Contextualizing Restorative Justice:

The cases of South Africa and Rwanda

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1 INTRODUCTION

The aim of this thesis is to discover, how the need for restorative justice led to the implementation of Truth and Reconciliation Commissions, in both South Africa and Rwanda. To explain this need, it is important to look at the specific context of these countries, first. Namely, each of these countries had been confronted with human rights violations, that took place on a large scale. Meaning that, thousands of people had lost their lives and the ones who did survive, were either guilty of horrible violations or had been the victim of one, or both. Secondly, these countries were presented with a whole new set of challenges and questions after the violence's stopped. For example, how can a country be restored when it's left without a proper justice system? Or, what happens when the country is left without a functioning government, to inspire a different future? This will all be examined in the coming chapters and the basic principle of restorative justice will be further illustrated in chapter 2.

Truth and Reconciliation Commissions are governmental sponsored institutions, who inquire the pattern of violence that took place as well as promote reconciliation by unveiling the truth. These commissions were first implemented in Latin America in the 1970s and 1980s, during the aftermath of dictatorships in Argentina, Chile, Guatemala, and elsewhere (Hayner,2001)**.** However, they have been adapted and developed since the 1970's and 1980's. Meaning, there is no single, broadly accepted definition of what defines a truth commission. The implemented design of the Truth and Reconciliation Commissions, is dependent on the country's needs and intentions. Nevertheless, the general objective will always be to achieve social understanding and acceptance of a country's past, while there is an increased focus on generating reconciliation. Reconciliation hasn't always been a focus of the truth commissions though, nonetheless it does seem that "the intention of truth commissions is part of what defines them: to address the past in order to change policies, practices and even relationships in the future, and to do so in a manner that respects and honors those who were affected by the abuses" (Hayner, 2001). Hayner uses the word 'abuse' here, however in my opinion this should be named 'violence', therefore the latter will be used throughout the thesis.

A truth and Reconciliation Commission is merely representing the basic principle, named restorative justice. That's why these commissions can be differently implemented and designed, due to the specific context that led to the country's need for restorative justice. This is explained by the Commission's chairman of the South Africa Truth and Reconciliation Commission, Desmond Tutu, who said **"**there is another kind of justice, restorative justice. Here the central concern is not retribution or punishment but, the healing of breaches, the redressing of imbalances, the restoration of broken relationships" (Roche, 2006). Therefore, he said the South African Truth and Reconciliation Commission "embodied a restorative approach to justice" (Roche, 2006), considering that the commission collected testimony from victims, granted amnesty to offenders, and advised the government on how to repair the harm done during the apartheid. These different dimensions of the principle named: restorative justice, are explained in chapter 2.

This thesis will address, The South African Truth and Reconciliation Commission as well as the Gacaca Courts in Rwanda. Both were conceptual truth and reconciliation commissions which had been adjusted to fit the country's specific contextual situation. In other words, they were representing the basic principle of restorative justice, yet the specific designs of these commissions were contextually influenced.

This leads to the main research question on which this thesis is based, specifically:

- **How does context affect the implementation of the basic principle of restorative justice through the truth and reconciliation commissions, in South Africa and Rwanda?**

To answer this main question, these two countries will be analyzed through a range of sub-questions. Considering that the basic principle of restorative justice is implemented and then translated into the designs of these commissions, it is important to examine the relevance of context, governing these commissions. To build on what has been said by Desmond Tutu before, the objectives of these commissions were to: 1. Provide the government with the opportunity to (re)establish civil- and political stability. 2. Steer towards restorative justice instead of retributive justice and 3. record and acknowledge the mere fact that these violence's occurred in the first place. Thereby, preventing these violence's from taking place in the future.

The restorative justice' objectives as explained above, form the framework through which The South African Truth and Reconciliation Commission and the Rwanda Gacaca Courts, will be examined in this thesis. For the analysis of the contextual influence on the implementation of the basic principle of restorative justice, these objectives have been translated into three different perspectives. Therefore the framework of this thesis correlates with the objectives of these commission as mentioned above, namely 1. a political perspective, 2. a juridical perspective and 3. an anthropological perspective. Meaning that the literature used in this thesis will be approached through the 'glasses' provided by these perspectives. For this reason, the coming chapters will be focused and guided by these sub-questions below. Each representing a perspective.

Political perspective

- **What balance is found in the need for justice and the need for political stability?**

Juridical perspective

- **What range of initiatives are presented to compensate for the transpired violence?**

Anthropological perspective

- **What attempt is made to reconcile damaged relationships between the victims, offenders and the broader community?**

However, considering that context consists of a broad spectrum of circumstances, the thesis will not be able to provide a decisive answer to the main research question. Simply because it is not possible to include 'all' contextual aspects that may have influenced the implementation of the basic principle of restorative justice. Nevertheless, by using these three perspectives throughout this thesis, it is be possible to examine the influence of 'specific contextual aspects' on the implementation of the basic of restorative justice, in South Africa and Rwanda. In other words, these three chosen perspectives will determine which contextual aspects are considered, for answering the main research question of this thesis.

To sum up, the three perspectives will be used to analyze the implementation of the basic principle of restorative justice and the design of these specific commissions, in South Africa and Rwanda. This framework will consistently be present and used throughout this thesis. This is demonstrated in the next chapter, as the basic principle of restorative justice is approached and analyzed with the use of these perspectives.

2 THEORETICAL FRAMEWORK

Restorative justice is a practice which is implemented through the truth and reconciliation commissions, in correspondence to specific circumstances within each country. To fully understand what defines restorative justice, especially regarding the general concept of truth and reconciliation commissions, it is important to examine these concepts properly. Like restorative justice, some concepts require a broad explanation and this chapter will try to clarify these. As mentioned in the introduction, the implementation of the restorative justice practice will be examines with the use of three perspectives, namely political, juridical and anthropological. Therefore, this chapter will approach the basic principle of restorative justice itself, in the same way.

