

International tribunals – Questioning their general usefulness in the transition process from persistent conflict

Abstract

There is presently a trend to increase efforts bringing leaders of dubious regimes and rebel movements to justice. Several international tribunals have been organized to deal with severe crimes against humanity. Here this quest for justice is questioned with respect to its contribution to a transition from a state of repression or civil war to peace and progress. Justice, in the form of tribunals, is seen as one potential tool for this larger mission. There are also other components such as truth-seeking and reconciliation. Here potential conflicts between different tools are discussed. The article's purpose is to develop a model for evaluating whether international tribunals are constructive. Advantages and disadvantages are discussed and applied to situations such as negotiations with LRA in Uganda and "The Justice and Peace Law" in Colombia. To obtain both justice and peace might be unattainable and peace with no justice might be unsustainable and prevent reconciliation. There is now some experience of international tribunals and a need for an evaluating discussion. The most serious risk of prosecution is the incitement for dictators and rebel leaders to continue their misdeeds since an end to the conflict makes them vulnerable to international prosecution. The commitment problem of a peace agreement increases when amnesties might be overruled.

Keywords:

Trials, reconciliation, truth-seeking, separatism, topic taboo, amnesties.

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1 Introduction

Political turmoil and conflict appallingly often result in human rights abuse or even genocide. How to treat such situations? The present trend shows an increasing number of international juridical processes. The International Criminal Tribunal in The Hague for the former Yugoslavia (ICTY) in 1993 was the first, followed by a UN tribunal in 1994 in Arusha, Tanzania for crimes in Rwanda (ICTR), and several other special tribunals. The International Criminal Court (ICC) began operating in 2002, also in The Hague, in an effort to create a more permanent structure instead of separate tribunals. A recent move was to act for an indictment of Sudan's ruling president Omar al-Bashir. In addition, there are national courts as in the trial of Saddam Hussein, and mixed national and international courts like the ones in Sierra Leone and Cambodia. This development has widespread support. Many people share Richard Wilson's judgment: "The tide of global justice is now turning in favor of legality, prosecution, and punishment rather than diplomacy, reconciliation, and forgiveness" (Wilson 2002).

The research question in this paper is whether this increased activity by international courts is a constructive policy, or whether it should be reconsidered. When are justice and punishment constructive components and when do they become obstacles for reaching agreement and peace? The article does not base the reasoning on one special empirical case described in detail, nor on a quantitative study. With the help of the model presented, the ambition is make an analysis to determine a justified role for international tribunals. Another way to describe the approach is to classify a transition as the ultimate normative goal and retributive justice as a proximate

normative goal. The issue to evaluate is whether justice by international tribunals and other proximate goals are suitable for the ultimate one. Is a universal jurisdiction for human-rights abuses a helpful tool, or one with unintended but expected negative effects?

In this model the more ambitious “transition” (as in the use concerning post-Communist European countries) has been chosen as goal rather than the more modest word “peace”, which might be considered overambitious. Presently, most international organizations have a strong preference for conflict management instead of conflict resolution. Ceasefire and negotiations are generally promoted as well as early elections, even if there are few other democratic institutions in place.

In a striving for transition, there are further sub-goals in addition to justice. “Truth-seeking” is one such goal. What happened to the missing persons? How did a specific individual get killed? Who killed him? Such answers are also of intrinsic value as well as of possible instrumental value in a peace process. The third sub-goal is reconciliation/integration. War is likely to rebound if the two sides in a conflict still see each other as enemies, where the end of war is perceived as a temporary pause for rearming rather than a lasting peace.

I think it is advisable to favor a more ambitious long-term perspective investigating what factors contribute to transition (see e.g. Long & Brecke 2003). From this point of view, the long-term and transitional ambition of the tribunals is recommendable, but the issue is whether their contribution is sufficient also when considering negative consequences. Truth-seeking and reconciliation also aim at the long-term perspective, while amnesties focus on the peace deal in a

short-term perspective. Peace is a necessary first step, but the question arises whether such a pragmatic treatment brings long-term problems. Human Rights Watch, an influential agitator for trials, argues that: “Justice for yesterday’s crimes supplies the legal foundation needed to deter atrocities tomorrow” (HRW 2003).

Of course there are a number of other issues that can be more or less essential for a successful transition. Collier (2007) is one proponent for foreign military assistance, while Easterly (2006) is a critic of such involvements. Several scholars, predominantly Jeffrey Sachs (2005), suggest massive foreign aid to help a miserable country out of its poverty trap. Easterly (2006) argues that there are no poverty traps when controlling for bad government. The essential missing factor for transition to take place is not money but good institutions. The merits of these positions will not be further discussed in this paper, which will focus on the contribution to transition of the sub-goals in the presented model: justice, truth-seeking and reconciliation.

Considering these three sub-goals as variables for the prime goal, transition, implies no evident problem. According to a harmony hypothesis, justice and the other two sub-goals support each other and the aggregated result. Pursuing each of the three goals will increase the possibility of a successful transition. There are of course many problems in these endeavors, but fundamentally there is no conflict between the sub-goals. An opposite hypothesis is that of disharmony. The three sub-goals might be in conflict and advances in one might imply negative influence on another. The disharmony hypothesis also questions whether the three sub-goals really are so self-evidently positive. Justice is evidently better than injustice, but there are reasons to consider other

antitheses. Therefore some more appealing autonyms will be introduced. They are presented in the following picture and discussed in the following sections.

Figure 1

The focus is on the choice between justice and amnesty, and here four different issues will be discussed. The interaction with the other two spheres will be two further issues. The letters A to F will be used to facilitate the reading and to form a comparative calculation. The estimated effect of tribunals can be seen as the summary effect of these six factors, compared to how a policy more inclined to amnesties influences these six factors. It can also be depicted simply as a mathematical function: Transition-supporting effect = $f(A, B, C, D, E, F)$.

2 Justice and Amnesty

It may be useful to define justice in this analysis. The term will here imply two functions: first the attribution of guilt or innocence, and secondly the execution of punishment. I will not penetrate the demand for more justice than the numbers currently brought to the tribunals, but ask whether the present ambition level of the international tribunals is too high. I will not raise any doubt about the competence and objectivity of the tribunals, but focus on their contribution to the prime goal, the desired transition.

