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Nuremberg or The South African TRC: A Comparison of the Retributive and Restorative Models of Justice

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NUREMBERG OR THE SOUTH AFRICAN TRC?

A Comparison of the
Retributive and Restorative
Models of Justice

Brendan Gooley

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Undergraduate Senior Thesis

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Introduction

The post world War II era saw the development, expansion, and implementation of new international human rights law and protections in response to the terrible atrocities that took place during the second world war. The United Nations, non-governmental organizations, and activists witnessed the massive violations of human rights that had occurred in the Second World War, and developed institutions and legal precedents under such documents as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to ensure that they never happened again. One of the problems that these human rights advocates had to address was how to punish gross violators of these new codes of international law. Undoubtedly, this was no trivial or easy task, as prosecution required the violation of the principles of state sovereignty that form the basis of international law, and that had been well entrenched for hundreds of years dating back to the Treaty of Westphalia.

Nevertheless, if the provisions in the UDHR, the ICCPR, and the ICESCR that advocates had worked tirelessly for were to be treated seriously, they had to be enforceable, and violators had to be held accountable. The first system developed to achieve this goal was the Nuremberg system, first implemented after World War to address the horrific violations of the Holocaust, and other Nazi violations of human rights. However, at this time (1946), the Universal Declaration of Human Rights (UDHR), and other codifications of international human rights did not yet exist and the Nuremberg trials played a large part in developing these protections, as well as

developing a system for how violators would be charged. This system was based primarily on retributive justice, and served to punish the abusers of basic human rights with imprisonment or death. It was implemented as a direct result of the terrible atrocities of World War II, most notably the Holocaust. The Nuremberg Tribunals gave the world the term “crimes against humanity,” and set a new standard for international prosecutions of state officials. Long after Human Rights had been implemented and accepted through the United Nations and various treaties however, a second model of justice arose. In the early 1990s, as the Apartheid regime finally crumbled, South Africa focused more on creating a unified country out of the legacy that centuries of white domination over blacks had formed and implemented Truth and Reconciliation Commissions based primarily on restorative justice.

These two systems clearly arose, not only at different times but also out of distinctive circumstances, to meet diverse goals, and respond to unique situations and violations of fundamental human rights. Both also used different methods of examination and punishment to achieve justice. However, both also have similarities with one another that go well beyond the connection that both were implemented to address violations of human rights. This essay will define these models, demonstrate why they were used in different historical situations, evaluate their effectiveness at achieving justice for those whose rights were violated, and finally raise considerations for these systems’ possible future use in addressing human rights violations.

Furthermore, this essay will argue that the different strengths and weaknesses of each model make each one uniquely adapted to dealing with particular situational contexts, which is why most examples of transitional justice have focused largely on one

model or the other. At the same time, a fundamental understanding that this essay advances is that, contrary to the beliefs of many, there is in fact much to be gained from combining the Nuremberg and South African models in a more even-handed approach to justice. The only challenge that has to be overcome to achieve this is to understand the contextual and situational factors that contribute to the selection of one model over the other, and a willingness on the part of those designing and implementing the system to incorporate aspects of both models into their transitional system of justice.

Historiography

The first wave of historians to write about the Holocaust and the Nazi regime beginning in the 1950s, interpreted the events as the actions of a small, elite group within the Nazi hierarchy whose fervent anti-Semitism led them to seek the elimination of European Jewry. The literature, including works such as William L. Shirer's *The Rise and Fall of the Third Reich*, focused almost exclusively on this small group. Men like Heinrich Himmler, Hermann Goring, and above all Adolf Hitler were seen as the perpetrators of the heinous acts that so shocked the international community. In many ways, the academic writing of this time period coincided perfectly with the popular perceptions of Germans as well as the international community, whose understanding of the Holocaust was likewise that a very small group, distinct from the normal German population, had perpetrated it. The Nuremberg Trials, as some have noted, played no small role in developing this belief as prosecutors concentrated their efforts exclusively on the top tier or most heinous of Nazi officials. Whatever the underlying cause, it is clear that this enormously influential first generation of Holocaust literature focused

almost exclusively on the very few individuals who had played leadership roles within the third Reich, and categorically ignored and dismissed the involvement of lower level perpetrators.

However, beginning in the early 1960s new understandings of the Holocaust and those involved in perpetrating it began to emerge. Hannah Arendt, writing about one of the most significant post-Nuremberg Nazi trials in *Eichmann in Jerusalem* focused not only on a slightly lower level Nazi, but also gave a different understanding of those involved in the Holocaust altogether. Rather than racial hatred being a primary motivator, Eichmann is portrayed as merely following orders. Eichmann was assigned a task to do, and he completed that task. This new understanding of the Holocaust greatly reinforced the previously held notion that thousands of middle and lower rank perpetrators were merely following the orders of their superiors in a society dominated by the necessity of order.

While this approach provided new insights into the Holocaust, it did not necessarily refute the notion established at the end of World War II that the Holocaust had been conducted by a small, elite group of top Nazi officials who were motivated primarily by a deep hatred of the Jews. Other theories were also put forward during this wave in the 1960s. The far left for example argued that capitalism was at least partially to blame for the atrocities. According to these scholars, greed inspired by the evils of modern capitalism led the Nazis to not only pursue the Second World War, but to attempt to systematically exterminate entire populations, including European Jews, largely for economic gain. Despite the presence of these ideas, the most significant implication of this second wave was that for the first time, historians began to look beyond the few

dozen Nazi leaders to mid and lower level and perpetrators. For now however, they still believed that these men were following orders and had little, if any, choice in conducting the heinous acts that they were assigned.

These perceptions lasted largely unchallenged by mainstream academia until the early 1990s, when two groundbreaking works were published that in many ways challenged a half-century of historical writing, and immediately reinvigorated an intense debate about the Holocaust and, in particular, those involved in perpetrating it. The first of these works, released in 1992 was Christopher R. Browning's *Ordinary Men: Reserve Police Battalion 101 And The Final Solution In Poland*. This book was based on a series of interviews of a unit of the German Order Police, who during World War II were assigned the task of systematically exterminating tens of thousands of Jews from conquered Polish territory. This was one of the first works to focus exclusively on lower level perpetrators— those who had actually carried out the executions of thousands. From the very title of this work, Browning sought to dismiss the idea that these men were merely following orders or that they were somehow psychopaths motivated by racial hatred, and put forward the argument that these ordinary Germans were perpetrators just as those many ranks above them had been. In a similar argument in 1996, Daniel Goldhagen's *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* also refuted previously held notions that only the top-tier of Nazis, and not everyday Germans, were responsible for, or even participated in the Holocaust.

Together, these two works greatly changed understandings of the Holocaust and responsibility for its crimes. Today, it is understood that thousands more people, for a wide variety of reasons, including economic or career goals, willingly participated on one

level or another in the Holocaust. Nevertheless, these new understandings, that economists, people with PhDs and everyday Germans participated in the Holocaust have not answered everything. How harsh should history be on people who were starving and did nothing to save their Jewish neighbors so that they could get more food? How hard should it judge the men in Reserve Police Battalion 101, who were offered the chance to not participate, but did so in order to not be judged negatively by their colleagues? These are just some of the many new questions that this more complicated (though more complete) understanding of the Holocaust has led to.

There is also a final division, not in historical development, but in academic divisions that needs to be recognized in regard specifically to the Nuremberg Tribunal. Legal scholars, concerned about the Trials shortcomings in relation to numerous accepted legal principles have generally been more forward in criticizing the Trials for their numerous legal shortcomings, including the lack of any sort of appeal, the loose legal grounding of some of the charges, and a host of other issues related to widely accepted principles and practices of jurisprudence. While historians recognize the faults inherent in the system, they have been less committed to these judicial standards, and more apt to ask, "If not Nuremberg, then what else?" Many historians have concluded that Nuremberg, despite its faults, was a marvel given the war-torn context that it was conducted in, and argued that the only legitimate alternatives at the time would have been to simply execute, or release the Nazi leadership.

The history of the South African Truth and Reconciliation Commission (TRC) meanwhile has undergone far less historical development than Nuremberg, primarily because the Commission finished its work so recently (at least in historical terms).

Nevertheless, the South African TRC has been one of the most written on subjects in transitional justice, beginning even while it was still going on. Some of the most beneficial sources are the primary histories written by members of the Commission and those involved in the proceedings. These include Archbishop Desmond Tutu's *No Future Without Forgiveness* and Pumla Gobodo-Madikizela's *A Human Being Died That Night*, which provide insight into the minds of those on the TRC itself, and their perspectives.

However, the richest primary source above all else has to be the Final Report of the TRC itself. The Report is a set of volumes that comprises the most comprehensive set of testimony, summary, and understanding of the heinous acts people suffered during the conflict over Apartheid. It includes not only geographic locations, but also the names of thousands of individuals and how they suffered in this conflict. The Final Report alone provides incredible insight into what and how people suffered, as well as how the TRC sought to overcome what often amounted to intense hatred between different groups of people. An additional source of information comes from research data, interviewing South Africans about their thoughts on the Commission, which has provided eye-opening insight in terms of understanding how effective the TRC was at its mission or reconciliation. A final important collection of primary source material comes from the media. The TRC, while it was operating hearing testimony, and reviewing amnesty applications, was constantly written about not just by the South African press, but also by the international media. As a result, a wealth of information is available through newspaper articles, video documentaries, and other media outlets that chronicle the TRC, particularly in relation to some of the most high profile hearings. Overall, the TRC has

produced a wealth of primary source material that has helped scholars understand and analyze the massive undertaking that constituted the Truth and Reconciliation Commission.

While a host of secondary literature exists in a number of important fields (including history, legal, transitional justice, etc.), much of the history, and in particular our understanding of the TRC's legacy have yet to be fully understood as only fifteen years on from the close of the Hearings, historians continue to understand the long-term implications, successes, and failures of the Commission. Nevertheless, a wealth of information, including a host of scholarly writings in the legal and transitional justice fields are available for academia to begin to understand, if not the TRC's legacy, then at least its grounding.

Works such as *Truth and Reconciliation in South Africa: Did The TRC Deliver?* have begun to answer tough questions about how beneficial the TRC was at reconciling South Africans. Likewise, dozens of publications have appeared in legal journals, and the fields of literature in connection with alternative models of justice, as well as with transitional justice are particularly well developed, with many scholars commenting on the successes and shortcomings of the tribunals. Additionally, scholars have also taken primary research data (which interviewed South Africans) in an attempt to understand to what extent actual reconciliation between opposing groups occurred. Like the primary source material, there is also a wealth of secondary information about the TRC.

Methodology

As described in the previous section, a wealth of primary source material, in relation to both the Nuremberg Trials and the South African TRC exists. In the case of the Nuremberg Trials, documents entered as evidence, as well as notes belonging to prosecutors and defense attorneys are just a small part of the evidentiary body. In the case of the South African TRC, evidence includes thousands of witness testimonies, interviews, and even documentaries involving victims and perpetrators. In both cases, the evidentiary body is rich in courtroom and hearing transcripts, as well as newspaper, and other media publications about the undertakings. The body of primary material in both the Nuremberg Trials and the South African TRC is immense, to say the least, involving tens of thousands of pages of written documents, and additional sources including recordings of the events. While this primary record is undoubtedly incredibly rich and informative, even attempting to just break the surface of the material from either of these proceedings is a daunting task.