2.1 DIMENSIONS OF THE BASIC PRINCIPLE OF RESTORATIVE JUSTICE

It is necessary to examine how the concept of restorative justice is prescribed, to fully understand the key assumptions underlying the practice. The Restorative Justice Council (2016), prescribes it best as "Restorative justice brings those harmed by crime or conflict and those responsible for the harm into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward. This is part of a wider field called restorative practice". So even though restorative justice sounds theory-based, "it is commonly acknowledged to be a grassroots movement that is practice instead of theory-driven" (Ward & Langlands, 2009). This makes the formation of a clear definition rather difficult, since the practice of restorative justice is adjusted to fit specific circumstances. These specific circumstances also determine the applied design through which the basic principle of restorative justice is implemented. To clarify, a 'grassroots movement' is defined as "the common people, originally those of rural or nonurban areas, thought of as best representing the basic, direct (political) interests of the electorate" (Webster, 2010). In this case, local people collectively use action to try and generate change at the local, regional, national or international level. Concluding that restorative justice is practiced bottom-up. Meaning that it is necessary for local people, to implement (local and restorative) justice in order to eventually achieve both local and national reconciliation plus the restoration of social relationships, thus society.

Considering that restorative justice is a principle, therefore practice-based and thus not distinctly defined, it is important to emphasize that therefor, the principle of restorative justice can consist of different dimensions. This chapter will provide a theoretical framework for the basic principle of restorative justice, which will be shaped by using of the above mentioned perspectives.

2.1.1 Political perspective

From a political perspective, restorative justice can be seen as a constant battle for finding balance in the need for justice and the need for political stability. However, the practice of restorative justice can also be used to fulfil a politically motivated move, as "recounting history is always a political endeavor as there are many 'truths' from which to form a narrative"(Corey & Joireman, 2004). Politically speaking, by implementing restorative justice and uncovering certain 'truths', an opportunity is given to use these 'truths' to promote or demote someone's political position. That is why, McCold (1996) claims that "only if our democratic political institutions support the restorative process and provide the resources and responsiveness to local community needs, can the possibilities of a safe community be realized". In other words, restorative justice can only succeed if the government's political motivations are equal to the country's need, in this case reconciliation and the restoration of communities.

Implementing the basic principle of restorative justice through a Truth and Reconciliation Commission could be seen as a political compromise. South Africa is the perfect example of this. Here, the government surrendered it's powers to the commission in return for "a blanket amnesty for any crimes they committed during the apartheid rule" (Roche, 2006). In this case, the choice for restorative justice instead of retributive justice, confirms that it was politically motivated. From a political perspective, restorative justice can provide the government the opportunity to transfer some of its powers to the commission and at the same time, use restorative justice as a tool to benefit their own political-structures. This doesn't comply with the basic principle of restorative justice 'ideals.

Nevertheless, restorative justice does provide an opportunity to structure restorative encounters, especially at a time of crisis. "This is an opening to focus not just on the isolated incident, which has caused the harm, but the history and context of the incident" (Verity & King, 2007). Individual 'choices' could be better explained when the historical and contextual factors are considered too. The actions or choices of an individual can be explained better if you consider they were "shaped through a series of historically produced interactions between individuals and communities, and communities within a changing political economy" (Verity & King, 2007). Therefore, implementing the basic principles of restorative justice can be useful to understand greater historical and contextual factors that were of influence. By generating an open dialogue between victims, offenders and the broader community, it can reveal the political environment in that time too.

However, in order to change economic conditions and social structures that contributed to the uprising of violence, other resources are required. As McCold (1996) agrues in this article, "The resources required to alter structural inequities can only be met from larger political structures". This logic undermines the effect politics had on creating the economic conditions and social structures in the first place. This top-down approach can lead to further destabilization, especially from a political perspective, as restorative justice provides an opportunity to speak out, tell the truth and be heard, nevertheless explain the political environment that contributed to the violations.

Silva-Leander (2008) argues, "the long-term stability of the country will depend on the government's ability to open the political space". In other words, the government need to allows other 'voices' to be heard in the political environment, for example allowing other political parties to be part of the government. Only if citizens feel represented in the government and the political environment consists of multiple 'voices', long-term stabilization can take place. However, short-term survival of the government depends on "its ability to manage internal opposition" (Silva-Leander, 2008). This means that the government's survival strategy is focused on those who won't support them, by "undertaking policies that could aggravate structural tensions" (Silva-Leander, 2008) This will ensure short term survival, yet only decrease the chances of long-term peace. These political struggles can lead to tension within all layers of society and therefore spark the onset of gross human violations, genocide or civil-war.

The implementation of the basic principle of restorative justice means that focus will be on the symptoms of the harm done, not only the violation itself. In other words, the practice of restorative justice can create awareness for larger 'environmental' factors that generated the tension in the first place. The country's political discourse could be one of those factors (Verity & King, 2007).

2.1.2 Juridical perspective

Zehr and Mika (1998) have outlined three core principles that underpin restorative justice practices. "1. Crime is fundamentally a violation of people and their interpersonal relationships. 2. Violations create obligations and liabilities. The offenders' obligation is to make thing right as much as possible and a restorative justice process empowers victims to effectively participate in defining these obligations. 3. Restorative justice seeks to heal and put right the wrongs. The process of justice maximizes opportunities for exchange of information, participation, dialogue and mutual consent between victim and offender. And the justice process belongs to the community, where community members are actively involved in the process". As restorative justice tries to restore damaged relationships between the victims, offenders and the community. It should be emphasized that Zehr and Mika have a legal background and therefore only one perspective is considered in the undertaking of formulating the underlying principles of restorative justice, the juridical perspective. Restorative advocates have argued that the appeal of restorative justice lies in its "flexibility to encompass a wide range of initiatives and thus, any attempts to reach a definitive agreement about 'what it is' will somehow contaminate, and potentially destroy, its essence" (Ward, 2008).

