Reconciliation Through Truth?

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A Comparison of the Judicial Approach of the International Criminal Tribunal for the Former Yugoslavia and the Amnesty Principle of the Truth and Reconciliation Commission of South Africa
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By David Mosler

Abstract: Throughout the past three decades the world has witnessed an increased transition of states from autocratic systems to liberal democracies. During such transitions the reconciliation of societies fractured by previous human atrocities is an integral part for success. This article explores the impacts of principles of truth and justice on reconciliation of fractured societies during the process of transitional justice. Throughout the process it will provide an insight on different aspects and levels of the terminology of reconciliation. To illustrate the difference between a judicial approach and the process of amnesty giving, it will contrast the International Criminal Tribunal for the Former Yugoslavia and the Truth and Reconciliation Commission of South Africa. Furthermore, it will provide an analytical account on the impact of internal actors versus external actors on reconciliation of fractured societies. This analysis will provide an understanding of the factors at work during reconciliation as a process and an outcome.

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1. Introduction

Throughout the past decades democracy has been spreading more and more throughout the world. Formerly closed societies, ruled by autocratic or tyrannical leaders, opened up as a result of liberation struggles, violent or peaceful in nature. These newly democratic societies face a unique set of challenges on how to deal with their violent and oppressive past. How do societies move on from past atrocities by embracing democratic values without excluding their former adversaries? Such societies are struggling towards reconciliation in different ways.

In this paper I will analyze two different approaches to reconciliation. The South African Truth and Reconciliation Commission (TRC), while certainly not the first, is probably the most prominent institution linking reconciliation to ‘truth’ and ‘forgiveness’, which is now integral to most people’s understanding of reconciliation. But the impact of ‘truth’ and ‘forgiveness’ is not the only relevant measure. In fact, those terms are disputed as well. Some of the questions are: Is forgiveness really necessary for a society to move on? Where is the line between forgiveness and forgetting? If crimes are not forgiven, can a society at least peacefully coexist? Is punishment integral to the process of moving on?

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, which is more commonly referred to as the International Criminal Tribunal for the former Yugoslavia (ICTY), is one of the challenges to the approach of the TRC. The ICTY, while boasting many structural differences to the TRC, is set up on the same goal as the former – to achieve reconciliation between split nations after human atrocities. To achieve such, the ICTY embraces a traditional judicial approach, which is conducted by outside actors. This paper will help to establish an understanding of two different approaches to reconciliation. In the process I will evaluate the impact of truth and forgiveness on reconciliation, each institution’s ability to gather the truth, different types of reconciliation and which of them are necessary as the minimal requirement for peaceful coexistence versus a fully integrated society.
1.1. Aim and Research Questions

I set out to generate an understanding of the impact of reconciliation on peace-building efforts in newly democratic societies. For the past two decades, the world has encountered more and more justice courts and truth commissions, which set out to find the truth about atrocities committed by the former leaders of each respective country. In South Africa, the Truth and Reconciliation Commission set out to uncover crimes, which took place during the racial segregation of apartheid from 1960 until 1994. During apartheid a white minority government led by the National Party, enforced policies of segregation and race discrimination against the majority non-white population of South Africa. In those years, uncountable human rights violations took place, which were justified by the political system at the time. After negotiations in the early 1990s between the National Party and the African National Congress, an agreement for power-sharing and the eventual turn-over to majority-rule came into existence. Part of this agreement was to set up a commission with the purpose to find the truth about past atrocities and reconcile the societies. The most debated part of this commission was the principle of amnesty, which granted perpetrators freedom without punishment in exchange for the complete and truthful accounts of their actions.

In the Former Yugoslavia multiple wars took stage in the heart of Europe simultaneously to the process of change in South Africa. Until the end of the last millennium human rights violations took place during the process of the disintegration of Yugoslavia. A series of wars was fought between 1991 and 1995 largely between Serbs on side, and Croatians and Bosnians on the other side. However, multiple violent conflicts also took place between different fractions of Bosnians as well as between Bosnians and Croats. As in South Africa, the differences were largely based on ethnicity, which lead to numeral mass atrocities and ethnic cleansings in the region. In fact, these conflicts were the first since World War II to be judged as genocidal in character. Tensions resumed, and lead to the break out of conflict in Kosovo in 1998, which was eventually appeased through a bombing campaign of NATO in 1999. The different ethnic groups continue to be divided to this day, but efforts have been made towards reconciliation, especially through the establishment of the International Criminal Tribunal for the Former Yugoslavia by the United Nations in 1993.
The TRC in South Africa is much more diverse in its structure than the ICTY, and has three main branches in its effort towards reconciliation, the Human Rights Violations Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee. The commission was empowered to grant amnesty to those who committed abuses during the apartheid era, as long as the crimes were politically motivated, proportionate, and there was full disclosure by the person seeking amnesty. For comparative purposes, my focus will be largely on the Amnesty Committee. I will argue the positive and negative aspects of both, the judicial approach of the ICTY and the amnesty-giving approach of the TRC, in order to evaluate the relevance of both for the success of reconciliation. This paper is not a historic analysis of the processes, nor does it pass judgment on specific individuals involved on the side of victims as well as perpetrators. It does not declare ultimate truths in its findings. The purpose is to provide a theoretical account of what promotes or hinders reconciliation in post-violence societies, by comparing two different approaches to the problem. For this purpose I found it necessary to contrast two specific institutions, which embrace the dissimilar approaches, namely the TRC and the ICTY.

I identify and evaluate multiple specific aspects, which are part of the larger procedures. In the chapter concerning the TRC, I analyze the amnesty approach as such, and its impact on victims and perpetrators, which will conclude in an overall assessment of its effects on the South African society as a whole. This includes accounts on the construction of public memory in South Africa, and an attempt to identify who the process serves. Furthermore, I will point to the strength and weaknesses of the Commission as a state-internal actor. Concerning the ICTY, my research focuses on the interplay between international actors and internal actors of the Former Yugoslavia. Special attention will be paid to the impact of plea bargains on the finding of truth, and the corresponding impact on reconciliation.

This analysis will therefore be constructed around the following research questions:

*Is the best way to reach reconciliation a truth commission, which in order to find the truth might grant amnesty to individuals who are prepared to confess their crimes, or a court of justice or criminal tribunal, which embraces criminal prosecution and might therefore discourage defendants from cooperation and consequently the uncovering of the whole truth?*
Can reconciliation be achieved from the outside via the involvement of international actors, or can success only be expected if the process towards reconciliation is initiated from inside the post-violence state?

Special focus will be placed on aspects of public memory and the impact of truth on reconciliation.

1.2. Material and Method

My choice of material reflects the aim of my research. In order to compose a comprehensive analysis, I largely relied on scholarly material. A wide range of academic books and articles was necessary to establish the framework of my study, and more specifically to articulate a theoretical account of reconciliation. In addition, I felt it to be necessary to accumulate primary sources to outline and debate the goals of the individual institutions, as well as the self-perception of their achievements. Both, the TRC and the ICTY, provide continuous reports, which present the results of their work, with the difference, that the reports of the former are complete, and the ones of the latter are not. The drive for reconciliation is articulated in multiple policy documents of both institutions, and does not just stand alone as a goal, but also as part of the process towards togetherness. Furthermore, these documents provide an approach for how reconciliation, in the eyes of the authors of such documents, can be achieved. I am aware of the fact that such information may be of bias, based on political considerations of individuals or the institutions themselves. Part of my work is to identify biased positions in the structure and documentation of each institution, since such are relevant to the process of reconciliation, but also to clarify the circumstances which lead to certain considerations on the approach of the institutions towards reconciliation. In order to avoid selection bias, I attempted to establish quantitative parity and similar treatment of sources issued from both institutions.

My epistemological approach places me amid the wide sphere of constructivist philosophy. As a constructivist, I deny the possibility of objective access to information. Nevertheless, I aspire to the greatest degree of impartiality and integrity through careful evaluation of all sources. In this endeavor, the secondary sources complement the evaluation of the positions at hand in the primary sources, which are used. I recognize that my assessments will be based partly on my personal experience and knowledge, as “patterns of interest are not
firmly rooted in nature but are a product of our own making” (Moses and Knutsen, 2007: 10). But not only do I follow the constructivist approach, it is also clear that the subjects of this study, the people of South Africa and the Former Yugoslavia, structured their response to previous atrocities on values and experiences, which are channeled through the human mind (2007: 10).

I furthermore recognize, that the strength of the human factor in the proceedings at hand indicates an increased ontological complexity and diversity. Since social contexts are filled with meaning, my epistemological toolbox is very broad and includes the assessment of elastic concepts such as compassion, truth, justice, forgiveness, authority and others. Furthermore, since I perceive knowledge as reflective, I attempt to understand the analyzed actions in hermeneutic terms (2007: 11). The goal of this research is to understand the meaning of social actions for the performing agents, as well as the impact of such. Therefore, my research will not provide an ultimate truth along the lines of the naturalist perspective, but attempt to provide a contextual understanding of the proceedings of the TRC and ICTY through critical analysis. I hence leave the judgment of truth to the eyes of the observer. While I will make recommendations for improvements of the reconciliatory process in each analyzed country, based on the structures provided in the section on theory in the following, those cannot be seen as truths of ultimate value. There certainly is a wish for the establishment of general rules, but due to the small sample size of my research in just two institutions, the outcome of my research will merely be applicable to South Africa and the Former Yugoslavia, and at most serve as an example for future reconciliatory processes in the world.