Thankfully, both the Nuremberg Trial and the South African TRC are some of the most studied and analyzed legal events of the past century, and thousands of scholars have devoted an untold amount of time to sifting through mountains of documents in order to reach their own conclusions. As a result of this wealth of secondary literature and the dedication of so many experts to developing greater understandings of the systems of justice, this essay will not seek to focus on primary material. Instead, it aims to gain deeper understandings for comparative purposes, of the strengths, weaknesses, successes, and failures of the International Military Tribunal at Nuremberg (IMT) and the

TRC respectively, by examining the conclusions of many experts who have so tirelessly and expertly examined primary sources in order to synthesize and begin to answer questions of individual strengths and weaknesses.

While directly examining primary sources can also yield useful information in regards to strengths and weaknesses, the secondary literature is so well developed that in many cases, it is unnecessary. Furthermore, examining secondary sources provides insight into controversies and understandings that have developed after the events themselves, which are absent from the primary material. Therefore, in examining the writings of historians and legal scholars, this essay seeks to gain a further understanding of the intricacies of each model of justice (by using the IMT and TRC as case studies), to develop understandings of why each system was used in the context that it was, and finally, to contribute to the field of transitional justice, by offering considerations for implementing future legal programs.

THE NUREMBERG MODEL OF RETRIBUTIVE JUSTICE

Introduction

As the Second World War came to an end, the Allied leadership turned their attention to punishing the Nazi leadership for the bloodiest war in world history, and the horrific crimes perpetrated under the Third Reich, including the treatment of prisoners of war, and most notably, the Holocaust. After intense negotiations between the Allied

powers, it was decided that an international tribunal comprised of the victorious powers would try the remaining Nazi leadership. This decision led to the Nuremberg Trials, a series of tribunals held by the victorious allied powers in Nuremberg, Germany, to hold the highest ranking Nazis, and the criminals who perpetrated the atrocities of the Second World War responsible to the international community for their actions. Supreme Court Justice Robert Jackson (the chief American prosecutor) perhaps articulated the goals of Nuremberg best in his opening statement, saying “The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”¹

The primary goal of the Nuremberg Trials was to bring those individuals in the Nazi regime responsible for the terrible atrocities perpetrated during the Second World War, including of course the Holocaust, (but also such violations as the murder of escaped allied prisoners of war) to justice. The Trials charged the top tier of Nazi leadership with crimes against humanity, war crimes, waging a war of aggression, and crimes against peace. It is thus not surprising that the allied powers used a retributive system of justice that eventually dealt out death sentences to 11 defendants and prison sentences to 7 more.² It is widely believed that retributive justice serves as more of a deterrent to future violators than restorative justice, and given Justice Jackson’s opening statement, it is clear that the goal of the Nuremberg prosecutors was to attempt deterrence through severe punishment.

¹ Robert Conot, *Justice at Nuremberg*, (New York: Harper and Row Publishers, 1983), 105.

² Conot, *Justice at Nuremberg*, 498.

Taking place in the aftermath of the war from 1945-1946, the series of trials punished the Nazi leadership with lengthy prison sentences, and in many cases death, for their part in the atrocities perpetrated by Nazi Germany. The Nuremberg Trials thus represented the first, and foremost example of the retributive model of justice as applied by the international community. Retributive justice, broadly defined, is a system of justice that seeks to punish the offender with imprisonment or death after they have been found guilty through a trial of violating human rights. The retributive system was the accepted system of the majority of criminal justice systems on the national level, and had been well developed and used, in different variations in many Western countries for hundreds of years. However, “The International Military Tribunal (IMT) at Nuremberg represented the first time that senior political and military leaders were tried and sentenced by an international tribunal for their part in the commission of crimes against peace, war crimes and crimes against humanity.”³

Nuremberg was the world’s first trial that held national leaders to such a standard, and of all its legacies surely one of the greatest, and most pronounced, is the idea that there exists a class of crimes so heinous and despicable, that the veil of state sovereignty can not, and will not shield perpetrators from prosecution. The significance of Nuremberg as a groundbreaking tribunal was perhaps best stated by Paul Gordon Lauren, when he said “Never before in history had a legal proceeding attempted to make government leaders internationally responsible as individuals for crimes covering so much time, so many nations, or so many people.”⁴

³ Madelaine Chiam, “Different Models of Tribunals” in *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 205.

⁴ Paul Gordon Lauren, *The Evolution of International Human Rights*, (Philadelphia: University of Pennsylvania Press, 2003), 202.

The tribunal charged the leadership of the Nazi Regime with “Crime Against Humanity.”⁵ This is incredibly significant, as “Crimes Against Humanity” would become virtually the standard charge for gross violators of human rights, and would be subsequently used as justification for intervention, extradition, and prosecution. The profundity of this charge, and the dedication to aggressively pursuing violators of fundamental human rights that accompanies it (even if these rights were not explicitly protected under international law) cannot be understated. Nuremberg became the first application of an effective international effort to use retributive justice to bring violators of human rights to justice, and developed into a blueprint for addressing human rights violations. Although the Cold War effectively blocked its immediate implementation, it has since been used in such instances as the International Criminal Tribunal for Yugoslavia ICTY, Rwanda ICTR, and in the International Criminal Court ICC. The International Military Tribunal at Nuremberg had nurtured a strong discourse of rights and inspired a new category of legal infrastructure based on the retributive model, and then held perpetrators accountable effectively for their actions.

Strengths of the Nuremberg Model of Retributive Justice

The retributive model of justice used at Nuremberg had a number of strengths. First, the prosecution of leading Nazi officials clearly established blame for the atrocities that occurred under their command, and in many cases by their own orders. Surviving relatives (or even those who had their rights violated but had not been killed) could see the faces of the men responsible, and saw them executed or sent to prison. Even more

⁵ Conot, *Justice at Nuremberg*, (New York: Harper and Row Publishers, 1983), 24.

importantly, the world has been left with a clear picture of who was responsible for one of the greatest crimes in history.⁶ As Robert Conot, one of the foremost scholars on the history of the Nuremberg Trials noted, Nuremberg directly resulted in the passage of the Genocide Convention and an inviolable ban that exists to this day on policies that the Nazis employed.⁷ The value of clearly establishing responsibility for the atrocities of the Second World War and The Holocaust are incredibly important for two reasons. The first value of the justice was the closure that the final judgments gave to victims and their relatives. Second, the Trials delegitimized the systems, practices, and violence employed by the Nazis, a ramification that continues through today in the form of a sort of taboo on many policies employed by the Third Reich.

In relation to this idea of clearly establishing guilt, the Tribunal also clearly developed an extremely in-depth historical record of the events of the Holocaust, the second major strength of the Tribunal. Susanne Karstedt a scholar of Post-War German reconstruction, who has done in depth research into the Nuremberg Trials and their implications for post-conflict reconstruction noted that “The IMT was indeed conducted as a ‘monumental spectacle’ of truth and justice with the clear objective not only to bring the perpetrators to justice but to educate the German public.”⁸ The prosecution, in their primary effort to establish the guilt of the defendants, compiled a wealth of evidence that the Holocaust was meticulously planned and executed by the Nazi leadership. The thousands of documents that implicated the men on trial (and others) “would never have occurred without the decision to go to trial, that was the driving force behind the

⁶ Susanne Karstedt, “The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction” in *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 22.

⁷ Conot, *Justice at Nuremberg*, (New York: Harper and Row Publishers, 1983), 520.

⁸ Susanne Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 17.

exhaustive search for evidence.”⁹ As Karstedt went on to say “The prosecutions had revealed a truth that could never be denied again by the majority of the population”¹⁰ The significance of this wealth of documents was best summed up by H.R. Trevor-Roper, who wrote in *The Last Days of Hitler* that

Had it not been for this exposure it would have been possible for a new German movement in ten years’ time to maintain that the worst of Nazi crimes were Allied propaganda easily invented in the hour of such total victory. That is now impossible. The most damning documents– the minutes of Hitler’s meetings . . . Eichmann’s account of Himmler’s dissatisfaction at a mere 6,000,000 executions . . . these and many others have now been through the test of cross-examination; their signatures and authenticity have been confirmed.¹¹

One of the greatest strengths of the organization and scrutiny of the Nuremberg trials, and of the requirements of a criminal proceeding which requires a high level of proof thus was the establishment of a clear and undeniable historical record of evidence that indicted the Nazi leadership in the Holocaust and other crimes.

Third, Nuremberg established a precedent for dealing with gross violations of human rights, and sent a message to later generations that crimes against humanity would not be tolerated by the international community. Nuremberg set a precedent that began to end the principle of inviolable state sovereignty, as for the first time leaders of a country were held accountable as criminals under an international system of justice that had the authority to punish them severely for their crimes. In fact, Nuremberg created an entire new set of crimes, such as crimes against humanity, that were considered so heinous that state sovereignty is an insufficient shield for those who violate them. Kelly and McCormack noted that “all three categories of international crime [crimes against

⁹ Norbert Ehrenfreund, *The Nuremberg Legacy: how the Nazi war crimes trials changed the course of history*, (New York: Palgrave Macmillan, 2007), 36.

¹⁰ Chiam, “Different Models of Tribunals” in *Legacy of Nuremberg*, 33.

¹¹ H.R. Trevor Roper, in *The Nuremberg Legacy: how the Nazi war crimes trials changed the course of history*, (New York: Palgrave Macmillan, 2007), 36.

humanity, crimes against peace, and war crimes] in the Nuremberg Charter have subsequently become well and truly entrenched in the corpus of customary international criminal law.”¹² Therefore, the Nuremberg Trials created a new set of laws and legal framework in which to punish the worst violators of human rights and fundamental freedoms that could not be automatically blocked by the principles of state sovereignty. This extension of retributive justice to the international sphere was one of the great strengths, and enduring legacies of the International Military Tribunal.

Finally, and perhaps surprisingly, it seems that Nuremberg also fostered reconciliation among Germans, a success not usually associated with retributive justice. Reconciliation is usually regarded as a goal better achieved by restorative models of justice (to be discussed later), however, some argue that retributive justice can also contribute to this goal. Graham T. Blewitt, a international legal scholar even argues “that victims and survivors of crimes against humanity, and similar violations of international humanitarian law, are more likely to forgive and allow reconciliation to occur, without recourse to acts of revenge, if [retributive] justice is achieved.”¹³ Karstedt concluded in her analysis that post-war “Germany has achieved reconciliation with those peoples who had been the victims of German aggressive warfare, war crimes and genocide. Since the beginning of the 1950s successive German governments started a long and drawn-out process to compensate the victims of genocide, war crimes and mass atrocities that is still

¹² Michael J. Kelly and Timothy L.H. McCormack, “Contributions of the Nuremberg Trial to the Subsequent Development of International Law” in *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 108.

¹³ Graham T. Blewitt, “The Importance of a Retributive Approach to Justice” in *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 39.

going on.”¹⁴ Thus, several scholars have found evidence that retributive justice can lead to reconciliation among formerly opposed and oppressed groups, an unlikely, and perhaps unexpected strength of the Tribunal. As a final note, compensation is a fundamental part of any reconciliation, and is used in restorative models of justice as well (to be discussed in depth later).

Weaknesses of The Nuremberg Model of Retributive Justice

The Tribunal was not without its numerous faults. While the strength of individual criminal responsibility led to clear guilt, and an in depth historical record of the violations and German reconciliation, as an international model of justice it ensured that Nuremberg failed to bring individuals below the top tier or Nazi officials to any sort of justice, and most were essentially pardoned for their actions, due to the inability of the Allies or Germans to effectively prosecute them (as there were far too many people to prosecute all of them in a courtroom). As John H. Ralston and Sarah Finnin, two international legal scholars noted, “The combination of the international system’s particular capacity limitations and its commitment to individual criminal responsibility – which requires that the court or tribunal fix liability on key individuals for their deliberate wrongdoing, rather than groups for their collective wrongdoing – means that international prosecutors must, as a necessity, be highly selective in committing resources to investigating and prosecuting particular cases. They must isolate a handful of individuals

¹⁴ Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 13-14.

considered most responsible for crimes committed by a multitude of persons.”¹⁵

Unfortunately, while individual responsibility was an asset to Nuremberg’s establishment of clear responsibility and punishment of those responsible, it was also a drawback, as tens of thousands of individuals, whose responsibility had ranged from tacit support to full involvement, had to be virtually ignored by the Tribunal due to the logistical restraints of criminal prosecution.