When laws have been violated or social conduct have been breached, people commonly demand punitive action to overcome the violation. To compensate the victims and restore justice, punitive action should be proportional to the situation. However, this is a challenge when the violations are difficult to compensate for, in case of human rights violations for example. In these situations a truth and reconciliation commission could be designed perfectly, to accommodate restorative justice instead of retributive justice. Due to the usually extenuating circumstances, it is hard to overthrow the desire for punitive action, however the search for restorative justice should still be pursued rather than 'common' justice through the state's justice system. Not to mention, that a state's juridical system often no longer exists after a violent war or genocide.

Central to the processes of restorative justice is the opportunity for both the 'victim' and the 'offender' to tell their story and have their story heard. One of the strengths of this approach is that the harm done to individuals and the community can be named. Only this, creates the opportunity for healing or reconciliation, for victims, offenders and the broader community.

2.1.3 Anthropological perspective

From an anthropological perspective, Author Wachtel (2013) from the International Institute for Restorative Practice states that restorative justice should be approached as 'social work'. Which "allow victims, offenders and their respective family members and friends to come together to explore how everyone has been affected by an offense and, when possible, to decide how to repair the harm and meet their own needs" (Wachtel, 2013). In social work, a decision is made by the family as a group which "empower extended families to meet privately, without professionals in the room, to make a plan to protect children in their own families from further violence" (Wachtel, 2013). As well as provide opportunities to " share their feelings, build relationships and solve problems, and when there is wrongdoing, to play an active role in addressing the wrong and making things right" (Wachtel, 2013). The restorative justice approach promotes the reintegration of the offenders into their community and thereby reducing the likelihood for them to reoffend.

In restorative justice, not only the violation of the law but also the violation of relationships between people are interpreted as 'wrong' (Kuo et al, 2010). This means, restorative justice can only be spoke of, when violations or injustices are done on multilateral dimensions of society. Therefore the primary focus of restorative justice is directed to all involved; the victim, the offender and the community, in an attempt to heal or reconcile the afflicted relationships (Goodstein & Aquino, 2010).

By incorporating these three actors (the victims, offenders and broader community) restorative justice goes beyond other forms of justice. “Restorative justice emphasizes healing through both material and symbolic restitution, rebuilding the self-respect of offenders, and integrating them back into the community” (Goodstein & Aquino, 2010). In this case, it is unclear what the authors exactly mean with ‘healing’, in my opinion this a substitute for ‘reconciliation’. “The true remedy to the harm is to repair relationships, not to punish the person who has done the harm” (Kuo et al., 2010). Again the word ‘repair’ is used, yet the word ‘restore’ would be more appropriate.

2.2 CONCEPTUAL FRAMEWORK

As these dimension of restorative justice have been discussed above, we could conclude that truth and reconciliation commissions are the embodiment of restorative justice. Considering, they avoid formal prosecution, emphasize the importance of victim participation, and provide a forum which enable people to tell and be heard by all involved parties. Plus, the design of these commissions are constantly adjusted to the circumstances under which the violations have taken place, so to benefit the process of restorative justice.

We now know, defining restorative justice isn’t straightforward and is actually rather complicated. However, the underlying essence and implication of restorative justice is hopefully becoming more apparent. In this thesis, the undertaking of restorative justice, in South Africa after the Apartheid regime and Rwanda after the genocide, will be analyzed. These two countries were chosen because they have endured very distinct, yet very different, conflicts.

To emphasize once more, throughout this thesis the political-, juridical- and anthropological perspectives will be used to analyze the implementation of the principle restorative justice. As you could see above, the dimensions of this principle could be shown with the use of these perspectives too. Furthermore, these perspectives will continue to function as guidelines throughout the thesis. To analyze the implementation of the basic principle of restorative justice by using the three perspectives, it might be important to describe, how I distinguish these perspectives from each other.

First, when I read an article through the ‘glasses’ of the political perspective, I ask myself questions. These questions below will give an impression of this. My priority is to examine, if the government played a role in the conflict? If so, what was this role? Also, did the government get involved with the actual implementation of the basic principle of restorative justice? Are there political motivations for choosing restorative justice instead of retributive justice? Does the implementation of this principle provide the government with more or less power? In other words, anything that involves the government, whether it’s their role in the conflict, the implementation of the principle, or their overall intention. All will be considered in the political perspective.

Second, when I read an article through the ‘glasses’ of the juridical perspective, my priority is to examine, what type of violations took place? What rights are emphasized by using restorative justice? What rights are ignored or substituted in the process of a Truth and Reconciliation-trial? Are universal human rights ignored or diminished with implementing restorative justice? Are the rights of victims and/or offenders respected? How are these proceedings legally organized? And, how are these violations compensated for, specifically to the situation? In other words, anything that involves the juridical framework of these truth and reconciliation commissions.

Last but not least, when I read an article through the ‘glasses’ of the anthropological perspective, my priority is to examine, how people experience these trials? Do these commission provide enough space for everyone to speak their truth and be heard? And if so, how do these commissions

contribute to generating reconciliation? When victims and offenders are given the chance to interact, is this experienced as beneficial? Is the community involved in the proceedings? If so, what role do they fulfil? Will the community be considered an active actor, in the realization of reconciliation? In other words, anything that focusses on how 'truth and reconciliation' proceedings were experienced by the victim, the offender and the broader community.

Considering these specific aspects of every perspective, this could help determine the contextual influence on the implementation of the basic principle of restorative justice in South Africa and Rwanda. In other words, these aspects will form the conceptual framework for this thesis and will be used as guidelines throughout this thesis, to eventually answer the main research question.

3 RESEARCH METHODOLOGY

A lot of literature studies and empirical studies have been conducted over the years, due to the fact that 'restorative justice' and 'truth and reconciliation commissions' have been widely known concepts since they were implemented in the 1970's and 1980's. Even though, empirical studies are essential for social sciences, it is always important to stress the fact that the observations, interpretations, representations and intentions of the author will have its effect on the collected data. Therefore, only literature-based arguments will be included in this thesis. Since I won't be able to conduct my own empirical study.

