests and not sectarian agendas that turn reconciliation into "victor's justice".

A well-planned and implemented outreach and communication strategy is vital to build a reconciliation constituency. The authorities must communicate clearly all the aspects of the strategy and open a national debate, seeking the collaboration of respected people within the nation.

Another important component of this policy is to include the debate of transitional justice and reconciliation in the educational syllabus of elementary schools, high schools and universities. Usually, this is a mid-term measure taken when transitional justice mechanisms are already developed or in their advanced stages, but it should be implemented from the very beginning in order to open a new space of dialogue within the school and the family. Educational institutions are a second circle of socialisation for children and teenagers and an ideal space to internalise important values like justice, solidarity, the respect for human dignity and human rights and to build up citizenship.

3. Support the victims during the implementation of transitional justice mechanisms. The avoidance of the risk of re-victimisation must be a central task of the state in transitional societies. Reconciliation must always take into account the feelings of the victims including their view of reconciliation and transitional justice. Forcing the victims into a scheme of transitional justice that limits or conditions their right to justice can be a dangerous precedent and can perpetuate demands that will eventually jeopardise the political transition. Paul Van Zyl (2006) expresses the importance of prioritising the needs of victims when adopting a retributive strategy by helping them with the healing process by listening to their stories and giving them the possibility of overcoming such violent past.

4. Carry out institutional reforms: It might be useful to seize momentum during a transition to carry out institutional reforms, while legitimacy and popular mobilisation favourable to change are strong. A broad institutional reform implies the creation or reconfiguration of state institutions in order to fulfil human needs, uphold human rights (political, civil, economic, social and cultural) and avoid a relapse into conflict. It means that "the political system and state institutions must be able to create and safeguard room for equal opportunities, democratic participation and reconciliation processes in the long term" (Zupan and Servaes, 2007).

The implementation of *good governance policies* that reinforce the political systems and the rule of law is a great way of rebuilding society's strength and confidence in problematic transitions. Good governance means the capacity to make decisions and to implement them and has eight characteristics: participation, consensus, accountability, transparency, responsiveness, effectiveness and efficiency, equality and inclusiveness, and the rule of law (ESCAP, 2009). It minimises corruption, secures the representation of minorities and the most vulnerable groups in the decision-making process (ESCAP, 2009).

The reform of the security sector is another issue that must be taken into account. People must feel that those in charge of the judiciary are able and willing to deliver justice. Law enforcement and police reform include police capacity-building, human rights education, building a new relationship between the forces and the people, and fighting against any ethnic or cultural bias.

There is a close link between transitional justice mechanisms and political system and state institutions reform; therefore the integration of transitional justice in institutional reform projects might potentiate both (Zupan and Servaes, 2007). An example would be the establishment of lustration and screening in recruitment processes for public office and security forces (Zupan and Servaes, 2007).

5. Do not postpone policies for socio-economic development: Post-conflict societies have multiple issues that need immediate resolution and scarce resources to tackle them. In most cases, due to social demands, political urges or international pressure, governments focus in transitional justice ignoring that one of the main causes of violence is social injustice (distributive and economic) and inequality. Particularly, in this item, the help of the UN, World Bank, other international organisations and NGOs is fundamental to design programmes suitable for unique national contexts, including: infrastructure, sanitary facilities, communications, food security, agricultural development, education, etc.

6. Integrate local methods of conflict resolution: Bleeker affirms that transitional justice is a contentious matter that can create a new dynamic for conflict resolution, if it is managed properly, or can lead to violence if it lacks legitimacy, technical resources and dialogue (2006:158). For transitional justice to succeed, "multi-track" mediation is essential because it ensures ownership of the process and guarantees its implementation (Bleeker, 2006). Culture is of great influence on the way in which a society creates and solves conflicts; therefore, it is fundamental to create processes that integrate social practices to facilitate the regeneration of the social fabric.

7. Promote a strong civil society: Fortify the structures of the civil society that are normally disunited and weak after conflict or an authoritarian regime and encourage them to transcend the "grass roots" and promote the broadest possible dialogue to reinforce the support of transitional justice (Crocker, 2000a). However, it must be recognised that this sector has limitations to carry out its mission without government support. As Crocker explains, civil society cannot and must not replace the state. It can supplement, evaluate and control, but it is the government's role to secure "some forms of prosecution, punishment, investigation, compensation and commemoration" (Crocker, 2000a:23).

The decision to initiate prosecutions for human rights violations is a political one. Serious government efforts are needed to overcome procedural and institutional obstacles to prosecutions (Wilke, 2004). Thus, strengthening political support for prosecutions is crucial. NGOs should understand that they can play a key role in pressuring the government into creating conditions under which prosecutions are possible.

8. Seek international cooperation for support and capacity building: International civil society organisations (Amnesty International, Human Rights Watch) can bring legitimacy to domestic civil groups and elected governments that pursue transitional justice based on their appeal to human rights and the necessity in a post-conflict society to deal with the past (Crocker, 2000a).