1.3. Delimitations

Due to the special confines of this study, my research will rely exclusively on a theoretical account on reconciliation, which is retrieved from a multitude of scholars. This account shall be used as a toolbox in the assessment of successes and failures of reconciliation in South Africa and the Former Yugoslavia. Not using a grand theory was a difficult decision, but due to the complexity of reconciliation and the interrelatedness between different fields of social science concerning the assessment of it, I felt it to be most appropriate to assemble the toolbox following in the section on Theory.
Reconciliation is a very complex and floating concept, and covers multiple disciplines within the social sciences. Many of the aspects are concerned with philosophy and psychology, but I will show the real political impacts of it as well. I am aware that the proceedings of the TRC and ICTY invite to use different theoretical accounts than the one I chose, such as the actor-driven model, concepts of peace- and nation-building, among others, but the goal of this research is to provide an insight in the complexity of interests at play when a society has to find ways after human suffering to exist together. Therefore, none of the aforementioned theories seemed sufficient for a broad assessment of reconciliation.

Furthermore, I am aware that none of the assessments I make are final or applicable in a universal manner. Every post-violence society faces different challenges, and neither one, nor the other approach to reconciliation can be adapted for every case.

Since the aim of this research is to find the strengths and weaknesses of the judicial versus the amnesty-giving approach, I chose to stay at a rather general level when assessing the two institutions. Specifically, because I chose to provide a structural analysis, I decided against the dissection of individual trials, statements or persons, since it would disable me from a qualified judgment of reconciliatory processes in general. While I acknowledge that structural problems, such as the inability to arrest high-profile suspects in case of the ICTY, are of importance, I chose to lay my focus on broader structures. If, indeed, I would have chosen to analyze specific cases such as the hearings of former South African President F.W. de Klerk, or former Serbian and Yugoslavian President Slobodan Milosevic, I think it would not have been just to victims of other perpetrators, nor would it have covered all nations which are involved. Therefore, in order to avoid selection bias, I chose to exclude individual persons on trial, as well as individual prosecutors or leaders of the institutions.

Additionally, I want to point out that the overarching concept is concerning reconciliation. While there are many terms, which are associated with reconciliation as an umbrella term, the ultimate emphasis lies on reconciliation itself. Therefore, definitions of other analytical tools are framed to serve the assessment of reconciliation, and are not ends in themselves. I did not set out to judge whether specific decisions made through the institutions
are just or not, but focus on the perceptions of such decisions by the public in the affected countries.

Lastly, I want to acknowledge, that an institutionalist perspective would have given some valuable insights to the evaluation of both institutions. However, due to the confines of this work, I had to decide against multiple theories. I found it more valuable to define the relevant aspects of reconciliation in a dualistic manner, which leads to a rather lengthy and complex account of it. I am aware that I am exploring relatively new grounds in the field of International Relations through my writing, and that my analysis will therefore only cover parts of the subjects at hand. It is important though, to maintain a clear focus within this work, because the over-complication of the rather flexible definition of reconciliation will only lead to a lack of clarity in the findings.

1.4. Disposition

My dissertation will be constructed in the following way. In chapter two I deliver an account of the theoretical framework I draw upon. This will involve an assessment of multiple aspects of reconciliation, which is necessary to the understanding of the cases at hand. According to my research questions, I set out to evaluate the differences in the concepts of the TRC and ICTY, and their success, as well as the interplay between internal and external actors on reconciliation. The aforementioned aspects are applied to both cases, while the cases are divided in subsequent chapters. Respectively, the analytical framework will be applied to the TRC in the third chapter and to the ICTY in the fourth chapter. There will be an occasional overlapping of both institutions in those chapters when needed for comparative purposes.

In both chapters there are subdivisions according to specific procedural concepts of each institution, and they will end with an individual conclusion of the impact of each institution on reconciliation in the respective societies. To illustrate the differences between the two institutions, I highlight specific aspects of each institution. In the case of the TRC, the focus will lie on the Amnesty Committee, and the creation of public memory, while I chose the process of plea and sentence bargaining at the ICTY to illustrate its impact on reconciliation. Furthermore, a crucial aspect of chapter four will be the analysis of the interconnectedness between
international actors and the affected societies of the crimes under prosecution, which will be debated in subsections 4.1. and 4.2. respectively.

In chapter five I will conclude my findings by bringing both institutions together. The final assessment of both institutions’ impact on reconciliation will be contrasted and integrated in the larger framework of the peace-building process.

1.5. Definitions and Restrictions to Judicial Concepts within the Institutional Frameworks of the TRC and ICTY

In order to understand the proceedings of the TRC and ICTY we have to acknowledge certain judicial concepts within the frameworks of these institutions. While the TRC was built on an internal judicial system, it certainly shows a strong influence from the supporting Western societies. The ICTY on the other hand, finds its roots in the sphere of International Criminal Law, and in fact, contributed large parts of the international judicial framework through its own work. Before going into detail, it is important to understand that the ICTY uses a framework designed by actors from outside the actual conflict zone in the Former Yugoslavia. Here, Western actors were not only a guiding example, but were the active creators of the judiciary system. In the following, I outline specific rules and principles of each judiciary, which will be relevant to the establishment of guidelines concerning the consistence and appraisal of reconciliation.

1.5.1. Crimes Against Humanity, Genocide and War Crimes in International Law

Crimes against humanity are a fairly new concept in international law. While first mentioned during World War I in condemnation of the Armenian Genocide through the Ottoman Empire, they were first established as legal grounds at the end of World War II. The first modern international court, the Nuremberg Trials, granted Nazi leaders a criminal trial in contrast to traditional military executions. This impediment on sovereignty of the state was new, but felt to be necessary considering the cruelties committed by Germany and Japan during the war. The new class of crimes, crimes against humanity, gave rise to the principle of universal jurisdiction. However, until the 1990s, no real international accountability existed for human
rights violations. It was just in the light of atrocities in Yugoslavia and Rwanda, that the United Nations established some more elaborate structures for international prosecution, which until today paved the way for the International Criminal Court and the Rome Statute.

The idea behind the terminology used was, that the crimes committed during World War II were not just crimes against the individual victims or the people who lived in a country, but were so horrifying, that they had to be considered crimes against all of humankind. This meant that such crimes could from then on be prosecuted before courts all over the world, not just where they were committed. The shift went therefore from a focus on the location of the crime to the crime’s nature itself (Goldstone: 2004: viii)

In 1949, as part of the Geneva Convention, a new type of war crimes, so called ‘grave breaches’, was established. Since then courts of all countries are allowed to prosecute individuals who are suspected of grave breaches of the Geneva Convention, which means that once a suspect is captured, it can be prosecuted in the country of capture, or can be handed over by that country to another, if the first is not willing or able to prosecute the accused.

In this context it should be mentioned that the ability to prosecute crimes against humanity in a place away from the actual ground the crimes were committed on, was made use of in a much larger scale than previously seen, when the United Nations decided to establish the ICTY in The Hague in face of continuous ethnic cleansing in the Former Yugoslavia.

The last definition of this section is concerning genocide. Genocide is often seen as the epitome of human rights violations, since it shows the most deeply rooted cruelty of mankind. The crime is defined as the attempt or intent to destroy a group defined by ethnicity, race, religion or nation in its entirety. Different crimes, range from the infliction of mental or bodily harm over birth-preventing measures and forced transfer of children to another group to the infliction of conditions of life aimed at the physical destruction of the group or killing of members of the group (Moghalu, 2004: 206). A new acknowledgement under the confines of genocide is rape, which has been established as a genocidal crime during the workings of the ICTR in Rwanda. Genocide continuously proves as a hard accusation to hold up in court, since it is often difficult to prove the intentions of the ruling individuals to exterminate an opposing
group. There will be a deeper account on this problem in the section concerning plea and sentence bargains at the ICTY.

1.5.2. The Concept of Political Impunity and Its Limits

Since the Treaty of Westphalia, the understanding in the international community has been that the sovereignty of the states is the highest principle of international affairs. Accordingly, for a long time crimes perpetrated by servants of the state, may those be autocratic or democratically elected, could not be prosecuted unless they were overthrown by their own compatriots or lost a war and were prosecuted by the winners. While this is still largely the case throughout the world, there has been a recent development whose establishments have been first the ICTY and ICTR (in Rwanda) and now the ICC. The principle of all these institutions is that impunity should not persist in the face of gross mass atrocities anymore. While the Nuremberg Trials are often criticized as a winners’ tribunal, the new institutions are much less based on pure punishment, but on the incentive to hinder future human rights violations through exemplary punishment. One clue for that is the abolishment of capital punishment under these international courts and tribunals.

As aforementioned, the real purpose of these institutions is to end impunity of those who used to be protected under the umbrella of state sovereignty. Historically, perpetrators of mass atrocities were protected by the claim of pursuing their actions on political grounds. While this claim is still relevant, there are now rules in place which curb this excuse and created a common standard for what politically motivated actions consists of. In order to end impunity, it has to be defined what impunity is. It may be defined as the “absence of accountability and of the rule of law within states or other formal organizational structures; a situation in which coercive power, not rules, regulations or law, is the “organizing” principle (Moghalu, 2004: 198).” Logically, in order to end impunity then, an element of accountability has to be introduced, which will aid conflict resolution as well as reconciliation in the long run. In order to establish such accountability, there has to be a basis for fairness, which has to be recognized by the international community. Accordingly, the establishment of international courts and tribunals made sense in order to curb the impact of revenge thinking, which might dominate the beliefs in a victimized society. Since we are talking about judicial accountability, which includes legal
responsibility and punitive measures, it means that the truth finding process does not happen with the prospect of amnesty, but perpetrators have to face their charges and expect punishment, which will only be impacted positively in the sense of shorter sentences, if the accused complies with the court. This is one of the most common interpretations of justice, and is essentially the principle of most national courts of law in the Western hemisphere.