Even though choosing a literature based study was most practical for this thesis, it did challenge me to limit and put certain restrictions on my research. My first restriction meant only choosing two countries to include in this thesis. Eventually leading to South Africa and Rwanda, because these two countries had both gone through gross human rights violations in the past. Due to the very distinctive, yet, very different conflicts, these countries were perfect for a comparison-study. Another restriction was to only use three perspectives, as guidelines to compare the countries, this being the political-, juridical- and the anthropological perspective. I chose these three perspectives since they best translate the objectives of the basic principle of restorative justice. Therefore, these perspectives could be helpful to determine if and/or in what way, the implementation of the basic principle of restorative justice has been contextually influenced, in South Africa and Rwanda. In other words, to answer my main question.

To work within the limited research time I had, my research has mostly been focused on the concepts below. These are some 'words/phrases', my literature research is based on: restorative justice, reconciliation, truth and reconciliation commissions, South Africa, Rwanda, traditional justice, transitional politics, retributive justice, genocide, African studies, human rights, apartheid, government, tribunals, collective memory, rule of law and amnesty.

To maximize the intake of valuable information in each article, I developed a system where I would encode the information on the basis of, where the article was published, for which perspective this information could be useful, for which country it could be useful and the author's motivation for writing the article. This resulted in a encoding system, at which every author got it's own color, every perspective was noted behind the information as well as the country. This looked like (purple, anthro., SA) or (blue, political, Rw) or sometimes even (Red, Juri., SA, author Lawyer). This way, my collected data was organized and it made it easier to use information from one article for multiple perspectives. It made a huge difference in preventing myself from getting too overwhelmed.

4 SOUTH AFRICA

4.1 HISTORICAL BACKGROUND

The 'black' population of South Africa had been subdued to apartheid rules since the beginning of the 20th century, however the politics of apartheid took on even sharper forms, in the 1950's. Under 'white' prime minister Verwoerd, the black population was deprived from important (human) rights, such as the right to vote, the right to use "white services" and the right to marry interracially. As well as forcing the 'black' population to move and live in so-called homelands or Bantustans. This was true for every non-white South African's and it restricted their freedom to movement. The ANC (African National Congress) party fought against this racist policy. Later on, Nelson Mandela (ANC party leader) would become the icon of the resistance.

It wasn't until the 1990's that the apartheid ended. On 11 February 1990, president De Klerk released the (by then) well-known anti-apartheid activist Nelson Mandela. When general elections for all races/ethnic groups were held for the first time in 1994, Nelson Mandela became the first free elected 'black' president of South Africa. This meant the new government was led by the ANC-party and this marked the end to differentiated citizenship. However, the conservative forces of apartheid didn't completely vanish and maintained representation in the government. Committed to institutional guarantees for the new role of whites, this was exactly what Nelson Mandela envisioned as a South African national unity.

In 1995, a truth and reconciliation commission was created by the Promotion of National Unity and Reconciliation Act 34 and Nelson Mandela appointed Desmond Tutu (Anglican Archbishop of Cape Town) as president/chairman of this commission. The main purpose of this commission was to create a platform for victims of the Apartheid policy and for those who committed such violations. Those who had undergone serious human rights violations could testify in front of the commission and the offenders could prevent prosecution by being interrogated by this committee. These interrogations were held publicly. From the commissions mindset, the possibility for offenders to request amnesty and thus preventing civil and/or criminal prosecution, was perceived as an incentive to tell the truth.

4.2 POLITICAL PERSPECTIVE

After installing the new government under leadership of Nelson Mandela, it was imperative that democracy was implemented. Equal rights for all. In this political paradigm, retribution for former rights violators was avoided, because the negotiated peace-process could be compromised by this and it would only add tension to the democracy that was trying to get hold in the country.

The new government had to be very cautious in proceeding because "the threat of criminal proceedings against the old guarding apparatus of apartheid security implicated the very real possibility of an outbreak of bloody civil war", said by Nahla Nvali in the article of author De Hollanda (2012). In face of a new democratic government, they couldn't disregard the fact that these right violations took place, however they had to create a sense of legitimacy too. The problem was that international tribunals were focused on clarifying past events, trace blame and assign punishments, yet this was never the intention of the new South Africa government. Accoring to Alex Boraine, the Truth and Reconciliation Commission of South Africa went beyond the normal boundaries of formal politics and at the same time instituted public dialog and recognition (De Hollanda, 2012). For which Nahla Nvali explained, "national amnesia about the past, was also unacceptable".

Some argue, that breaking with the past needs to be facilitated by investigating the past, act on what is unveiled and ensure accountability for past crimes (Hamber, 2003). However, this accountability can be assign in many different forms. In this case, the ANC's aspirations were for the South African Truth and Reconciliation Commission to undertake the process "as quickly as possible so that we indeed let bygones be bygones and allow the nation to forgive a past, it nevertheless dare not forget" (Hamber, 2003). This means the past is addressed as well as accountability assigned, to proceed towards the future, while avoiding "national amnesia". After all, "truth commissions are by definition established during times of political instability and therefore inevitably characterized by a push toward political and social stability" (Hamber, 2003).

In the report of the African Union Panel of the Wise (2013), the author describes two incorrect assumptions that underlie the discussion, on whether peace and justice are competitive or complementary goals. " First is the narrow view that assumes that peace processes are solely about ending violent conflicts. Second is the tendency to perceive justice in terms of retributive justice—that is, prosecution or criminal accountability". However, a more accurate approach would be to perceive peace and justice as fundamental concepts to end the violence and to prevent the recurrence of it. You could say the prize for peace and democracy, in the case of South Africa, was to give offenders the option of requesting amnesty.

