Transitional Justice: A New Discipline in Human Rights

«The past is not dead. It’s not even past.» William Faulkner

1. Introduction: The Definition and Historical Evolution of Transitional Justice

The question of how best to deal with a divisive past of mass violence is not a new one. What Ernest Renan called «historical amnesia» might be necessary for the building of a nation, but recent developments in human rights have shown a turn towards collective remembrance. Memory-work is now considered a useful tool of conflict resolution throughout the world, as there is a growing belief that unaddressed past legacies actually fuel conflicts. The theories and research programs that explain, justify, compare, and contest specific practices of moral and social repair, and the political and social movements dealing with the past, including practices such as Truth Commissions, trials, administrative reorganization, nation building, commemoration and reparation, is what we now call «transitional justice» (Mendez, 1997; Crocker, 1999; Teitel, 2003; Elster, 2004; Roht Arriaza, 2006; Eisikovitz, 2009).

Roughly, the function of transitional justice (hereafter, TJ) is to exercise justice and provide some form of repair in the wake of horrifying violence (Walker, 2006b: 12). TJ is an instrument of broad social transformation, and rests on the assumption that societies need to confront past abuses in order to come to terms with their past, and move on. The notion of TJ as a separate field of research and action first appeared during the «third wave» of democratization in Latin America and in Eastern Europe (Huntington, 1993), referring specifically to the transition from a dictatorial or authoritarian regime towards a liberal market democracy. In 1992, the «Charter 77 Foundation» gathered in Salzburg with leaders from South America, Africa, Eastern and Central Europe, to define the best way of organizing the transition from a dictatorial to a democratic regime (Kritz, 1995). The collapse of communism and the end of bipolarity caused the proliferation of political democratization and liberalization, consequently «transition» became a central word in both human rights and international relations. For Pierre Hazan, this moment is analogous to the appearance of purgatory in Christianity: transition is the time of confession, repentance, and judgment, animated by the constant hope of possible salvation (Hazan, 2007). Ruty Teitel, in one of the first extensive books on the subject, defines TJ as «a concept of justice, intervening in a period of political change, characterized by a juridical answer to the wrongs of past repressive regimes» (Teitel, 2003: 69). According to the International Centre for Transitional Justice, a New York-based research group which works with transitional regimes,

«Transitional Justice is a response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation and democracy. Transitional Justice is not a special kind of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some case, these transformations happen suddenly, in others they may take place over decades» (ICTJ, 2008).

TJ is both backward and forward looking. It affirms that successive governments must build institutions that will bring justice to the past, while showing their commitment to good governance in the future. Justice, then, amounts to replacing «violence with words and terror with fairness», and finding «a path between too much memory and too much forgetting» (Minow, 1998: 4).

However, TJ as a discipline has evolved a great deal in the last two decades. From an instrument of democratization and human rights, it has tended to become an essential component of any liberal peace-building operation. There is now what Kimberley Theidon calls a «TJ industry», composed of «teams of experts, consultants, standardized software packages or data management, and a set of assumptions regarding how to ‘do memory’ and why memory matters» (Theidon, 2009: 1-2). Efforts
to confront the past are now a permanent feature in post-conflict transitions (Lederach, 1997). TJ has thus become a tool within the wider peace building ‘package’: confronting the past is considered necessary to foster a culture of human rights, to reform a State’s institutions, and to re-build civil society after the occurrence of mass violence. Although some TJ efforts have been purely local, TJ initiatives are now mostly dealt with through NGOs, regional organizations, and international institutions such as the United Nations Development Program, the International Criminal Court and the World Bank. In 2004, the UN released a report on TJ, which combined it with post-conflict reconstruction and the rule of law. According to the 2004 United Nations General Secretary’s Report on Transitional Justice, the concept comprises:

«The full range of processes and mechanisms associated with a society’s attempts to come to term with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation» (UN, 2004: 3).

Indeed, two main challenges are usually distinguished in post-Cold War peace operations: to mediate, secure and implement a peace agreement that will create new political and economic institutions and new social norms that will transform the society and prevent the recurrence of conflict; and to legitimate this new «transitioning» political order on the ground by empowering the people and increasing local ownership over the peace process (, 2001; Chandler 2006; Yordan, 2009). TJ is considered a useful tool for both these goals: by re-establishing the rule of law, it helps rebuild the political institutions at the State level; and by healing victims, promoting reconciliation and unearthing the truth about the past, it contributes to the building of a healthy civil society.

The goals of TJ are rather ambitious: nothing less than the transformation, or the regeneration, of a whole society. It involves political, economic, cultural, sociological and psychological actions: prosecutions, Truth and Reconciliation Commissions, lustration, public access to police and government records, public apology, public memorials, reburial of victims, compensations, reparations, literary and historical writings, and blanket or individual amnesty. More often, TJ combines a number of these tools in a holistic approach, acknowledging that none of the above measures will ever provide a sense of closure and adequately repair the injuries of the past. However, TJ remains a rather optimistic answer to mass violence, one that goes against the defeatist argument that would make genocides and mass atrocities forever unforgivable and imprescriptible (Jaspers, 2001). It is certainly true that neither a judicial sentence nor an apology can ever be commensurate with the horrors of mass violence. «We are unable to forgive what we cannot punish and we are unable to punish what has turned out to be unforgivable», Hannah Arendt famously said (Arendt, 1958: 241). And indeed, as Lawrence Langer wrote, «the logic of law will never make sense of the illogic of genocide» (Langer, 1995: 171). But TJ argues that the recognition of this fundamental disproportion should not become an excuse for fatal attitudes. These crimes do «transcend the domain of humane affairs» (Arendt, 1958: 307), but humans can, and must, nevertheless confront them. The language of «transition» in TJ is thus rather optimistic, teleological and seductive: forming a «before-and-after narrative of change», it implies that «‘after’ will lead to something better» (Theidon, 2009: 1).

The literature on TJ has evolved a great deal, as has the discipline itself. From a retribution-centered approach, it has recently moved towards a more restorative one, focusing less on perpetrators and more on relationships at the level of society, with the explicit goal of «healing» the victims. Recently, scholars are arguing in favor of broadening the scope of TJ, so as to include social justice, development and economic distribution (Mamdani, 2000; De Greiff and Duthie, 2009). The research trend in the TJ field in the future seems to be moving towards evaluating the impact of TJ (Van der Merwe et al., 2009), and developing more complementarity between global and local approaches to justice (Sriram and Pillay, 2009; IJTJ, 2009).

Here, I will distinguish three main categories of action:

- **legal justice**: prosecuting the perpetrators and re-establishing the rule of law, reforming the security and judicial system;

- **restorative justice**: gathering the truth about the past, healing victims and rebuilding communities through reconciliation and collective memory;
- **social justice**: settling the economic, political and social injustices that may have created the conflict and defining the basis of a just, stable society (reparations, financial or symbolic, affirmative action programs, gendered approaches, development, etc).

I will successively examine these three types of action, highlighting the promises and limitations of each, before arguing in favor of an extension of the TJ project, both geographically and thematically, in order to make it compatible with the wider project of deliberative democratization.

## 2. Retributive Justice: From International Trials to Local Justice

*The Historical Background of Trials*

**a) The Nuremberg Trials**

The initiation of TJ is often considered to be the Nuremberg Trials, a model of accountability focusing on individual responsibility that took place in Germany after World War II. Between 1945 and 1949, the Allies held a total of thirteen trials, involving surviving senior Nazi officers such as Hermann Göring, Joachim von Ribbentrop, Julius Streicher and Rudolf Hess. Smaller actors in the Nazi regime, doctors, lawyers and industrialists, also stood trial (Earl, 2009). The tribunal was the moment of a conceptual break that laid the foundations for TJ that were to be re-discovered in the 1990s. Indeed, the Nuremberg judges clearly defined themselves as the high moral authority, and used the trials to tell a story about the past. Robert Kempner considered them to be «the biggest history seminar that was ever held» (in Marrus, 2000: 25). A cinema screen was introduced into the courtroom for the first time and the prosecutor Robert Jackson used those images to confront the perpetrators with their deeds, while survivors and victims testified, face to face, in an encounter that was supposed to restore the lost moral order. The challenge of Nuremberg was clear: the re-founding of a political and moral community through the narration of past horrors (Simpson, 2008; Durkheim, 1998).

The Tokyo military tribunal did not have the same symbolic impact as the Nuremberg one, although it was subjected to the same criticism: that of victor’s justice and, even worse, of «disguised revenge» (Minear, 1971: 19). More clearly displayed than in Nuremberg, the tribunals in Tokyo had an American bias: headed by US Army General MacArthur, members of the prosecution team were mostly Americans, but the Americans themselves were never made accountable for the bombing of Tokyo, Hiroshima, or Nagasaki. According to Indian judge Radhabinod Pal, the Tokyo Trials were «little more than a sword in a judge’s wig» (in Brook, 2001: 38).

However, it was not certain at first whether the allies would use the law against their defeated enemies, and the decision to do so should be acknowledged, as it had crucial consequences for TJ. A fierce debate within the American administration opposed hard liners such as Henri Morgenthau, who simply wanted to execute the key perpetrators, and legalists such as Henry Stimson, who defended trials as being more faithful to America’s procedural tradition (Shklar, 1963). Stimson was not only a legalist, he also had strong realist arguments to support the legal approach: if Germany were to be punished collectively, he warned, this would only increase resentment and might provoke another war. Conversely, the courts of law would help the country to internalize and individualize its guilt. Prosecutions were believed to have many curative powers: they establish the truth; they educate the public about the nature of past abuses and thereby promote a shared understanding of the past; they help rebuild the rule of law after mass atrocities, demonstrating its universality and continuing authority; and they reinforce moral norms, forging a nationwide moral consensus that the past acts were wrong and unacceptable (Hampton, 1984; Bass, 2001; Koskenniemi, 2000).