1.5.3. The Amnesty Principle of the TRC

In its mandate the TRC states that amnesty shall be granted to “persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of [the Promotion of National Unity and Reconciliation Act from 1995]” (TRC, 1999a: 55). This principle is a challenge to retributive justice and emphasizes restorative justice as an alternative. The TRC states clearly that truth is the most important requirement to achieve reconciliation, and therefore knowingly put legal justice second to the finding of truth and therefore the promotion of national unity. While acknowledging the desire for revenge as an understandable human response by individuals, the commission emphasizes the focus on restorative justice with a focus on healing of the victims and perpetrators to achieve communal restoration (1999a: 118).

It also has to be understood, that while the amnesty principle might not have been the preferred option of the African National Congress (ANC) at the negotiating table with the National Party (NP), the clear military imbalance favoring the oppressor, did not leave them with much of a choice, but to make certain concessions to their opponents in order to achieve the greater good of an inclusive government. The ANC did avoid granting blanket amnesty to the NP-government though, and achieved the compromise of full disclosure in exchange for amnesty. This principle incorporates the idea to overcome impunity through accountable amnesty.

Another consideration was that in comparison to criminal trials, public hearings with the incentive of amnesty move forward in a timelier manner, and would therefore give more victims and more perpetrators the chance to be heard. Throughout the public hearings the TRC gave voice to over 20,000 victims and more than 7,000 perpetrators (Goldstone, 2004: x), and was therefore able to collect much more data on the large amount of human rights violations, than a
criminal court would have been able to. Finally, is has to be mentioned, that the Amnesty Committee was just one of three committees at the TRC. Punitive measures were implemented, and overall the number of recipients of amnesty was rather small.
2. Theory

In order to evaluate the level of reconciliation achieved in the fractured societies of South Africa and the Former Yugoslavia, it is necessary to establish the attributes of reconciliation first. The departing point of this analysis is the transitional process from Apartheid to a liberal democracy in South Africa on the one hand, and the disintegration of the Former Yugoslavia into separate democratic states on the other. Part of the transitional process is the reconciliation of societies, which will be conceptualized in the following.

The second part of the theory section concerns the establishment of specific needs of societies in transitional justice. Transitional justice is outlined as a concept with antagonisms.

2.1. The Conceptualization of Reconciliation – A Toolbox

Reconciliation is a confusing term. Where does it happen? Is it political, societal or national? Does the process start with the individual or society as a whole; victims or the perpetrators? Where are the origins of reconciliation? Maybe in religious scriptures? Maybe reconciliation is a psychological process, inherent to humankind. Or, to make the situation even more complicated, is it even a process, or rather a goal? The answer is, that it can be all of the above mentioned things. However, there are certain aspects of reconciliation that are universal, and therefore important to my analysis, and there are aspects, whose importance has to be questioned in order to evaluate the outcomes of the TRC and ITCY.

The definition of reconciliation, while being a central point to my research, is one of the most difficult parts of it. There is no clear understanding in academia on what reconciliation means or consists of. In this aspect, my writing is no different from other scholarly writing, and I have to start with an acknowledgement of the difficulty of definition, as well as a restriction to a specific framework of reconciliation. As Johan Galtung put it: “Reconciliation is a theme with deep psychological, sociological, theological, philosophical and profoundly human roots – and nobody really knows how to successfully achieve it” (2001:4). My work will focus on the political implications of reconciliation. In my writing I will establish what reconciliation is, and is not, starting from the proposition, that reconciliation is an umbrella term for a larger peace-
building framework, including a wide range of processes and outcomes, such as justice, democracy-building, forgiveness and truth, among others.

2.1.1. Clarifying Reconciliation – Process, Outcome or Both?

This section will focus on the broad aspects of reconciliation, whereas the following sections will go into deeper underlying structures and aspects it. I find it necessary to take a top-down approach to the subject, wherefore the broad parameters of reconciliation should be set first. Therefore the first distinction to be made is, whether reconciliation is a process or an outcome.

Most scholars focus on reconciliation as a process, because it allows for it to be a tool in policy making. If it is indeed a process, then it is important to identify which purpose the process serves. More specifically, what is the goal of the process? Lederach defines it as a “dynamic, adaptive process [...] aimed at building and healing” (2001: 842) and a process of change, leading to a redefined relationship (2001: 847). This process is multi-dimensional and long-term (Chapman, 2002: 1). In the first volume of the report of the TRC, reconciliation is pointed to as a requirement for the pursuit of national unity, peace and the well-being of all South Africans (TRC, 1999a: 103). Reconciliation is therefore seen as part of a broader process of “‘building a bridge’ between a deeply divided past of “untold suffering and injustice” and a future “founded on the recognition of human rights, democracy, peaceful co-existence, and development opportunities for all”” (ibid.).

On the contrary, there are some, who define reconciliation as an outcome, even though some of them acknowledge it to be a process as well. Bar-Tal and Bennink for example define it as an outcome, which “[...] consists of mutual recognition and acceptance, invested interests and goals in developing peaceful relations, mutual trust, positive attitudes, as well as sensitivity and consideration for the other party’s needs and interests (2004: 15).”

The term ‘reconciliation’, while more and more popular in the international arena, still encounters large resistance among the victimized groups. This might be largely due to the lack of definition between the two possible uses of the word. It is hard for victims to forgive, and often they are suspicious of the process, because they suspect the outcome to be unachievable or
unfair. Reconciliation as an outcome might not be desirable for many victims, because it does not fit into their interpretation of what justice consists of. Therefore, a process, which has to goal of achieving an undesirable end-state, is met with suspicion. In consideration of this fact, I acknowledge the duality of the term ‘reconciliation’, but put an emphasis on the definition of reconciliation as a process, rather than an outcome.

Now, that I arrived at the point of defining reconciliation as a process, let me refine what type of process it is in the context of my study. Bloomfield suggests that it is “a process through which a society moves from a divided past to a shared future, […] a process that redesigns the relationship [between the victims and the perpetrators] (2003a: 12).” Therefore, it is not focusing on solutions for issues in a conflict, but on the relationships between the groups and individuals, who will have to implement such (ibid.). This is a rather practice-oriented approach, which does not neglect the length, depth and broadness of the process. Such a definition provides parameters on how to judge the effectiveness of reconciliation in a specific context, by acknowledging that there is no quick solution to a problem at hand, but also by pointing out the difficulty and incalculability of the depth of the process, by defining different levels of reconciliation. If one is to judge reconciliation, one has to determine which level is relevant to the context, and if it is achievable. Reconciliation requires changes in the aspirations, emotions, feelings and even beliefs of both, victims and perpetrators. Furthermore, the process is broad, because it is concerning not only the individual, who has been damaged, but also the community, maybe even the society, as a whole (2003a: 13). The two antagonistic groups will have to overcome previously created enemy images in order to be able to achieve reconciliation.

To summarize the aforementioned assessment, reconciliation is both, a process and an outcome. In my analysis, I will focus largely on the process-aspect of reconciliation, although at times an assessment of the results will be necessary as well.

2.1.2. Political Reconciliation versus Individual Reconciliation

Now I want to go deeper into the definition of reconciliation. What does a society need to function properly? Sure, there are many types of reconciliation, and all are important in their own regard, but in order to make a society function, not everyone has to love one another. As a pragmatist, I identify the political and social needs of the post-violence society as the most
important. The state of harmony and forgiveness seems to be a very personal sphere of reconciliation. There is a distinction to be made though. Since there are many types of reconciliation, I have to identify the most important one in the context of international institutions such as the ICTY and TRC as political reconciliation. As Villa-Vicencio clarified: “Political reconciliation is not dependent on the kind of intimacy that religions and some forms of individual reconciliation may demand. Rather, statecraft and politics require peaceful coexistence [...]. Forgiveness may come later, after the creation of confidence and the building of trust (2004: 6).” This is the type of reconciliation that I will search for when analyzing the two institutions. It is important though to understand that this definition of reconciliation brings challenges with it. The biggest problem, which institutions such as the TRC and ICTY face, are the expectations of the victims, who want to see punishment or at least resentment of the perpetrators in order to find inner personal closure. The institutional process is not aiming for that though, but for the enablement of a stable and functioning society, in which victims and perpetrators live together, not loving or fully respecting each other, but at least in peaceful coexistence (Dwyer, 2003: 108). While one might not exclude the other, it would also be a hasty assumption that a functioning society requires closure on the level of the individual. As will become clear on multiple instances throughout my research, this concept is in a flowing state and cannot be seen as just black or white. I will provide a more detailed account on the relation between reconciliation and coexistence in section 2.1.4.