If offenders were granted amnesty, victims would, in effect, be forced to give up their rights to justice in exchange for the truth. Though, Hamber and Kibble (1999) claim that "most amnesties have been granted without any conditions being placed on the perpetrator". Admitting that such 'forgiveness' is necessary to ensure peace. Hayner claims in the article of Hamber and Kibble, that this "tends to be the perpetrator's argument". However, this argument also tends to be used by new governments to seek political stability. As political stability is in the best interest of peace. To conclude, amnesty was a pragmatic necessity to ensure democracy in South Africa and "some rights of the victims were thereby forfeited for the so-called greater good" (Hamber, 2003).

4.3 JURIDICAL PERSPECTIVE

Archbishop Desmond Tutu said in the Truth and Reconciliation Commission of South Africa Report (1993), that without the Truth and Reconciliation Commission, "we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa". This became the core justification for the existence of the South Africa's Truth and Reconciliation Commission. Therefore the agreement to grant amnesty for offenders under the apartheid policy, was a pragmatic choice invoked in the interim Constitution. That's why Hamber (2003) concluded that "Amnesty, especially for apartheid forces - or so the argument goes - was the cost (especially to victims' seeking justice through the state's courts) of saving the innumerable lives that would have been lost had the conflict continued". Using this argument, amnesty was about progressing "reconciliation and reconstruction" as stated in The Promotion of National Unity and Reconciliation Act 34 (1995). This is in agreement with author De Hollanda (2012) who argued, amnesty was "therefore a hope to generate revelations that would have been less likely to emerge in regular judicial procedures, especially in a context where material proof was scarce". Not to mention, large-scale prosecutions weren't even possible given the court systems inefficiencies.

Through the commission, amnesty applications were assessed as well as examined whether amnesty criteria were met under The Promotion of National Unity and Reconciliation Act 34 (1995). One essential criterium for granting amnesty being, to confess and provide full disclosure on the details of the crimes they had committed. In other words, justice would be overlooked if you had told the truth and confessed to your involvement in the criminal act. Notwithstanding that the Commission wasn't only used for granting amnesty, it was also used as an instrument to fulfill other functions. The

structure of the commission included three committees dedicated to distinct objectives, put shortly "the testimonies of victims and witnesses, recommendations for reparation, and regulated concessions of amnesty to self-confessed rights violators" (De Hollanda, 2012).

Finally, to add, the granting of amnesty as took place in South Africa, is highly unusual for a truth commission. The justification for the South African's exception, was described best by De Hollanda (2012) who said, "The judicial decision [to grant amnesties] was aligned with an understanding of amnesty as a condition for a new political era". In other words, the need for a (stable) political transition was considered to be more important than the right to justice.

4.5 ANTHROPOLOGICAL PERSPECTIVE

Author De Hollanda (2013) says that Alex Boraine claimed, it was the commissions objective to "hold up a mirror to reflect the complete picture". Meaning, reflecting the violence in the society of South Africa as a whole. After holding that mirror up, it would be possible to determine "all victims of the conflict and to confront all perpetrators of gross human rights violations" (De Hollanda, 2013). However, it is still very hard for the commission to decide what was 'good' violence or bad 'violence. Hence, determining who was right or wrong in the conflict. Whatever the motivation behind the violence, whether it was used as a political instrument or not, it doesn't reflect the democracy ideal the 'new' government wanted to form. Therefore, the new government wanted to discourage the use of violence in itself.

This coincides with the realization that everyone is capable of doing terrible things, once they are convinced of doing the right thing. Like Tutu says, although referenced to in the article of De Hollanda, "none of us could predict that if we had been subjected to the same influences, the same conditioning, we should not have turned out like these perpetrators". According to him, "we cannot underestimate the power of circumstantial conditioning". It is often seen that the difficulties of the offender aren't taken into consideration. That's why Desmond Tutu describes the Apartheid as a catastrophe that led to a nation of victims and offenders, yet both survivors (De Hollanda, 2013). Fullard (interviewed by De Hollanda in 2008) agrees with Tutu, she estimated that among the 25.000 homicides during the apartheid, 16.000 of those were the result of conflicts between counterparties in the political struggle. Therefore, many persons interchanged between the status of offender and victim.

The commission represented a platform at which the offender's and/or victims could speak out, tell the truth, with no real consequences. Not everyone was considered for amnesty, however even if amnesty was granted, the truth was "considered vital to understanding what had happened, assisting victims to come to terms with the past, and preventing its repetition. Truth was considered a basic building block of reconciliation". However, "On the psychological front, the process may have helped some with healing, but was hardly sufficient and the impact not necessarily psychologically beneficial" (Hamber, 2003).

One reason for setting up a commission, was to have an accurate historical record established. That way, learning from the past could be promoted and it might even be psychologically healthier to uncover the past instead of leaving it untouched. With that in mind, the commission provided "official and public acknowledgement of facts about crimes that may have been known by local people for many years but have never been officially recognized" and generated a "break [from] the culture of silence" (Hamber & Kibble, 1999). Hoping that it would eventually reconcile old 'enemies'.

Conventionally, testifying in public is seen as something healing and psychologically beneficial, for both victims and offenders. However, psychologists and anthropologists Hamber and Wilson,

referred to in the article of Richards and Wilson (n.d.), argue that, in this case, “Survivors report different experiences of recounting their stories in public. Some report [they are] feeling worse and afterwards they seldom receive adequate mental health support”, which is the opposite of psychologically beneficial and could even lead to a raise of anger. Not to mention that, anthropologists are also critical on the statistical approaches of political violence, “on the grounds that statistics often exclude questions of political consciousness and intentionality in the conflict” (Richards & Wilson, n.d.).