The intrinsic value of justice (A)

To most people justice is an intrinsic good; it has a value in itself. According to the Kantian maxim “May justice prevail even if the world perishes”, there is no problematic conflict with

other goals; justice is the goal that always should be enforced. Such a fundamentalist approach provokes some objections. One is that the alternative to consider is not “justice prevailing”, but the more modest task of applying retributive justice. That is not only a means for deterrence, but often considered of independent value. However, a challenging view is that such a quest for justice is primitive compared to a more New Testament-like view: forgiving is morally superior. This conflict illustrates that intrinsic values can come into conflict, and the analysis is not terminated on finding a single intrinsic value. Furthermore, there is no rule that gives intrinsic values a greater importance than instrumental values, even if many people envisage such a hierarchy. An illustration is the value of democracy, certainly a very important value above many others. However, democracy has “only” an instrumental value, containing marginal pleasure in voting, but bringing legitimacy and political moderation to power, and therefore often seen as a citizen’s duty.

According to my judgment, the intrinsic value in retributive justice exceeds that of forgiving, but as in all other crimes, such a value judgment is not the only factor to consider – there are others. It is important not to be unduly influenced by the persuasive power of the words “justice” and “intrinsic value”.

The instrumental value of justice (B)

In addition, justice has instrumental value, the primary one being that the threat of punishment will influence potential offenders to behave according to widely acclaimed norms (Roth 2001). A prominent protagonist for international tribunals, Payam Akhavan (2001, p. 23), expects an organized moderate justice to prevent vengeance of less moderate kinds. A more long-term

objective is to install the norms so firmly that they become “unconscious inhibitions against crime” (Akhavan 2001, p. 12). Finnemore and Sikkink (1998, pp. 904-905) see similar positive influencing effects. At first the norms might be idealistic statements, but over time these ideas might migrate into rules demanding obedience, and finally, in a third step, they become strongly internalized. Proponents of trials also see a generation effect. Bass (2003) gives prominence to younger Serbs being more positive to the tribunal than older Serbs.

An important goal for justice initiatives is to break a “culture of impunity”. In many places there is an acceptance that “might makes right” and, when a shift of power occurs, past injustices are not addressed. New problems and new injustices overtake the interest; crimes unpunished tend to be crimes accepted. However, crimes accepted are not crimes forgotten: strong feelings of resentment remain against the group behind the crime, and a distrust of the state that either committed such crimes or was unable to prevent them. In contrast, punishment is a step toward closing the cases and toward reconciliation (van Zyl 1999). Another benefit of the juridical process is to penetrate what really happened, and the juridical investigation will be a part of the quest for truth. Justice in a situation of “crime against humanity” often has a special instrumental aim of prime interest, namely to contribute to a transition from conflict and human rights abuses to peace and democracy (Kouchner 2000). According to the harmonious view, justice will contribute to the other two sub-goals, truth-seeking and reconciliation. These effects will be further discussed when focusing on these sub-goals.

It is hard to evaluate the effects of tribunals in quantitative terms. The use of tribunals is too new a policy for providing enough empirical data. Furthermore, it is of little use to compare the cases

where tribunals have been employed with those they have not. The existence of a deterrence effect would rather be shown by an absence of crimes and prosecutions.

The use and misuse of violence have several other risks, so tribunals are but an incremental increase of risk for the perpetrator. There are two very different ways to react for the potential criminal, and they can be combined. First, apply some moderation in the use of excessive violence. Later, reduce the danger of being drawn to court by maintaining a power base that prevents an arrest by national or international police.

I would like to draw some conclusions from the experiences of international courts that are relevant for further decisions. Speed, magnitude and costs are important aspects. Concerning the time aspect, the judgment is that justice is seldom fast, but late and slow. A charged person is normally already long since eliminated from executive power and the trial drags on. The genocide by the Khmer Rouge took place in the late 1970s and peace was established by 1996. “Brother number one”, Pol Pot, died in 1998 and in 2006 another prominent leader, Ta Mok, “the butcher”, met a natural death of old age. The Khmer Rouge Tribunal concluded its first prosecution in July 2010 of Kaing Guek Eav alias Duch. In the case of Serbia the juridical process started in 1993, much closer to the events; Milosevic was indicted in 1999, before his loss of power in October 2000, and the trial lasted till his death in 2006.

The standard tribunal is of limited scope when considering the number of accused, but of significant scope as regards the length of time and the cost involved. The ICTY for Yugoslavia

has accumulated costs approaching \$2 billion dollars (Economist 2010). This is by far the international trial with the highest number of indicted, 161 persons.

Concerning Rwanda the ICTR proceedings are in line with other international tribunals, having 52 cases completed and another 22 in process at a cost of \$1.4 billion (Economist 2010). But in addition there are the ordinary Rwandan courts and the Gacaca process. The former proceed by about 1,500 trials per year, which is insufficient considering that more than 100,000 people are arrested for suspicion of taking part in the genocide. The Gacaca process operates at a decentralized level with around 10,000 village courts with local judges that let victims and accused testify, and then assign punishment according to local tradition (Amnesty report 2002, Clark 2007).

The slow pace, and the low proportion, of offenders of human rights being accused are factors diminishing the deterring impact. But there are compensating strengths. According to Bentham (1789), the deterrence effect is determined by three factors: the degree of punishment, the probability of punishment, and the knowledge by the potential criminal of the prior two factors. The media attention of these tribunals will support the crime deterrence effect.

However, the attention to the risk of shaming and imprisonment will also stimulate activity to avoid justice. A special problem with the crime situation discussed here is that the criminal has better possibilities to avoid arrest than ordinary criminals. By staying in power, often implying continuous crimes, the probability of ending up in court is decreased.

Norm erosion effects (C)

The antonym of justice in this context is not injustice but amnesty. The use of amnesty in other areas might tell us about its usefulness. I think the success of Amnesty International can be instructive not only for the potential of amnesties, but also for their dangers. For Amnesty International one purpose is to save the specific prisoners whom the organization selects for campaigning, but there is also the broader ambition to undermine rules that restrict freedoms of expression. An amnesty for one person encourages others to be bolder and step-by-step enlarges their practical freedom. An exceptional amnesty is tempting for a regime that tries to solve a problem without backtracking in principle. It is still unlawful to criticize the president, and the authorities plan to handle future similar situations in more subtle ways, without so much negative publicity. However, sometimes the amnesty decision becomes something else, a more general and permanent retreat.

Italy is a democracy that frequently uses amnesties over a wide range of issues. Illegal immigration, constructions without building permits, and tax evasion are treated with amnesties. One aspect of this policy is the Catholic virtue of forgiving; there is *una cultura del perdono*. Each amnesty is also combined with pledges of more efficient policing in the future; the build-up of old cases is eliminated to make a more accurate treatment possible in the future. One result, undesired but hardly surprising, is that such an amnesty stimulates a lot of similar illegal behavior and hoping for another amnesty. A culture of impunity is stimulated; actions are still considered officially wrong, but expected to be accepted *ex post*.