The overall goal, then, was prevention, not vengeance. Robert Jackson reflected this view at the opening of one of the trials in 1945, when he famously said:

«That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law, is one of the most significant tributes that Power has ever paid to Reason» (in Bass, 2001:1).
The tribunals were crucial in that they helped the development of international justice, with the notion of «crime against humanity», the rejection of the «I was following orders» excuse, the weakening of retroactivity as a defense, and the criminal responsibility of Heads of States (Earl, 2009).

b) The ad hoc tribunals and the International Criminal Court

Despite these clear successes, the model created at Nuremberg disappeared from international practice during the Cold War. The bipolar balance of power made the cosmopolitan impulse behind them useless. However, without the Nuremberg precedent, the United Nations’ decision to create an International Criminal Tribunal for both ex-Yugoslavia (ICTY, established 1993) and Rwanda (ICTR, established 1995), as well as the International Criminal Court (ICC, established 2002), would not have been possible. Those institutions largely rely on the retributive model of transition that was created in Nuremberg and Tokyo, and were predicated on the same principles: ending impunity, moralizing international affairs, creating a link between peace and justice. The two ad hoc tribunals were also the result of the convergence of several, more contingent factors, largely due to the end of the Cold War. The idea of a new norm of «international judicial intervention», a «shiny new hammer in the civilized world’s box of foreign policy tools», was thus born (Scheffer, 1996: 51).

The two ad hoc tribunals have had some significant achievements. Key actors in the Balkan Wars, such as Milosevic, Karadzic or Plavsic were put before the court. The man who masterminded the Sarajevo siege and the Srebrenica massacre, Ratko Mladic, is the only «big fish» still on the run. In total, more than 160 persons have been prosecuted by the ICTY. Both tribunals have contributed to the advancement of international law itself, in particular with regard to the definition of genocide and crimes against humanity, the law of non-armed conflict, and the issue of command responsibility (JICJ, 2004; HRW, 2004). The ICTR defined rape as a crime of war for the first time (Akayesu, 2001) and convicted Rwanda’s former Prime Minister, Jean Kambanda. Serbian President Slobodan Milosevic was sent to The Hague while still in power, and stood trial before he died in his cell. Those cases established that Heads of State were no longer immune from prosecutions. Main perpetrators were thus excluded from the political scene, with important consequences for peace and stability (Kerr, 2000).

As in Nuremberg, the trials were also used for larger, more ambitious, purposes: issuing a detailed narrative of past atrocities, documenting the history for future generations, acting as a deterrent for the future, giving victims a voice, strengthening the rule of law, and promoting reconciliation on the ground (Stover and Weinstein, 2004; Teitel, 1999; Kerr and Mobekk, 2007: 43). The ad hoc tribunals have nevertheless been criticized for their inherent limitations. Many argued that their «ad hoc » nature was against the very principle of the rule of law they were meant to enforce, and that they were intrinsically motivated by political interests. More specifically, it was argued that the tribunals had little social impact on the ground: perceived as fundamentally biased, they did not have much support among survivors of the conflict (Biro, 2004). The sense of remoteness, geographical and cultural, was thus heightened, as the tribunals certainly did not do enough to reach out to the affected population (Fletcher and Weinstein, 2004; Des Forges and Longman, 2004).

Despite those criticisms, one of the main legacies of the ad hoc tribunals has been the creation of a permanent International Criminal Court (ICC) by the Rome Statute in 1998. The ICC has jurisdiction over genocides, crimes against humanity, war crimes and crimes of aggression committed after July 1, 2002, by a member State, or when the UN Security Council so decides (Bassiouni, 1997). The Statute of the ICC was the result of a difficult compromise, with strong political constraints and the necessity of respecting State sovereignty. According to the principle of complementarity, the ICC can only act where domestic courts are unable or unwilling to do so: it is only a last resort. At present, the ICC is concerned with cases of ongoing conflict in Northern Uganda, the Democratic Republic of Congo, the Central African Republic, and Sudan. The ICC’s main role is to gather evidence and lead investigations in war zones. According to its philosophy, the victims have a central role, as stated by article 68 (3) of the Rome Treaty: «Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court in a manner which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial». To that extent, the ICC may also be considered an important tool of TJ, giving victims a voice and perhaps helping them recover
According to the UN report on TJ, international criminal justice, indeed, aims at:

«ending human rights violations and preventing their recurrence in the future, guaranteeing victim’s rights and their dignity, establishing the truth about the past, promoting national reconciliation, re-establishing the rule of law, and helping the building of a sustainable peace» (UN, 2004: 13).

But the realization of these ambitious goals, as in the case of ad hoc tribunals, is compromised by the ICC’s remoteness. Its contribution to capacity-building in the domestic legal system is therefore intrinsically limited. The ICC, however, has recently made progress in terms of outreach and communication strategy. For instance, it was unique in establishing a trust fund to provide compensations and reparations to victims (Bekou and Cryer, 2004; Kerr and Mobekk, 2007).

c) Hybrid courts

In response to this remoteness problem, innovative forms of retributive justice have been created by a mix of both domestic and international instruments of justice: the hybrid, or «internationalized» courts. The involvement of local actors, and their location within the country where the violence took place, is allegedly better for their contribution to peace and reconciliation (Perry, 2009). They are also said to leave a positive legacy of respect for the rule of law, train and equip local lawyers, while giving the whole process more legitimacy on the ground. Access to witnesses and victims is thus made easier (Dougherty, 2004). Such hybrid courts were established in Bosnia, Kosovo, Sierra Leone, East Timor, Cambodia, Iraq and Lebanon, with various degrees of internationalization. These mechanisms are often accompanied with alternative forms of accountability, such as Truth Commissions. However, they do raise technical difficulties in terms of organization, logistic, and cooperation with the State, and are therefore often considered more as «stop-gap» measures (Sriram, 2006; Kerr and Mobekk, 2007).

d) Local justice

The strong and persistent influence of legalism on TJ has made it appear more and more distant from the communities actually affected by conflict. Institutionalized, technical and remote, TJ's retributive initiatives too often fail to properly analyze the questions of knowing what TJ is for and whom it serves (Nagy, 2008). Traditional, or indigenous justice mechanisms have often been referred to as an alternative to the national or international focus of TJ (Huysse and Salter, 2008). Because it is based on local structures and engages directly with local actors, traditional justice can be more conducive to empowering people and building capacities for both peace and justice (Shaw, 2007).

Indigenous justice is often seen as restorative in nature, but actually often incorporates elements of punishment and reparations too. The gacaca courts in Rwanda and the mato oput ritual in Northern Uganda are cases in point (Longman, 2006; Baines, 2007). However, even those rituals depend on contingent factors such as local power dynamics and their perceived legitimacy (Quinn, 2009). Initially designed to deal with petty crimes and family disputes, they may not be appropriate for cases of genocide and mass violence (Branswaite, 1999; Hazan, 2007). They can also be patriarchal and oppressive for individuals, particularly women and minorities (Arriaza and Roht-Arriaza, 2008; Valji, 2007). As Kimberly Theidon puts it, «the fantasy of the community can obscure the workings of power and force that riddle any space deemed communal» (Theidon, 2009: 2). Traditional justice is too often seen as an alternative to the global juridical imperialism of the ICC, or western-style «legal fundamentalism» (Branch, 2007). The common sense assumption is that the local is good, and the global is necessarily oppressive and colonial. But just because a mechanism is informal and indigenous does not entail that it has legitimacy for everyone on the ground. The application of traditional justice must therefore be carefully framed so that the rights of the individuals and the fairness of procedures are ensured (Kerr and Mobekk, 2007; Orentlicher, 2007).

However, as local level initiatives, traditional justice may promote participation and a sense of ownership over the TJ and peacebuilding process, but may also lose much of its value when encouraged and programmed by the State or by international institutions, as is most often the case. The tendency to institutionalize even traditional justice mechanisms, as was the case in Rwanda and Uganda, is a telling example of the strength of the top-down, statebuilding paradigm upon the
Limitations to the Retributive Approach

Retributive justice has always been controversial. Technical and substantial concerns have been raised against its efficiency and fairness as an instrument of political transition.

a) Substantial critiques

Philosophically, it has been argued that trials rely on a legalist paradigm that is ill-suited to address the social forces and psychological dimensions that characterize mass violence (Shklar, 1963). The strict victim/perpetrator dichotomy, for instance, does not account for the variety of ways in which ordinary individuals come to participate in violent actions, especially in complex cases such as Rwanda (Neier, 1999). Advocates of retributive justice openly place themselves in a consequentialist or utilitarian perspective: they argue that justice must be done not just for the sake of justice, as a Kantian or a moral absolutist would assume, but because it is socially useful too. Retributive justice is considered a means towards an end, and trials are «used» for the sake of democratic transition. Trials are therefore given an expressive and educative function (Osiel, 1997). This idea is certainly not new, as trials have always been presented as a morally important moment for the building of a nation’s identity. The French sociologist Emile Durkheim saw them as an essential means of reactivating social solidarity, offering society the occasion to gather in a common rejection of the crime and a reaffirmation of the violated moral values (Durkheim, 1998; Dewey, 1916). Bruce Ackerman calls trials «constitutional moments» (Ackerman, 1991: 84): they are a show, a socio-political drama. Hannah Arendt was aware of this dimension when she assisted Eichmann’s trial in Jerusalem. Indeed, Ben Gurion wanted the event to reunify Israeli society, «to be a purifying, exciting collective experience... a national catharsis» (in Seguev, 2001: 328). Punishment is thus supposed to have a pedagogical function for society as a whole (Hampton, 1984: 208), a way to reactivate social solidarity (Garton Ash, 1997; Chakravarti, 2008).