2.1.3. Justice and Forgiveness

2.1.3.1. Justice

Bloomfield points to the relationship between reconciliation and two key concepts, namely justice and forgiveness (Bloomfield, 2006:3). The two correspond with different levels of reconciliation, and these levels will be of utmost importance to the evaluation of the impact of both, TRC and ICTY, on reconciliation as such. The difficulty is the relation between justice and forgiveness, because they occur on different levels. Institutions, such as the ICTY, may provide a legal framework, which would be considered by many to provide justice, but no court of law has the ability to force forgiveness. Forgiveness is a very personal act, and even if a victim is satisfied with the punishment of the perpetrator, it is not given that he or she will
forgive the acts of harm against the individual. Correspondingly, it is very hard to gather accurate findings about the level of forgiveness in a society or on a personal level. While victims might go as far as stating their forgiveness, it can never be fully satisfying of an answer, since we lack the ability to observe the internal emotions of them.

The opinions on the relevance of justice on reconciliation vary in degree, but most scholars agree that justice is a core concept. Some, like Joseph Montville, see it as “the most fundamental element of peace, [since] in its most general sense, justice implies order and morality [which are] the basic rules governing right and wrong behavior […] (2001: 129).” Others imply that there might be a tradeoff between reconciliation and justice, although justice can never be neglected as part of the reconciling process. Pankhurst for example, assessed that “[…] no common understanding has yet emerged of the political conditions under which efforts at reconciliation should be restrained and justice promoted, or vice-versa, in order to achieve the ‘best’ peace (1999: 240).” He clearly implies that a balance has to be found between the two tools, and that there is a tradeoff. This seems especially relevant in the context of the TRC, where truth has been achieved through amnesty, which leaves many victims unsatisfied.

But the TRC had very unique features. Many, including the commission itself, have argued that the tradeoff is curbed by the publicity and resulting transparency of the process. The argument is that truth is more important than punishment in order to move on from a fractured society. To add to their point, the transparency of the process at the TRC lead to a type of punishment different from a judicial one. Perpetrators, through admittance of their crimes and wrong-doings, subdue themselves to societal punishment like exclusion and open criticism. Once in the open, perpetrators have to deal with the consequences of their actions when facing their former victims in a now more openly structured society. The important fact is, that the former victims are now able to address their feelings in whichever ways they deem appropriate, as long as it occurs in accordance with the law. There have, for example, been calls in South Africa to boycott products which are produced by former perpetrators, which creates an economic and a psychological punishment outside of a court of law. However, the claim still remains by some victims and some practitioners, that justice was compromised in the process to enhance peace-building efforts. To conclude, there is a difficult correlation between justice and peace, which can be diverse from case to case. While a meticulous pursuit of justice in a
punitive sense may be the expectation of the victims, it will prevent essential compromises, which are necessary to rebuild social relations between former antagonized groups. The TRC itself claims that the refusal of amnesty would have greatly reduced its effect towards a reconciled society (TRC, 1999a: 53). On the contrary, critics of the ICTY claimed that the prosecution of key players in the conflict would hinder the compromises needed to build lasting peace. I will show later, during the analysis, there are often other influential underlying causes, and it is hard to determine if amnesty is needed for reconciliation.

One crucial aspect to this analysis is the impact of internal versus external actors. While the TRC was set up as an internal commission, where the victims became the prosecutors, the ICTY relies largely on foreign actors during the prosecution. The ICTY was set up by the United Nations in a multilateral agreement, where judges and prosecutors would be selected by the international community. Additionally, the tribunal is located in The Hague, far away from the former Yugoslavian countries. The TRC, on the contrary, was the result of negotiations between the apartheid government and the African National Congress, and therefore internal in nature. Pankhurst makes an interesting claim in her writing when stating that “[t]here is a much greater potential role for outsiders with regard to justice, [while] reconciliation is generally a more domestic affair (1999: 239, 255).” If this is the case, then the articulated goals of each institution are relevant for the assessment of its success, but this statement has to be analyzed with care. Does she imply that insiders are too biased to provide for justice? Is her claim, that reconciliation is a purely internal process? These could be interpretations of her work, but more likely her aim is gradual in nature, and by no means does she make universalistic claims.

Most points of critique against either approach, international tribunal or national truth commission, are due to the narrow interpretation of justice. Critics usually interpret justice in a purely retributive sense, but neglect reconciliatory justice as an umbrella, which has a broader aim and includes the former. Retributive justice can be seen as part of the latter, which aims to provide a system for what is socially right or wrong, and therefore establishes a shared value system between formerly antagonized groups (Bloomfield, 2006: 19). This value system involves an understanding of fairness and equal treatment for all, in other words, everyone can trust the justice system. Therefore, reconciliatory justice goes past mere coexistence, and leads to an increased involvement of the antagonized groups with each other.
The question arising out of this is if victims actually want a fair system, and therefore embrace reconciliatory justice, or if they lay exclusive emphasis on seeing the perpetrators punished. Victims’ first interest might be the latter, because their own suffering is so entrenched in their memory, that considerations of the greater good often do not cross their mind. But punishment is usually not the only factor of consideration for victims; they also are driven by an interest for revenge, retribution, accountability and protection (2006: 19). However, since the oppositions’ needs usually do not cross the minds of the victims, justice mostly remains as a system of crime and punishment. Accordingly, in order to achieve reconciliation, and develop positive social relations, it is necessary for the victims to find a “desire for that shared value of trust in the system” (2006: 20).

One aspect of reconciliatory justice is its restorative effect. Restorative justice shifts the focus from the offender to the victim, and therefore emphasizes rather the result of the crime than the crime itself (2006: 21). Furthermore, there is so called regulatory justice, which aims at setting fair rules for all social behavior. This is the connector for building a shared value of trust in a judicial system. Lastly, there is social justice, which focuses on sharing of goods of a society. This includes distributive and economic justice, which are embraced through measures such as reparations and redistribution plans (ibid.). All the aforementioned have to be incorporated to a certain degree in order to achieve reconciliation. The pure exclusion of the offenders will not lead to reconciliation, and therefore not to a fully functioning democratic society.

2.1.3.2. Forgiveness

Forgiveness in the context of reconciliation is clearly derived from Christian philosophy, and typically applied to interpersonal relationships. Especially in the context of the TRC, it has been raised as a central point of reconciliation, even though it was originally not stipulated of importance in the Promotion of National Unity and Reconciliation Act (Sanders, 2007: 93). When the act declares the conditions for amnesty, forgiveness is not mentioned at all. Nevertheless, the impact of Christian philosophy in the case of the TRC has been predominant, especially because it was managed and designed by Christian ministers, headed by Archbishop Desmond Tutu.
What has to be clarified is at which part of the process of reconciliation forgiveness sets in. Clearly, forgiveness is one of the few things that remain in the power of the victims. I agree with Bloomfield in his assessment that forgiveness is rather the result of a reconciliatory process than an integral part of it (2006: 23). This indicates that forgiveness is not of essence to the process of reconciliation, but rather a wished for result of it. As seen above, forgiveness happens on an intrapersonal level, and is therefore not part of political reconciliation.

The power to forgive remains with the victim throughout the process, and can be submitted to at any time. It is important to note that forgiveness should not be something that the victim just gives away, but something that the perpetrator earns.

The problem that arises out of the terminology of forgiveness is that it inflicts pressure on the victim. Especially in South Africa, forgiveness was identified as central to a peaceful society. Forgiving should not be obligatory, but remain at the discretion of the victim. As a result the focus of reconciliation has to shift to a result where peaceful coexistence is possible, even if individuals do not forgive each other for previous crimes. If the goal of reconciliation is an unrealistic one because it is closely tied to the notion of forgiving, then institutions will fail to reconcile societies. To simplify, no institutions can claim the realistic power to be able to force individuals to forgive, wherefore if forgiveness is a basic requirement of reconciliation, it is prone to fail. Therefore I detach the idea of forgiveness from reconciliation. In other words, reconciliation is possible even without forgiveness (Dwyer, 2003: 108).

2.1.3.3. The Interplay between Justice and Forgiveness

What becomes clear now is that even if justice is achieved, it will not necessarily lead to forgiveness. Therefore it is important to detach forgiveness from reconciliation as such, but keep a strong focus on the impact of justice. In this section I also clearly identified the different levels on which justice and forgiveness respectively take place. Justice can be achieved through institutions, while forgiveness can only happen on an individual level in response to the just achievements of the institution. This causal chain is imperative when assessing the achievements of any institution with a reconciliatory aim.
2.1.4. Reconciliation and Coexistence

The term of coexistence is gaining more and more ground in the field of peace research. In comparison to reconciliation it seems to be a less loaded term, since it does not immediately imply the need for forgiveness. As aforementioned, reconciliation does not necessarily require forgiveness either, but that is more of an academic assessment than reality. Politicians and the civil populous in post-violence societies will mostly agree that the goal of reconciliation is forgiveness which is also cited as the reason for failure of reconciling efforts, and should therefore not be neglected by scholars. Coexistence can also be seen as a stage of reconciliation, as Huyse identified in his IDEA Handbook in 2003. Here, he describes coexistence as the first stage in the process towards state reconciliation, with the second being the building of confidence and trust, and the third a move towards empathy (Huyse, 2003: 19-21).

The advantage of coexistence over reconciliation is clearly the range of outcomes it caters. Coexistence, while at the very basic level only requiring rancorous acceptance based on the need to live together, to deeper involvements with each other, including cooperative efforts towards integration. Coexistence is much closer to the basic principles of democracy, than reconciliation, because it does not require as much, and leaves the individual with the choice to feel a wide range of emotions. Looking at well-functioning democracies around the world, one can conclude, that it is not necessary to like other groups or their individual members in order to have a strong sense for democracy and a developed national identity. The tie can be based purely on common citizenship, rather than common interests or mutual respect past the basic level (Chapman, 2002: 5). In fact, one of the attributes of democracy is discourse over disagreements, and not a fully homogenous group of actors.