While further prosecutions followed, they continued to focus on either the top echelon of Nazi officials, or the most heinous perpetrators, never reaching the average German officer or soldier who may have committed a violation. Furthermore, Nuremberg was challenged by the sheer scope of atrocities. Prosecutors simply had to focus on only the most outrageous violations, there were so many that an uncountable number of terrible violations to peoples rights never faced prosecution of any sort for their actions.¹⁶ Even after the Trials, when the “goal of prosecuting millions of Nazis was turned over to German officials,” the “task was so enormous that it simply collapsed of its own weight. The German courts charged 3.5 million persons with being major offenders, offenders, lesser offenders or followers, but only 9,600 ever spent any time in custody. By 1949 all but 300 had been freed.”¹⁷

This problem has severe ramifications for the justice process. As Karstedt noted, a major drawback of the Tribunals setup was that “Several characteristics of the

¹⁵ John H. Ralston and Sarah Finnin, “Investigating International Crimes: A Review of International Law Enforcement Strategies: Expediency v Effectiveness” in *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 49.

¹⁶ Conot, *Justice At Nuremberg*, [There are a number of references to the unprecedented problems of the massive number of records that documented violations, for a good example of this, see the Chapter “The Documentation Division”] 36-38.

¹⁷ Ehrenfreund, *The Nuremberg Legacy*, 105.

Nuremberg Trial made it easy for the Germans to perceive of themselves as victims. First, only representatives from the highest echelons were on trial, thus leading the public to put all the blame for the crimes on the elites.”¹⁸ Thus, the trial made it appear, to many German people, that they were not responsible for the atrocities of the Holocaust, but rather that the “final solution” was planned and implemented by the Nazi hierarchy without the knowledge or support of the German people. While this interpretation of events undoubtedly existed prior even to the Nuremberg Trials, by focusing on only the highest ranking individuals, Nuremberg gave legitimacy to and reinforced this view of history among the German public (complicating our view of the results of the Trials in regards to their efforts of producing an accurate historical criminal record). While the idea that the Holocaust was perpetrated solely by the Nazi hierarchy is true to some extent, this portrayal ignores the complicity of hundreds of thousands of Germans, who were not only aware of what was taking place, but were implicated, because without them, such a vast extermination project could never have taken place.

For example, historian Christopher R. Browning in his book *Ordinary Men* chronicles the story of a German reserve police battalion, a quasi military unit that was responsible for executing, transporting, or guarding Jews as they were deported to concentration and extermination camps. Browning states that “For a battalion of 500 men, the ultimate body count was at least 83,000 Jews.”¹⁹ At the same time, Browning details how many of the men in the unit struggled with their assignments, avoiding their duties whenever it was possible, and whenever they could do so without putting themselves in danger. Browning’s account is evidence that there were tens of thousands

¹⁸ Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 24.

¹⁹ Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 And The Final Solution In Poland*, (Harper Perennial, 1992), 142.

of people who were directly involved in the Holocaust, and that it could not have been carried out without them. At the same time, it is evidence that many of those involved did not support what they were ordered to do, but faced serious repercussions if they refused. Their involvement, and to what extent “ordinary men” should be held accountable for their actions has remained an issue of contention, even through the present, with no one quite sure how to prosecute them (or for that matter, if to prosecute them at all). Nevertheless, none of these individuals ever faced any sort of prosecution for their actions. Thus, thousands of people who were fundamental to the implementation of the Holocaust were permitted to just walk away and continue their lives since Nuremberg proved unable to bring them to justice under the retributive model.

These serious problems were not specific to the IMT, but are a significant drawback to the retributive model overall. As Mark Aarons, an international legal scholar writes in *Justice Betrayed: Post-1945 Responses to Genocide*,

Quite properly, the ICC will only concern itself with the senior criminals responsible for major crimes against humanity, genocide and war crimes. These are defined by the Statute that established the Court in such a way as to ensure that even middle-ranking criminals are unlikely to be brought before the Court, let alone the thousands of rank-and-file mass killers without whom the crimes could never have been carried out. This leaves the middle and lower levels free to live their lives, either in the countries where they committed their crimes or, often, in new countries to which they have emigrated, hidden among the refugees and survivors of the crimes.²⁰

The retributive model of justice, due to its commitment to individual criminal responsibility, as well as the logistics of building a case, cannot bring to justice, and must in fact ignore, thousands of individuals whose support was essential to the crimes success, and concentrate only on those most responsible and in leadership roles. In this

²⁰ Mark Aarons, “Justice Betrayed: Post-1945 Responses to Genocide” *Legacy of Nuremberg: Civilising Influence or Institutional Vengeance?* (Leiden: Martinus Nijhoff Publishers, 2008), 94.

way, individual responsibility is a double-edged sword, as it provides victims with a clear picture of who is responsible for their suffering and can bring them to justice, however it can do practically nothing against many of those lower level perpetrators, who may be equally responsible.

Yet another set of significant problems resulted from the setup of the trial, this time in the form of a number of legal challenges. The International Military Tribunal was, at least in comparative terms to other judicial systems a rather hastily assembled tribunal that combined a number of different aspects of various legal systems into one working judicial body. Added to this, was Nuremberg's status as the first trial of its kind anywhere in the world. With no precedent, the result was a number of serious problems that challenged Nuremberg as a legitimate system of justice on the basis of some of the most fundamental guarantees of all legal frameworks. For example, "A major criticism of the trial was its failure to provide for the defendants' right to appeal their convictions to a higher court."²¹ The right to appeal, a basic guarantee in judicial systems around the world, was absent from the Nuremberg Trials; the judges' decision would be final and absolute.

Even more controversial, the drafters of the Nuremberg Charter largely invented the crimes that they charged the defendants with. Crimes against humanity for example, had little grounding in former judicial precedent as a legal standard. This led to the serious charge that the defendants were being charged *ex post facto* by the Tribunal, a serious violation of accepted legal practice. Kelly and McCormack noted that "The drafters of the Nuremberg Charter attempted to blur the issue of criminal law being

²¹ Ehrenfreund, *The Nuremberg Legacy*, 16.

applied retroactively by including in the definition of crimes against humanity a requirement that any such crimes be perpetrated “in the course of war.”²² Thus, the drafters of the Charter recognized the legal issues raised by the ad hoc and uncharted nature of the Tribunal, and sought to at least minimize these challenges. Nevertheless, questions of the legal grounding of the Tribunal have remained to challenge Nuremberg’s legacy as an effective and legal system of justice. However, the alternative to this hastily assembled trial was no trial at all, and furthermore precedent must begin somewhere. Thanks to Nuremberg, Tribunals since have not faced the same criticisms due to the widespread acceptance of Nuremberg’s founding principles. Nevertheless, several key issues with Nuremberg, most notable the lack of any sort of appeal remain uncorrected.

A final serious criticism of the Nuremberg Trials is the complete lack of involvement of victims in the Trials. Karstedt stated that “there were no victims present, not even representatives who could speak on their behalf Consequently, the Nuremberg Trial was a trial that only gave voice to the perpetrators”²³ In addition to their absence, Ehrenfreund also noted a lack of emphasis on the victims, saying that “At all the Nuremberg Trials, the court’s attention was focused on the defendants and their punishment. No mention was made of help for the victims. No part of the sentencing process attempted to alleviate the suffering of the millions ravaged by Nazi cruelty.”²⁴ These silences, as well as decisions by the prosecution to pursue the charge of waging an aggressive war as the chief charge above crimes against humanity have not only given rise to challenges about Nuremberg’s value as a justice system that serves the victims of atrocities, but has also furthered allegations that the Trials were more about punishment

²² Kelly and McCormack, “Contributions of the Nuremberg Trial” in *Legacy of Nuremberg*, 107.

²³ Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 18.

²⁴ Ehrenfreund, *The Nuremberg Legacy*, 107.

than justice.²⁵ Therefore, the absence of victims from the trials was a negative aspect that has led historians to challenge elements of the Tribunal ever since. Ehrenfreund wrote that “Much would have been added to Nuremberg’s reputation for fairness and compassion if it had initiated a reparations program at the beginning and created a victims’ trust fund similar to the one established later by the International Criminal Court.”²⁶ Thus, despite this drawback, subsequent Tribunals have been careful to incorporate victim’s into proceedings in an effort to address some of the shortcomings of Nuremberg.

“Victor’s Justice” Strength or Weakness?

In addition to the problems of prosecution, which some have charged as being highly subjective, Nuremberg also faced a number of other problems and accusations of failure. Of all the numerous challenges raised against the Tribunal, the most serious and most frequently raised objection, is what can best be categorized as the charge of “victor’s justice.” Essentially, those that denounce the trial as “victor’s justice” note that the defendants were tried before a bench comprised of representatives of the victorious Allied Powers, that there were no such trials of the victorious allies, and that the Trial was little more than a show, intent on condemning the Nazis from the outset, and was not fair by even the most basic standards of judicial systems. As Norbert Ehrenfreund noted in *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History*, “Every judge on the Nuremberg bench represented a victorious Allied power.

²⁵ Ehrenfreund, *The Nuremberg Legacy*, 123.

²⁶ Ehrenfreund, *The Nuremberg Legacy*, 110.

No neutral country was represented, nor was any request ever made for a judge from a neutral power. No German judge sat on the bench, nor was such an arrangement ever considered; there was no jury; neither the defendants nor their counsel had any say about the trial procedure; it was not a trial by one's peers. No Allies were on trial on charges of war crimes. Only the losers were tried."²⁷ Here, Ehrenfreund lays out the slew of charges that those who support the idea of "victor's justice" (meaning a show trial used to discredit the Tribunal). These charges have remained serious challenges to the Nuremberg legacy.

As Michael J. Kelly and Timothy L.H. McCormack noted, these allegations have become extremely common, and have significant negative ramifications for how the trial is viewed. They state that,

The persistent allegation of 'victor's justice' is so entrenched that it has produced a simplistic view that war crimes trials are only ever selectively imposed on the losing side. It is true that both the Nuremberg and Tokyo Tribunals were established by the winning side in World War II and imposed on the vanquished. There was never any suggestion that Allied nationals would be subject to the same Tribunals, the same subject-matter jurisdiction, or the same procedure as defeated German and Japanese defendants.²⁸

One of the most significant criticisms of the Tribunal is the idea that Nuremberg was a sort of "institutionalized vengeance," rather than true justice, and thus was not about achieving justice for victims, but was about blaming the Nazis for all the destruction that had taken place. These allegations strike at the very heart of questions surrounding justice by arguing that a trial imposed in such a manner cannot be fair by the most basic accepted standards of justice, and have, even today, served to discredit the Nuremberg trial as a travesty of justice.

²⁷ Ehrenfreund, *The Nuremberg Legacy*, 46.

²⁸ Kelly and McCormack, "Contributions of the Nuremberg Trial" in *Legacy of Nuremberg*, 102.