5. RWANDA

5.1 HISTORICAL BACKGROUND

By 1994, Rwanda's population consisted of more than 7 million people, comprising three ethnic groups: the Hutu (85%), the Tutsi (14%) and the Twa (1%) (United Nations (1)). Hereby, it is important to know that both the Tutsi's and the Hutu's have had governmental power in the past which had contributed to the unrest between both ethnic groups. However in 1993, an agreement to ceasefire allowed a power-sharing-government to exist, between the Tutsi's RFP (Rwandan Patriotic Front) and the Hutu's, who officially governed the state. Nevertheless, despite this ceasefire, hell broke loose on April 6th, 1994.

The genocide started on the 6th of April in 1994, when the presidents of Burundi and Rwanda were traveling back by plane to Rwanda. Together with their entourage, the plane was shot down mid-air and crashed. Even though, no one has ever been able to determine where the rocket came from and who authorized the launching of it, this plane crash was still accredited to the Tutsi's. And with that, the Hutu's declared war on the Tutsi's. This plane crash awakened the genocide where "as many as 1 million people are estimated to have perished", over a period of 100 days from April 6th, 1994 until July 16th, 1994 (United Nations (1)). On average, six people (men, women and children) were killed every minute during the genocide and 75.000 children were orphaned. Approximately 20% of the entire Rwandan population was killed (softschools). Despite the magnitude of the genocide, in the end, the RPF gained control and ended the genocide in July, 1994. The RPF is an acronym for Rwandan Patriotic Front and consisted of (maybe surprisingly) Tutsi rebels.

After the genocide, the government had a huge endeavor to undertake. Namely, the persecution of all people who had committed human rights violations. They began this process by the end of 1996, but it became painfully clear that the government was unable to fulfill this role. Due to the destruction of many government buildings, such as courts and jails, as well as the loss of authorized personnel. This means that by the year 2000, more than 100.000 genocide suspects were still awaiting trial by the national court system (United Nations (1)). This prevented the country from moving forward and prolonged the suffering of genocide. That was no longer acceptable.

In order to bring about justice and initiate the reconciliation process, the "Gacaca", was re-established by the government, otherwise known as "grassroots justice". The Gacaca is a traditional Rwandan system of justice and used for reconciling communal disputes or other disagreements. At which, local community members were allowed to testify freely and cases were judged by people elected from the community. Originally, these Gacaca gatherings were meant "to restore order and harmony within communities by acknowledging wrongs and having justice restored to those who were victims" (IDEA, 2008). However, 'wrongs' is not specified in this quote and could mean anything.

Despite this traditional system of justice, since the introduction of a national court system there was no longer use for it. Until the post-genocide government reintroduced it, nationally in 2005, as a means to help with the 'backlog' of criminal cases in relation to the genocide. Pretty much all people accused of genocidal crimes were seen before the Gacaca Court, except the suspects accused of planning the genocide. They were brought to stand trial at The International Criminal Tribunal for Rwanda in The Hague, The Netherlands. "Over 12.000 community-based courts trialed more than 1.2 million cases throughout the country" (United Nations (2)).

5.2 POLITICAL PERSPECTIVE

In 2006, Bert Ingelaere concluded that the genocide was essentially shaped by political and social factors that influenced communities on a micro level and society on a macro-level. The genocidal violence that erupted, reflected that both Hutu's and Tutsi's were "mobilized by political actors for political purposes, struggles for power, fear, coercion, the quest for economic resources and personal gain, vendettas and the settling of old scores" (IDEA, 2008). . In Rwanda itself, the genocide came to an end after 100 days, however violence was still part of everyday life due to the underlying tension between the two ethnic groups.

Paul Kagame was the RPF commander and leader of the rebel force during the genocide. In 2000, he became President and has said frequently that he "wants to build a new country" and "building or (re-)establishing this unity of Rwandans" (IDEA, 2008). This is what he defined as 'reconciliation' and has been an essential part of his regime. This vision was shared by the senate. In a Senate report from 2006, was stated that the senate looked upon the Gacaca courts as a means to "the building of a democratic culture" (IDEA, 2008). Which meant a consensus based democracy and a society consisting of reconciled Rwandans that would form one united country. The Gacaca courts would normally embody this statement, yet, 'consensus-based' might have been the theoretic approach, in practice it was much more complicated on a social and political front.

Traditionally, Gacaca was a practice of men and elderly to come together and discuss the 'case'. Usually a disputed, disagreement or conflict within the community. The decision they would make, was accepted throughout the community, as the men and elderly were respected and seen as 'wise'. This tradition was reformed however, to deal with the aftermath of the genocide and nowadays were seen as an 'instrument of the state'. This derives from the fact that the state defined "the rules and regulations to be followed in the Gacaca courts" (Ingelaere, 2007). Not as traditionally prescribed, the respected men or elderly in the community. In other words, the Gacaca court system was community-oriented but the state defined the framework in which it was applied. Corey and Joireman (2004) called it, "politicized application of justice". This became even more evident when Tutsi's were excluded for the process of Gacaca, since the RFP gained control over the country after the genocide. In making this distinction, the government placed all Tutsi's on a higher moral ground. This could be called a "Tutsi-isation" of the state by the RPF (Reyntjens, 2006). This only intensified the ethnic divide within Rwanda. This 'Tutsi-isation' is also reflected in Organic Law No. 40, article 1 (2000), "Limiting the jurisdiction of the Gacaca courts to crimes committed between the 1st of October 1990 and the 31st of December 1994". This way, Tutsi's couldn't be convicted for the killings of Hutu civilians, after the genocide ended. This was justified by the RPF as they were convinced that "The RPF 'liberated' all Rwandan people from the whims of a dictatorial and genocidal regime, created one big 'family' for all Rwandans and installed 'good governance' instead of the 'bad governance' of the past." (Ingelaere, 2007).