External actors should cooperate in educating and training the top-levels of all sectors to create a new generation of leaders with capacity and skills to deal with the past (Bleeker, 2005) and launch a new era in their society. The assistance must be focused on building capacity and providing the instruments necessary to build reconciliation on local foundations.

The international community can contribute in two ways: as a source of information, expertise and training; and in the development of international humanitarian and human rights laws that foster the setting of standards in the international legal order (Bloomfield et al, 2003).

CONCLUSIONS

Identifying the definitions of reconciliation and transitional justice chosen by any transitional government is important because those notions are intimately related to the implementation, the outcome and the socio-political purpose of the post-conflict strategy. John Paul Lederach (1997) defined reconciliation as a holistic concept, a meeting-point of four values: justice, mercy, peace and truth; a delicate balance among relationship-building, forgiveness, historical truth and justice. Although there is a general accord regarding the convenience of implementing this approach to reconciliation, the actual application of this concept is very limited. As stated above, the definition of reconciliation and transitional justice may vary according to structural conditions (culture, psychology, etc.) and political agendas. Post-conflict governments sometimes apply a more limited notion of reconciliation (as punitive justice, as a shared truth, as forgiveness and relationship-building, as coexistence or as forgetfulness) following their political convenience or feasibility.

In the case of South Africa, reconciliation equalled "moving forward", rebuilding the "new South Africa", a multicultural and unified state. The main parties of the conflict favoured a restorative approach with truth-seeking elements as a means of acknowledging the past while focusing on the future. Initially, in Rwanda, reconciliation meant justice and punishment. Retributive justice was the corollary of this approach to answer the demand of punishment wanted by the Tutsi and the government. As time went by, due to many material and social factors, a broader notion of reconciliation that included new relationship-building and forgiveness was adopted. In Argentina, the motto of many people after the *Proceso* was "*Juicio y Castigo*" (Indictment and Punishment). The word reconciliation was forbidden and seen as an insult, even equalled to impunity. All those who sustained a notion of reconciliation that included relationship-building and forgiveness were seen as supporters of the military. For a great part of the people, it was about transitional justice alone and not reconciliation because, in their view, there was no reconciliation possible with murderers.

The hypothesis that the choice of the reconciliation and transitional justice strategy is conditioned by domestic and international factors which, in the short-term, limit the options and mechanisms liable to be used in dealing with the past was demonstrated. There is no universal recipe to attain reconciliation because many factors incline the election of the strategy towards a certain approach. No size fits all and all reconciliation and transitional justice processes must take into account the characteristics of the conflict, the actors involved, the context, the international influencers and the type of transition. It is impossible to design a successful reconciliation strategy if it is not deducted from the reality in which it is taking place. Therefore, the imposition of foreign models or paradigms could risk, as seen in the case of Rwanda, a relapse into conflict or the collapse of the transition.

As for the domestic factors that condition the transition, the cases of South Africa and Rwanda have shown that, if the conflict is rooted in a society's history and the causes go beyond a simple political juncture, restorative and truth-seeking approaches are great tools to deal with the past. Moreover, if

there are social inequalities and lack of access to essential resources, reconciliation would be impossible without addressing social injustices.

In the cases of Argentina and Rwanda —although with some limitations— where it was possible to clearly identify the master-minds behind the mobilisation strategy towards the conflicts, as well as the triggers, a retributive approach was more feasible and even more appropriate to delegitimise such processes and create the collective notion that collusions to commit such crimes would not be tolerated.

The military junta in Argentina demonstrated that the nature of the authority of the regime influences the possibility of carrying out legal proceedings, except when their existence reflect a deeper conflict in which case a combined approach could be more appropriate. The connivance between top-leaders of the government and the security sector to escalate a conflict and commit crimes, which existed in the three cases analysed, tends to suggest that institutional reform should be a top priority along with truth-seeking mechanisms and retributive justice.

As for the crimes committed, there are two key issues to evaluate in reconciliation process: the obligation of the state to prosecute crimes against humanity and the differentiation between war crimes, common crimes and minor offenses. The pursuit of a restorative approach should not mean a state's renunciation to comply with international and national obligations (this was a major debate in South Africa regarding the establishment of apartheid as a crime against humanity and in Argentina as a consequence of the "impunity laws"). On the other hand, for the sake of reconciliation, minor offenses and other crimes could be dealt with from a restorative perspective, as shown in Rwanda with the modernised gacaca. The enactment of conditional amnesties in South Africa remains controversial due to their questioned legitimacy and the effectiveness of their implementation to deal with the past.

The identification of the main parties was crucial in Argentina and in Rwanda when it was necessary to determine the level of responsibility for the implementation of the retributive approach. Another key issue in cases of civil wars and internal conflicts of similar nature is to differentiate between violence <u>from</u> or <u>against</u> the state. Violence exerted from the state like the military junta in Argentina, Habyarimana and the akazu in Rwanda, and the NP's apartheid in South Africa cannot be compared with the violence carried out by the guerrilla groups, the RPF or the ANC. When the state is the perpetrator, it acts against its own nature which is to attain the common good and the welfare of its population.