Despite the heavy criticism of the trials in this regard, a whole host of new literature has come forward (much of it from a new school of legal scholars, but also from several historians) arguing that the so called victor's justice was not only fair and achieved justice, but was actually beneficial to the judicial process. While Kelly and McCormack summarized the criticism of victor's justice, they also went on to denounce many of its allegations, stating

'Victors justice' is often used as a disparaging label to characterize a lack of Allied willingness to hold their own nationals criminally accountable. That characterization is fallacious. Allied nations did undertake disciplinary proceedings against their own servicemen and women for alleged violations of the law of war. The US, for example, tried hundreds of its own personnel, including for violations of the law committed against the civilian populations of various areas they occupied. Many of those US nationals convicted of violations were awarded severe sentences and a significant number were sentenced to death and subsequently executed."²⁹

This viewpoint suggests that the Allies did hold a minimum standard of conduct for their troops, while noting that Allied leadership was never expected to be tried by the same set of standards Nazi officials were. However, it is essential to understand that while Allied commanders may have targeted civilian centers in their bombing campaigns and caused the deaths of millions of people themselves, the historical record does not even suggest that the goal of Allied leaders was as heinous or diabolical as the extermination of entire populations. Thus, perhaps it is fitting that Nazi leaders responsible for the "final solution" were subject to a Tribunal such as Nuremberg, while their Allied counterparts were not.

Furthermore, there are those who argue that victor's justice (in reference to the idea that the victorious powers executed the Trials) was a strength of the Tribunal, given the state or post-war Germany. It is difficult, if not impossible, to imagine the Nazi

²⁹ Kelly and McCormack, "Contributions of the Nuremberg Trial" in *Legacy of Nuremberg*, 102.

leadership being tried by anything but the victorious powers, given the ravaged state of war-torn Germany. What little was left of Germany's leadership and justice system that had remained after the war had been removed by denazification, and it is difficult to come up with an alternative to the Tribunal that would have given the defendants as fair a trial as they received. As Norbert Ehrenfreund stated, "Yes, [the Trial] *was* victors' justice and the trial had its share of injustice. But the only alternative was no trial at all, or either setting the Nazis free or executing them summarily without giving them a chance to defend themselves."³⁰ In this regard, victor's justice is a powerful strength, as it allowed justice to be served in an era and place where it otherwise would likely have been a travesty.

While international involvement and oversight allowed the Trials to take place in as fair an atmosphere as possible, it also exposed the Trials, and the defendants, to international politics and pressures. The Trials themselves were in many ways a compromise between the Russians, who favored a harsher form of justice, and the other Allies. As the Cold War began to dominate international politics, occupied Germany became the center of contention, where East met West, and many of the early releases of convicted Nazi officials in the 1950s were a result of this atmosphere. This was arguably a downside of international involvement, as systems of justice face great difficulty in fairly prosecuting individuals on the basis of evidence when they become too involved with politics of any kind.

Despite this problem with Allied involvement, there is evidence that the German people also felt that the victor's justice brought down at Nuremberg was fair. In her

³⁰ Ehrenfreund, *The Nuremberg Legacy*, 49.

analysis of polling and other public opinion work in post-war Germany in relation to the Tribunal, Susanne Karstedt analyzed the question “Was the IMT Seen as Victor’s Justice?,” and concluded that yes it was, but that “The German public obviously found ‘victors’ justice’ just and fair, and supported the way it was done as well as the final outcome.”³¹ Nuremberg may have been a system arbitrarily imposed on the Nazi leadership, but it was by far the closest to a real operating judicial system the Nazi leadership were going to get at that time, and it seems that far from resenting it, the German people looked upon the proceedings in a favorable light. Additionally, despite the many criticisms and problems that faced the Tribunal, “the judgment of historians from both sides was that the trial was basically fair.”³² While many have focused on the shortcomings of the Tribunal, the general consensus is that while it was imperfect, it was a fair trial.

Scholars made a number of arguments that both support and oppose the idea of victor’s justice being employed at the Nuremberg Trials. In short, the trials were victor’s justice in the sense that the Tribunal was set up, run, and ultimately decided by the victorious Allied powers. The setup and function of the trial has been an issue of contention ever since, as some regard it as a failure of justice due to the governing role of the Allied powers, particularly on the bench. However, claims that “victor’s justice” was a form of institutional vengeance that superseded true justice and was some sort of mock trial whose decision was set from the beginning, as well as claims that the Allies systematically ignored similar violations on their own side have little basis in historical fact. Why, if the outcome was predetermined were defendants such as Hans Fritzsche,

³¹ Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 19.

³² Ehrenfreund, *The Nuremberg Legacy*, 48.

who was a key propaganda and media figure and Franz von Papen, the former German Chancellor acquitted? Furthermore, “victor’s justice” undoubtedly had its advantages, most notably its provision of a timely and effective judicial system in a ravaged country that, in all likelihood, would not have been able to conduct such a comprehensive set of trials on its own without such international oversight. Thus, victor’s justice is perhaps best viewed as a double-edged sword, it had both its strengths and its weaknesses in achieving justice.

Conclusion

The International Military Tribunal at Nuremberg was a groundbreaking experiment that held criminals responsible to the international community for their heinous crimes. The Trials significantly broke down the barrier of state sovereignty to prosecuting national leaders for crimes committed under their watch. The Trials had a number of strengths, which included clearly and swiftly bringing those responsible to justice, as well as establishing an irrefutable historical record and wealth of documentation of the Nazis atrocities. Finally, Nuremberg also fostered some basic reconciliation among Germans and their victims by forcing Germans to acknowledge the heinous crimes they had perpetrated. However, like any system of justice, Nuremberg was imperfect and not without its flaws. The most serious of these were legal issues that violated standards of law, and tarnished Nuremberg’s legacy, the complete absence of victims’ from the trial, as well as an apparent lack of focus on the victims by the prosecution, and finally, the problem that only the highest ranking and most heinous

perpetrators could be tried. Finally, “Victor’s Justice” ensured the fairest possible trial for the defendants, it also brought in allegations of “institutionalized vengeance.”

While later Tribunals have significantly improved the Nuremberg model of retributive justice by including victims and not being subject to the same uncertain legal grounding, the basic strengths and weaknesses of this model have remained largely unchanged. It is also necessary to understand more than just the strengths and weaknesses of this model, as the long-term effects that it has are also important. By putting the leadership of the Nazi regime on trial, Nuremberg successfully put on trial (at least in spirit) the entire Nazi regime, and effectively served to discredit it as a government.³³ As a result of the Nuremberg trials, and the truths uncovered during them, Nazism as a legitimate system of government has been completely discredited, along with policies that they employed in numerous fields of governance. While Nazis continue to exist, they remain few in number and ostracized from mainstream society. The implications of Nuremberg style retributive justice, while only actually trying a few individuals, implicated an entire system of government, which remains discredited.

While the focus and intent of the Trials was to punish offenders following the retributive model, it also engaged in amnesties and reparations, a provision usually associated with the restorative model of justice. As Karstedt reflected, “It is an often neglected and perhaps unduly censored fact that amnesties were an integral, though unplanned part of the model, and quite sweeping amnesties already started during the occupation.”³⁴ Many saw this as betraying the very principles that had inspired the Tribunal in the first place, and a travesty of justice. For example, Norbert Ehrenfreund

³³ Conot, *Justice At Nuremberg*, [Requiem for the Reich] 507-522.

³⁴ Karstedt, “The Nuremberg Tribunal and German Society” in *Legacy of Nuremberg*, 26.

stated that the early release of Alfred Krupp, one of the worst war criminals who used forced labor to supply Hitler's Third Reich with military arms as staining "Nuremberg's reputation as the great promise of justice."³⁵ Although Nuremberg promised to bring those responsible for the atrocities of the Second World War to justice, gave amnesty to many, and released many other criminals long before their sentences were complete. This amnesty may have furthered reconciliation and forward progress, but to many, it was a betrayal of the principles of Nuremberg and a travesty of justice.

THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

Introduction

In sharp contrast with the Nuremberg Trials, the South African Truth and Reconciliation Commission's main goal was not to punish with imprisonment or death the violators of human rights, and as a result the leaders of the new South Africa employed a restorative, rather than retributive system of justice. Restorative justice, loosely defined is a system of justice that seeks to return the situation to the way it was before the violation occurred, using public hearings. As Elazar Barkan notes, restorative justice "includes reparation, restitution of property, restitution of cultural property, historical commissions and apologies as a form of atonement."³⁶ Perhaps the best explanation of what the new South Africa and the Truth Commission were about came from Nelson Mandela, who as President heavily influenced both. In his autobiography

³⁵ Ehrenfreund, *The Nuremberg Legacy*, 25.

³⁶ Elazar Barkan, "Historical Reconciliation: Redress, Rights, and Politics," *Journal of International Affairs*, Fall/Winter (2006): 3.

Mandela states “From the moment the results were in and it was apparent that the ANC was to form the government, I saw my mission as one of reaching reconciliation, of binding the wounds of the country, of engendering trust and confidence . . . I said all South Africans must now unite and join hands and say we are one country, one nation, one people, marching together into the future.”³⁷ Evidence of similar ideology is evident in The Constitution of the Republic of South Africa, which states “Every person shall have the right to equality before the law and to equal protection of the law” among numerous other rights that attempt to directly counter the law of Apartheid South Africa, by including every South African as an equal member in a new society.^{38,39}

The most important goal for South Africa was to form a unified country out of two groups of people that were, to say the least, distrustful of each other.⁴⁰ Any attempt to severely punish perpetrators of the terrible atrocities that had plagued the nation for the past half century would likely have been counterproductive to this primary goal of reconciliation, and would have served only to encourage the negative feelings that black and white South Africans had toward each other (even though South Africa cannot be considered a clear-cut post-war scenario with clear winners and losers). The Truth Commission, could, and did establish blame for the events that had occurred, however saying that the Apartheid government was solely responsible for all of the atrocities would likely only have served to vindicate victims and relatives, and reinforce the view among many of white South Africans as oppressors, making reconciliation less likely. It

³⁷ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela*. (New York: Little, Brown and Company. 1994), 619-620.

³⁸ John A. Williams, *From the South African Past: Narratives, Documents, and Debates*, (New York: Houghton Mifflin Company, 1997), 393.

³⁹ “Constitution of the Republic of South Africa, 1996,” Government of South Africa, July 21, 2009, accessed May 20, 2011, <http://www.info.gov.za/documents/constitution/>.

⁴⁰ Mandela, *Long Walk to Freedom*, 619-620.

may be that the system of Apartheid in South Africa instigated the violence, but it is equally clear that both sides used violence, which often harmed innocent people.⁴¹ While it is impossible to say with certainty what would have happened, it is clear that the Truth and Reconciliation Commission (TRC) recognized that at certain times, both the government and ANC (through Spear of the Nation) had been at fault, likely because of fears that merely placing all of the blame on one actor would be counterproductive to reconciliation.⁴²

Truth Commissions did not originate in South Africa, and had their origins in the 1980s in various countries transitioning from authoritarian style regimes to more open societies, with famous examples in South America including systems in Chile and Argentina. While Truth Commissions had been used numerous times prior to South Africa, the South African Truth and Reconciliation Commission has become the worlds foremost example of restorative justice, and is arguably the best developed example of the model. South Africa has also had the benefit of being by far the most high profile set of hearings, and has accordingly received enormous attention from scholars. Just as the Nuremberg model, the South African model is imperfect, and not without its faults, but likewise, it too had a number of strengths that made it an example worthy of further study as a post-conflict system of justice.

⁴¹ *Long Night's Journey Into Day*, directed by Deborah Hoffmann and Frances Reid, (Reid-Hoffman Productions, 2000), DVD.