This political instrumentalization of law in retributive TJ is a serious danger for the liberal mind, and Judith Shklar is certainly right to say that the Nuremberg trials were the moment of a serious intellectual crisis for any convinced liberals (Shklar, 1963). The violation of certain fundamental rules of due process was justified by the good that was expected to come from the trials (the reconciliation of the German people, the satisfaction of victims, the moral duty to prosecute, the need to write history, etc). But for a true liberal, such a reasoning amounts to sacrificing an individual in the name of the collective good (Allen, 1999). That is something liberals do not accept, especially where the expected good — for instance, the contribution of justice to peace — is difficult to evaluate and uncertain at best. To avoid such a risk, liberalism usually relies on an «ethically pure», neutral conception of law: legalism, which Judith Shklar defines as «an ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules» (Shklar, 1963: 1). For liberals, law should be free from any moral or political interference. Interestingly, this legalist attitude can be found in the spirit of international trials, whose actions are considered to be somehow above politics, purified from its pervasive, «impure» interests. ICTY prosecutor Carla del Ponte reflected this well, especially during the Milosevic trial when she regularly accused Milosevic of using the trial to make political statements — as though she, on the contrary, was not doing so (Simpson, 2008: 11).

b) Technical objections

International courts have often been criticized for their limitations and inherent weaknesses. Among those we could name are: their distance from the victims, the disconnection between the people who suffered and the process which addresses their suffering, the cost of trials, their difficulty and delay in prosecuting all perpetrators, their inability to deal with the enabling structural context of mass violence, their adversarial nature and their focus on perpetrators rather than on victims (Valji, 2009).

The most serious argument against retributive justice after mass violence is that of «victor’s justice». There is indeed a deep cynicism about the idea of doing justice after war. Kant compared justice after war to the right of the mighty. Hermann Göring, confessing to the psychiatrist Leon Goldenstein, affirmed that: «the victor will always be the judge, and the vanquished the accused» (in...
One of the main concerns for TJ is the issue of retroactivity: trials often hold defendants responsible for acts that were not prohibited at the time of their commission. Nullem crimen, nulla poena sine lege: no crime or punishment without legal prohibition. Such argument relies on a positivist understanding of the rule of law, considering, like H.L.A. Hart that: «A legal standard is morally obligatory... because that standard is a law... A proposition of law is morally obligatory in virtue of being legally valid» (Hart, 1958: 593). One cannot therefore justify violating positive law in the name of higher moral obligations, as the prosecutors of Nuremberg and the Hague tried to do: legality and legitimacy are two distinct matters for the positivist mind.

But defending such a position entails the risk of becoming a «legalist bastard»: the person who follows all rules by the books but is nevertheless a morally despicable person. Eichmann was a good example of that «citizen respectful of the law» (Arendt, 2006). Against this argument, natural law theories argue that the rule of law is more than the simple rule by law, because it has to do with the meaning of justice itself, as a substantial, moral value. Law is therefore also determined by its purpose (Fuller, 1958; Shapiro, 2007). Some actions can be morally legitimate although not strictly legal. Especially when human behaviour reaches the extreme, illegality does not necessarily require a prior legal prohibition: «Humanity, not legality, must be our guide», Churchill famously said during the Dresden campaign (Churchill, 1986: 488). The strictly positivist kind of argument was ironically reflected by Hartley Shawcross, the British prosecutor in Nuremberg: «I suppose the first person ever charged with murder might have said: ‘now see here. You can’t do that. Murder hasn’t been made a crime yet» (Persico, 1994: 138).

Another legal issue concerns the difficulty in prosecuting all perpetrators, especially in cases like Rwanda and Bosnia where crimes were committed by a large number of persons. The ad hoc tribunals have chosen to prosecute only the «big fish», the high commanders, who are deemed to be more guilty. But the contingency of this choice raises legal and moral questions. Prosecutions express the belief that only a few individuals are guilty, not entire political or ethnic groups. The individualization of guilt is certainly important for post-conflict reconciliation. Individual crimes are an essential component of mass violence, and individual accountability is necessary to construct the national narrative without stigmatizing entire groups. The individualization of guilt is certainly important for post-conflict reconciliation. Individual crimes are an essential component of mass violence, and individual accountability is necessary to construct the national narrative without stigmatizing entire groups. However, it can also be argued that radical evil «requires an evil political and legal framework in which to flourish» (Nino, 1996: 145), and that this framework should be made accountable too. The prosecution of just a few can create an «impunity gap», particularly in cases where mass violence involves a large number of «small» executioners, collaborators, beneficiaries, passive perpetrators, or child soldiers. When TJ is dealing not only with a «regime of criminals» but with a «criminal regime», as in South Africa or the former USSR, trials are unable to deal with the wider context of a criminal system, (Rosenberg, 1995).

The adversarial nature of retributive justice has also been criticized for its focus on perpetrators, placing the needs of victims second and making truth less easily disclosed. The prosecutions tend to become technical, long and tedious, trivializing the vivid suffering being discussed. Indeed, «while trials may have moments of high drama, their formalism and rigidity can also make them excruciatingly boring» (Aukerman, 2002: 71). The suffering of victims is therefore not adequately reflected in legalist procedures. The underlying argument of retributive action after mass violence is that atrocious human rights violations through industrialized gas chambers or machete-wielding mobs are, in fact, «ordinary crimes». The ordinary crime analogy suggests that «even massive horrors can and should be treated as punishable criminal offences perpetrated by identifiable individuals» (Minow, 1998: 25). But are extraordinary evil events such as genocides and ethnic cleansing really just «more egregious versions of premeditated murder»? (Aukerman, 2002) Are they not qualitatively different, therefore requiring a fundamentally different response?

3. Restorative Justice: Truth and Forgiveness

The Philosophy of Restorative Justice

In response to the flaws of the strictly retributive paradigm, TJ has recently evolved towards a more holistic, comprehensive approach: restorative justice, a normative theory of social repair, focuses...
Crime is not primarily lawbreaking but a conflict among individuals, it is harmful to an individual, but affects the community and the perpetrator too;

Criminal justice should aim more at reconciling the parties and repairing the wrong rather than simply punishing the perpetrator;

The process of justice should engage the participation of the victims, the offenders and their respective communities.

Restorative justice raises existential questions about the identity of the parties. It argues that in the western model of justice the State has stolen the conflict from the victims (Christie, 1998: 318). The aim of restorative justice is therefore to democratize the social control of punishment, by making its methods more consensual and participatory (Dzur, 2003: 6). The restorative justice paradigm has first been applied to small scale crimes of juvenile offenders (Brainthwait, 1999: 7). Its application to mass atrocities in post-conflict situations, mainly through Truth and Reconciliation Commissions (hereafter, TRC), is relatively recent (Hayner, 1994; Sriram, 2001; Villa-Vicencio and Verwoerd, 2000). The founding moment of restorative justice is the creation of the South African TRC, which has since been the subject of a wealth of literature (Boraine, 2000; Du Toit, 2000; Krog, 2000; Wilson, 2001; De Lange, 2000; Simpson, 2002; Ntsebeza, 2003; Van der Merwe, 2005; Chapman and Van der Merwe, 2008).

TRCs are a tool of transformative social action, which rest on the assumption that collective remembrance of the past will help prevent the recurrence of violence in the future (Du Toit, 2000). The goals of TRCs are many and ambitious: to unearth, clarify and acknowledge past violations, to respond to victims’ needs, to create a culture of accountability and respect for the rule of law, to outline institutional responsibility and possible reforms, to advance the prospects of reconciliation and reduce historical conflict over the past (Hayner, 2001: 24). Two kinds of TRCs can be distinguished. Some, as the South African one, rest on a participatory model, fostering reconciliation by public dialogue and collective acknowledgment. Other TRCs are constructed more as educational fact-finding bodies, with the explicit aim of encouraging historical interpretation, and disseminating a new collective memory. The TRCs in El Salvador, East Germany and Guatemala are of the latter kind (Nagy, 2008; Beattie, 2008).

Priscilla Hayner enumerates the four common characteristics of those bodies:

1. They deal with the past;
2. They operate for up to two years and then submit public reports on their findings;
3. They investigate continued patterns of abuses;
4. They are official bodies sanctioned by the state (Hayner, 2001).

TRCs cannot determine culpability for the individual, and cannot punish or sanction perpetrators of human rights abuses. They have no subpoena power. However, they can make recommendations for broad reform of State institutions based on their findings, and suggest reparation for the victims. They may also be related to criminal trials and help their investigation, as in Sierra Leone. TRCs are mostly a vehicle for truth-telling, providing a public platform for voicing victims’ stories and creating a historical record of past abuses through official acknowledgment of the facts. TRCs combine investigative, judicial, political, educational, therapeutic and even spiritual functions. In most TRCs, the State asks individuals to renounce their desire for prosecution and revenge in the name of national reconciliation, as the focus is on healing and reparation rather than on punishment (Asmal, 1999). Restorative justice, as embodied in TRCs, regards the universe as an organic whole, and thus infuses jurisprudence with concrete principles. In South Africa, this aspect was reflected through the African philosophy of ubuntu, which emphasises the group over the individual. Restorative justice rejects adversarial, retributive, approaches to peace in favor of a more conciliatory approach, which
gives a larger role to forgiveness, and defines the law as promoting the individual’s duty to a larger group rather than the individual’s rights and entitlements (Boraine, 2000; Allen, 1999). Defenders of TRCs affirm that the telling of peoples’ stories is a necessary step to the building of their identity, both as individuals and as people: «private accounts become woven together into a larger narrative about the period as a whole» (Andrews: 2003, 47), thereby permitting individuals to heal (Phelps, 2004). As Antjie Krog has said:

«For me the TRC microphone with its little red light was the ultimate symbol of the whole process: there the marginalized voice speaks to the public ear, the unspeakable is spoken – and translated – the personal story brought, from the innermost of the individual to bind us anew to the collective» (Krog, 2000: 86).

Truth, then, is the path to healing, and TRCs’ reports are often filled with a therapeutic type of language. TRCs provide a platform for victims to come together and share their memories, which is considered essential to healing. As this survivor of the Rwandan genocide told French journalist Jean Hatzfeld:

«The survivors do not get along so well with their memories, which zigzag constantly with the truth, because of fear or the humiliation of what happened to them... survivors must get together in little groups to add up and compare their memories, taking careful steps, making no mistakes» (Hatzfeld, 2006: 161-62).