Furthermore, coexistence is more approachable to the victims, because it is much easier to agree to coexist with former enemies, than it is to reconcile with them. Coexistence does not require integration or forgiveness, which are often cited as the points of failure in the process of reconciliation. The notion of coexistence therefore gives the power to commit to aforementioned processes to the individual, rather than the group as a whole (Bloomfiled, 2006: 14). Therefore, the basis for coexistence is accommodation on structural levels only, whereas every type of emotional closure or convergence is an addition, rather than a requirement. It is
therefore congruent with my pragmatic approach to this analysis, as it can be seen in purely structural terms. Hence, it is a minimalist argument for a post-violence society (McCandless, 2001: 213), or a part of the process towards reconciliation. As Cynthia Burns puts it: “Coexistence is the process whereby reconciliation is achieved (2003: 95).” When defining coexistence as a process towards reconciliation, this also implies a tendency of development from rather negative forms of coexistence, like the sharing of space, towards more positive coexistence involving cooperation in the public sphere and the development of a shared set of values (Villa-Vicencio, 2004: 6f.).

The limits of coexistence are also important to consider. While reconciliation may be harder to achieve, it provides higher goals than coexistence. The latter fails to provide any type of perspective on what comes after peace. Peace as a goal does not include political rapprochement or the building of positive relationships.

To conclude, the term coexistence might be helpful in the analysis, but cannot replace reconciliation as the goal of the aftermath of conflicts. As reconciliation, it lacks clarity on what it actually is. While it can be a goal, it is also cited as an integral part of reconciliation, which implies a procedural claim. It therefore serves more to clarify certain stages of reconciliation, rather than a concept standing by itself (Bloomfield, 2006: 16). In the complexity of peace-building efforts, reconciliation provides a more positivist perspective, and is more value loaded than coexistence. Therefore, it carries more importance not just to the analysis, but also to the goals of institutions, which aim to assist in nation-building.

2.1.5. Instruments of Reconciliation

To make the analysis a little more comprehensible, I will now provide an overview of the main instruments of reconciliation that push the process of a gradual rebuilding of social relationships between previously alienated communities further. The first instrument is some process of justice, which punishes previous crimes and deters future occurrences. This justice has to be centered around human rights principles, democratic values and international legal norms, but most importantly it has to promise fairness in the future (Bloomfield, 2006: 12).
The second instrument focuses on truth. To this instrument, there are two sides, truth-seeking and truth-telling, which have to go hand in hand (ibid.). This process is relevant to the establishment of a common history through the uncovering of unknown events as well as the acknowledgement of experiences of both sides. It gives a voice to the previously oppressed to display their suffering, but also to the perpetrators, who have a forum where they can either attempt to defend their actions or ask for forgiveness. However, truth can have a negative impact if it is incomplete.

Third, there is a process of healing, whereby the victims go through a learning process at the end of which they will be able to deal with their suffering, but not necessarily be able to forgive the perpetrators (ibid.). This is difficult to understand in the context of political reconciliation, since no national or international process has the power to change the deepest feelings of the individual. To clarify, while the political process might evolve into tolerance of another, it will not cause every individual to forgive the other.

The last instrument is one of the most debated, as scholars are strongly divided over its impact on the previous instruments. It is a process of reparation, which through real and/or symbolic measures compensates the victims for their losses (ibid.). It is important to understand that all these instruments are tightly interlinked, and none of them will fully function without the others.

2.2. Transitional Justice

Transitional justice is a type of justice specific to the needs of a nation in the transition from an authoritarian regime to liberal democracy (Herwitz, 2005: 539). Specific characteristics of this justice are the curbed usage of criminal justice, for example through the use of truth commissions. Another crucial aspect of transitional justice is the building of public or collective memory. Tools used towards this purpose range from public hearings, which are confined in time to the establishment of memorials, which in the widest sense of the word are physical points of memory, ranging from typical statuesque constructions (i.e. war memorials, etc.) to the open exposure to memory through the dedication of public buildings and places (i.e. named libraries, streets, squares, etc.).
The idea behind transitional justice is to accommodate to the specific set of needs, which nations in aforementioned transition have. Those needs, according to Herwitz (2005: 539f.), are:

1) the need to punish perpetrators from the past regime and relatedly, to thereby strengthen the rule of law against forces of terror remaining in the society; 2) the need for the kind of social healing that comes not from punishment but instead from public exercises in reconciliation; 3) the need for specific spectacles of transition, often in an international forum or through the media, which will build the moral capital of the new regime and garner support; 4) the need to delicately appease those from the old regime, so that transition will not be derailed by a coup or other regressive means; and 5) the need to strengthen the new state while also freeing it of the remnants of the past.

The dilemma is though, that these needs are not consistent with each other, wherefore transitional societies have to create a customized approach which advantages certain needs over others.
3. **Reconciliation Efforts at The Truth And Reconciliation Commission of South Africa**

This chapter will analyze goals and actual outcomes of the procedures of the TRC after the end of apartheid. Due to the spatial confines, I will focus on the impact of the Amnesty Committee, and just leap to the other commissions for reference. While there is a close relation between all the committees, the most prominent is the Amnesty Committee, due to the novelty of its approach. With its establishment the TRC made clear its aim that truth is by and far the most important tool to achieve reconciliation. While acknowledging that reconciliation is also a process, the TRC therefore lays a clear focus on it being an outcome. Throughout this chapter I will point to the difficulties of this interpretation, but also encourage the achievements of the TRC. The first part encompasses the struggle for a shared public memory, the second part provides detailed accounts of the amnesty approach while incorporating critical points, and the third part will provide a link between the different sub-committees of the TRC and the resulting outcomes of the TRC’s work.

3.1. **The TRC and the Construction of Public Memory**

One goal of the TRC was to establish the truth in order to build a public memory, which over time would lead to a reconciled society. For this purpose the commission gave up some of its rights to punish and established one of the most expansive public hearing procedures yet. In order to determine if the prospected chain of events took place, we have to establish first, for whom the creation of public memory is relevant, and what this memory is supposed to consist of. The TRC declares that reconciliation furthers memory, rather than wipe it away. Memory in this context is defined as a form, “which stresses the need to remember without debilitating pain, bitterness, revenge, fear or guilt” (TRC, 1999b: 435). This memory is the basis for a learning process for the future, where reconciliation (as a goal) will be the outcome.
3.1.1. Building a Legacy – For the Dead or for the Living?

Public memory or collective memory is a bizarre concept. While family and friends of an individual victim will remember their loved one, the public remembers victims without ever having personally known them. They might be informed about the acts of that victim, and therefore remember him or her in association with an act, rather than a personality.

But how is collective memory created? South Africa honors many former freedom fighters through different types of memorials. While typical memorials, like statues, exist, a way to build memory with a day-to-day impact is the naming of public buildings. Many libraries, schools and office buildings are named after individuals who struggled for the liberation of South Africa from the oppressive Apartheid state. As a result, the population is exposed to their heroes every day, however, largely without recognizing it. Therefore, collective memory is something created without actual memory, or at least a different kind of quality of memory (Herwitz, 2005: 533).

The purpose of this collective memory is memorialization; the establishment or publication of memory in the public sphere with the goal to create consciousness of the past which lives on in the future. Collective memory is therefore an integral part to the building of a group identity. It is understood, that memorials of any kind are build to the heroes of a society, and not its enemies. Therefore perpetrators and victims are consistently exposed to a picture of what is considered right, which provides a contrast to what is wrong.

The language often used to describe memorialization is that memorials are established ‘in memory’ of the dead. This clearly implies that the memory is relevant to the ones left behind, the living. A dead victim does not have a memory anymore; therefore it would not matter to the victim if it is memorialized in a library or school. So public remembrance is important for the ones who survived, to not forget the struggles of the past, but also the ones who struggled for them and additionally to expose the perpetrators of atrocities to the damage they did.
To conclude, while survivors often insist that they are establishing memory for the dead, they really do it for themselves and other survivors. This is part of getting past hatred for the perpetrators, as it is a public acknowledgement of the crimes committed.
3.2. Truth Through Amnesty, or Struggles of Transitional Justice

As mentioned in section 1.5.3., the TRC embraced an amnesty approach in order to gather the truth about human atrocities. This section will be an appraisal of amnesty in South Africa.

The institution mentions multiple instances of success on different levels. While they highlight the most successful instances in their report, they do not fail to mention that the most realistic goal of the reconciliatory process, peaceful coexistence, was achieved on the largest scale (TRC, 1999b: 400). The TRC identified multiple stages or signposts on the road of reconciliation in its concluding chapter on reconciliation. The admittances of this chapter are a relativization of the critiques of the following paragraphs. Those admittances are that reconciliation is a time-consuming process with undefined outcomes, since those are mostly subject to the victims’ decisions (1999b: 435). If anything, the accounts of the TRC can be seen as guidelines on the road to reconciliation. The commission did not claim it could achieve reconciliation by itself. Nevertheless, the critique of the TRC remains relevant for a learning process within South Africa, but also for the rest of the world, as a framework for restructuring fractured societies.