Besides the government (RPF) protecting itself, they also made sure the whole Gacaca process was controlled by the national government in a top-down orientation (Rettig, 2008). This is nothing like the intended principle of restorative justice**. T**he military authorities would ensure participation of all residents (the Gacaca's General Assembly), by threatening them with fines, closing up local shops and rounding up the population (Rettig, 2008). Organic Law No. 16, article 3 (2004), supports these actions by stating that "This General Assembly of a Gacaca Court is composed of all residents in the jurisdiction of that Court, aged 18 years at least". The top-down orientation is even more evident in the fact that the authorities themselves, would also attend the Gacaca Court sitting. This is yet again a confirmation that the Gacaca was an 'instrument of the state' and nothing like an institution to promote reconciliation. By attending these Gacaca Courts themselves and obligate people to

participate, they ensured dominance over the community/country. To justify this approach, they argued that “not all are ready yet and enlightened control is necessary (Ingelaere, 2007).

5.3 JURIDICAL PERSPECTIVE

In the IDEA report from 2008, is stated that “the ordinary justice system was virtually non-existent after the genocide”**.** In the entire country of Rwanda, “Only 12 prosecutors remained alive after the war” (Silva-Leander, 2008) and “nearly all judges or lawyers fled or were murdered” (Corey & Joireman, 2004). More than 760.000 people (one of every four adults) were suspected of genocide related crimes (Silva-Leander, 2008), therefore it was simply not possible to prosecute them all. This led eventually to the implementation of Gacaca Courts countrywide, in 2005. It would have taken more than 200 years, for all the accused/suspected to see the inside of a national courtroom (Corey & Joireman, 2004).

To promote information retrieval and increase the available evidence, the “principle of plea bargaining” was introduced (IDEA, 2008). Meaning that after the defendant gave an confession with valuable information about his crimes, he could get a reduced sentence in return, as long as this confession was accepted by the community and he had apologized in public too (IDEA, 2008). The trial would come to an end, with the judge reading the casefile summary aloud and pronounce the verdict in front of the community, thus the ‘General Assembly’.

Even Though the Gacaca courts were the perfect solution for the Rwandan situation, we must remember that these courts were ruled by communal elected judges. Judges who didn’t have any law- or juridical education. Therefore, it was of most importance to the community, that these elected judges were “having the qualities of ‘a person of integrity” (Ingelaere, 2007). They were considered impartial and ‘fair’. However, they were affected by the genocide too. Based on the African Rights Report (2003), referred to in the article of Corey & Joireman (2004), Hutu’s and Tutsi’s alike were “considerably apprehensive regarding the independence and the impartiality of Gacaca judges, since nearly all the elected individuals were involved in the events of the genocide to some degree”. Another argument against the court’s reliability, would be that the defendant had no legal representation. This means that the defendant had “little protection against misrepresentation of the facts and the effects of a personalized confrontation between victim and criminal” (Corey & Joireman, 2004).

Despite the restorative practices and character of the Gacaca Court, it remains a legal instrument and punishment does constitute as a crucial element (Rettig, 2008). One form of punishment, was community service which entailed almost always “prescribed tasks such as the rebuilding of victims’ homes, working in their fields or other variations of community service, instead of a jail sentence” (Wielenga & Harris, 2011). Still, in many ways this type of punishment remains within a restorative framework of repairing the harm done through practical measures. To add, it is important to note that for these offences, restitution (compensation) was not individualized; it was a family affair (IDEA, 2008).

5.4 ANTHROPOLOGICAL PERSPECTIVE

In 2000, Special Rapporteur Michael Moussalli, presented the United Nations’ General Assembly a rapport on ‘The situation of human rights in Rwanda’ and stated that “after five years of refusing to talk of reconciliation until justice is seen to be done, Rwandans have accepted that reconciliation must be a national goal in its own right” (Mousalli, 2000). That nationwide reconciliation was accepted was very positive, however at that time no one knew it would still take over 5 years to start this process. Right until 2005, when the Gacaca Courts were finally installed throughout the country.

Due to the fact that the Gacaca Courts were installed so long after the genocide the took place, anthropologically seen, interesting developments took place within society. Mainly, survivors of the genocide had to establish a way to be able to interact with each other and live in the same community as since before the genocide. The "distrust between the different ethnic groups was present, but lingered under the surface of social life" (Ingelaere, 2007). Therefore, distrust was pushed under the table, since people within the community were highly dependent on each other. This form of co-habilitation was purely out of necessity to survive in post-genocide Rwanda. So "silence about the past was the order of the day" (IDEA, 2008) and this is described perfectly in the next Rwandan saying: "If someone does not want to tell you he hates you, hide for him the fact you are aware of his hatred" *(Uguhishe ko akwanga, umuhisha ko ubizi)* (Ingelaere, 2007). These daily interactions became a way to deal with the past and these practices were a means to "inspecting the humanity in the other", or "what we call truth telling, rendering justice, fostering reconciliation or providing compensation for the reverse emotions, (such as vengefulness or distrust) that had taken root in the ambiguities of local life" (IDEA, 2008).

Thus in 2005, "the arrival of the Gacaca Courts, changed the natural but difficult process of cohabitation that had already started" (IDEA, 2008). Still, the Gacaca courts were conceived as the embodiment of restorative justice, as it created a platform for the victims, offenders and the community to come together and discover the truth about what happened to their family members for example, during the genocide. Although, it was never seen like that through the eyes of the people, because the Gacaca Courts were installed (in 2005) long after the genocide ended. People saw it as unnecessarily stirring up the community and moreover as a political move, not as restorative justice at all. Let alone national reconciliation (IDEA, 2008).

Author Luc Huyse argues, in the article of Bert Ingelaere (2007), that the process of reconciliation consists of three stages, 1. replacing fear by non-violent co-existence, 2. building confidence and trust and 3. evolve towards empathy. In case of Rwanda, the first stage was nearly completed, since offenders and victims co-existed in the communities already. However the second and third stage have been more of a challenge. The second stage, 'Building confidence and trust' was difficult to achieve, since crimes were covered up, victims were threatened and little to no protection was offered to the people who testified. The third stage 'evolve toward empathy' hasn't been successful either, since Tutsi's were protected from facing trial in the Gacaca courts.