TRCs can also be defined as a sanctioned form of fact-finding. Through testimonies, they help to establish an accurate record of a country’s past, and thus to provide a fair record of a country’s history and its government’s acts (Nagy, 2002). Of course, TRCs are less likely to discover this truth than to acknowledge it: «Knowledge that is officially sanctioned, and thereby made part of the public cognitive scene... acquires a mysterious quality that is not there when it is merely ‘truth’. Official acknowledgment at least begins to heal the wounds» (Mendez, 1997: 255). The problem with compiling this comprehensive account is that it may modify the meaning of justice and of the trial itself: is it really the role of law to heal individuals? Because of its focus on victims’ emotions and feelings, the South African TRC has been depicted as the «Kleenex commission» (Kiss, 2000: 72), and it was argued that an overemphasis on the therapeutic aspect disserves survivors who regard themselves not as patients in need of healing, but as citizens entitled to justice (Wilson, 2000; Eisikovits, 2009). Restorative justice, with its emphasis on «healing», shifts the focus from justice to health in a problematic way. The integration of the language of love and forgiveness into the public political field should therefore be carefully analyzed as it might, once again, shock the liberal mind.

**Limits of Restorative Justice**

a) Forging the «truth»

The restorative approach to mass violence, outlined above, raises several problems, and variations of it have emerged as an answer to these criticisms. Like trials, commissions are often used to create a collective memory about the past, and are considered an essential instrument in the rebuilding of a post-traumatic national identity. But the attempt to forge a global consensus about the past can be problematic. Is such consensus ever possible? Is it necessary for the transitional process that each individual share a unique moral perspective on the past facts? (Garton Ash, 1997). The aim of TJ is the creation of a tolerant, pluralist society: but how is this goal compatible with the creation of a single, State-sponsored «truth» about the past? The real meaning of «reconciliation» must therefore be more carefully defined (Hamber and Van der Merwe, 1998; Börneman, 2002; De Greiff, 2006): any unilateral assessment on the past or attempt to sweep up historical debates through law can result in a miscarriage of justice. «When the court of law is used for history lessons, then the risk of show trials cannot be far off», writes Mark Osiel. «It may be that show trials can be good politics... but good politics doesn’t necessarily serve the truth» (Osiel, 1995: 58). Post-conflict societies are deeply divided and it is often very difficult for citizens to agree on a single version of the conflict. Any unilateral reading of the conflict thus runs the risk of artificially dividing the society into «victims» and «perpetrators», whereas the dynamics of past violence are actually much more complex (Levi, 1989).
The notion of collective memory, which TRCs are bound to create, suggests a consensus that can only be an ideal, and which potentially carries oppressive structures. As Michel Foucault has demonstrated, collective memory itself embodies the dynamics of social conflict, and cannot be understood without «counter memories»:

«It is a very important factor in struggle... if one controls people’s memory, one controls their dynamism... It’s vital to have possession of this memory, to control it, administer it, tell it what it must contain» (Foucault, 1969: 25).

TRCs are bound to determine what is included and what shall be left out in the story a nation tells itself about its traumatic past: to that extent, they are highly political tools. Woods is thus right to describe national or public memory as a performative act: it is less something we have than something we do (Woods, 1999). TRCs are a «doing of memory», and must therefore be understood in relation to the goal they serve.

Moreover, the official version of the past is difficult to apply to peoples’ real beliefs. TRCs function as narrative builder, seeking to present the past in a comprehensible manner, as being tied to the teleological end of reconciliation within a peaceful democratic future. TRCs are often defined as modern morality plays, where all present characters function allegorically (Osiel, 1995). They are «a grand meta-narrative of liberal redemption, the recounting of an epic of collective destruction and rebirth» (Osiel, 1997: 275); a form of political storytelling. However, the prospects of such a morality play model differ when complicity for the crimes is widespread throughout society, as in most totalitarian states. Legitimating narratives produced by TRCs might end up imposing a top-down authoritative historical account of the past, masking the plurality of experiences of each individual (Gutman and Thompson, 2000). As Karl Jaspers wrote about the Second World War:

«The suffering differs in kind, and most people only have sense for their kind. Everyone tends to interpret great losses and trials as a sacrifice. But the possible interpretations of this sacrifice are so abysmally different that, at first, they divide people» (Jaspers, 2001: 21).

Any attempt to impose a single version of history could also be counter-productive, and risk provoking a backlash of competing narratives that celebrate or negate the past, rather than condemning it (Lind, 2008). «It is putting too much faith in truth, to believe that it can heal» (Ignatieff, 1998: 186). The South African TRC made a significant step when it recognized that there are different kinds of truth, namely: a narrative truth, a forensic truth, a historical truth and a social, or dialogic, one. But it failed to evaluate the huge disjunction that can exist between information and belief. A TRC report can establish facts and provide information, but it cannot change a people’s belief, or affect how people interpret the information. It may therefore fail to establish the moral common ground necessary to promote reconciliation. In May 1996, a study showed that 41% of White South Africans believed that Black victims were exaggerating their account of terror when testifying at the TRC (Hamber and Thiessen, 1998). «For the most part, people expect a TRC not to tell the truth, but their truth» (ibid ).

The objectivity that TRCs pretend to is therefore difficult to reach, and might not even be desirable. «To describe the Holocaust concentration camps sine ira (without outrage) is not to be objective, but to condone them» (Arendt, 1953: 79). Objective facts exist, but they are not necessarily the ones that matter to the survivors. Jean Améry echoed this difficulty when he wrote that there is no possible objectivity in his suffering: «I am forever the prisoner of the moral truth of the conflict», he said. «The crime, as such, has no objectivity» (Améry, 2002: 52). How one understands that history is a function of how one experienced that history, especially under totalitarian or apartheid systems which affect all aspects of one’s life. Any attempt to fix history and impose a single vision of the past would therefore be dangerous, as would any utopian wish for ultimate reconciliation of all with all.

b) Amnesties and forgiveness

Another problem lies in the relation between restorative justice and procedures of amnesty and forgiveness (Orentlicher, 1991; De Greiff, 1996; Weschler, 1998). Indeed, one of the main characteristics of TRCs is that they do not have prosecutory powers, such as the power to subpoena witnesses or bring cases to trial. Like trials, they symbolize a condemnation of the past and a break
with ideology, but their assumption is that the telling of the truth will itself do justice. «Memory is the ultimate form of justice... truth is both retribution and deterrence, and undermines the mental foundation of future human rights abuses» (Huyse, 2002: 327). Forgiveness is thus intrinsic to the functioning and the philosophy of restorative justice. «There is no future without forgiveness» said Desmond Tutu (Tutu, 2000). Forgiveness is said to be morally justified for the sake of the community. As Kader Asmal, a South African minister, has said:

«We must deliberately sacrifice the formal trapping of justice, the courts and the trials for an even higher goal: Truth. We sacrifice justice, because the pains of justice might traumatise our country or affect the transition. We sacrifice justice for truth so as to consolidate democracy, to close the chapter of the past and to avoid confrontation» (in Verwoerd, 1999).

However, this may appear to amount to making a virtue out of necessity, since TRCs are often part of a political compromise themselves. In South Africa, the conditional amnesty clause that was included in the TRC mandate was certainly politically motivated. To that extent, justice in its retributive sense becomes the casualty of political calculations. TRCs often come with national programs of amnesty in the name of healing and reconciliation. But those high goals are difficult to evaluate. Aren’t the advocates of TRCs confusing aspirations and prediction? Does anyone really know whether TRCs really secure the benefits of healing, catharsis, disclosure of truth, and nation building? And, if we doubt their efficiency, is it morally justified to sacrifice the victims’ right to justice in the name of a doubtful, long-term national goal? In most cases, we cannot verify that disclosing the truth promotes reconciliation and healing. We also know that in many cases (for instance, Mozambique), amnesty and amnesia may be more viable options (Allen, 1999: 315). Many victims who testified in the South African TRC said they actually experienced retraumatization, and their wounds were not healed by simply telling their stories. In addition, many complained that the TRC did not respect the due process of law, or observe the customary rules of evidence and of deliberative procedure. Nor were the rights of the alleged perpetrators always respected, as TRCs often allow untested allegations to be made in public hearings.

TRCs are caught in a paradox here: on the one hand, they must satisfy the public need for the exposure of wrongdoing, but on the other they must ensure the fair treatment of those accused of wrongdoing. They need to balance the victim’s right to know who violated them with the fundamental importance of due process. Standard laws of evidence are often relaxed within the TRC process, mainly to demonstrate the focus on victims and their healing. For instance, TRC commissioners usually rise when the witnesses enter the courtroom, visit the sites of atrocities, sing and pray with the witnesses, or participate in reburials and public rituals of remembrance. The informality of the restorative process gives the officials the ability to grieve with victims publicly. As Justice Albie Sachs of the South Africa Constitutional Court said: «[Bishop] Tutu cries. A judge does not cry» (in Minow, 1998: 73). In TRC hearings, the testimony of a witness is not considered to be a legal argument in a court, but a personal narrative, which, as such, deserves respect. Those gestures of acknowledgment are important, of course. In South Africa, they served as a proof that Black peoples’ stories were worth telling and should be handled with care and respect in the public sphere. Violations of due process were thus justified by a higher need for recognition. But, as Nir Eisikovits argues, people differ in their appreciation of what it means to recognize an individual’s dignity (Eisikovits, 2009). For some, it may simply require that those who hurt them are punished:

«In order to feel worthy of respect, they must know their injuries merit the criminal law’s protection... For some of us... the currency of recognition is punishment rather than storytelling; being recognized as a human being can consist, first and foremost, in knowing that one is part of a civic zone protected by law, where the use of violence against her is met with strict sanction» (Eisikovits, 2009: 17).

The therapeutic discourse of restorative justice marginalizes those who demand justice, not health, or see themselves as activists more than as victims (Nagy, 2008: 336). It is significant that many victims’ groups in South Africa are now lobbying for prosecutions, overriding the amnesty law, and arguing that «redress is an integral component of reconciliation» (Khulumani, 2007).