⁴² *Long Night's Journey Into Day*, directed by Deborah Hoffmann and Frances Reid, 2000.

Strengths of the South African TRC

The first, and arguably greatest strength, of the South African Truth and Reconciliation Commission was its emphasis, focus, and detail on victims, their relatives, and victim's rights. Justice, in relation to any crime so horrible as those that occurred in South Africa, must as an absolute necessity focus on those who suffered the worst violations of fundamental human rights. In this respect, the TRC did an outstanding job, as it allowed everyday people to come forward and tell their stories. While it is true that many of the hearings, particularly the most well covered hearings, had to do with people in leadership positions, or involved with particularly heinous or well-known crimes, the vast majority of those that the TRC heard from were everyday people that had been caught up in the violence endemic in Apartheid South Africa.

For example, a review of the TRC Final Report lists tens of thousands of everyday people, and chronicles their suffering. "Mr. Makulana Phato [EC1819/97ETK] was held for five years, variously at Bizana, Mount Frere, Umtata and Butterworth. His family told the Commission they did not know whether or not he had stood trial. He was assaulted in custody, released, and died of head injuries a few months later."⁴³ The Volumes of the TRC's Final Report are filled with such chronicles of people who suffered torture, banishment, and even death in the conflict that tore through South Africa, and thus, a great strength of the TRC was its ability to involve, and even focus on everyday people and allow them to tell their stories.

Even more importantly for the victims, it became apparent that the commission served those who had suffered in ways beyond just reparations. Archbishop Desmond

⁴³ "Truth and Reconciliation Commission of South Africa Report," Volume 3, 44.

Tutu, one of the architects of the TRC, its leader, and a strong advocate of the restorative model stated in his book *No Future Without Forgiveness*, that “We found that many who came to the commission attested afterward to the fact that they had found relief, and experienced healing, just through the process of telling their story.”⁴⁴ Scholars of transitional justice have also reached a similar conclusion, as Amy Gutmann and Dennis Thompson in “The Moral Foundations of Truth Commissions” said “Another common defense of truth commissions adopts the perspective of the victims. Some proponents of this defense follow a therapeutic approach, pointing to the psychological benefits of offering public testimony and receiving public confirmation of injustice.”⁴⁵ For this reason, as well as the Commission’s focus on everyday people, one of the greatest strengths has to be the relief it brought to those people and relatives who were involved in the TRC hearings.

A final consideration of the benefits to victims were the sheer number of people, in many cases ordinary people, who were involved in TRC hearings or the reconciliation process in some other way, such as amnesty applications. Despite initial estimates that around 200 amnesty applications would be received, the TRC ultimately had more than 7,000 people apply for amnesty.⁴⁶ In addition to this, thousands of people came before the TRC in its hearings to give testimony, hundreds of people found out new information about the suffering and disappearances of their loved ones, and dozens of families were able to give the remains of their loved ones proper burials. It is difficult, if not

⁴⁴ Desmond Tutu, *No Future Without Forgiveness*, (New York: Random House, 1999), 165.

⁴⁵ Amy Gutmann and Dennis Thompson, “The Moral Foundations of Truth Commissions” in *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, New Jersey: Princeton University Press, 2000), 29.

⁴⁶ Elizabeth Kiss, “Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice” in *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, New Jersey: Princeton University Press, 2000), 77.

impossible to imagine that any other model of justice could directly involve so many victims and perpetrators. By contrast, “two large, high-profile postapartheid trials yielded only one conviction.”⁴⁷ The ability to touch the lives of thousands of people all across South Africa was undoubtedly a powerful strength of the TRC’s model of restorative justice.

A second major strength of the TRC was the establishment of an extremely in depth and detailed account of the conflict that raged in South Africa for four decades, and developed a historical record for future generations (much like Nuremberg did a half-century earlier). The Truth and Reconciliation Commission’s Final Report is just one of many chronicles that now exist and seek to examine and understand what really happened in South Africa from 1960 (and before) through 1994. Archbishop Tutu detailed the bombing of Khotso House, the “headquarters of the South African Council of Churches;” at the time, the bombing was blamed on the ANC. An amnesty application to the Truth and Reconciliation Commission ultimately exposed the truth, that the Apartheid government had secretly been responsible for the crime. Archbishop Tutu stated that “The world and South Africa would perhaps never have been the wiser about what actually happened to Khotso House had it not been for the Truth and Reconciliation Commission.”⁴⁸

Tutu was furthermore quoted by Antjie Krog as saying “I am thrilled by the new information that has come out in amnesty applications about the Pebco Three and Cradock Four- and especially Steve Biko. We’ve never got this information before and the country deserves to have it. This uncovering more or less justifies the existence of

⁴⁷ Kiss, “Moral Ambition Within and Beyond Political Constraints” in *Truth v Justice*, 77.

⁴⁸ Tutu, *No Future Without Forgiveness*, 178-179.

the commission.”⁴⁹ The hope of amnesty, and the threat that someone would find out about past crimes after the TRC had completed its work, when such forgiveness was no longer available, convinced many to come forward with new information that might otherwise never have been found, and ask forgiveness. These situations are an example of how the TRC was able to reveal many truths amid the mystery of many disappearances and events in Apartheid South Africa, and thus contributed greatly to the establishment of an accurate historical record.

A related strength of the TRC was its ability to not only establish a more accurate representation of what had happened in South Africa, but also to revise the way that many people viewed the atrocities committed under Apartheid. Archbishop Tutu, speaking again about the Khotso House bombing once again, said “Most of the white community, having been brainwashed by propaganda spewed forth by the government-controlled electronic media, swallowed [the government’s account of an ANC bombing] hook, line, and sinker. They simply added it to their tally of dastardly deeds of terrorism carried out by those savages who wanted to overthrow a Christian, God-fearing government....”⁵⁰ Prior to the TRC, the majority of white South Africans focused on the violations committed by the ANC in their bombing campaigns, while Africans had focused on the atrocities committed by the Apartheid government. The TRC, by calling before it for testimony violators from both sides made it more strikingly clear that both sides had committed gross violations, and in doing so arguably furthered its goal of reconciliation by forcing people to realize the horrible pain and suffering that had been caused by both sides.

⁴⁹ Antjie Krog, *Country Of My Skull: Guilt, Sorrow, And The Limits of Forgiveness In Then New South Africa*, (New York: Three Rivers Press, 1998), 207.

⁵⁰ Tutu, *No Future Without Forgiveness*, 179.

Weaknesses of the South African TRC

Despite the numerous strengths the TRC exhibited, it was not without its faults, and struggled in several aspects of its mission, as well as received major criticism. Without any doubt, the largest criticism of the TRC was the amnesty process, which resulted in perpetrators of severe crimes being allowed to walk free, while their victims and their families would never be the same. Elizabeth Kiss wrote that, “If truth commissions have a moral Achilles’ hell, it is the issue of amnesty.”⁵¹ As the newspaper *The Sowetan* wrote ““Reconciliation that is not based on justice can never work”” and it was noted by Amy Gutmann and Dennis Thompson that “The paper was expressing not only a widely shared doubt about this particular commission, but also the most commonly voiced objection to truth commissions in general.”⁵² Gutmann and Thompson went on to voice the largest criticism of the TRC, that it was not a legitimate form of justice at all. They stated “Justice is not achieved when a murderer or rapist publicly acknowledges his crimes but is not brought to trial and suffers no further punishment.”⁵³ These charges strike at the very heart of the TRC’s mission, setup, and conduct, and threaten it as a system of justice in itself.

However, while the focus of the TRC was on amnesty, and many people previously convicted, or who had come forward with applications confessing their crimes were granted amnesty, some were not. Blanket amnesty was rejected by the ANC and

⁵¹ Kiss, “Moral Ambition Within and Beyond Political Constraints” in *Truth v Justice*, 74.

⁵² Gutmann and Thompson, “The Moral Foundations of Truth Commissions” in *Truth v. Justice*, 22.

⁵³ Gutmann and Thompson, “The Moral Foundations of Truth Commissions” in *Truth v. Justice*, 25.

TRC, and many who were not awarded amnesty faced prison time, and a more punishing model of justice that would usually be associated with the retributive model. Perhaps the best example of such punishment is the case of Eugene de Kock. De Kock, dubbed “Prime Evil” by the South African and international media, was a commander in the South African Police, attached to a special unit whose mission it was to seek out and destroy anti-Apartheid forces. De Kock committed some of the most heinous crimes carried out by the Apartheid government directly, and through the men under his direct command. For his involvement in these crimes de Kock was awarded 212 years in prison after being convicted in a criminal court on 89 charges, including multiple murder charges.⁵⁴ De Kock was not awarded amnesty, and remains in prison for his crimes.⁵⁵ De Kock is an example that despite the focus on forgiveness, amnesty, and reconciliation, justice in post-Apartheid South Africa was not without a more retributive side.

There were also a number of difficulties that plagued the TRC that went beyond criticism of the amnesty policy. The first of these problems had to do with the difficulty the Commission faced in uncovering documents, evidence, and witness testimony from events which dated back nearly forty years. Furthermore, the lengths that the ANC, and especially the Apartheid government had gone to ensure absolute secrecy about their actions compounded this difficulty. Pumla Gobodo-Madikizela noted that “investigators in the post-apartheid era discovered, to their dismay, that the government’s trail of blood ended right where the atrocities had been committed. It did not lead to the corridors of

⁵⁴ “De Kock Trial To Conclude On Wednesday”, *South African Press Association*, October 29, 1996, accessed May 16, 2012, <http://www.justice.gov.za/trc/media/1996/9610/s961029m.htm>.

⁵⁵ “Eugene do Kock seeks forgiveness”, *South African Press Association*, January 24, 2012, accessed May 16, 2012, <http://www.news24.com/SouthAfrica/News/Eugene-de-Kock-seeks-forgiveness-20120124>.

power.”⁵⁶ Eugene de Kock, for example, implicated his superiors numerous times during TRC hearings, and afterward, and although many people applied for amnesty as a result of his statements, many of the highest ranking individuals in the Apartheid regime, whose policies had directly led to these atrocities, and who may have approved them, were not brought to justice in any form, restorative or otherwise.

Nothing highlights this problem better than the case of P.W. Botha, the former President of South Africa, who presided during some of the darkest, and most violent days of Apartheid in the 1980s. Botha repeatedly ignored subpoenas from the TRC, and the TRC eventually had to bring him to court on criminal charges of ignoring the TRC’s summons. When he finally had to appear in a court of law, Antjie Krog wrote “We don’t expect him to tell the truth”.⁵⁷ While the TRC had finally forced Botha into a court of law to ask him questions, they could not force him to apply for amnesty, nor could they uncover any documents or evidence that made him complicit in the terrible crimes perpetrated by his government. Despite the best intentions and efforts on behalf of the TRC, the Apartheid regime had been incredibly effective in its secrecy, and left little evidence of its many crimes. As a result of this, “the TRC’s encounters with the highest-ranking leaders of apartheid, former prime ministers/presidents Pieter W. Botha and Frederik W. de Klerk, were frustratingly inconclusive.”⁵⁸ The absence of evidence implicating many Apartheid leaders, not only gave them an incentive to not apply for amnesty, but also allowed them to completely escape from any system of justice, restorative or retributive.

⁵⁶ Pumla Gobodo-Madikizela, *A Human Being Died That Night: A South African Woman Confronts the Legacy of Apartheid*, (New York: Houghton Mifflin Company, 2003), 64.

⁵⁷ Krog, *Country Of My Skull*, 350.

⁵⁸ Kiss, “Moral Ambition Within and Beyond Political Constraints” in *Truth v Justice*, 77.