The TRC offered qualified amnesty, which meant that amnesty would only be granted in exchange for full disclosure of the truth in combination with the demonstration of ‘proportionality’ of the crimes committed (TRC, 1999a: 119). That means crimes, i.e. gross human rights violations, had to be in proportion to the political goals which motivated the larger method of action, respectively Apartheid. Such goals had to be the protection of the state or the fight against communism. This interpretation of proportionality does not make a value judgment concerning morality, which is critical. The concept of proportionality is absurd in this context, because gross human rights violations in their very nature are out of proportion from human decency (Herwitz, 2005: 541). The reason for the use of the concept of proportionality was to distinguish between crimes targeting political enemies and crimes targeting innocent bystanders, such as women, children and the elderly who did not have any political involvement against the authority of the state. Proportionality is obviously not more than a political compromise between the calls for justice by the victims and the call for blanket amnesty.
through the perpetrators. The resulting discrepancy between amnesty and justice is one of the two main points of critique to the Amnesty Commission of the TRC. No party, ANC or NP, achieved what they wanted throughout the process of the transition negotiations. Due to the structural and political pressures of the negotiation process a different understanding of justice emerged, which was closely tied to the moment, rather than a universal understanding.

This contextual understanding of justice, based on the notions of forgiveness, reconciliation and nation-building, rather than retribution, was also closely tied to the individuals involved, not just the pressures of the negotiations. Especially the clerical influence was strong, which shows in the positions held by clergymen, most famously the chairman of the TRC, Desmond Tutu. The biblical notions of forgiveness, reparation and moral nation-building are central to the commission’s interpretation of memorialization, as mentioned in the previous section (Herwitz, 2005: 541). In the following I will continue the critique of the amnesty principle as such, and move back to the theoretical sphere of my research.

The main critique of the amnesty principle is a supposed discrepancy between amnesty and justice. This is largely due to the rather narrow interpretation of justice in the traditional legal, ergo retributive sense. The TRC certainly acknowledged the tensions between truth-seeking and justice, but the outcome is nevertheless the same. One tension is mainly consistent on the personal level, where it is just natural for human beings to desire revenge. The problem that can occur out of the lack of revenge is that suppressed anger might undermine reconciliation. Every victim has the right to feel hatred towards its oppressor, but in order to reconcile on a societal level, these hatreds sometimes have to be ignored. In any case, a judicial approach cannot guarantee full satisfaction of the victim, since forgiveness can only happen on an intra-personal level. Therefore, the TRC found it to be more suitable to focus on the larger goal of communal restoration through the healing effect of knowing the truth.

The second critique point is that amnesty can be interpreted as a denial of responsibility and accountability. As such, it is seen as embracing a culture of impunity, which is exactly what the developments in international law have been trying to overcome in the past three decades. Wilson implies it clearly when talking about the TRC, that “reconciliation was the Trojan Horse used to smuggle an unpleasant aspect of the past (that is, impunity) into the present political
order [...]” (2001: 97). Victims often voiced the feeling that the refusal to punish the perpetrators constituted a failure to respect their suffering. The TRC responds with a clear voice by emphasizing the need for the fractured societies to come together. A fractured society will not and cannot be reconciled if the perpetrators are jailed and thereby excluded from participation in society. Both sides have important claims, and it becomes clear that the process should not be generalized. The critics of the TRC often forget though, that amnesty is only one of the possible outcomes, and mostly some type of judicial punishment was incorporated in their ruling. In fact, while only 849 applicants were granted amnesty, 5392 people were refused amnesty (Bhargava, 2002: 1312). This shows that the aim to avoid blanket amnesty has been rather successful.

3.3. Goals Versus Reality – What Did the TRC Achieve?

This section will step away from the discussion whether amnesty is an appropriate concept or not. Instead, I will discuss the outcomes of the work of the TRC. While I will continue to emphasize the work of the Amnesty Committee, I will now also touch upon the impact of other parts of the TRC-framework.

3.3.1. Reconciliation of the Mind

Reconciliation of the mind is what will hopefully be the outcome in the far future of this society, which was divided by subjection and racial boundaries. It is nothing that was within the power of the TRC to achieve though, and will ultimately depend on the individuals’ own dealings with their personal memory. It is the final step of reconciliation towards a homogenous society, and does frankly barely exist anywhere in this world.

What the TRC did achieve though, is a framework for society based on shared values of democracy and the judiciary through the establishment of collective memory through truth. Memory is essential to the reconciliation effort, and transcends into the structures of a functioning state and society. South Africa has a strong constitutional court, which is not afraid to ruffle the government, regardless of the power structure of the latter. Therefore South
Africa’s societies, while still fractured, moved past mere coexistence already. Currently, South Africa is a functioning state on most levels, and while gaps continue to exist, so do opportunities. This shows in increased enrolment of the former victims and their children in schools and universities, but also in increased ‘Black’ and ‘Colored’ business ownership and cooperation with the former perpetrators in most parts of society. To summarize, the TRC showed strength in finding the truth about atrocities of the past, but the pursuit of the broader objective of promoting reconciliation was more problematic.

3.3.2. The Discrepancy Between Reconciliation and Economic Justice

The Promotion of National Unity and Reconciliation Act did not only institute amnesty as an underlying principle for a larger accumulation of truth, which by many victims was judged as letting the perpetrators get away with their misconduct, but also put an effort into compensating victims in return for the suffering they had to endure. For this purpose the Reparations and Rehabilitation Committee was instituted. The purpose of this committee was to make recommendations to the parliament concerning the reparation to, and restoration of human dignity of the victims (Rigby, 2001: 135). While the committee certainly made detailed recommendations, it is much harder to implement such in the real world of politics, where lack of funds and accessibility play restricting rules.

It is true, that reconciliation without restitution is barely possible, but how can restitution be facilitated in a country like South Africa, without opening new wounds and reemphasizing ethnic divides? While compensation through small cash contributions, the construction of memorials and other forms of symbolic and material reparations are a step in the right direction, they are mostly incomplete. Victims are often dissatisfied with the amounts they receive, and even if they are not, financial compensation rarely fosters satisfaction without punishment of perpetrators. Furthermore, if victims, who have been compensated for their direct suffering, are satisfied, the rest of society often is not. Those who were not victims of human rights violations, but had to suffer indirectly under the confines of the apartheid regime mostly go empty-handed. In its final report the TRC recommended that approximately 22,000 victims should receive
reparation payments of 17.029 – 23.023 Rand annually for a period of six years (Wilson, 2001: 22). Much smaller payments were distributed to roughly 20,000 people.

Surely, these considerations were made throughout the negotiating process prior to the commission, and the actual procedures of the TRC, but decisions against a general redistribution took place for good reasons. One of the fundamental restrictions of the negotiated agreement between ANC and NP was that property relations would be left untouched, because the turnover of power was unlikely to happen peacefully otherwise. Furthermore, when looking across the border to the land redistribution efforts of the Zimbabwean government, the severity of problems of land reallocation becomes clear. Especially Whites innocent of crimes were heavily concerned that they might be the next class of victims, if a general plan on land redistribution would be executed (2001: 145).

3.3.3. How Winners Lose and Losers Win – A Critique of Structural Procedures at the TRC

As aforementioned, the granting of amnesty to perpetrators was a major source of conflict. This common belief among South Africans was deepened by a seemingly minor, yet strongly influential fact. While the Amnesty Committee was given full powers of implementation, meaning that decisions made by this committee would be valid in law and put into immediate practice, the Reparation and Rehabilitation Committee could only make recommendations. As mentioned in the previous section, economic justice is one of the influential factors impacting reconciliation if criminal justice is not in place. Under the proceedings of the Amnesty Committee perpetrators were granted immediate freedom after full confessions, while victims were required to wait for a positive or negative decision on the recommendations made by the Reparation and Rehabilitation Committee to Parliament. This led to disgruntlement among groups of victims, who felt that perpetrators were given preference over the victims in the pursuit of the ultimate truth.

The underlying Christian principles of compassion and forgiveness seemed to be too strongly rooted in the set-up of the TRC in the eyes of many victims. Reconciliation is often
seen as time-dependent and can only be achieved if the timeline of the reconciling process is in a specific order. Therefore, if perpetrators are freed before reconciling efforts have been contributed to the victims; it is highly unlikely that reconciliation can be completed in any sense. The call for justice includes that the victim is put first, and the perpetrator second. This was at times not the case due to the unregulated interactions and different empowerments between the sub-committees of the TRC.

3.4. A Resume of Reconciliation

What has crystallized by now is that the TRC has not fully reconciled the South African society. It never had the power, or the aim, to fix everything that is wrong with South Africa. Nevertheless, it made a relevant contribution to the reconciliation effort in South Africa, and was an integral component of it. The process of reconciliation continues to unfold, and we now see the TRC as one of the first steps of this process.