An important lesson drawn from the analysed cases is that a society that undergoes a reconciliation process needs to address its collective behaviour prior and during the conflict, and the best way of doing that is through restorative justice and healing. Undoubtedly, there is a social responsibility in every conflict because nothing happens if the majority of the population does not want it to happen. Usually, in transitional periods, when there is a need of putting society back on its feet, all the guilt and responsibility is charged upon the top-leaders. However, those leaders do not come out of nowhere; they reach power —may it be de facto or de jure— because they personify values and attitudes that are present in a society, and in most cases, in the majority of the people.

Culture is a crucial element in choosing the reconciliation strategy and in dealing with the past. As mentioned before, some cultures may prefer traditional or community-based mechanisms to heal and to address past grievances instead of a punitive approach. Cultures have positive and negative elements

regarding the notion of conflict and peace but, without any doubt, they can close the gap between the possible and the ideal reconciliation strategy, like in the case of Rwanda's gacaca system. Cultural and traditional costumes and behaviours may be crucial to understand the complex logic of conflict and the key to open the door towards new relationship-building and reconciliation like South Africa's philosophy of ubuntu and its churches.

Social cohesiveness may condition the approach to reconciliation and the more fragmented a society is, the more focused and local the process need to be. For example, in Rwanda, the fragmentation that reigned among the population required a bottom-up mechanism to solve the distance and the estrangement among neighbours and between them and the state.

Regarding the importance of the rule of law, the immediate re-instalment of the rule of law and the judiciary was determinant to reinforce the policy of pursuing a retributive approach in transitional Argentina. On the other hand, Rwanda's example showed that despite having political room of manoeuvre to instate judicial proceedings, the lack of a stable and impartial judiciary may endanger reconciliation.

In this globalized world, international factors exert an influence in domestic political processes. In the cases analysed in this thesis, the international community and the influential powers influenced the life cycle of the conflicts which, in turn, affected their type of transition. This was clearly seen in the case of Argentina, where the defeat in the Malvinas war destroyed the military's legitimacy before the people and facilitated an asymmetric —although negotiated— transition. In South Africa, influential powers pressured for the end of apartheid but did not pursue an aggressive transitional justice agenda. In Rwanda, influential powers shaped the political process since the decolonisation, and their role —either by omission or over-reaction— during the last phase of the conflict and the genocide, changed substantively the political scenario of the transition.

The type of transition and the balance of power among the main parties were decisive in the selection of the transitional justice and reconciliation strategy in the three cases studied. The abrupt transition in Rwanda and the negotiated transition in Argentina shared the fact of an asymmetric balance of power between the parties which allowed a more ambitious approach like retributive justice. On the other end, South Africa's transition was negotiated between two parties that held a great degree of power, therefore, they were inclined to a less problematic approach like a truth-seeking mechanism with a restorative element which included a conditional amnesty.

Despite the considerations made above, if a reconciliation strategy is decided solely on political grounds and on the existing balance of power, as soon as that co-relation change, the path taken could be undone and society could be forced to relive its painful past as in the case of Argentina with the Due Obedience and Full Stop Laws. In other words, if a transition or reconciliation strategy is solely based in the short-term influence of the type of transition, it is possible that it could vary in the mid- and long-term.

In conclusion, transitions are not developed in a vacuum and, more often than not, governments in charge of transitional processes opt for the feasible strategy and not the ideal strategy towards reconciliation. Therefore, strengthening the social forces that favour a holistic approach to reconciliation and debilitating the spoilers of the process could allow transitional governments to close the current gap

between what seems feasible and what seems to be the better suited strategy. The approach is not to rush an ambitious reconciliation process that will falter without institutions and public support to carry it out. Rather, the strategy should focus on measures that add to that effort including: Creating or strengthening the reconciliation constituency; Supporting the victims and taking into consideration their views and opinions; Carrying out institutional reforms that ensure the fulfilment human needs and the uphold of the rule of law; Implementing policies for socio-economic development; Favouring local ownership of the process; Promoting a strong civil society; Seeking international cooperation for support and capacity building.

The claim that truth by itself, or justice by itself, can lead to reconciliation is a misconception that, rather than laying the foundation for reconciliation, could risk generating more grievances and conflicts. Thus, reconciliation should be treated as a bidirectional process: one face that looks into the past to acknowledge and remedy past wrongs, and other face that looks into the future to reconcile estranged parties and to generate peaceful ways of managing conflicts.

Reconciliation is also a non-linear process where the interaction between mechanisms will have an end result different than the sum of the parts. The development of a tailored and unique road-map to reconciliation does not contradict the idea of implementing a holistic approach in post-conflict societies that may include retributive justice (accountability and end of impunity), restorative justice (victims' rehabilitation, restoration of the psychological, physical and social well-being damaged by past wrongs), historical justice (truth commission), social justice and distributive justice. The absence of a complementary approach to reconciliation, a notion where justice, truth and reconciliation are considered incompatible goals, can give way to a superficial and fragile reconciliation.

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