The erosive effects on rules by amnesties should not be underestimated. If this consequence is to be avoided, adequate action has to be taken to convince people that violation of the rules will be punished in the future. Amnesties often imply an unofficial retreat from rules under attack, both in cases where we consider the erosion desirable and where considered malign. However, I think that such a rule-erosion is caused not directly by how the past is treated, but by attributing prognostic information to an amnesty about how the authorities will act in the future. More of the same – that is, more amnesties and a culture of impunity – is one reasonable forecast in most situations. But if there is a significant shift to a new situation with new rules and new law enforcement, the treatment of the past is then less prognostic for how stringently the new laws will be upheld. A regime change that implies a transition of society is so significant a change that it is realistic for potential offenders in the new situation to expect retribution, even if similar violence before the transition is not brought to court.

Peace-delaying effects (D)

The reason for amnesties in the cases discussed is not humanitarian, but a concession to enhance a peace-deal. Often an amnesty is a condition for one side to give up a position of military strength. Such a situation has another implication: justice, in the form of a threat of indictment by an international tribunal, might be peace-preventing in the short or long run. Also such an unintended effect should be considered. What kind of influence is exerted on potential defendants? This is an actual issue in several conflicts and will be illustrated with the examples of Uganda and Colombia.

The Lord's Resistance Army in Uganda (LRA) is a most brutal guerrilla force (Dunn 2007). There is no doubt that its leaders have committed crimes against humanity, but they have remained in control of a territory since 1987 because the national army has not managed to defeat them. The ICC has indicted the LRA leader Joseph Kony and four of his commanders. This undermines the offers of amnesty given by the Ugandan government provided that the rebels give up fighting. The already low credibility of the government is further eroded and it is harder for some external actors – e.g. the government of Sudan – to host these potentially retired rebel leaders. Even conducting negotiations with the rebels has been more difficult because of the participation by representatives instead of these leaders themselves. The International Crises Group has suggested that ICC should uphold its indictment of the LRA leaders, but that Sudan might still grant them asylum as a non-signatory of the Rome statute. This is not much of a principled solution, but rather an avoidance of application. A sensible system prescribes when and how it is to be used, and does not count on being helped by obstructions. The indictment of the Sudanese president will hardly simplify the LRA problem.

The government of Colombia has suggested a deal – “The Justice and Peace Law” – with several armed groups that the army has failed to defeat. The government has offered reduced punishment for crimes against civilians, if these organizations disarm and their soldiers return to civil life. The offenders should confess their crimes and pay back illegal assets, then face a maximum sentence of 8 years and no extradition to the USA for drug crimes. The right-wing paramilitary force AUC accepted the deal in 2005, but the left-wing FARC and ELN have not accepted it and demand total amnesty. The partial peace deal is now criticized for being too lenient by several different sources. The opposition includes human rights NGOs, the US government, internal left-

wingers and judges in the juridical system, who want a hard treatment of the paramilitaries. In my judgment, this pressure implies two threats to the peace deal. AUC might conclude that the government is not trustworthy and take up arms again, and FARC might suspect that the government is likely to backtrack on a deal with them too. As soon as the threat by the brutal force of the rebels is diminishing, a deal might be undone, so an alternative policy is to keep the arms and continue the fight that has been running since the mid-sixties. According to the think-tank CERAC – *Centro de Recursos para el Análisis de Conflictos* – the 2005 deal has saved about 2,800 lives so far, illustrating the benefit of peace (CERAC, Internet). But according to other judgments the compromises of justice are too high a price.

If you can restore order and enforce justice, this article sees no fundamental problem with punishing culprits by using universal rules. The central problem according to this analysis is not the use of retroactive rules or the victor's justice; often the organizations committing the crimes claim to honor most, if not all, of these rules. The central issue is what to do if you cannot enforce the rules through your own strength. Are you then obliged to cling to an all-or-nothing strategy? The demand for “unconditional surrender” is becoming the only way that does not compromise with justice. The governments in these examples can be criticized for not defeating violent groups in a competent manner, but they can hardly be criticized for giving up easily. The duration of the conflicts indicates that the lack of competence and the difficulty of the task make total victory in a short or medium time span unlikely.

There are evident, but unacknowledged, contradictions in many of the suggestions for handling these problems. A positive attitude toward negotiations is combined with criticism of concessions

to the offenders. This negotiation optimism implies hopes that people in extremist organizations are like a bunch of slightly delinquent youths. They will sober up during the negotiation, feel regrets, then surrender and ashamedly ask to be forgiven as much as possible. Dialogue is the method and the answer. A more realistic attitude would presume that negotiations imply concessions, so the issue at stake is to find out which concession will hurt the least.

Political concessions are easier to portray as sensible compromises and constructive solutions than as acceptance of extortion. Personal amnesty is often seen as more controversial; the criminal gets off without punishment. However, it seems better to be hard on political concessions, because softness on political issues will encourage more politically motivated violence. Therefore, being soft on personal amnesties should be considered the least problematic concession, since the goal of a brutal organization is stopped. Its failed effort may have caused plenty of damage that deserves to be punished, but this presumes a capability to bring the culprits to justice. Letting people go that you cannot catch is a small concession. That you might catch them after a peace deal is causing great confusion, by assuming a circumstance that is not available at the point of decision.

For a non-democratic regime, it is less problematic than for a democratic one to make political concessions. The regime might be on more equal terms with the guerrillas, and some power-sharing or regional autonomy might even be seen as steps to a more representative government and more sound policies. For established democratic regimes, there are stronger reasons to keep a strict line against violent pressure. Strong legitimate governments should be in no need of

dubious compromises. The democratic mandate of the voters is not really at a government's disposal for deals with undemocratic rebels.

Especially from an international perspective, there are reasons to consider the long-term dynamic effects of a choice of peace or justice. Advocates of court procedure claim that the conclusion of observers of trials is: "Do not commit crimes against humanity". Such crimes will never fall under a statute of limitations – there will come a judgment day. This might be the conclusion of most people, but not necessarily for a small group of special interest. Dictators and guerrilla leaders with blood on their hands may conclude that it is becoming more problematic to be a brutal ex-commander, and hence more advantageous to remain an active commander of a state or of an insurgent movement. The conclusion becomes: "Do not step down and let them drag you into court. Never surrender or accept defeat, but cling to the power you have and die with your boots on."