On a more moral ground, one could give a compassionate justification for the sacrifice of justice entailed by TRCs, arguing in the name of psychological benefits and healing. Indeed, a commission
«enables victims to fulfil the civic sacrament of forgiving» (Gutman and Thompson, 2000: 29). However, some argue that testifying can also reopen old wounds. «He that increaseth knowledge increaseth sorrow» says the Bible. Even in situations where the truth is told, it may not be psychologically healing; talk therapy is not necessarily productive, especially when victims of a regime’s cruelty continue to live under extremely difficult socio-economic conditions. The Trauma Centre for Victims of Violence and Torture in South Africa reports that between 50 and 60 percent of victims have suffered serious difficulties after giving testimony at the TRC (Gutman and Thompson, 2000: 30). For many victims, truth is a luxury that neither heals their wounds nor puts bread on their tables (Daly, 2008: 31). The fact of giving a «civic» tone to the complex and intimate act of forgiving is also morally problematic. Both Boraine and Derrida make this point by quoting a South African woman at a TRC hearing on her husband’s killer. After learning for the first time how her husband had died, she was asked if she could forgive the man who did it, and she replied: «‘No government can forgive’. Pause. ‘Only I can forgive’. Pause. ‘And I am not ready to forgive’» (in Garton Ash, 1997: 36).

Moreover, it is not certain that forgiveness as such is morally desirable. Many argue that it is not, and that to forgive the person who killed or raped a family member is immoral, and even contrary to the Christian tradition on which restorative justice often relies. «Forgiveness died in the death camps», Vladimir Jankelevitch famously said, adding that «forgiving those gigantic crimes against humanity would be like committing another crime against humanity» (Jankelevitch, 1986: 21). The idea is that, contrary to what many people think, it is not always morally appropriate to forgive, and that the crimes should not be made easier to forget. TRCs’ focus on restorative justice and reconciliation can often amount to understanding the perpetrators and, as Desmond Tutu often recalled, seeing them as one of us. But «there are moments when understanding is pure madness» (Todorov, 1996: 277). TRCs’ spirit of understanding can indeed go too far and obliterate victims’ right to seek legal redress, robbing them of their moral right to choose to forgive or to withhold forgiveness. In the end, TRCs allow a huge level of impunity, often for political reasons. F.W. De Klerk and Pieter W. Botha were never made accountable, and their only meeting with the TRC was frustratingly inconclusive (Kiss, 2000: 76). «The oppression was bad, but what is much worse, what makes me even more angry, is that they are trying to dictate my forgiveness» said Kalukwe Mawila, a South African victim of apartheid (in Verwoerd, 2003: 264). The work of the TRC provoked anger in many parts of the Black community, who saw security forces leaders walk free in exchange for telling their crimes, while victims were denied access to courts. «What many wanted more than truth was justice – prosecution in the courts and prison sentences» (Meredith, 1999: 315).

The argument for forgiveness is based on the fact that it is the only way to break free from the cycle of violence: no democracy can exist if we do not let go of our hatred and resentment (Tavuchis, 1991; De Greiff, 2007). The equation is simple: «forgiveness leads to renewed relationships built on trust, and ultimately to reconciliation» (RLP, 2005: 8). The expected benefits of reconciliation are therefore said to justify the individual’s renunciation of retributive justice. People need to let go of their anger and their desire for revenge in the name of the nation’s survival. «An eye for an eye can make the whole world blind», Gandhi once said. However, one could also consider that there are ways other than forgiveness and amnesty to quell this desire for revenge. Trials, rehabilitation measures, the building of memorials, or simply forgetting and moving on can be considered as alternative ways of dealing with revengeful passions. No psychological pressure should be put on those who refuse to forgive: TJ must acknowledge the legitimacy of «moral hatred» (Hampton, 1984; Wilson, 2001) and the role of anger in the psychological progress of victims. Jean Améry, who experienced torture by the Gestapo during the Second World War, gave a moral justification to his resentment, defining it as his «personal protest against the anti-moral natural process of healing that time brings about» (Améry, 1980: 77). The enormity of some evil should call for our resolute refusal to see the people who committed it as eligible, ever again, for social trust. Indeed, a moral community is defined both by what and whom it comprehends and by what it marks as beyond the pale (Walker, 2006b: 190).

4. Social Justice

Reparation programs
a) Material reparations: «Making whole what has been smashed» (Torpey, 2001)

Criminal justice, as we have seen, is focused on perpetrators more than on victims. Truth telling and restorative justice, on the other hand, are all about victims and the integration of the perpetrators and the whole community into the healing process. However, in the absence of other positive and concrete measures, those mechanisms can be viewed as an empty gesture, «a cheap and inconsequential talk» (De Greiff, 2006a: 1). Indeed, the longer-term goals of TJ, such as the democratization of institutions and the rebuilding of the rule of law, will only affect victims' lives indirectly, and concern their children and grandchildren more than themselves. What is immediately needed is the promotion of social trust and integration, as a key to victims’ healing (De Greiff, 2009). To that extent, it is often considered that only material reparations can have a direct, tangible impact on victims, and that they should therefore be given a special role within TJ (Meister, 2002; Hayner, 2002; Roht-Arriaza and Orlovski, 2009). Reparations are part of a broader challenge to the State’s sovereignty, and a symbol of its accountability for past abuses. They can be defined as:

«those policies and initiatives that attempt to restore to victims their sense of dignity and moral worth and eliminate the social disparagement and economic marginalization that accompanied their targeting, with the goal of returning their status of citizens.» (Verdeja, 2008: 1)

Reparations represent the dawning of a new phase in the relationship between States and the groups they have historically victimized (Colonomos, 2005). For many commentators, the origin of this phase lies in the post-Holocaust era (Torpey, 2001: 335). But claims for reparations have now become prominent aspects of political transitions in Latin America, Eastern Europe and Africa in the last two decades. The so-called «Van Boven Principles», set in the UN document on «The Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law» (UN, 1993), distinguishes four categories of reparation: restitution, compensation, rehabilitation (medical, psychological, social and legal), satisfaction, and the guarantee of non-repetition.

Material reparations are meant to put an end to an unjust situation through the allocation of a monetary equivalent that is supposed to compensate for it. One advantage of reparation policies, as opposed to restorative justice, is that they are said to be morally neutral: the reliance on the economic dimension is a way to free the relations from an overwhelming affective and moral weight. As Georg Simmel said, economic exchange shifts things away from their affective signification, transforming the victim/perpetrator relation into a more neutral relation of debt (Simmel, 1999: 49; Garapon, 2008). It also helps empower the victims, giving a public sign of their activism and thus putting an end to the cycle of «victimness». Reparations are a tangible proof of a State’s willingness to make amends after mass violence, and can therefore help promote civic trust (Roht-Arriaza and Orlovski, 2009). To that extent, reparations do achieve one of the main goals of TJ: inclusiveness, in the sense that all citizens become part of a common political project (De Greiff, 2006b).

Generally, the benefits of reparations are coordinated in a holistic manner, as part of a wider TJ program that would also include prosecutions, truth telling, and institutional reforms (De Greiff, 2006b). Reparations embody the cost of wrongdoing. Therefore, they should always include a symbolic element, where the giving of compensation itself acknowledges the responsibility and sends a message about the seriousness of the wrong or the sincerity of the responsible party to make things right (Walker, 2006a: 188). Other types of compensation could include, apart from monetary payments to individuals, the restitution of lost property, the building of memorials, the naming of streets after victims, or the revision of history books. The truth itself is sometimes considered a form of reparation: when families learn where the bodies of their loved ones are buried, for instance, the injury may begin to repair. Official apologies too are sometimes included in the reparative paradigm: unlike material or political reparations, their aim is to promote reconciliation through words only, by public acts of contrition and repentance (De Greiff, 2007). Public apologies are often ‘costly’ for the leaders who utter them. However, the idea that a simple expression of regret can right the wrongs caused during a civil war or a genocide appears to be shocking at first glance: words seem trivial when it comes to recovering from mass violence. In the face of such «unspeakable truths» (Hayner, 2001), would it not be better to simply, silently, bow down, as Willy Brandt famously did at the Warsaw Ghetto Memorial in 1970?

Monetary compensation is therefore often considered a necessary complement to all those symbolic
measures such as apologies or rehabilitation. Reconciliation after mass atrocities requires a credibility that only the implementation of a tangible economic and social program can provide (Terreblanche, 2000; Hayner, 2001).

b) Limits of reparation

Despite its advantages, «coming to terms with the past», which is TJ’s major goal, has often been interpreted as involving truth telling and prosecutions rather than providing tangible mechanisms of reparations, which are too often excluded from TJ programs. Indeed, reparations in the aftermath of mass violence can be considered as «trivial», incommensurate with the horrors they are supposed to compensate for: no price can be put on peoples’ suffering, and the attempt to «monetarize» a mass atrocity is always morally problematic, as the debate over the restitution of Jewish goods and reparations for the Holocaust has shown (Colonomos, 2001). «There should not be anything in a reparation program that invites either their designers or their beneficiaries to interpret them as an effort to put a price on the life of victims or on the experiences of horror», warns Pablo De Greiff (De Greiff, 2006a: 466). Indeed, how much money is one’s life worth? How does one materially compensate for the life of one’s children, one’s arm, or one’s sight? Incommensurability is one of reparation policies’ main problems.

Moreover, money shifts the issue from a moral to an interest-based dimension, and thus risks raising ambiguities about the victims’ real motivations, creating a «victims’ competition» (Chaumont, 2002). Asking for money inevitably raises doubts about the victim’s intentions, something that was particularly prejudicial in the case of Jewish class actions, as greed is a commonly used anti-Semitic argument. Money also has the effect of «de-singularizing» the event, of rendering it ordinary. Reparations without truth-telling or prosecution measures could be seen by victims as an attempt by the state to «buy» their silence. Reparative justice without any attempt to reform institutions or punish perpetrators to prevent the recurrence or the repetition of violence in the future can be seen as a form of «payment», or, worst, as blood money. The line is indeed thin between payment as acknowledgement and payment as alibi. «Let’s pay, but let’s not talk about it anymore», often seems the argument of the party who signs the cheque (Hazan, 1998).