Unfortunately, this problem, extends beyond the ANC leadership. While it was previously noted that a strength of the model was its ability to include thousands of people, they were still only a minute fraction of the overall population. Major sections of South African society, most notably, white South African society, were not drawn into the TRC, even as spectators. Archbishop Tutu stated “For me, one of the greatest weaknesses in the commission was the fact that we failed to attract the bulk of the white community to participate enthusiastically in the process.”⁵⁹ When so many white South Africans failed categorically to participate, or even give credence to the TRC in some cases, the result was an undermining of the Commission and its mission of fostering reconciliation.

Another problem that plagued the TRC was the problems of reparations that were promised, but were plagued by delays in their delivery. While at first this may seem like a minor problem, it was potentially very damaging in its consequences, as it threatened to take away legitimacy of the TRC system, by allowing perpetrators to walk away, while victims got nothing. As Antjie Krog stated, “The Reparation and Rehabilitation Committee could make or break the Truth Commission. It will help little if the transgressors walk away with amnesty, but the victims, who bear the appalling costs of human rights abuses, experience no restitution. No gesture of recognition or compensation.”⁶⁰⁶¹ Immediately, reparations became a problem. Who qualified as victims, relatives of victims, how distant? How much should compensation be? How much could the government afford?

⁵⁹ Tutu, *No Future Without Forgiveness*, 231.

⁶⁰ Krog, *Country Of My Skull*, 218.

⁶¹ “Policy Framework For Urgent Interim Reparation Measures”, Government of South Africa, September 14, 1996, accessed May 16, 2012, <http://www.justice.gov.za/trc/reparations/policy.htm - issues>.

To make matters worse, a firestorm of misinformation about reparations occurred in the media. In its final media conference, Commissioners state, “‘We have failed the victims’ ... ‘Our biggest regret is that we failed the victims—here we are, three years down the line, and the victims still don’t have anything.’ They recommend that future commissions ensure that they have the powers and the means to implement some form of reparation swiftly and without government involvement or possible sanction to impede the process.”⁶² Reparations were an incredibly problematic issue for the Commission, and the drawn out process involved after their promise was a disservice to victims, and undermined the effectiveness of the TRC.

Another, extremely serious problem, was that the TRC was the product of, and subject to the political atmosphere in South Africa. However, this aspect of the TRC was not all bad, as Robert J. Rotberg noted in “Truth Commissions and the Provision of Truth, Justice, and Reconciliation” stated that “The TRC grew out of an elaborate political compromise that rejected the outgoing regime’s demand for blanket amnesty and no retribution in exchange for a mechanism (the TRC) that could grant amnesty for political acts.”⁶³ The transfer of power between the Apartheid government and the new ANC government led to a compromise that was agreeable to both sides, and allowed the TRC to complete its important work, while at the same time refusing to simply let all perpetrators go free.

However, as the Commissions work progressed, it became apparent quickly that there would be a political clash between the current ANC government and the TRC over

⁶² Krog, *Country Of My Skull*, 373.

⁶³ Robert J. Rotberg, “Truth Commissions and the Provision of Truth, Justice, and Reconciliation” *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, New Jersey: Princeton University Press, 2000), 5.

the investigations into ANC sponsored violations. There is no question that there were those who suffered horrendously at the hands of the ANC in their attempt to destroy Apartheid. As Archbishop Tutu stated “In the 1980s the ANC embarked on a bombing campaign against targets it claimed were connected to security force personnel, targets such as police stations or military installations. Contrary to the ANC’s declared intentions, however, most of those who were killed in such explosions were in fact civilians and not security force personnel.”⁶⁴ The ANC had clearly been responsible for violations in its battle against Apartheid, and in order to ensure that justice was fair, and to protect the legitimacy of the TRC as being fair, Archbishop Tutu and his Commission had to hear from people who had suffered at the hands of the ANC, as well as seek the truth from the ANC leadership.

This necessity on the part of the TRC unfortunately led to conflict between the Commission and the South African government. While the ANC endorsed the TRC, and showed its support by, among other things, filing many amnesty applications themselves and giving testimony to the Commission, the ANC became increasingly concerned, and arguably even opposed to the TRC’s conclusions on ANC induced atrocities. In fact, the ANC tried to block TRC’s release of its final report over concerns about “the findings on the ANC.”⁶⁵ Despite the best intentions of the ANC, and its commitment and support of the TRC, the Commission was undoubtedly a product of politics in South Africa, and despite its relative independence, it was nevertheless subject to political pressures within South Africa. For example, the official platform of the ANC, put forward by Thabo Mbeki, was that “whatever went wrong was in the context of a just war against a racist

⁶⁴ Tutu, *No Future Without Forgiveness*, 153.

⁶⁵ Krog, *Country Of My Skull*, 368.

dispensation and should be treated as such. On the basis of the Geneva conventions and protocols, the ANC rejected the finding of the TRC that it was guilty of gross violations of human rights.”⁶⁶

Furthermore, it was made known during the Commission’s hearings that, due to the attempts by the ANC to form a working alliance with the Inkatha Freedom Party (IFP) that “criticism by the TRC” of the IFP was “unwelcome”.⁶⁷ It is hard to judge how much actual effect this knowledge had on the TRC, however, it is clear that the more involved in politics a system of justice is, the more vulnerable it is to outside influence that threatens the fairness of the judicial process. The TRC, unfortunately, despite its independence, was tied into politics with its involvement in questioning political parties (although it is impossible to completely remove politics from any system of justice).

Another criticism of the TRC was the time constraints on amnesty applications. The TRC, under its mandate, was charged with examining allegations of violations that had occurred between 1960 and 1994. While these dates were not arbitrary, but coincided with the Sharpeville Massacre and the end of Apartheid rule, respectively, they had the effect of excluding many serious violations from the Commission’s mandate. Apartheid had been the official policy of South Africa since the National Party took office in 1948, Africans had suffered tremendously long before that, with such events as the Native Land Act of 1913 having huge negative repercussions for Africans. Did the Africans who suffered under these time periods, not count, did they not suffer equally as those who were falsely imprisoned after 1960? While it was necessary to set some date for the Commission’s starting point (as it was unrealistic for the Commission to examine

⁶⁶ Krog, *Country Of My Skull*, 381.

⁶⁷ Krog, *Country Of My Skull*, 374.

violations dating back to 1652, or even the 19th Century for that matter), it was nevertheless a weakness of the model of justice that dates simply excluded some people from the TRC, and thus also excluded from any positive healing, reconciliation or truths that were found during the process.

Did the TRC Deliver On Its Promise of Reconciliation?

One of the most fundamental questions that has been hotly debated about the South African Truth and Reconciliation Commission is, whether the TRC delivered on its promise of reconciliation between Africans and Afrikaners. This question is essential because one of the primary justifications for granting gross violators of human rights amnesty was that it was more important to foster reconciliation and healing among two distinct groups that had to live together and function effectively in a single nation. If the TRC did not achieve reconciliation, then this moral justification nullifies the model. The answer to this question, as Antjie Krog wrote, “is both simple and complex.”⁶⁸ The records of TRC hearings, as well as numerous secondary writings and documentaries attest to reconciliation as subjective. In essence, this means that the TRC found that there were many people ready and willing to find closure, acceptance, and move forward, while many more simply could not bring themselves to forgive, or reconcile with those who had been responsible for terrible atrocities.

There were many people involved with the TRC hearings and procedures who were willing, and in fact wanted to sit down with the people who had taken their loved ones from them. Archbishop Tutu wrote of people’s “unprecedented magnanimity in

⁶⁸ Krog, *Country Of My Skull*, 384.

their willingness to forgive those who had tormented them so,” and even quoted a victim as saying “‘We do want to forgive but we don’t know whom to forgive.’”⁶⁹ Pumla Gobodo-Madikizela likewise chronicled an amazing story of forgiveness and reconciliation between Eugene De Kock and the widow of a man he had killed, Mrs. Faku, who said “‘I could hear him, but was overwhelmed by emotion, and I was just nodding, as a way of saying yes, I forgive you. I hope that when he sees our tears he knows that they are not only tears for our husbands, but tears for him as well.... I would like to hold him by the hand, and show him that there is a future, and that he can still change.’”⁷⁰ Likewise, the documentary about the TRC, *Long Night’s Journey Into Day* found evidence that forgiveness and reconciliation was possible and could be advanced by TRC hearings, amnesty applications, and the truth. The parents of Amy Biehl for example did not oppose amnesty for their daughter’s murderers, and even met with their mother in a gesture of forgiveness and reconciliation.⁷¹ There is no doubt that for many individuals caught up in the violence of Apartheid South Africa, the TRC fulfilled its promise to break down the hate, mistrust, and misinformation that had divided white and black South Africans.

However, for many other people, the TRC was a much more frustrating exercise, as they failed to forgive those who had torn their lives apart, and reconciliation failed. Pumla Gobodo-Madikizela said simply that “Not all the victims who appeared before South Africa’s Truth and Reconciliation Commission were willing or able to forgive those who had so deeply violated their integrity.”⁷² Gobodo-Madikizela recalled the

⁶⁹ Tutu, *No Future Without Forgiveness*, 144-149.

⁷⁰ Gobodo-Madikizela, *A Human Being Died That Night*, 14-15.

⁷¹ *Long Night’s Journey Into Day*, directed by Deborah Hoffmann and Frances Reid, 2000.

⁷² Gobodo-Madikizela, *A Human Being Died That Night*, 125.

story of a Mrs. Plaatjie whose son was killed by the police, and said that “‘The TRC is a pointless exercise,’ she said. She had forgotten her pain, she told me, and had ‘put grass over the past,’ ‘And now you want me to remember? Is this going to bring back my son?’”⁷³ As further evidence, the documentary *Long Night’s Journey Into Day* cites the widow of one of the Cradock 4 as saying that she cannot forgive the men who lit her husband’s remains on fire, and opposed amnesty for her husband’s murderer.⁷⁴ There is no doubt that the acts committed in the battle to preserve, and destroy Apartheid, were for many relatives and victims, so heinous, that they could never forgive what had happened.

The effectiveness of the TRC at fostering reconciliation and building a more unified nation at the individual level was highly varied, and dependent on the individual person who had to forgive, or ask for forgiveness for their actions. While this is an essential and important understanding in order to comprehend the limits of the TRC and the restorative model, it is also necessary to take a wider look at the views of South African’s towards the TRC. In their article “Effectiveness of South Africa’s Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans,” Jay A. Vora and Erika Vora use survey data to evaluate how effective everyday South Africans thought the TRC was at fulfilling its mission. In response to the question “Is the TRC Effective in Bringing Out the Truth?,” “All participants perceived the TRC to be effective in bringing out the truth, however, in varying degrees. The Afrikaners perceived the TRC to be less effective in bringing out the truth than the

⁷³ Gobodo-Madikizela, *A Human Being Died That Night*, 87-88.

⁷⁴ *Long Night’s Journey Into Day*, directed by Deborah Hoffmann and Frances Reid, 2000.

English participants... and much less effective than did the Xhosa....”⁷⁵ This indicates that while South Africans overall believed the TRC achieved its mission of finding the Truth, there were significant differences between different ethnic populations.

Even more importantly, in response to the question “Is the TRC effective in Bringing About Reconciliation?” there was also a major discrepancy, this time, more clearly split along racial lines. Overall, the Xhosa (who represented one of the African groups interviewed) found the TRC far more effective at achieving its primary goal of reconciliation than white South Africans regardless of whether they identified as Afrikaners or English. The respondents also offered statements in support of their position, with one Afrikaner saying “[The TRC] seems to be prolonging the reconciliation process rather than actually contributing to it.”⁷⁶ The effectiveness of reconciliation, arguably the TRC’s most important goal, was viewed as a success by many Africans, but as a failure by many Afrikaners, showing that there were widely different views on the TRC between the black and white communities in South Africa.