Snyder and Vinjamuri (2004) point to the priority of political bargaining. Furthermore, unsuccessful projects for ambitious universal rules might weaken norms of justice by revealing their low effectiveness. These scholars stress the importance of obtaining consequences rather than setting standards for appropriateness.

3 Truth-seeking

Apart from an intrinsic value, truth is often credited with great instrumental value. Santayana's famous maxim comes to my mind: "Those that cannot remember the past are condemned to

repeat it.” Time has a tendency to transform horrid situations into good old days. An example is the romanticizing of the communist past in the DDR, a phenomenon often called “Ostalgia”.

There is a need for continuous research and reflection on the great disasters of the last century. In the case of Germany “revisionism” has come to mean drastic re-evaluation or even denial of historic events that most researchers consider plain facts. This is unfortunate because revisionism is an essential part of science, and truth-seeking is more in conflict than in harmony with an official truth that assigns blame and closes cases with some moralistic statements.

Truth-seeking has more appealing antonyms than lying. I will use “topic taboo” as a heading for reactions like protecting some groups from criticism, a monopoly for an official story, and silence about the past as a measure to focus on the future instead of the dreary past. A humoristic illustration is the Fawlty Towers thesis: “Do not mention the war.” The English innkeeper played by John Cleese is convinced that this is the formula to keep good relations with his German guests, but he has continuous problems implementing it. Yet in many situations topic taboo is a serious alternative, both proposed and tried. After some periods of witch-hunting in the seventeenth century in Sweden, silence was encouraged and enforced by the authorities. The hope was that the conflict would fade away if both the accusers and those tarnished by the accusations avoided the topic completely (Lennersand 2004). In the decades after the death of Franco, the nationalist and the republican perspectives on the Spanish civil war were both tuned down in an effort to reduce tension – “The pact of forgetting”. El Salvador is a more recent example of the topic taboo strategy (Popkin 1995).

John F. Kennedy is said to have observed: “Success has many fathers, but failure is an orphan.” This generalization is not limited to special ideas, but is common concerning fallen regimes; when a totalitarian regime is ended, there are many claims to have been a member of the resistance. Bravery in retrospect may be untrue, yet tolerating such claims might be a more constructive behavior than to charge your opponent with collaboration and receive similar accusations. Truth-seeking might not be opposed in principle, but the long delay of more complete and balanced work indicates strong taboos on what can be said about a recent turbulent past. Even if not stringently proclaimed and defended with arguments, topic taboo is commonly politics in use. It should be enlightening to have an open discussion about the advantages and disadvantages of taboo policies, especially because they are in conflict with liberal theory (for example Mill 1859), which sees benefits also in unmerited arguments since these prevent the truth from becoming an unreflective prejudice. See Mendeloff (2004) for a systematic critique of the case for truth-seeking.

Justice and truth-seeking (E)

The contribution of justice to truth-seeking is especially interesting for the approach of this paper. The Nuremberg trials exposed acts of violence that were not common knowledge, but rather so extreme that many components would have been classified as Allied propaganda if they had not been supported by strong evidence and a strict juridical process. In contrast, many later trials have contributed less to a new perception of the magnitude of genocide. The picture of the Balkan war was already fairly adequate, whereas the court focused so much on the central character, and his personal and provable guilt in some special crimes, that most of the mayhem falls outside the juridical case. The limelight of media often focuses on the accused dictator and

his responses. Saddam and Milosevic acquired many additional “quarters of fame” by counter-accusations and obstruction. In the trial of Saddam the prosecution did not penetrate some of the greatest misdeeds, such as the gas attack on the Kurdish village of Halabja, with about 5,000 victims, but focused on the killing of 148 Shiites in Dujail.

In ordinary crime proceedings, the guilty or non-guilty judgment is a central issue. Here it is more of a technicality. How explicit has the ruler been in his orders? The court’s mission is not so much to find a hidden truth as to confirm an informed pre-court verdict. Even so, there are always risks of fumbling the ball and losing a presumably easy case. A guilty verdict contributes very little and a non-guilty verdict will hardly indicate innocence, but juridical inefficiency. There is a lot to lose in these trials, and the gains are disputable.

Truth-seeking is a part of the normalization process. An official version of history will always be criticized from at least one side, often both, so truth-seeking is a revisionist project. For all crimes there is a deadline for justice – but not for the truth. Considering the problems of many East European countries in facing the past, it seems necessary to establish a clear priority of truth over justice. The risk is otherwise that a wall of denial and silence will stop the quest for truth. The proper functioning of a truth and reconciliation commission is undermined if it also becomes a punishing commission. There is an advantage if facts are brought up as self-criticism, confessions and explanations, rather than as accusations from enemies and outsiders.

Common sense and experience indicate that topic taboo and *de facto* amnesty are a fitting combination. If truth-seeking is pursued, there is a risk of generating both demands for and fear

of prosecution, which might reheat tension into conflict between old antagonists. Therefore, formal amnesty will be more compatible with truth-seeking. Such an amnesty will also be more valuable for the pardoned and thus a useful bargaining chip in a negotiation for a transition. This presupposes that amnesties given are not revoked. An amnesty has a negative aspect as a concession, but its possibilities as a bargaining asset should not be forgotten.

4 Reconciliation/integration

“Restorative justice” often involves less of justice and truth-seeking and more of a reconciliation program. Some level of victimization and guilt may be considered appropriate, while more radical views of vengeance and counter-accusations are avoided. The aim is not justice in the normal impartial sense, but rather justice as a compromise ordering a moderate amount of guilt and shame. Reconciliation policies often involve bringing previously warring groups together in a common project; integration of sport teams, as in South Africa, is one example. A central theme is to portray the state and its functionaries as representing the national interest, not just the group that brought them to power. By officially erasing the ethnic classifications of Tutsis and Hutus, president Paul Kagame tries to build a common Rwandan identity. Even when ordinary parliamentary reasons suggest a majority government, reconciliation efforts often result in still broader governments to bring the minority into the national project. Efforts to integrate Sunni representatives into the Iraq government of Nuri al-Malaki can serve as one illustration of reconciliation politics; the broad government of Northern Ireland is another. The main purpose is to create a “new start”, and sometimes a limited amount of both justice and truth is considered useful for that purpose.