Another problem concerns the timing of reparations: where does one stop compensating or being accountable for past abuses? Reparations raise the question of our obligations towards our predecessors. For their evaluation they imply some form of «counterfactual history» (Colonomos, 2005): what would have happened if the violations had not taken place? In the case of reparations for Black slavery in the United States, lawyers based their demands on the notion of the «loss of a chance», but this argument still raises many issues (Brophy, 2006). The Durban Conference in 2001 reflected this problem well: defenders of reparations let themselves make dubious calculations, arguing for instance that colonization was a «double Holocaust» (Hazan, 2007). Despite the ethical problems of such evaluation, we may wonder how responsibility can be assigned over such a long time frame. Is there only one single cause for present injustices? Reflecting on the Nazis, Karl Jaspers tried to overcome the hostility of Germans to what they saw as «victor’s justice» and argued against the idea of a collective guilt. However, he did insist that members of a State share a collective responsibility for crimes committed by their government (Fletcher and Weinstein, 2004). To the extent that a German citizen benefits from his membership in a community, he must also take responsibility for the wrongs committed by his predecessors:

«Political guilt involves liability for the consequences of the deeds of the state whose power governs me and under whose order I live. Everybody is co-responsible for the way he is governed» (Jaspers, 2001: 159).

Jaspers affirmed that this responsibility entailed the need to make reparations (Wiedergutmachung).

The notion of gaining compensation for those who suffered injustice in the past does seem uncontroversial at first glance. But, philosophically, one could argue that reparations are strangely apolitical, and reflect a dangerous «juridification» of politics. As Jurgen Habermas notes, we have entered a «postpolitical world», one in which «the multinational corporation becomes the model for all conducts» (Habermas, 1998: 125). Antoine Garapon considers that demands for reparations are an extension of this wider movement of juridification of history at the expense of the political.
Indeed, the main instrument of reparation claims is not criminal but civil law. «The aim is no longer the criminalization of history but the civilization of the world, in the double sense of putting an end to barbarism and promoting civil rights» (Garapon, 2008: 22). The public relations that are the cornerstone of trials or restorative procedures are thereby replaced by private law, and can be understood through the paradigm of contract and civil liability, as relations of debts only: «History is now perceived in strictly individual terms» (Garapon, 2008: 62), and political relations are being de-politicized.

**Distribution and Development: Addressing the Root Causes of the Conflict**

a) A forward looking policy

Reparation policies are essentially backward looking. Their claims are rooted in commemorative projects, calling attention to the past mistreatment of individuals in an attempt to recognize and repair this victimization. To that extent, reparations are not connected to current economic disadvantage: this focus on the past is sometimes considered as a serious limitation to their healing power. South Africa is a telling example of the limits of restoration and timely reparation programs without longer termed adjustment policies to address the economic and social dimension of apartheid.

«How much reconciliation can be achieved if, in post-apartheid South Africa, Whites admit that their economic, social, and political status was based on a morally bankrupt system but then refuse to accept redistributive taxation?» (Aukerman, 2002: 83).

TRCs have therefore been criticized for the paucity of their concrete effects (Chapman and Van der Merwe, 2008). More than ten years on, South Africa is not the «rainbow nation» that the designers of the TRC wished for. Black people are still economically marginalized. Indeed, while 61% of Black South Africans live in poverty today, only 1% of Whites do (May, 1998). According to the UNDP, Whites in South Africa have the living quality of Spain, and Blacks of the Democratic Republic of Congo. The South African TRC has been blamed for that failure, for having focused too much on gross human rights abuses rather than on the suffering experienced daily by Blacks, and the benefits enjoyed by Whites as a result of those systemic structural injustices (Mamdani, 1996: 3). The Whites, as beneficiaries, were never made accountable.

As a result of this deception, many people have argued that programs of redistributive social justice are a more appropriate response to the past than TRC hearings: the money spent on creating the Commission would have been better spent in making victims’ lives better concretely, for instance through community service delivery in the townships. This argument, based on the structural nature of the violence, raises the question of accountability: if what we are moving away from is not simply a «regime of criminals» but a «criminal regime», should everyone be held responsible? (Rosenberg, 1998: 400) Should only the main perpetrators be named? Or also those who made the violations possible, those who created the structural climate and ideology, or who simply benefited from that climate? In that case, the argument behind distributive policies is that TJ should not only deal with physical abuses, detention, torture, or murder, but also with other forms of injustices: forced removals, pass laws, broken families, and land occupation (Mamdani, 1996). Victims should then be redefined as to include those whose lives were mutilated in the day-to-day web of regulations in which the atrocities took place. If structural violence is to be addressed too, then social justice might be a way of dealing with the past as well. The relation between perpetrators and victims, which is the central focus of TJ, should therefore be extended to beneficiaries. Indeed, «if evil is thought of in social terms… does not the demand for justice turn mainly, if not wholly, into a demand for systemic reform?» (Mamdani, 1996: 5)

This structural aspect, however, has long been ignored in the TJ field. According to the South African TRC act, a victim is someone who «suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or substantial impairment of human rights (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted». A gross violation of human rights was defined in a very limited manner, as «(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit [killing, abduction, torture or severe
ill-treatment» (in De Greiff, 2006a: 8). But because of the nature of the apartheid system, which controlled fundamental aspects of peoples’ lives, the point has been made that this strictly political definition of «victim» was too narrow. As in communist or totalitarian regimes, everyone could be considered a victim, if only because the majority’s standard of living was affected. If this is the case, then no reparations program could ever «make up» for the past, and this general sense of victimhood would be better addressed through structural distributive programs. Such demands are rooted in the assumption that the past system in which the violations took place was one of structural violence and domination (colonialism, apartheid, slavery, segregation) and that this legacy is the cause of continuing economic disadvantages. Structural social reforms are the most forward looking measure of TJ, as they look for a way of transforming the current conditions of the victims themselves and their descendants. Through them, TJ becomes connected to a broader project of social justice, one that could take the form of redistributive policies, development, or affirmative action programs (Roht-Arriaza and Orlovsky, 2009).

This connection between TJ and development is only recent, and still calls for more research (De Greiff and Duthie, 2009). It is a consequence of the evolution of the concept of development itself, from a purely economic to a more human perspective, based on capabilities (Sen, 1999; Crocker, 1992; UNDP, 2001). Development, in this understanding, implies political participation and active citizenship. TJ, by healing and empowering victims, could help make this social integration possible (De Greiff, 2009). Indeed,

«Once a group of people is left outside the system or treated as marginal over a period of time, forces develop that reinforce that marginalization. The group learns not to participate in society and others learn to exclude members of this group, and participator inequity becomes a part of the economic and societal equilibrium» (Roht-Arriaza and Orlovsky, 2009: 178).

Social fragmentation and isolation are common after mass violence, and this erosion of what Putnam called «social capital» can affect, in turn, a society’s capacity for development (Putnam, 2000). Because poverty and victimhood share the same effects, development and TJ should go hand in hand. Louise Arbour, UN High Commissioner for Human Rights, has recently argued in favor of such a commitment to economic, cultural and social rights, affirming that TJ must «reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused or contributed to it» (Arbour, 2006: 2). The East Timor Commission for Reception, Truth and Reconciliation (CAVR) has taken a step in that direction by looking beyond the direct result of military operations, to «indirect» deaths from hunger, displacement, and illness. Sierra Leone’s TRC made recommendations that included a gendered sense of justice, asking for a revision of the State’s customary law on marriageable age and discriminatory inheritance law, the promotion of stricter laws on domestic violence and the setting up of a specific Gender Commission.

Adding the missing links between TJ and development is important, because seeing «transition» in a limited and teleological manner, as a fixed interregnum between a violent past and a democratic peaceful future, might obscure the deeper and continuing cycles of violence and exclusion that characterize post-conflict societies. South Africa after the TRC is a case in point, with racism and de facto apartheid continuing until today. Post-traumatic stress is another factor. Violence against women actually tends to increase in the post-conflict period (Nagy, 2008; Valji, 2007). This shift towards development and social justice would thus imply a redefinition of what «transition» means.

b) Questioning the liberal paradigm

Including such social measures into TJ would imply a major shift in its philosophy. Indeed, as we have seen, TJ since its inception has largely been under the influence of a liberal paradigm, which insists on legalism and political rights rather than on economic or cultural ones. The aim of the «transition» is the establishment of a liberal regime, both politically and economically: a regime where pluralist views will coexist and where no one will be given preferential treatment based on their political or ethnic origins (Rawls, 1995). To that aim, TJ usually focuses more on direct forms of political violence than on economic, social, or structural violence.

As we have seen, this failure to take into account the deeper structural patterns of exclusion and
domination is problematic if one considers TJ a performative tool, or a speech act (Nagy, 2008; Miller, 2007). Not taking into account the socio-economic roots of conflict means supporting structural violence, and planting the seeds of future conflicts. If socio-economic issues are left out of the picture, the story that will be told of the conflict will be a purely political one. If TJ is divorced from land redistribution and economic change for instance, it may give legitimacy to the myth that the conflict was purely political, or ethnic, but not based on deeper distributive economic inequalities (Miller, 2007; Mani, 2008). It suggests that present inequalities are only a question of time and development, rather than the result of a deliberate elite ideology. As we have seen, the story told at the TRC in South Africa was often criticized for being a story of racism and individual violations, rather than one of long-term, systemic abuses (Mamdani, 2000). The same can be said about Rwanda, where the narrative of years of unequal land distribution under colonial rule, and the deep resentment against the Tutsis that resulted, has often been neglected in the name of a purely ethnic reading of the conflict (Miller, 2007). Restoration of the moral order and economic justice should therefore go hand-in-hand. This implies recognizing that the goal of reconciliation cannot be obtained immediately, through truth telling, trials and forgiveness. If the roots of violence are structural, the legacy will run deep and it will take generations for some kind of equilibrium to be reached. Such a shift also implies finally abandoning the dominant model of economic transition based on the International Monetary Fund’s «Washington Consensus», which focuses only on liberalizing growth and marketization without taking into account wider demands for social justice in post-conflict or post-totalitarian societies (Stiglitz, 1998; Naim, 2000; Collier, 2003; , 2004).