While I acknowledge the importance of finding the truth, and ascribe a high success rate to the TRC in that endeavor, I also agree with many of the TRC’s critics, that some mode of justice is needed for social reconciliation. While most perpetrators were not granted amnesty, the ones who were, especially the ones of high profile, like former president F.W. de Klerk, leave a mark of dissatisfaction on society. The TRC was successful in achieving political reconciliation, but South Africa cannot be satisfied with just the political elites being reconciled. Instead it needs to further the efforts to reconcile society as a whole. The mode of justice I am implying does not have to be retributive justice in the sense of punishment, but should certainly include actions which address socioeconomic inequalities. Such actions have to refrain from a ‘hard power approach’ of forceful condemnation, but should rather focus on creating incentives for the current economic elites and the government to create opportunities for the disadvantaged. For this to be successful, change has to start on the grassroots level. For this purpose it is important to continue the educational efforts started by the TRC. The people of South Africa have to know that violence is not the right way to address their needs. Instead reconciliation has to be enhanced through democratic and non-violent means.
4. Reconciling the Other – The ICTY in The Hague and Prosecution from a Distance

The ICTY was set up in 1993 as a “measure to restore and maintain peace and promote reconciliation (Del Ponte, 2007)” In comparison to the approach of truth commissions, a clear advantage of criminal trials, like at the ICTY, is, that they establish individual responsibility for crimes, and therefore rejects the notion of collective guilt (Moghalu, 2004: 216). It therefore removes a critical barrier to genuine reconciliation, by taking the guilt away from the group (ethnic, religious, etc.) and transferring it to the individual. Therefore, judicial trials of individuals can be acclaimed to be a deterrent to future crimes, by gradually removing the ethnic divide.

Furthermore, trials assure participation of the accused, which contributes to rehabilitation and reintegration of the accused into the national deliberative process (Slye, 2000: 173). Additionally, some claim that trials enhance the quality of information, since information provided by defendants and victims is supported through evidence. However, due to the mixed approach of punishment and amnesty at the TRC in South Africa, these points seem to have been equally fulfilled, if not even more, than has been the case at the ICTY.

While embracing retributive justice from a distance, there are now complementary projects on the ground in the former Yugoslavian countries, including the ‘Imagine Coexistence’-initiatives, which are funded by UN Commission for Refugees. These are part of an attempt to widen the perspective of the ICTY to more than just retributive justice. However, the location of the tribunal remains one of the most debated and criticized aspects, and will be analyzed in the following sections. Afterwards, I will continue with an analysis of one specifically influential aspect of the ICTY – the impact of plea and sentence bargains on truth and reconciliation.

4.1. Different Place, Different Law – Same Outcome?

Since the end of the Cold War multilateralism has been on the rise and is continuing to overtake the importance of bilateral agreements. Multilateralism was also at work during the
establishment of the ICTY, when the UN Security Council passed Resolution 827. However, multilateralism has not been sufficiently upheld. Throughout the procedures of the ICTY it became more and more clear, that just a small group of actors is involved in the decision making process. The countries which are concerned are nearly exclusively the funding countries of the ICTY. Meanwhile, the countries which are most concerned with the actions of the ICTY, the countries of the Former Yugoslavia, have been marginalized through absence in The Hague. As a subsequent dispute, the populations of such countries feel like they are on trial, rather than the individual perpetrators.

One of the declared goals of the ICTY is to reconcile the people of the Former Yugoslavia, yet the UN Security Council decided that it would be not only wise to establish the tribunal in a different country, far away from the Former Yugoslavia, but also introduced English and French as the working languages (Clark, 2009: 422). This makes it difficult for people in the region to continuously follow the trials of the ICTY. Many are not able to receive direct reporting from the trials, and there is no continuous TV broadcast of if, like it was the case with the TRC. Therefore, if the ICTY wants to achieve its goal to move towards reconciliation, it has to make concessions in order to increase communication with the populations of the newly formed states. This will take time, and financial efforts, but if it does not happen, the impact on reconciliation will be devastating. Many in the region see the tribunal as the imposed work of Western Europe and the US, and continue to support the perpetrators from their ethnical group.

Additionally, the judicial principles applied during the trials are unfamiliar to most in the affected region. The ICTY uses a concoction of the inquisitorial civil law system and the adversarial common law system, but leans towards the latter, which is unfamiliar to most former Yugoslavians (2009: 422). As a result, it is important that the ICTY receives more support from NGOs and increases its own efforts to apply their work on the ground. The people of the Former Yugoslavia have to be better informed about the dealings at the ICTY. While the ‘Imagine Coexistence’-projects are part of this work, it is important to pay more attention to the actual work of the ICTY. The projects attempt to reconcile fractured societies by implementing joint projects to bridge the gap between the different ethnicities. Sure, it will help to show that the different groups can coexist on the small scale, but since the ICTY laid emphasis on retributive
justice, they should also encourage the information flow about their developments during trials. In order to move towards reconciliation, people from different ethnic groups need access to the same information, rather than pre-digested information from their respective ideologically biased journalist outlets.

Accordingly, an increased publicity of the trials and the conduction in languages of victims and perpetrators would help tremendously. While most within the Balkan region would rather see the tribunal within their territory, that seems to be a counterproductive idea for future perspectives. It is no perfect solution to have the residence of the tribunal in The Hague, but it is a clear statement of a commitment to impartiality. Therefore, the focus of the ICTY has to be on communication with the local populous. It is clear, that “the relationship between a tribunal and the local populace is a critical dimension of its success” (Fletcher and Weinstein: 2004: 44).

4.2. The International Community versus the Former Yugoslavia – A Critique

While the impact of the location of the court in a country outside of the territory of Former Yugoslavia, and other structural aspects of the ICTY have been analyzed in the previous section, I will now turn to problems created through internationality, which are not of a structural nature.

The first, and most obvious critique point of the ICTY is, that there is no effort to prosecute the actions of outside actors during the wars, most notably the bombing campaign of NATO during the Kosovo Conflict in 1999. Many in the region of the Balkans are disgruntled with the involvement of NATO not just because of the ethnic divide and the believe of some Serbs, that Kosovo-Albanians were separatist rebels with the intention to harm them, but because of direct physical suffering inflicted by the bombing campaign. Those critics argue that the bombing had an unnecessary human cost, and mainly killed innocent bystanders. What dissatisfies them with the ICTY is, that it seems like a winner tribunal where NATO is not questioned over a single incident during the campaign. There were multiple targets throughout the NATO campaign, which are questionable indeed, but a review commission established by the ICTY reported, that there are not sufficient grounds in law or evidence to prosecute NATO or its members in front of the tribunal (Benvenuti, 2001: 504). The chief prosecutor decided to follow this recommendation, without making use of the larger truth-finding abilities of the
ICTY itself. To the defense of the ICTY it should be stated, that the ICTY in its mandate focuses on the prosecution of individuals in the context of ‘grave breaches’ of international humanitarian law, rather than on the prosecution of states in context with international humanitarian law in general, which has elementary differences in applicability of law as well as punitive measures (2001: 527). However, this fact should not have constrained the ICTY from looking into the cases involving NATO, and if unable to proceed in prosecution, at least bring it to the attention of the International Court of Justice.

More basically though, it was illegal according to international law, that NATO forces involved themselves into the conflict in the first place. NATO never received a mandate from the United Nations Security Council, and hence never acted on legal grounds. Theoretically, NATO involvement was a grave breach of state sovereignty, an underlying principle of international politics since the Treaty of Westphalia, reinforced until the present day through the United Nations Charter. According to the latter, sovereignty can only be breached on a few exceptions, such as humanitarian intervention, but has to be approved by the United Nations Security Council. While the NATO countries agreed upon the action, the UN Security Council certainly did not, and this decision is often reminded on by Serbs. In fact, an initiative was started by the Russian Federation to immediately end the bombing campaign on March 26th, 1999, two days after the start of the campaign. The Russian representative stated, that “aggressive military action unleashed by the North Atlantic Treaty Organization (NATO) against a sovereign State was a real threat to international peace and security, and grossly violated the key provisions of the United Nations Charter” (UN Press Release SC/6659, 26.03.1999). The resolution never passed, due to the involvement of Security Council members, including permanent members, in the NATO campaign. That does not change the fact that the NATO countries started the campaign without a mandate of the UN Security Council though.

In the aftermath it becomes clear though, that at least on moral grounds, the intervention in Kosovo seemed right, even though it was technically illegal due to political differences between some of the permanent members of the UN Security Council. What is less clear though, is how specific incidents, resulting in civilian deaths were not investigated by the international community. Some of the claims made by members of the ethnic groups under trial at the ICTY concerning the conduct of NATO should be considered more closely. The current
procedures seem lopsided, and therefore harm reconciliation, by reinforcing the diving lines among the different ethnic groups and nationalities. If justice is the goal, then it should be the same justice for all. Otherwise the lack of accountability and fairness will hinder the development of common values and the belief in just courts.

4.3. Bargaining for the Truth – The Impact of Plea Bargains and Sentence Bargains at the ICTY

Throughout the activity of the ICTY, twenty defendants have pleaded guilty. The tribunal stated that every defendant, who issues a guilty plea, has to do so voluntarily, informed and unequivocal and there has to be sufficient factual proof for the crime, and the defendants partaking in it (ICTY in Clark, 2009:417). This shows clearly, that in the case of a guilty plea of a defendant, it has to be accepted, no matter what the suspected crimes of the individual encompass. But why is it of interest for the ICTY to approve such pleas? There are a multitude of reasons, some fundamental to the self-perception of the tribunal, some structural in character.

If indeed, as debated above, truth is of essence to achieving reconciliation within a society, then what impact do plea and sentence bargains at the ICTY have on the mission to find the ultimate truth? In order to answer this question, we have to take a step back, and explain why plea and sentence bargains are relevant, and to whom.