The prime antonym to reconciliation and integration is separatism. The divide between the two groups in a conflict can be so wide that there is little motivation for a new uniting project. The chief alternative of each side seems to be to throw the other out and claim the whole territory. Kosovo can be seen as an example. Since the worst alternative for each group is to be thrown out or killed, there is a need to look into a second-best alternative for both groups. This is not necessarily cohabitation of a common territory, but could involve splitting the territory. How to arrange such a “civilized divorce” is discussed in Tullberg & Tullberg (1997).

The number of independent states has increased globally from 43 in 1900 to just below 200 a century later. The present general trend in Western Europe has been towards integration between nations, and this has had a significant normative impact – “separatist” has become a negative word. Replacing separatism with “national liberation” or “full autonomy” makes a more appealing impression, but is hardly any change in substance. All over the world, non-national states have internal problems, and sometimes the conflict runs so deep that separation into two states becomes an alternative to reconciliation. The United Nations, functioning as an interest organization for governments, normally supports the borders of the status quo; there is often a dogmatic preference for national unity, also when the spirit in the country is one of antagonism.

Considering how often separatism arises, and the many specific political and military movements that promote such projects, the categorical negativism toward it seems destructive. One solution – the antonym of integration – is stubbornly rejected until occasionally the separatists establish a *fait accompli*. Separatists most often get nothing, but sometimes too much when the new entity contains a substantial discontented new minority. There is frequently a dogmatic and confused

line of judgments. Why should Bosnia be kept together, when Yugoslavia was split? Why detach Kosovo from Serbia, but not the Serb-dominated area north of Mitrovica from Kosovo? The resistance to considering separatism as a morally acceptable alternative to integration is a drawback for finding the best opportunities for a democratic transition. It is certainly a problem if the parties involved cannot even agree on who constitutes the *demos* in their democracy. I think it is important to stress the crucial importance of separatism in many transition cases and include it as an option in the model. Integration should not carry a TINA (“there is no alternative”) stamp.

Justice and reconciliation (F)

The model discussed raises the possibility that justice might come into conflict with reconciliation. If so, the question arises of which goal to give priority. Other proponents of amnesties and restorative justice present more humanitarian arguments. Bishop Desmond Tutu brings up both the message of forgiveness in the New Testament and an African tradition of *Ubuntu* that stresses accommodation, and claims that African jurisprudence is restorative rather than retributive (Goodman 1999). In contrast, the argumentation in this article does not build on the opinion that it is a virtue to be soft on crime and generous in forgiving.

A tribunal focuses on a few villains, but even guilty men can become scapegoats. Most horrors are not the product of just a few human beasts, and more people are guilty than the leaders. Few humans are a potential Stalin or Hitler, but many are potential concentration camp guards. This combination of outrageous crime with ordinariness is both appalling and enlightening (Browning 1992). Many victims have suffered by the hands of people close by, and problems emerge when meeting them at the grocery shop.

Justice is often perceived as transferring a collective guilt into individual crimes that also contribute to deconstructing a negative stereotype. Croat leader Mesić used such reasoning to motivate sending accused Croats to the ICTY (Akhavan 2001, p 20). It can be questioned both whether this individualization will succeed and whether it is morally right. The “only a few rotten apples” theory might misrepresent the situation. Leaders have a special responsibility, but the perception of a collective guilt for atrocities is often adequate. The “total war” character of several conflicts makes the boundary between combatants and civilians more blurred than desired and acknowledged (Wippman 1999). Dehumanization of the enemy is one effect in hard conflict, and the atrocities have escalated, often being motivated as revenge. However, also captured combatants should be treated humanely. Re-humanization of the enemy is one important task in reconciliation, but de-victimization of the own group may be as difficult (Maier 1993).

When trying to bring the warring tribes together in the same state, there are often problems with the attribution of justice. Equal criticism is unfair if the crimes committed were unequal, but focusing on the crimes of one side will be seen as partial. Serbs do not admire the ICTY court as a paragon of objectivity, but as an intimidation (Mendeloff 2004, p 373). Often, justice seems to be in conflict with reconciliation.

5 Discussion

When are justice and punishment constructive components and when do they become obstacles for reaching agreement and peace? One position is that trials and punishment should be seen more pragmatically, but such pragmatism needs some principles in order not to become plain

opportunism. There are reasons for serious reflection over a number of issues with significant ethical importance and crucial practical impact.

Cheating and the commitment problem

With a desire to reach peace, but also to punish, there is an attraction to finding a way of both eating the cake and still having it. One possibility, so as to obtain successful negotiations without making concessions from justice, is to cheat. You offer e.g. the leaders of LRA an amnesty, and later you overrule it and send them to the ICC. Cheating might be considered wrong, but lying to a murderer to make him give up arms and confront him with justice may seem rewarding enough to excuse the deed. People in governmental positions appear inclined to reconsider the honoring of amnesties. Both Chile and Argentina made some agreement revisions in 2003. Such actions are often popular both nationally and internationally, but they entail an opportunistic view of agreements and disregard effects on other dictators' behavior.

Much can be said for a hard line of law and order. A government too inclined to negotiate with criminals and honor those agreements will cause itself problems. It is not always desirable to solve the commitment problem (Schelling 1960). In the example of the Prisoner's Dilemma, the problem for cooperation is that neither party can be sure that the other follows an agreement to cooperate, and the agreement then becomes useless. The allure of cooperation is that it brings advantages to both parties, but if one or both of the parties are criminals the reaching of an agreement is not necessarily positive for society at large.

Suppose that a president's promise to a criminal is binding for the state. Any robbers who fail to get away from a bank then have a pleasant plan B: they demand an amnesty for the robbery by the president or they will shoot some hostages in the bank. Making such an exceptional amnesty as an honest commitment is sure to open Pandora's Box. Instead the president might make a dishonest commitment so that the criminals get nothing but increased sentences for their threats to kill (and of course even more punishment if they actually kill someone). The unreliability of such promises will undermine the whole idea of taking hostages to obtain amnesty, which of course is a desirable effect. There are clear advantages with stubborn justice, without giving amnesties or, if given, not honoring them. But the question is whether there should not be some exceptions to this rule.

A suggestion for solving the commitment problem and honoring deals to reach a peaceful solution should not be seen as a general policy. It is only advisable for successful "difficult opportunity crime". Culprits who succeed in taking over the army and the capital have been successful in acquiring power. To continue in their present position is something of a default alternative, substantially more attractive than being in a siege of a bank office. Even if the fight for defeating their enemies to obtain total control has ended in a stalemate and disappointment, it is still a power position. To give it up becomes far less attractive if it implies a prison instead of a secluded villa in a friendly country. If an offer of the latter kind can bring peace, I think such an offer is advisable. Keeping such agreements is most important for transition in other countries. We live in a world that is interconnected and no dictator is unaware of what happens to his colleagues.