This broader shift of reparations towards distributive and development programs may therefore be perceived as a threat to liberal ideas, or at least invite a reformulation of their principles, since liberalism does not generally support the notion of group rights, cultural rights, and affirmative action (Renaut, 2007). Here again, law, politics, and morality tend to become confused. Is the economic system that is created after mass violence necessarily normative? Can a strictly neutral distribution of goods, as the liberal distribution pattern pretends to afford, be enough? Or do victims in the aftermath of mass atrocity call for special rights, for group rights? This transformation of TJ could mean integrating group rights and collective recognition procedures as a new rationale for social redistribution – something liberals have long been reluctant to do, always carefully separating the field of justice from that of culture and group recognition (Fraser, 1997; Honneth, 1992; Fraser and Honneth, 2003). Taking equality seriously might thus mean rethinking distributive justice as such (Renaut, 2007). The relation between redistribution and recognition, in particular, would need to be addressed, in favor of what many communitarians call a «politics of difference» (Young, 1990).

As we have seen, TJ has a clear teleological nature that might contradict the traditional, procedural, understanding of liberalism predominant since Rawls. In many ways, TJ seems closer to the feminist ethics of care: in order to heal, victims call for more than pure proceduralism and «benevolent neutrality». TJ therefore gives politics an existential, quasi-romantic aspect that liberals have tended to be, sometimes with good reasons, reluctant to admit. How can we take this difficulty into consideration without abandoning the private/public distinction and without promoting some form of ethical paternalism? (Rorty, 1989). These are questions open for future research in the field of TJ.

5. Conclusion: The Way Forward

Forgetting?

The several weaknesses that we have highlighted in the retributive, restorative, and social dimensions of TJ could lead one to abandon the pursuit of reconciliation and remembrance altogether, acknowledging the fact that all responses are inadequate after mass violence, and that we cannot ever expect a sense of closure or completion. «Closure is not possible», wrote Martha Minow. «Even if it were, any closure would insult those whose lives are forever ruptured» (Minow, 1998: 4). Indeed, it is important not to have unrealistic expectations about what TJ can and cannot do. Liberals such as Bruce Ackerman have come to argue that a society’s moral capital would be better spent in educating the population about the limits of the law rather than in engaging in a quixotic quest after the mirage of justice. Such a quest would generate «the perpetuation of moral arbitrariness and the creation of a new generation of victims because of the inevitable deviations to due process that would attach to trials» (Ackerman, 1991). Is that an argument in favor of amnesia
as a tool of political transition?

Countries such as Mozambique and Spain have chosen to forget in order to move on, and are considered today as «successful» transitions (Cobben, 2007). However, according to Renan’s definition of a nation, advocating forgetfulness is «the political correlate of suicide» (in Eisikovits, 2009: 20), since nations are defined as «the possession in common of a rich legacy of memories» and «the current consent, the desire to live together, the willingness to continue to maintain the value of the heritage that one has received as a common possession» (in ibid.). Some countries might defend immediate executions and lustration, or vetting, for a society to simply move on (Mayer-Rieckh and De Greiff, 2007; Michnik and Havel, 1993). We know that this option was advocated amongst the Allies after World War II before the Nuremberg solution was chosen. In South Africa, while the National Executive Committee of the ANC officially talked about the «cleaning power of truth», many within the party wanted to just «catch the bastards and hang them» (Boraine, 2000: 28).

The argument in favor of forgetting and moving on might be tempting, but even if one accepts it, the question remains: forget what? As Mary Burton, one of the South African TRC chairs, has said: «We must wipe the slate clean but we haven’t even written on the slate yet!» (in Boraine, 2000: 5). TJ is therefore important at least for defining what it is that must be forgotten in order for the country to move on and look forward. Knowing the past, then, is an imperative (Elster, 2004).

«Perhaps one cannot, what is more, one should not, understand what happened, because to understand is almost to justify… If understanding is impossible, knowing is imperative, because what happened could happened again» (Levi, 1965: 213).

Beyond arguments on the healing and reconciliatory power of truth, truth is necessary because, morally, we simply have a duty to remember (Sémelin, 2005). As Paul Ricoeur argues, «the tiniest way of paying our debt [to victims] is to tell and retell what happened to them… The horrible, the inverted image of the admirable – needs to be rescued still more from forgetfulness by means of memory and narration» (in Borer, 2006: 267).

A major danger in the aftermath of mass atrocity is indeed silence. Democracies can only be built on unfettered communication and a public space dominated by the use of public reason. There is therefore a real need to recreate the communication that has been lost through mass violence – if only for the victims. As Jean Améry experienced:

«The pain is what it was. There is nothing more to say about it. The way one feels is as incomparable as it is indescribable. Pain marks the limits of the power of communication. If someone wanted to impart his physical pain, he would be forced to inflict it and thereby become a torturer himself» (Améry, 1995: 82).

TJ, for all its flaws, provides the basis for communication about the past and contributes to ensuring that it will not be instrumentalized by future leaders. The refusal to acknowledge the past, by whatever means, only widens the gap between victims and perpetrators, making an unbiased communication between the two sides even harder. It may reinforce and legitimize the image of «otherness» which is often the source of violent conflicts and tensions. An example is today’s Russia, where the failure of the Russian regime to acknowledge and apologize for the massive deportations of populations during Soviet rule is seen by many neighbouring countries as an insult, the effect of which is to reinforce nationalist tendencies and transform collective memories into myths. The Chechen Wars, where memories of past suffering have been a major source of ethnic mobilization, are a case in point (Williams, 2008). Even if it is true that TJ might lead to the past being seen as an obsession, a policy of enforced amnesia is not a viable alternative for new democracies emerging from a period of intense human rights violations. Unacknowledged injustice might only poison societies and create new cycles of violence (Walker, 2006a).

Enlarging the Scope of Transitional Justice

If forgetting is not a viable option, what form should TJ take to ensure that the past is dealt with in the most appropriate manner? As we have seen, although TJ has recently become a well-established
fixture in the global field of human rights — and even a body of customary law and a normative standard — it can be criticized on several grounds. The influence of legalism on TJ and the formation of it as an «industry» (Theidon, 2009) have created a deep disjunction between justice which is embedded in communities and «distant justice» (Gready, 2005). The fact that it is more often the international community which provides fragile, newly created governments with the means to reckon with their past, can be a matter of concern. Too often, the international community adopts a technocratic, one-size-fits-all approach that can be damaging. TJ has become steeped in western liberalism, often appearing as distant and remote to those who actually need it most (Nagy, 2008: 275). But ultimately, the resolution of conflict lies in the society in which it occurs: external agents can only build capacities that increase the likelihood of peace. Rebuilding social capital and livelihood systems is harder than restoring infrastructures and institutions. It involves redefining relationships, promoting public deliberation, creating a healthy civil society, facilitating the healing process, as well as making institutions both trustworthy and effectively trusted (De Greiff, 2006b). Recent literature has therefore been arguing for a more differentiated approach that would give special care to child and gender violence, and would finally address the remaining blind spots of TJ and the prevailing «zones of impunity» (Sriram and Ross, 2007).

It is interesting, however, to observe that TJ itself is not questioned anymore: there is now a general consensus in favor of justice, accountability and dealing with the past (Scheffer, 2001). «The question is not whether something should be done after atrocity but how it should be done» (Nagy, 2008: 276). A current approach to this question of «how» is to argue in favor of an enlargement of the scope of TJ. As we have seen, TJ is a performative tool, an inherently selective process which involves the delimitation of a narrative and the exclusion of others. A fundamental question then, is what does TJ transit «from» and «to» (Bell and O'Rourke, 2007: 35). Broadly understood, the framework should include structural and gender-based violence which, as we have seen in the matter of reparations, is often left out of the picture. TJ is still under the influence of the liberal-legalist paradigm which tends to favor freedom and liberty over equality, undermining the socio-economic and gendered roots of the conflicts (Mani, 2007: 151).

Broadening the scope of TJ and transition might also be understood geographically, so as to include democratic countries in the northern hemisphere too. This would mean acknowledging that «every society is in transition» (Kiss, 2000: 92). Even democratic societies have their share of unacknowledged past injustices, whose effects are corrosive and deep. The effects of Australia’s forced removal of Aboriginal children from their families, or of America’s brutality against Black Americans, continue to corrode these democracies today, and contribute to endless cycles of violence and distrust (Brophy, 2006). The legacy of colonization in France, especially regarding Algeria, is also a case in point. It might seem surprising to label well-established liberal democracies such as Australia, the United States or France as «transitioning» countries, but the acknowledgment of this long denial of justice is the prerequisite to a more just, non-western understanding of TJ.

**Promoting Deliberative Democracy**

a) The meaning of trust and reconciliation

Many of TJ’s definitional and practical issues depend on the goal that TJ sets for itself. Is it reconciliation, understood as friendship, love and forgiveness? Or is it simply «non-lethal coexistence» (Mendelhoff, 2004: 365)? «When the dust settles in the street, when the shooting stops, when people let go of one another’s throats, be grateful. That is enough!» exclaimed a member of the Reparation and Rehabilitation Commission of the South African TRC (Meiring, 2000). This first «thin» account of reconciliation sees it as a mere modus vivendi, a «departure from violence» (Borneman, 2002: 281), and a way to coexist without necessarily interacting or forgiving one another.

«At its simplest, [reconciliation] means finding a way to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them, so that we all have better lives together than we have had separately» (Huyse, 2003: 12).

This «thin» account of reconciliation is based on the cautious argument that any deep substantive
agreement would leave little room for the democratic values of debate and difference (Nagy, 2008). A thin solidarity would be forged around the commitment to democratic practices, a procedural agreement, or what Habermas calls «constitutional patriotism» (Habermas, 1994: 134). While it is true that efforts to impose a single national narrative and to build a substantive solidarity from the top might compromise democratic plurality, a too thin account may remain too abstract after mass violence. Can post-conflict societies be satisfied with such a modest goal of reconciliation? Can trust between former enemies really be developed on the basis of strictly procedural rules? Is nothing deeper required?