4.3.1. Incentives for the Perpetrators

The incentives for defendants to enter into plea bargaining and sentence bargaining are rather clear and simple. The most obvious one is the prospect of a reduced sentence, wherefore defendants generally try to achieve a compromise with the ICTY to drop charges of the highest criminal account. In many cases that is the charge of genocide. The impact of bargains shows in the sentencing statistics at the ICTY. While accused, who plead guilty receive an average sentence of 11 years of imprisonment, those who did not, receive a sentence of an average of 17 years (Clark, 2009: 420). However, a reduced sentence is not the only incentive. Defendants might also consider bargains in order to hide additional crimes they could be accused of due to findings during the process of hearings of witnesses. In some cases, the reason might also be
actual regret of the actions performed during the violent struggle, since a plea bargain also means admittance of guilt.

4.3.2. Incentives for the ICTY

The official position of the ICTY states that guilty pleas can facilitate reconciliation (Clark, 2009: 423). In this regard, the ICTY clearly establishes a link between truth and reconciliation. It is believed that guilty pleas help to establish the truth, and are therefore vital to the process of reconciliation. Furthermore, such pleas are believed to offer partial closure to the victims through the perpetrators acknowledgement of guilt (ibid.).

There are more reasons though, mostly of a rather pragmatic kind. Clearly, the ICTY is exposed to pressure from multiple actors, mostly of a financial nature. The United Nations decided upon a completion strategy for the tribunal, which urges it to end all its proceedings in 2012, with the exception of the Karadzic case, which should be concluded in 2013. Following the final stages of the trials currently running, the ICTY allocated an additional two years to complete its revision of appeals (ICTY, 2010). The problem of funding of the tribunal has been prevalent since its founding. While the largest contributions come from the United States of America, other, largely European, powers contribute as well. In all contributing countries it seems difficult for local politicians to continuously justify their spending to the populations they account to. Meanwhile, the institutional budget of the UN does not hold enough resources to sustain the efforts of now more than 1200 employees of the tribunal. Plea bargains clearly provide a shortcut to the tribunal’s busy schedule (Clark, 2009: 419), and “the ICTY has little choice but to adopt a plea bargaining strategy” (2009: 433).

4.3.3. The Impact on Reconciliation in the Former Yugoslavia

Plea bargains are very common in many national judicial systems. On an international stage though, they appear rather unseemly, due to the gravity of the crimes being prosecuted. These bargains have to be considered carefully though, since they do not only have an impact on the individual victims of an accused, but on the victim’s group. As Wendy Lambourne points out, “reconciliation […] values the justice which restores community, rather than the justice which destroys it (2004: 24)”. In this context bargains are of severe impact, because they often
involve a tradeoff between the incentives for the ICTY and the crimes the defendant is accused of. If therefore the group of the victims, in the sense of societal group the victim belongs to, feels that the withdrawing of certain charges is inappropriate, the natural consequence is dissatisfaction with the institutional structures in play. Critics cite specifically the withdrawal of genocide charges as severely influential. As a result, victims feel betrayed and undervalued by the court. After all, the process is supposed to lead to reconciliation in the territories formerly affected by violence, wherefore victims feel, that they should be the ones prosecuting their former enemies, and not an outside power.

To elaborate, the withdrawal of charges, no matter which those may be, leads to the establishment of an incomplete truth. A plea bargain essentially means that a perpetrator, in order to improve his or her position and in order to help the tribunal with its completion strategy, acknowledges participation in certain crimes in exchange for the guarantee that charges for other crimes, which the perpetrator was formerly accused of, are dropped. Naturally, defendants are eager to have the charges with the highest prospective sentence cancelled, which in many cases is unfortunately the charge of genocide. The truth becomes incomplete, because the admittance through a guilty plea leads to the immediate move to sentencing of the defendant. Therefore, most parts of a regular trial do not take place, including the testimonies of witnesses. These testimonies are essential to the establishment of truth. While the ICTY makes a relevant claim by stating, that not having to take the stance bares the witnesses from having to come to The Hague, and therefore saving time but also from having to recapitulate their horrific stories, the impact on truth-seeking and consequently the reconciliation of society is negative. The defendant now has the chance to skew the accounts in his or her favor, due to the absence of witnesses.

Also, by not pursuing further investigation, the prosecutors give defendants the chance to pick information they reveal based on if it is beneficial to them. This has repeatedly led to arguments about the inevitability of crimes, due to the following of commands by a superior. Therefore, defendants were able to strip themselves from responsibility to a degree, and could make it seem that they are sorry for their crimes, but not solely responsible for it. According to Walzer, there can't be justice without responsibility though (2006: 288). This is a point, which is harmful to reconciliation, because, if not curbed through the proceedings of a regular criminal
trial, the admittance of guilt is overshadowed by the claim to have acted on command of another. While this claim does not have an impact on personal responsibility for crimes under the statutes of the ICTY (Moghalu, 2004: 216), it certainly seems to be an attempt at excuse for the crime in question to its victims. Subsequently, the claim that the admittance of guilt will help to provide closure for the victims, is not always true.

Additionally, the failure to prosecute all the crimes the defendant was originally accused of leaves gaps in the story-telling. The charges, which are dropped, are now only partially accounted for through an overlaps between crimes. Therefore, we arrive at the realization, that the positive linkage between truth and reconciliation, established by the ICTY, is incomplete. If bargains between defendants and the prosecution lead to a ‘truth’, this one will most likely be incomplete (Clark, 2009: 424). Furthermore, the terminology of truth is contested itself, and therefore the positive relation between truth and reconciliation should be observed with suspicion.

To conclude, there is a visible gap between the ambitions of the ICTY to reconcile fractured societies within the Former Yugoslavia and the external pressures of the US and UN to fulfill its completion strategy. Therefore, it has to be questioned how successful the aim of the institution to deliver justice, deter and to contribute to the larger peace-building process is. The expectations for the tribunal are high, which makes a positive assessment of their work difficult. The ICTY does not provide a full fix for the problems of the fractured societies. Moreover, the physical, linguistic and judicially conceptual removal from the supposed beneficiaries of their work hinders the impact the ICTY could have within the local communities (2009: 434). Hence, outreach projects are necessary, which bridge the gap between the reasons of entering into a plea bargain and the information of the affected local communities.
5. Conclusion

Throughout my research I showed that reconciliation is a gradual process, and cannot be assessed as ultimately successful or failing in either context. What certainly became clear, is that while the pretexts of each fractured society were different in nature, the requirements for reconciliation are similar. The most important factors to reconcile fractured societies are the provision of truth and justice, which are the two basic requirements to eventually achieve closure. When observing the societies of both countries, it seems like South Africa is ahead of the Former Yugoslavian societies in its quest for reconciliation. It would be presumptuous to blame this discrepancy on the different judicial approaches though.

Reconciliation is a context specific process, and therefore a context specific outcome as well. In response to the aim of my research, it seems that reconciliation has more promise in a national context, rather than from the outside. The biggest challenge to the success of the ICTY remains to be its displacement outside of the Former Yugoslavia. However, it seems unwise to move the tribunal to a different location, nor would it have been wise to set it up in the Former Yugoslavia in the first place. This means that, no matter which approach is chosen, not everyone will be satisfied with the process, and accordingly, not everyone will be reconciled. In order to bridge the geographical gap, it is important to increase the efforts around the tribunal to communicate with the affected societies. Furthermore, the displacement is overshadowed by the interpretation of many, that the ICTY is a winners’ tribunal. This claim can only be rejected if the same standards of justice apply to everyone, including NATO.

While the ICTY’s punitive approach implies a more just system from an outside perspective, the purely juristic approach is not able to overcome the differences between the fractured groups in the Former Yugoslavia. The process continues to be observed with Argus Eyes, and many stand behind the former leaders of their respective ethnic group. Therefore, it is of imperative that the educational efforts in the region are increased.

The TRC is a more complex institution, and therefore the assessment has shown to be even more difficult. I pointed out the misperception, that amnesty was given away lightly. This
was clearly not the case, as established in the numbers. Therefore, I find the approach of the TRC to be a rather promising one, which in the end came short because of structural issues. As with the ICTY, not everyone will be satisfied with the outcome, but the TRC has provided a basis for furthering reconciliation based on its finding of the truth. No process yet has uncovered such a quantity of truth, as the TRC did. However, the findings of the TRC have to go hand in hand with a continuous process to overcome economic and educational differences.

In the end, both processes have their pitfalls. What has to be understood is, that there is no easy way to reconcile fractured societies, and that each approach, truth commission or court of law, is only a part of an overarching peace-building process. Reconciliation is dependent on factors that are outside of the reach of both institutions, but the role of each is not to be underestimated. Most definitely, the ability to use institutions to reconcile societies ends at social reconciliation, and it will always be up to the affected individuals to reconcile on an intrapersonal level. But, in order to reconcile, one does not have to forgive the other his or her crimes. A functioning society is not reliant on all individuals loving each other, but on the ability to peacefully and respectfully interact within the societies framework. Fractured societies ultimately have to be reconciled from within, but in the right ways the help of outsiders can be valuable. Additionally, in order to reconcile societies, different types of justice are required, and none, retributive or restorative, will bring full success standing alone. Especially retributive justice by itself lacks the important quality to look forward. It punishes the past, but what is needed is the establishment of peace in the future. Hence, what has to be established is a process, which incorporates all types of justice - retributive, restorative, distributive, economic and regulatory. The aforementioned are necessary for victims and perpetrators to find a system to be socially just. Social justice is what connects fractured societies to each other, and will help them to move past their divide and identify with each other. Only if all fractions of justice are considered and pursued, the outcome can be reconciliation.
6. References

6.1. Primary Sources


6.2. Secondary Sources