Therefore, in my opinion, incentives for transition to democracy should be given great weight, and culprits giving up strong positions should be offered amnesty. This reasoning implies that culprits with a weak position can be treated more strictly, which would be an incentive for them to step down sooner rather than later, before they become weak. Such relatively utilitarian reasoning will appear unprincipled to many readers, since it implies a softer treatment of strong abusers than of weak abusers. The rationale is that this concession is necessary for obtaining and transferring a significant amount of power. One should then be prepared to offer something, because offering nothing is in practice merely to wait for another day. The negative consequence of waiting can be expected, and therefore carries moral implications. That it is not an intended consequence for promoters of strict justice is an insufficient reason for ignoring this effect. There is a risk of making the Best an enemy of the Good.

The copycat risk should be addressed. Will generals and local leaders in other countries take to arms in the knowledge that they can obtain a similar plan B solution? They might, if the threshold to amnesty is very low. For dictators and rebel leaders, like those of LRA, AUC and FARC, who have had territorial control for years, however, the threshold is so high that others do not follow for such a minor extra possibility. In a democratic society, not even the president or the chief of the army has any real opportunity to take over if they dislike the outcome of an election. But if they do revolt successfully, it is better to let them hand over the capital in exchange for amnesty, than to take back the capital by military conquest. Exceptional power positions make it sensible to make, and honor, amnesties.

The idea here is to limit the amnesty to the issue of self-preservation, not to recommend letting a dictator take half the national treasury with him. Such a possibility would increase the risk of establishing destructive incentives that could threaten weak democracies, and of smoothing power transfers between old and new dictators with no element of transition to democratic rule.

Amnesty authority

A problem with amnesties is that they most often are self-imposed rather than given by an adversary with a democratic mandate (Rooth 2001). Mandela is one exception with unmatched authority, and Uribe, re-elected after his peace deal with 62% support, is another. But often the power is fragmented, and any politician reaching a deal risks being seen as a collaborator. Being pure and self-righteous has personal advantages, and both conflicts and cease-fires drag on for decades rather than reaching a peace agreement. There is a strong tendency for soft peace rhetoric, while never retreating an inch in substance. At the most there is a hope that some other politician will bite the bullet – and then the purist himself can endorse the peace, but simultaneously express dissatisfaction with the compromises that made it possible. The problem is too much peace and justice rhetoric and too few substantial agreements.

Even if a serious amnesty proposition is offered, it might be questioned whether there are many takers. Are dictators rationally comparing their future prospects in different scenarios? As acknowledged, many will not be tempted by a possibility to quit, but cling to power to the end. However, some dictatorships and self-righteous insurgents lose faith over time, and then the question arises for the leaders whether there is a possibility to end the conflict and still avoid jail. A dictator might be followed by an heir who has less motivation to stay on, but is sufficiently

tarnished to qualify for a long stay in prison if brought to trial. The numbers of retired Junta generals in Latin America and Communist Presidents in Eastern Europe are impressive. For most social groups, it is advisable to make retirement less attractive and motivate individuals to soldier on with their work. But for the group discussed here it is essential that incentives push for, not against, retirement. A credible amnesty is an offer you should not refuse to give.

After a peace agreement there might be problems, with warlords that strive to restart a conflict and make a comeback. One argument for trials is that it is a way to eliminate such “spoilers” of a fragile peace (Stedman 1997). An amnesty combined with an asylum to a helpful country would be another solution. To stipulate a strict retirement as a condition for amnesty can be a constructive clause.

A hindsight reflection

In judging a policy, there should be room for some counterfactual speculation. Milosevic at first denied that he had lost the 2000 election, and declared his intention to remain president. Later he accepted the loss, despite being indicted by the ICTY. Does this indicate that the juridical activity does not have the destructive side-effect that this article suggests? The indictment increased the risk that he would have hung onto his presidential claims, causing further problems for the Serbian people. Luckily, Milosevic probably thought the court was toothless. Jiri Dienstbier, the representative of the UN Human Rights Commission in Yugoslavia, questioned the priority of bringing Milosevic to trial before the fate of ten million Serbs, and suggested that Milosevic should be offered freedom from prosecution if he left power (Dagens Nyheter, 2000). Akhavan claims approvingly that the ICTY prosecutor Louise Arbour “hastily prepared an indictment”

against Milosevic to forestall a possible amnesty in the peace deal about Kosovo that was under negotiations (Akhavan 2001, p. 19). This looks like a dilemma that will recur – and a reason to reflect about priorities. Other similar conflicts have occurred. The UN Administrator of Afghanistan, Lakhdar Brahimi, stopped a prosecution initiative from the UN Human Rights Commissioner, Mary Robinson, targeting persons in the Karzai government (Burns 2002).

The moralistic bystander

The situation of the persons making the judgments is also of importance, as an adage says: “Where you stand in an issue depends on where you sit”. Support for the uncompromising attitude is a convenient choice for the distant observer, since it is considered compatible with high morals. “Conflict zone inhabitants” might give higher priority to ending a continuous confrontation. This claim is not that the locals are generally less inclined to conflict – most often, great aggression is at the core of the conflict. A study by the Red Cross (ICRC 2000) reveals that people in conflict countries often are tolerant or even supportive of atrocities committed by members of the own group towards the other group. However, the situations of special interest are those where the leaders and their followers are losing faith in their project and the associated violence. It seems to me that the interests and opinions of those more directly involved should be given more weight than those of distant observers.

The overreaching question is whether the international prosecution threat in both the national and the global arena will prevent atrocities from happening, or whether they will motivate them to continue. A possible position after considering the arguments for and against tribunals is that there is a negative effect of a tribunal threat for the country in conflict, but a positive deterrence

effect for other countries. If the latter is significant, the local disadvantage might be more than compensated. This alternative has been of minor importance in the debate, since most scientists take more radical positions – either for or against. However, if a tribunal treatment has crime-preventing effects for other countries, but peace-preventing effects for the country primarily involved, it implies a difficult dilemma.

Police capability

A victor's justice is usually not in high regard. Sometimes even that is not attainable; without a victory there is no basis for a victor's justice. The situation is radically different when there is a stalemate rather than a victory. There ought to be some point at which continuous misery of the people should be given more weight than the pleasure of seeing a dictator or rebel leader hanged or behind bars.