Proponents of restorative justice argue that reconciliation must be understood in a more intimate, «thick» way, based on face-to-face reconciliation and trust. If we understand reconciliation as thick solidarity, then TJ should be given a substantial rule-setting function. Such a function is essential in the aftermath of mass atrocities, as those are times when all limits disappear. As Jacques Séminel has demonstrated, mass violence is a universe of destructiveness where everything is possible, in which all norms are inverted and impunity becomes the rule (Sémelin, 2005: 285). In the aftermath of mass atrocities, it is therefore essential that the community confirm the victim’s sense of wrong. Not doing so violates the moral trust that there are recognized, shared rules by which we live and which we can count on to protect and guide us. Such trust is essential for any community. In re-affirming the lost normative foundations of a society, TJ should help redefine the society’s normative foundations and the community’s rules of membership (Walker, 2006b: 190).

b) Deliberative solidarity

To overcome this tension between thick and thin reconciliation, perhaps we could think of TJ in a post-traditional moral way: without agreeing on any substantial particular norm, morality can indeed derive a meaning from an inter-subjective process of socialization. The missing transcendent, substantive morality in conflicting societies could then be replaced by an immanent process of deliberation, in a Habermassian fashion. According to Habermas, democracies are defined by «the public use of reason», within a procedural conception of popular sovereignty (Habermas and Rawls, 1997: 186). The notion of «constitutional patriotism» reflects this idea well: social solidarity, according to Habermas, is derived from citizens’ explicit engagement towards the moral principles embedded in a liberal constitution. It is the product of a «civilizing disagreement», organized through procedural constraints (Habermas, 2001: 259). This model of deliberative politics is philosophically rooted in Habermas’s rejection of the subjectivist paradigm, which he affirms must be replaced by an intersubjective, communicative paradigm mediated by language. The aim of TJ would therefore be the building of this discursive solidarity in the aftermath of mass atrocity (Habermas, 2001). It is the resetting of this lost communication that should be the aim. Indeed, if victim and perpetrator do not share a minimum of common language or norm, they will be unable to ask or grant forgiveness. «Even if I say ‘I don’t forgive you’ to someone who asks for my forgiveness, but whom I understand, and who understands me, then the process of reconciliation has started» (Derrida, 1999: 7).

TJ is then to be understood as an intersubjective mode of deliberation. It would not aim to build reconciliation as harmony, collective memory and substantive «truth» but, and perhaps less ambitiously, at establishing the conditions for peaceful dialogical mechanisms that would promote trust while encouraging reasonable disagreement. TJ, as part of the peace building project, would then become more society building than State building (Yordan, 2009). To remain an essential element of liberal peace building, TJ should not attempt to teach major lessons from the past, to provide a global meta-story about the facts or to promote the reconciliation of all with all. It should not provide a content so much as a method, a way of looking at the past that would authorize discussion and disagreement. The solidarity thus created after mass violence should be more procedural and discursive than substantial. It should reflect what Gutman and Thompson (2000) call the «economy of moral disagreement»: seeking a common ground about the past where it exists, and maintaining mutual respect where it does not. It presupposes the notion of reciprocity, «which asks citizens to try to justify their political views to one another, and to treat with respect those who make... efforts to engage in this mutual enterprise even when they cannot resolve their disagreements» (ibid). TJ must favor such deliberation and peaceful disagreement in order to help forge stable democratic institutions. It should therefore welcome controversy and avoid final judgments.
This, however, does not mean that TJ, in the name of pluralism and tolerance, should accept any account of the past, including those that negate or glorify violence. We could call this the «post-modernist» danger, one that would doubt any possibility of establishing a single truth about the facts. A genocide is not the kind of event that we would want to see open to a multiplicity of interpretations. The search for consensus is not necessarily the «basis of any fascist politics» (Lyotard, 1983). TJ can, and must, exemplify how people can actually live together peacefully even with disagreements about what exactly happened in the past and why, and still respect each other as fellow citizens. It must assume that truth and reconciliation are tentative at best, and are better sought through conflict and controversy than through a politically authoritative consensus. Or, as Michael Ignatieff put it, «all that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse» (Ignatieff, 1998: 178). One can reasonably understand another's view even if it is not right. This is even a healthy sign of the willingness of citizens to acknowledge one another as members of a common democracy. The primary function of any TJ mechanism is thus to «express unwelcome truths, so that inevitable and continuing conflicts and differences stand at least within a single universe of comprehensibility» (Asmal, 1999: 46). Only then can politics truly resume.

Tailored as an instrument of deliberative democracy, TRCs could then have a clear social advantage over trials and retributive justice, which depend on a binary choice between the guilty and the innocent, with little discussion possible. On the contrary, TRCs, as discursive and didactic mechanisms, can and should encourage conflicting views that fall within the range of reasonable disagreement. Of course, TRCs are not a panacea and it is important to admit that they are not democratic institutions themselves, but institutions meant to help the transition towards democracy in countries that often lack the essential elements of a democratic culture. A careful combination of both trials and TRCs, as in Sierra Leone, with political measures for the alleviation of poverty, could then be the best solution (Valji, 2009).

In the end, there is no turnkey solution for dealing with past abuses. What works in one country might not work in another, depending on numerous political, economic, and cultural factors. Different patterns of violations might also require different approaches. Indeed, expressions such as «mass violence» or «mass atrocities» actually hide a wide range of different abuses calling for different forms of justice. TJ has been incredibly successful in becoming a discipline so rapidly, but, more than ten years on, it might need to rethink some of its most fundamental principles and assumptions. The «tyranny of total recall», according to which «more memory = more truth = more justice = reconciliation», should be reviewed and nuanced (Theidon, 2009: 1). The philosophical underpinnings of a culture are decisive factors in influencing that culture’s choice about how to deal with its past (Aukerman, 2002: 92). The choice between prosecutions and forgiveness, for instance, is not simply about how to best express condemnation of those wrongs. It is also an existential question about the very nature of the society itself. Indeed, «the ways in which we punish, and the ways in which we represent that action to ourselves, make a difference to the way we are» (Garland, 1990: 268).

6. Bibliography


ARENDT, Hannah, 1958, The Human Condition, Chicago: Chicago University Press
ARENDT, Hannah, 1953, «A Reply», Review of Politics, 15: 1, pp. 76-84


AMÉRY, Jean, 1995, Par Delà le Crime et le Châtiment: Essai pour Surmonter l’Insurmontable, : Babel

AMÉRY, Jean, 1980, At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and Its Realities, Rosenfeld, S., (trans.), Bloomington: Indiana University Press


BASSIOUNI, Cherif, 1997, «From Versailles to Rwanda in 75 years; The Need to Establish a Permanent International Criminal Court», Harvard Law Journal, 10: 11

BEATTIE, Andrew, 2008, Playing Politics with History: The Bundestag Inquiries into East Germany, New York: Berghahn Books

BEKOU, Olympia, and CRYER, Robert, 2004, The International Criminal Court, Plymouth: Ashgate


BORNEMAN, Luc, 2002 «Reconciliation After Ethnic Cleansing: Listening, Retribution, Affiliation», Public Culture, 14: 2, pp. 281-304


CHAKRAVARTI, Sonia, 2008, «More than Cheap Sentimentality: Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions», Constellations, 15: 2, pp. 223-235


CHAUMONT, Jean-Michel, 2002, La Concurrence des Victimes, Paris: La Découverte


COLONOMOS, Ariel, 2005, La Morale dans les Relations Internationales, Paris: Odile Jacob

COLONOMOS, Ariel, 2001, «La Demande Croissante de Justice Sans Frontières: Le Cas de la Restitution des Biens Juifs Spoliés», Cahiers du Ceri, 78


DEWEY, John, 1938, Experience and Education, New York: MacMillan


DOUGHERTY, Beth, 2004, «Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone», International Affairs, 80: 2, pp. 311-328


DURKHEIM, Emile, 1998, De la Division du Travail Social, Presses Universitaires de France


FOUCAULT, Michel, 1969, «Film and Popular Memory», Radical Philosophy, 11, pp. 25-64


GARAPON, Antoine, 2008, Peut-on réparer l’histoire? Colonisation, Esclavage, Shoah, Odile Jacob


HABERMAS, Jürgen, and RAWLS, John, 1997, Débat sur la Justice Politique, R. Rochlitz, (trans.), : Cerf


HAMBER, Brandon, and VAN DER MERWE, Hugo, 1998, «What is this thing called Reconciliation?», Reconciliation in Review , 1: 1, pp. 3-6


HAZAN, Pierre, 1998 «Payons et n’en parlons plus», Libération , 27 November


HUNTINGTON, Samuel, 1993, The Third Wave, Democratization in the Late Twentieth Century, Oklahoma: University of Oklahoma Press

Electoral Assistance


JANKELEVITCH, Vladimir, 1986, L’Imprescriptible, : Seuil


KOSKENNIEMI, Martti, 2002, From Apology to Utopia., Cambridge: Cambridge University Press

KOSKENNIEMI, Martti, 2000, «Between Impunity and Show Trial», Max Planck UNYB, 6: 1, pp. 1-36


LANGER, Lawrence, 1995, Admitting the Holocaust, New York: Oxford University Press


LEDERACH, John Paul, 1997, Building Peace: Sustainable Reconciliation in Divided Societies, New


LYOTARD, Jean-François, 1983, Le Différend, Editions de Minuit


MEISTER, Robert, 2002 «Human Rights and the Politics of Victimhood», Ethics and International Affairs, 16: 2, pp. 91-208


MEREDITH, Charles, 1999, Coming to Terms: South Africa’s Search for Truth, New York: Public Affairs


NINO, Carlos, 1996, Radical Evil on Trial , New Haven, CT, Yale University Press


PAULSON, Stanley, 1975, «Classical Legal Positivism at Nuremberg», Philosophy and Public Affairs, 4: 2, pp. 132-158


SCHIEFFER, David, 1996, «International Judicial Intervention», Foreign Policy, 102: 1, pp. 34-51


Simmel, Georg, 1999, Philosophie de l’Argent, : Presses Universitaires de France Quadrige


TUTU, Desmond, 2000, No Future Without Forgiveness, London, Image


WALKER, Margaret, 2006b, Moral Repair: Reconstructing Moral Relations after Wrongdoing, Cambridge: Cambridge University Press


WOODS, Margaret, 1999, Vectors of Memory: Legacies of Trauma in Post-War Europe, Oxford: Berg