These differences are important to understand because they touch the heart of the TRC’s mission, the problem that different ethnic and racial groups the TRC was meant to reconcile had divergent views on its effectiveness is an indication of a setback within the TRC. Nevertheless, this survey evidence suggests that a large majority of South Africans’ thought the TRC was effective at uncovering the truth about atrocities under Apartheid, and a large portion of the population also believed the TRC to be at least relatively effective at fostering some level of reconciliation. The individual examples

⁷⁵ Erika Vora and Jay A. Vora, “The Effectiveness of South Africa’s Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans,” *Journal of Black Studies*, 34-3, 2004, 308-309.

⁷⁶ Vora and Vora, “The Effectiveness of South Africa’s Truth and Reconciliation Commission,” *Journal of Black Studies*, 310-311.

from TRC testimony also indicate that to a tremendous degree, reconciliation was dependent on individual people, and that both Africans and Afrikaners were able, and were not able, to reconcile with victims and their relatives. The TRC, overall, met with mixed results in its efforts to foster reconciliation, as there were amazing moments of forgiveness and acceptance that occurred at the TRC, while at the same time, there were many examples of people who found that they simply could not forgive those who had done such terrible things to their relatives.

Conclusion

The South African Truth and Reconciliation Commission, was, like any justice system imperfect, and suffered from a number of wide ranging difficulties that challenged not only its effectiveness, but its legitimacy as well. These challenges included criticism of the start and finish dates of the Commission, the influence of domestic politics in South Africa, problems with calling witnesses, uncovering documents, and moral and ethical attacks by victims, the media, and scholars in relation to the contentious issue of amnesty. Despite these challenges, the TRC also had a number of strengths as a system of justice that allowed and furthered reconciliation and forward progress among South Africans. These strengths included the number of people who were involved in the process, the cases in which the Commission was successful in finding the truth for victim's relatives, and most importantly, its tremendous focus on victims overall.

While there is significant debate about the merits and drawbacks of this system among the academic and historical community, there is at least a minimal level of consensus that the TRC was effective at its mission to uncover the truth about Apartheid South Africa, and establish an accurate historical record. Unfortunately, the effectiveness of the TRC's mission of reconciliation remains uncertain at the present time, with academics divided on whether the exercise was beneficial or not. There is evidence, from survey data, interviews with individuals, as well as theoretical concepts and academic writings that support the idea that the TRC was successful in reconciling these various ethnic groups, as well as evidence to support the idea that the TRC let criminals walk free without any benefit of reconciliation to South Africa. Ultimately, the intense emotions that people carried with them about Apartheid helped to determine to what extent people saw the TRC as a success.

COMPARING THE TWO MODELS

Introduction

Having spent the last two chapters establishing the different historical contexts which the Nuremberg Tribunals and South African Truth and Reconciliation Commission respectively took place, as well as the strengths and weaknesses evident in these cases and systems, it is now time to examine the models comparatively, in order to gain insight into which system provides a better way forward in post-conflict situations. Using the strengths and weaknesses of each system, it becomes apparent that both models have their strengths as well as their weaknesses, and that these strengths and weaknesses are in

fact a direct result of the context that these justice systems grew out of, and the goals that they were designed to meet.

This essay will argue that each system is uniquely adapted to addressing different situations in which gross violations of human rights occur. However, it is essential to recognize that these systems are not mutually exclusive, and that restorative justice is often used with retributive justice. This essay will also examine the prospects, and problems of combining these models. To conclude, this essay will look forward, to the place of the retributive and restorative model in transitional justice in the future, and suggest a number of key considerations that can be used to help determine which model is best suited in what context.

A Comparison of Strengths and Weaknesses

The retributive Nuremberg model and the South African restorative model each have unique strengths and weaknesses. By comparing these strengths and weaknesses, a greater understanding of which system is more appropriate under certain circumstances. For example, both models are to a large extent subject to the politics of the political entities that they are created from. Evidence has shown that in South Africa, it was impossible to remove the TRC from domestic politics, just as the Nuremberg Trials were subject to the international politics between the Allied powers. Thus, one consideration that arises from this realization when implementing systems of justice, is that careful attention must be paid to understanding the various political atmospheres, in an attempt to ensure that the judiciary is as independent as possible.

In some cases, it is likely unfeasible for domestically set-up (meaning how negotiations between opposed groups such as winner and loser, etc. are conducted) and run institutions to achieve a fair atmosphere. At the same time the Cold War and the international politics associated with it is routinely cited as a reason why Nuremberg overwhelmingly failed to deliver on its legacy for the first half-century after 1946.⁷⁷ Despite the best efforts to remove politics and establish an independent transitional judiciary, it is a clear weakness of both systems that political governing bodies, on any level, remain heavily involved in the justice process, and careful planning and consideration must be made in an attempt to minimize this potentially clouding influence.

While the influence of politics is an issue that affects both systems, this essay will argue that many of the weaknesses of each individual system can be alleviated, either partially or completely, by using a combined system that endorses both retributive Nuremberg style justice, as well as South African style restorative justice. At first, this concept may seem foreign and impractical, however, it is important to remember, as was noted previously, that both the Nuremberg Trials and the South African TRC contained elements of restorative as well as retributive justice. However, in both cases the emphasis was on one or the other, meaning that the Nuremberg Trials focused much more on retributive justice, and much less on restorative justice, and vice versa in South Africa. A system of justice that employs a more equal split has the potential to significantly reduce the weaknesses of each individual system, and reinforce some of their most important strengths.

For example, one of the strengths inherent in the Nuremberg model was its ability to swiftly and effectively bring Nazi leadership and the perpetrators of the “Final

⁷⁷ Conot, *Justice at Nuremberg*, 516-517.

Solution” to justice. However, one of the greatest drawbacks of this system, which depends on individual criminal responsibility, was its inability to prosecute virtually anyone involved with the Holocaust below the top tier. Thousands of people, who were essential to the implementation of the “Final Solution” through guarding deportation trains or concentration camps, never faced any repercussions for their part in the atrocities. Meanwhile, the South Africa TRC brought thousands of people before it through its amnesty application procedure, and many more to give testimony about their actions, however failed repeatedly to reach or properly address those in the highest levels of government in the Apartheid regime, those who were actually responsible for implementing policy that resulted in the torture, false imprisonment, and death of so many.

A more combined approach, incorporating both models on a more equal basis, has the potential to alleviate these problems. A Nuremberg style Tribunal has the ability to aggressively pursue those most responsible for the atrocities, and some form of a Truth and Reconciliation Commission has the ability to pursue at least a basic level of accountability for individuals below the top-tier of officials, who would otherwise have to be almost completely ignored out of basic practical necessity, due to the rigors and costs of establishing individual criminal responsibility. Thus, an examination of the strengths and weaknesses of each system of justice lends itself to the idea that some of the most important strengths of each system can be realized, while the individual weaknesses of each system of can be minimized by such a blending of the retributive and restorative models.

Furthermore, there are many more ways in which the systems stand to become more effective through combination that go well beyond merely involving people that otherwise would not have been. Including reconciliation with retribution can lessen the allegations and belief that the Trials were merely “Victor’s Justice” while still punishing individuals. Likewise, the reverse criticism of the TRC, that it was too lenient and gave perpetrators of heinous acts amnesty, can be diminished by the prosecution in the retributive model of the most serious offenders. Additionally, the problems endemic in the TRC with finding evidence and subpoenaing witnesses can be alleviated by a powerful Nuremberg style court (international or otherwise) that can truly threaten those that ignore its warrants and calls with prison sentences. These are just a few examples of a long list of strengths that can be gained from combining the Nuremberg model of retributive justice with the South African model of restorative justice. Overall, many of the faults of each individual system can be, at the very least, marginalized by such a combination, while using a combined model can emphasize the strengths of each system, and potentially lead to a more meaningful system of justice for the victims, and when necessary, for reconciliation.

A host of scholars have also come forward describing the importance, and effectiveness of mixed Tribunals which invoke the practices of both Nuremberg and South Africa. Madelaine Chiam in her article “Different Models of Tribunals” noted that “Many of the judicial models adopted, whether international, mixed or national, have been used in conjunction with other transitional justice mechanisms, most often truth commissions.”⁷⁸ There is no question that retributive mechanisms have been used with their restorative counterparts in transitional justice settings. More importantly, Graham

⁷⁸ Chiam, “Different Models of Tribunals” in *Legacy of Nuremberg*, 227.

T. Blewitt, after arguing for “The Importance of a Retributive Approach to Justice” (the title of his article) concluded, “I do not find the retributive approach to violations of international humanitarian law incompatible with a restorative approach to justice but rather complementary to it.”⁷⁹ Blewitt’s conclusion is essentially that systems of justice can actually be strengthened by the addition of restorative mechanisms to retributive models, which he views as the necessary foundation of the justice system. While the idea is relatively new, and admittedly somewhat counter-intuitive, there is evidence to suggest that not only can truth commissions and tribunals work side-by-side, but that combining them can actually improve the justice system, to better establish goals.

However, combining the models is not without its drawbacks. The most glaring, and arguably most serious issue that immediately becomes apparent when discussing combining the retributive and restorative system, is who qualifies for amnesty, and who gets prosecuted and sent to prison. While it is probable that the leadership, those responsible for formulating the policy, and advocating for the criminal acts can be probable, what about lower level ranks of perpetrators? If those who have the least responsibility for the atrocities are going to receive amnesty, or at least have the potential to receive amnesty, there has to be a cutoff at some point. What defines where this cutoff falls? Even more importantly, who defines where this cutoff falls in the hierarchy of perpetrators? How do those designing the system ensure that whatever distribution is decided upon is fairly implemented and non-discriminatory? These are all potentially serious issues that arise from attempting to combine the Nuremberg and South African models of justice. However, they are all issues that can be overcome with careful

⁷⁹ Blewitt, “The Importance of a Retributive Approach to Justice” in *Legacy of Nuremberg*, 46.

planning. Far more can be gained from a combined approach that incorporates retributive and restorative justice than there are drawbacks to this newer model.

It Really Is All About the Victims...

Whichever system, or combination of systems is used, ultimately, the focus of any justice system must be on the victims. The very essence of justice is to bring closure to, or alleviate the suffering of those who have been victimized as the result of criminal acts. Despite the serious flaws of the Nuremberg Tribunal in failing to accommodate victims in its proceedings, this has been a drawback that future retributive models have corrected, making sure to include the victims throughout the justice process. As a result, both models have the capacity to maintain a necessary focus on victims. The danger, is that both models also have the capacity to lose sight of this fundamental objective, and turn their attention totally on the perpetrators, or even become caught up in their own quest for successful prosecution.

To differing extents, the IMT and TRC were both systems that gave a voice to the perpetrators of these heinous crimes. This is particularly true of Nuremberg, as the necessities of criminal proceedings, and particularly the right of defendants to speak in their defense, gave a large voice to Nazi perpetrators, and contributed to the low number of victims speaking out. The TRC meanwhile, at least provided a more balanced approach, giving a large voice to victims, while still allowing perpetrators to speak in their defense. In this respect, the TRC may have an advantage over Nuremberg, as it proved its attention can be largely on victims and serving them. At the same time

however, it is important to recognize the evidence that there were thousands who did not feel that justice was served by amnesty and truth, and in this regard, the TRC failed at least those victims. Ultimately, both systems have the potential to serve the victims well, but in order to do so must avoid the common problem of turning their attention instead towards the perpetrators, and losing sight of victim's rights.