When the national system is unable to pacify the criminals and bring them to court, this becomes a potential mission for an international intervention. There was probably a high noon for spirits of democratic intervention just at the turn to this century. The opinion was often voiced that the international community had been much too slow to react on Rwanda and Bosnia, and faster reactions were suggested for the future. "The duty to protect" had many promoters. With the problems in Iraq and Afghanistan, the enthusiasm for intervention has now cooled off. Presently, a dictator is confronted with less serious external pressure. The combination of harder punishment of crime and a weaker police power makes the alternative of staying in power, and out of reach for justice, more attractive.

Maoz (1984) has suggested “prudence in victory” as a strategy after interstate conflict, implying juridical restraint. Hartzell (2009) discusses the merits of giving the losing side, after a civil war, possibilities to continue as a legally accepted organization. This article concerns other situations, and the strategy to consider could be termed “prudence without victory”.

5 Evaluation of trials versus amnesties

Intrinsic value of retributive justice (A)

As mentioned before, intrinsic value does not triumph over instrumental value by some kind of priority rule, and some readers might still want to treat them separately. One way of doing this in a reflective way is to make a comparison of the intrinsic value of retributive justice with other intrinsic values. I have not given much space to the virtue of forgiving, which often has many protagonists, but more seldom in this context. For these situations, it is hardly controversial to claim that the intrinsic value of retributive justice is more important than the intrinsic value of forgiveness. Yet I also claim that the intrinsic value of truth is more important than that of retributive justice. Justice has an intrinsic value, but it should be quantified as minor.

Crime deterrence effects (B)

The problem is that the threat of a tribunal process is only a minor part of all dangers confronting leaders in a dirty war. There is a deterrence effect, but it is countervailed by hate, tactics of repression, and retributive violence. In the fog of war there are many reasons for a development into a dirty war. Dictators and rebel *comandantes* have generally crossed the line of law and decent behavior, and committed crimes worth more years of prison than their life expectancy. The pull of power is strong and the risks are high of being killed in the quest for power, while the

additional risk of being punished when retiring is hardly a strong motivational factor when starting such a career. Therefore the deterrence effect is only estimated to be of minor nature.

Norm erosion effects (C)

There are erosion effects of an amnesty, but they can be kept rather low if the dominant impression is that of a new strong order. The prime problem with impunity is seldom an amnesty, but that the police are demoralized after a transfer of power and political opposition can transform into criminality. Rampant crime in South Africa and the Soviet Union after the regime change illustrates this problem. The important task seems to be to establish a new law and order regime. Still, I concede that letting criminals go free has an impunity effect, but it is a minor negative factor.

Peace-delaying effects (D)

The peace-delaying effect can be seen as the other side of the coin to the deterrence effect. The more substantial is the worry of punishment, the more efforts are made to “avoid getting busted” policy. As mentioned above, there are many other factors influencing crime or not. However, at the time of eventually settling an exhausted conflict, the personal consequences after a peace settlement for the deal-makers are a very salient factor. There is a major advantage in offering an amnesty.

Influencing truth-seeking (E)

The analysis of truth-seeking supports the general judgment that this sub-goal is preferable to its antonym – topic taboo. Can justice contribute to the truth-seeking efforts? Yes, but it is a

problematic endeavor that easily drums up accusations and denials. Confessions are more helpful in sorting out truths from rumors, and they are easier to stimulate if they do not result in punishment for the witness or his comrades in arms. Truth might also be harder to reach if more ambitious procedures are pursued to cover up the trail of misdeeds. More people will be motivated not to talk in the witness stand of a truth commission. Here, truth is deemed to be important, but it is a long-term project and a tribunal will be of minor, but negative, importance in this quest.

Influencing reconciliation (F)

Reconciliation is largely a question of generating and maintaining a curative momentum when the armed conflict comes to an end. By contrast, a tribunal process can be like an open wound with haggling about accusations and denials. The length of the juridical process is a problem. The attention to the past is a problem when the focus needs to be directed towards the future. A tribunal can be seen as something demanded primarily by the informed bystanders as a confirmation that they have been right in their moral condemnation – but for the peace process in the country, a tribunal might be a major distraction. There is a more negative effect of tribunals on reconciliation than on truth-seeking.

Summing up the comparison of a strategy with tribunals with a strategy of amnesty according to the six factors: Transition-supporting effect = $f(A, B, C, D, E, F)$.

Figure 2

When in a post-conflict situation with no peace-delaying effects, there is a close call for having a tribunal or not. In some situations it might be advisable. For a winner with a brutal loser, an international tribunal might be a constructive way of both restraining revenge and avoiding accusations of enforcing a biased victor's justice. I support the idea of having the option to send a case to an international tribunal. What is disputed is the application of an international jurisdiction with the possibility for courts to intervene on their own initiative. When there are evident problems in ending the conflict, the peace-delaying effect of a pending trial will tilt the evaluation strongly against recommending a prosecution, and instead suggests making a deal including amnesties.

6 Conclusions

Some observers, like Akhavan (2001), judge the international tribunals to be successes, while others, like Goodman (1999, p. 178), perceive the efforts as stunningly impotent. A third opinion is that no studies have systematically measured the contribution of trials to reconciliation and social reconstruction (Fletcher & Weinstein. 2002, p. 585). Despite this lack of evaluation, there are expectations of more prosecutions to follow (Meernik 2008, p. 181). The jury evaluating international tribunals will be discussing them for a long time.

The normal procedure is to arrest a criminal and bring him to court. But if you cannot muster that force, it seems counterproductive to make it harder to reach an agreement with the criminal. That a person can get away with murder is naturally offensive, yet it is even more offensive that the

murdering continues. A transition-focused *Realpolitik* would choose disarming the violators from power and weapons as the first priority. Getting them into jail is desirable, but nonetheless a bonus that is not sufficiently important to warrant a long delay in the transfer of power.

Amnesty-cheating is not a long-term policy for efficient separation of political criminals from their powers. Making “retirement bargaining” uncertain and dangerous will hardly stop people from trying to grab power by violent means, and it might dissuade them from relinquishing the power they presently hold. The same reasoning can be applied to rogue opposition groups like LRM, AUC, and FARC. If hunting them down has failed for so long, it is time for a second-best solution, and justice becomes destructive if it motivates the culprits to continue fighting. There is a window of opportunity in which heads of state and revolutionary leaders are disappointed and reflect upon quitting. It seems unwise not to grab such opportunities but to create institutions that compel them to hang on for the sake of self-preservation. It is justified to treat abdicating dictators differently from dictators dethroned. The recommendation is not an unprincipled pragmatism, but finding constructive principles. One valuable principle is *Pacta sunt servanda* – to honor agreements.