How Different Contexts Lead To Different Goals And Procedures

The Nuremberg Trials and South African Truth and Reconciliation Commission were direct byproducts of the nature of violations that they sought to redress. These different systems were used based on key differences in the atrocities that led to their implementation. The first key difference is that of scale. While no one would discount the suffering of South Africans, the level of destruction did not reach anywhere near the level that it had in Nazi Germany, where nearly 11 million were killed, and an entire population of European Jews nearly wiped out.⁸⁰ While murder dominated the trials in both cases, in Nazi Germany, the murder was genocidal, the attempt by a state government to eradicate entire groups of people (most notably the Jews).

This is an essential and important distinction. Genocide is, and must be regarded as one of the, if not singly the most heinous crime that exists. World leaders, as well as the public, demand a much more retributive form of justice to truly punish those responsible, and possibly even dissuade future perpetrators. Thus the primary goal of those calling for justice to be served was severe punishment based on the retributive model. Those involved with the Nuremberg Charter, or who influenced it through their

⁸⁰ Lauren, *The Evolution of International Human Rights*, 142.

political status, had little interest in reconciliation or a more moderate approach to justice, as can clearly be seen from the statements of men like Justice Robert Jackson, Winston Churchill and Russian prosecutor Lieutenant-General Roman Andreyevich Rudenko.

Furthermore, there is a second key difference between South Africa and Nuremberg in relation to the context of the violence. In Nuremberg, the violence was overwhelmingly and unquestionably one-sided. In essence, this means that the Nazis perpetrated terrible atrocities against Jewish populations throughout occupied Europe, while the Jews did virtually nothing to them. Nowhere in the wealth of historical documents and testimony is there any suggestion of Jews plotting or executing any plan that might make them perpetrators of human rights violations themselves. Conversely, in South Africa, the historical record is exactly the opposite. There is nearly irrefutable evidence that the ANC, in its battle against the Apartheid South African government engaged in actions that resulted in clear and malicious violations of innocent people's fundamental human rights. Immediately then, this context of two-sided violence, meaning that both parties were responsible for violations presents a problem for the retributive approach to justice without a war with a clear winner and loser.

Any attempt to use retributive justice against one party, at the very least brings into question the actions of the other. For example, had the ANC upon entering office in 1994 decided to pursue Apartheid criminals in courts of law, it would immediately have come into question itself for its role in combating Apartheid. If the ANC was going to attempt to charge policemen with murder in a court of law, the immediate question would be why ANC fighters and bombers, such as Robert McBride, were not being charged, when from a legal standpoint, they had committed the exact same crime. In response to

this, the ANC could have agreed to seek prosecution against its own fighters, and thus admit their own wrongdoing (an option that is almost unfathomable given ANC statements on how their actions were justified under a just war doctrine).

Another option would have been simply to ignore ANC violations and these criticisms, and continue to seek justice only for those who had been apart of the Apartheid regime. This would have had the effect of delegitimizing the criminal proceedings, and even worse, would have made the ANC look in the eyes of South Africa and the world, as though one illegitimate regime had been replaced by another. Furthermore, any such action that ignored ANC responsibility would have driven an even deeper rift between white and black South Africa. Clearly, the multifaceted nature of violence in South Africa led to serious concerns and problems with any attempt by the ANC government to use a retributive model. As a result, it is not surprising that the ANC looked for an alternative system of justice to pursue accountability.

The context in which violations of fundamental human rights takes place has a powerful impact on the type of justice system used to bring perpetrators to justice. While there are a number of factors that affect the selection of a certain type or model of transitional justice, two of the most important factors are the scale of violations, and whether one party is clearly responsible, or if numerous parties can be prosecuted for violations. It can be expected that in the future, violations that can be reasonably described as genocide or are particularly egregious in scale, and in which one party is the primary perpetrator of such crimes, a more retributive model of justice based on punishment can be expected. Conversely, when violations do not reach the scale of genocide, there is less international pressure for retributive justice, and if numerous

parties can be accused of gross violations, a more restorative model of justice can be expected.

Finally, some would argue that the goal of reconciliation or retribution are the primary factors in determining what related model of justice will be used. While intuitively this makes sense, this essay takes the position that the goals of reconciliation and retribution are not independent, and in fact are closely associated with the nature and context of the violations that took place. Nuremberg and South Africa are both examples that the context in which the violations took place were primary motivators for whether retributive or restorative justice was pursued, making the nature of the violations themselves the motivators of the goals, which then directly help to determine the model of justice. The grounding of this idea is well established by many of the comments made in the setup of each system. Justice Jackson in his opening statement at Nuremberg left little doubt that the sheer scale, deplorably heinous nature, and cold hearted ruthlessness with which the Nazis pursued their Final Solution was a major factor in the establishment of the Tribunal, and the pursuit of death penalties and lengthy prison sentences were the response of the international community to these atrocities. Likewise in South Africa, despite assertions by the ANC that they had acted responsibly under a just war doctrine, the two-sided violence in which both the ANC's armed wing and the Apartheid government were responsible for the deaths of innocent people, the deceit, and the need to foster a single South Africa, led directly to the ANC's support of the TRC and restorative justice, even when it called ANC leadership and activists before it to answer for atrocities.

A Difference In Legacy

While the context that the violence occurred in was among the most important factors that contributed to the decision of which model of justice to use, it was not the only factor. The decision of which system of justice to use was also influenced by the outcomes that those who setup each judicial system desired. First, it is necessary to demonstrate briefly that each judicial system does in fact result in a very different outcome, in terms of how the guilty parties are viewed. In the long term, this issue essentially deals with the legacy of each system.

The Nuremberg Legacy has been the complete denouncement of National Socialist policies and practices, extending well beyond the Final Solution itself, and resulting in continued aggressive pursuits of Nazi perpetrators. Perhaps nothing illustrates the legacy and impact of Nuremberg on establishing Nazi guilt than Archbishop Tutu's experience in Israel. When asked after a visit to the Yad Vashem Holocaust museum in Jerusalem for his impressions of the experience, Archbishop Tutu asked "But what about forgiveness?" That remark set off a firestorm; Archbishop Tutu "was roundly condemned" and "was charged with being anti-Semitic".⁸¹ The simple suggestion that perhaps the perpetrators of the Holocaust could be in some way forgiven for their atrocities led to an immediate and powerful revolt against any such idea, and Tutu faced the wrath of many, not just in Israel, for his suggestion. While this reaction was not motivated completely by the legacy of Nuremberg, the Tribunal played no small part in condemning those who were involved in perpetrating the Holocaust, and

⁸¹ Tutu, *No Future Without Forgiveness*, 267-268.

contributed greatly to a legacy that led Archbishop Tutu to face such sharp accusations for so simple a statement.

In contrast, the legacy to emerge from South Africa has been less condemning than Nuremberg, though it is also much more recent, and to be fair, the full legacy of the TRC will likely not be known for several more decades. The atmosphere of the TRC, underlain with so much Christian ideology of forgiveness and moving forward through revealing the truth led to a much different legacy. While many of the policies of Apartheid, most notably the racist underpinnings of the regime have met with near universal condemnation, this was not a result of the TRC. One need only point to the numerous declarations, economic sanctions, and boycotts of South African goods that far predate the TRC to see evidence that condemnation came far before the TRC. In fact, the TRC, with its open atmosphere and investigation into perpetrators of all races and groups, led to a legacy that recognized the misguided acts of both the Apartheid government and ANC activists. The ultimate legacy of the TRC then, is not merely the condemnation of Apartheid, though it is undeniable that that system of government has been discredited, but instead the realization by the international community that what took place in South Africa was more than just the oppression of a group of people by a minority government. The TRC, through its success in revealing the truth, literally rewrote many of the history books concerning the battle against Apartheid, and has led to a legacy that recognizes the horrors suffered by both white and black South Africa.

The difference in legacies between Nuremberg and South Africa are by no means accidental. The legacy of Nuremberg has become largely what Justice Jackson and his team sought, the complete condemnation of Nazism in all of its forms. Equally, the

legacy of the TRC has fallen in line almost exactly with the goals that Nelson Mandela and Archbishop Tutu laid out in 1994, the creation of a unified South Africa that was not divided, as it had been for centuries, between white and black. Both systems succeeded in producing the reaction among public opinion, governments, and historians that the crafters desired. This is not necessarily a criticism of the systems, but merely a recognition that the vastly different legacies to result from the IMT and TRC are clearly not accidental, and that the type of system (retributive or restorative) used in each situation played a major role in the formation of those legacies.

Conclusion

There has, not surprisingly, been much attention paid by historians, those who study international systems of justice, and human rights scholars to the enormously important Nuremberg Trials and South African Truth and Reconciliation Commission. Less attention has been paid to the differences between these two systems, and the strengths and weaknesses inherent in each. The point of this essay was first and foremost, to point out that each system was to a very large extent the result of the historical context it grew out of. As a result of this context, each system was designed to meet very different goals, and context, in accordance with these goals was one of the largest factors to help determine whether a more retributive or more restorative model of justice was adopted. It is not surprising then that such a difference in the legacy of each system, and of those who it prosecuted, can be found. The retributive Nuremberg based model and restorative South African model are by no means mutually exclusive, and

there is potentially much to be gained from combining these models. However, there are a number of problems that result from attempting to combine the models, most importantly, that each system had different, often conflicting goals that caused each system to be implemented in the first place. Those implementing future systems of transitional justice systems then, may have goals that lead them to largely favoring one system over another. Finally, it may be helpful to examine some questions that contribute to the final decision to use one system of justice over another....

- Was one group responsible for the atrocities? Or were there multiple groups who could all be legitimately charged with violating fundamental human rights?
- Did the violations occur on such a scale, or in such a deplorable manner, as to necessitate more aggressive forms of punishment, to establish precedent on behalf of the international community, and to dissuade potential future perpetrators?
- Do substantial needs for reconciliation exist? Do the groups' involved need to coexist peacefully? What are the prospects for future violence if no reconciliation occurs, and one group merely blames the other for the past atrocities?
- Is it reasonable to expect that a national system of justice can be effective at realizing its goals, and establishing some form of justice, or is that beyond the means and realities of the country or countries affected, and

does the international community need to in some way take charge? How can as much separation between politics and the judiciary be ensured?⁸²

- What are the interests of the victims'? What will serve those interests the best? What if victims have different interests and desired outcomes, and perceive the idea of justice differently?
- Is it possible to combine the models effectively, and still ensure justice, what are the advantages, and disadvantages of attempting a retributive and restorative system of justice?
- If it becomes impossible to pursue a combination of retributive and restorative justice, what is the most important desired outcome, punishment, reconciliation, or something else?

These considerations are by no means meant to lead unequivocally to the establishment of one system of justice over the other, but are merely some considerations that should be, and indeed have been, taken into account as it becomes necessary to establish new bodies of transitional justice to address a wide ranging set of different situations with an equally large array of institutions and mechanisms which can be individually applied to address each specific situation. Arguably the most appropriate conclusion was made by Madelaine Chiam in her article entitled "Different Models of Tribunals" in which she stated, "One lesson, perhaps the most important, is that there is

⁸² It is impossible to completely shield the judiciary from politics, but by removing it as far as possible from dependence on other political organizations, and limiting oversight, a fair degree of separation can be achieved.

no ‘model’ approach to transitional justice.”⁸³ Transitional justice systems need to be case specific, and are dependent on a number of factors touched upon in this essay.

⁸³ Chiam, “Different Models of Tribunals” in *Legacy of Nuremberg*, 205.

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