A juridical process can place too much emphasis on proving something trivial. More complete investigation may also acknowledge the crimes of the winners and give a more nuanced picture. The task is not only to reverse the dehumanization of the enemy, but also to de-victimize the own group. Such an approach is hardly in line with the accusations of blame and claims of innocence in a court trial. Justice is essential for society, but past injustices cannot efficiently be corrected; history can be reevaluated, but not replayed with corrections. In contrast, truth-seeking is at the

core of such reevaluations and seems both more important than justice as an intrinsic value, and more constructive as an instrumental value for a transition to peace and democracy.

Even the worst of movements may have some worthy ideas for improvement. Regional autonomy is not inherently stupid or undemocratic *per se*. If a good suggestion comes from a repulsive source, this is not a sensible reason to discard it – but accepting it because of threats of violence is extremely dangerous. “Independence” for the military and a “leading role” for a special party are other possible concessions in an agreement, but are even more problematic. Therefore an amnesty is generally the most acceptable of compromises. Truth and transparency can be combined with amnesty. A formal amnesty may help to prevent the quest for truth from becoming a quest for revenge/justice and reheating the previous conflict. A better understanding of the crimes committed might promote the opinion that the pardoned person deserves to be in jail, but such a reaction does not imply that the amnesty was wrong. Rather, the exposed brutality indicates that a choice to continue a fight for unconditional surrender would have brought further human suffering. Survey research by Gibson (2002) in South Africa indicates that the dominant judgment considers amnesty to be unfair but necessary.

In many situations an international court might be seen as the best method, but in other situations local courts, a truth commission, or an amnesty can be considered more fruitful. This is not an argument against international trials *per se*, but an argument for such trials to be dependent on the local political solution rather than a direct response to the observation of severe atrocities.

International tribunals as a universal tool can be expected to be an obstacle rather than helping a

transition from rampant atrocities to a society of peace and progress. The popularity of international tribunals should thus be reconsidered.

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Figure 1

Three sub-goals and their antonyms that can be useful tools for a potential transition from conflict and atrocities.

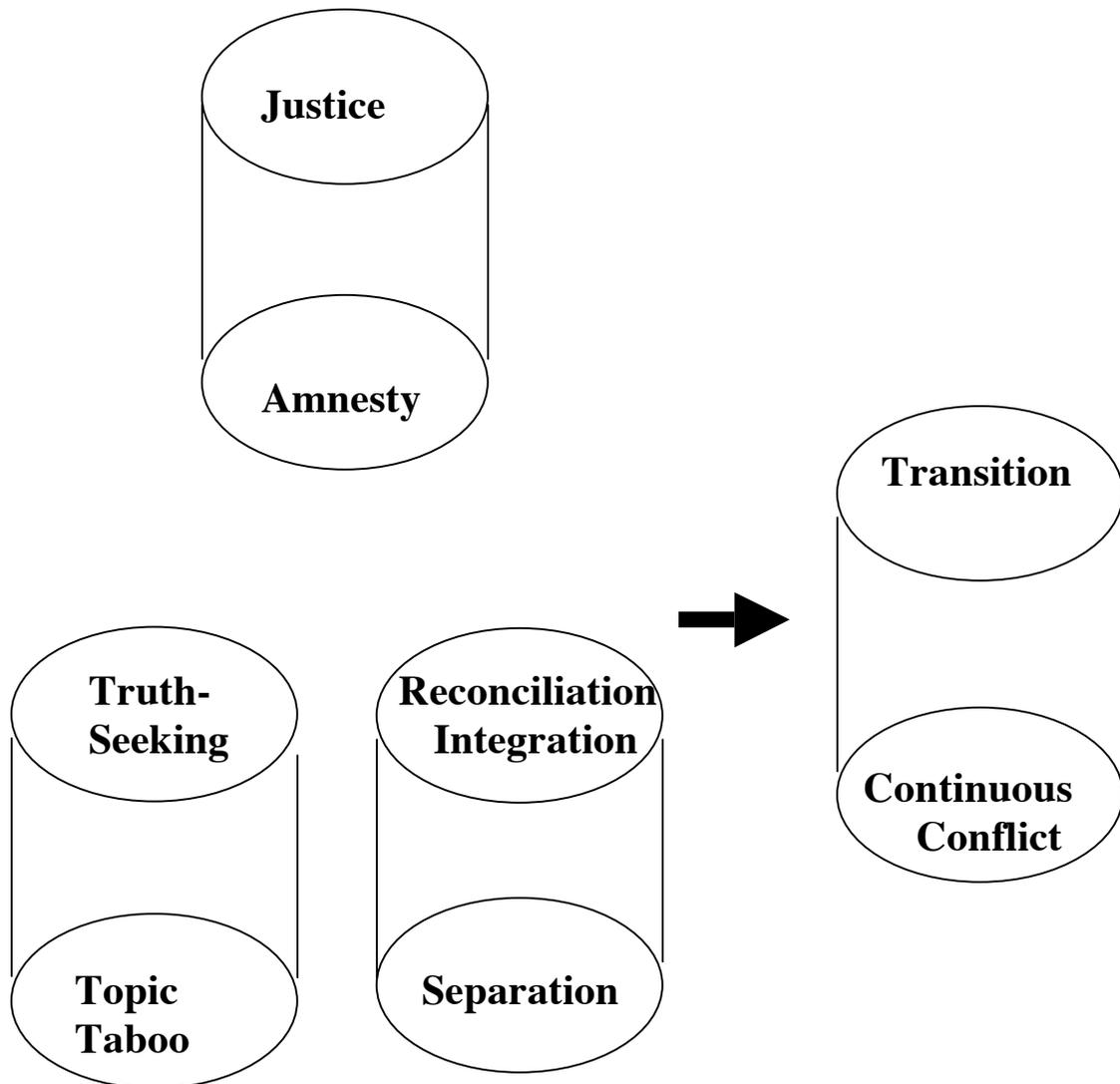


Figure 2

A comparison between a tribunal strategy and an amnesty strategy concerning the six important factors penetrated in the paper.

A Intrinsic value of retributive justice	minor tribunal advantage
B Crime deterrence effect	minor tribunal advantage
C Norm erosion effects	minor tribunal advantage
D Peace-delaying effects	major amnesty advantage
E Influencing truth-seeking	minor amnesty advantage
F Influencing reconciliation	major amnesty advantage