Max Rettig agrees with Huyse's statement. Rettig says that "Local justice that depends on the participation of the population can succeed, if community trust is strong. But if community trust is weak, then local justice (particularly punitive justice) will fray the social fabric" (Rettig, 2008). This is exactly what happened to Rwanda as the government imposed local justice, through a state controlled system. Leading to loss of social trust and that prevented people from participating in the Gacaca Courts "openly and honestly" (Rettig, 2008). To achieve reconciliation "all individuals should be held accountable for their actions" (Corey & Joireman, 2004). In other words, for the achievement of national reconciliation there shouldn't be made a distinction of 'when' crimes are committed or by who. "Without the equal application of the Gacaca process to both Hutu and Tutsi, it will be interpret more as revenge than as reconciliation" and this "endangers any effort of true reconciliation, since reconciliation requires accountability" (Corey & Joireman, 2004). In this case, it will only increase the chances of another cycle of violence within the country. A reconciliation strategy should always include one vital element, namely "A proper treatment of historical traumas" (Silva-Leander, 2008).

6 CONCLUSION

First of all, as said in the introduction, it is impossible to conclude all contextual influences that might have affected the implementation of the basic principle of restorative justice. However, by restricting the research to only considering three perspectives that might have been of contextual influence, it may be possible to conclude their influence. As shown throughout the thesis, the political-, juridical- and anthropological perspective provide a very valuable insight into contextual influences on the actual implementation of the basic principle. Therefore, to sum up this research, the conclusion can be made that the implementation was contextually affected, by at least these three perspectives. The context has influenced the choice itself for implementing the basic principle of restorative justice, it has influenced the implementation of the principle, by translating it into the specific designs which formed the Truth and Reconciliation Commission in South Africa as well as the Gacaca Courts in Rwanda and it influenced the way reconciliation was promoted and trying to get hold in the countries. Therefore, to answer the main research question, context 'did' affect the implementation of the basic principle of restorative justice through the Truth and Reconciliation Commission in South Africa and the Gacaca Courts in Rwanda. Explicitly, in at least three ways, analyzed with the use of the political-, juridical- and anthropological perspective.

Restricting the research for this thesis to only include these three perspective, was the right choice. Not only due to the limited time I had to conduct this literature based study, but also to answer the main research questions. Even though, a lot more perspectives should be considered to conclude 'all' contextual aspects that affected the implementation of the basic principle of restorative justice, still, it did provide me with the opportunity to conclude that context 'did' affect the implementation of the principle. As well as, how (at least from three different perspectives) it affected the implementation of the principle. For that reason, the use of these three perspectives have proven to be effective and sufficient enough to conclude the influence of context, on the implementation of the basic principle of restorative justice. In other words, though restricted, these perspectives were still (broadly) enough to answer the main research question.

This table, shows contextual aspects that affected the implementation of the basic principle of restorative justice in case of South Africa an Rwanda. In addition to affecting the choice for restorative justice in the first place. The contextual aspects will be shown and organized according to the three perspectives, through which this research has been guided.

These contextual aspects affected the implementation of the basic principle of restorative justice and they were analyzed and discovered through the political perspective.

	South Africa	**Rwanda**
Political perspective	Retribution could compromise the negotiated peace-process.	Both Hutu's and Tutsi's were involved in a political power struggle.
	Prosecuting Apartheid-participants would lead to a blood-bath.	Tutsi-isation of the state (RPF), intensified ethnic divide
	Transitional government; trying to create democracy.	Political stability was essential for the future of South Africa.

These contextual aspects affected the implementation of the basic principle of restorative justice and they were analyzed and discovered through the juridical perspective.

	South Africa	**Rwanda**
Juridical perspective	Amnesty for Apartheid-participants, to ensure peace.	Only 12 prosecutors survived and most lawyers and judges fled during war.
	Material proof was scarce.	Non-existent (ordinary) justice system.
		760.000 people were accused of genocidal crimes.
		For all accused to stand trial, would have taken over 200 years.

These contextual aspects affected the implementation of the basic principle of restorative justice and they were analyzed and discovered through the anthropological perspective.

	South Africa	**Rwanda**
Anthropological perspective	Nation of victims and survivors.	Both offenders and victims were highly dependent on each other.
	Status interchangement (between victim and offender)	Crimes were covered up.
	Violations were never publicly and officially acknowledged before.	Un-addressed historical traumas, increased ethnic tension.

Last but not least, after writing this thesis, it surprised me how 'western juridical practices' are often seen as a blueprint to follow. Even though, not all countries are capable of dealing with justice the same way as in the 'west'. Especially after something as destabilizing as genocide or a violent political war, which leaves a country with an instable government and a lack of educated lawyers and judges, to act independently and unprejudiced.
In my opinion, we 'westerners' could learn a lot from traditional- and/or indigenous justice practices. These cultures could provide an abundance of practices, which have never been mainstreamed before. In these cultures, people had to come up with ways to live with one another without killing each other. Despite the lingering tension or the violations that took place, the interdependency was undeniable and therefore the (group) survival too imperative. This means, they have been forced to deal with disputes, disagreements and communal tension (let alone violations) for the last few centuries. Not to mention, genocides, discriminations, imprisonments and displacements. They had to have their own way of dealing with these types of injustices or violations, long before 'westerners' came into the picture. It's the only explanation for these cultures to still be present today and not yet culturally extinct. In my opinion, these cultures could possess 'practices of restorative justice' of undeniable greatness.

This is a list of countries that all implemented some type of a Truth and Reconciliation Commission over the years: Uganda, Argentina, Zimbabwe, Chile, Chad, El Salvador, Haiti, Ecuador, Nigeria, Panama, Ghana, Sierra Leone, Morocco, Indonesia, Mauritius, Togo, Canada, Bangladesh, Brazil, Colombia, Bolivia, Uruguay, Philippines, Nepal, South Africa, Guatemala, Peru, Timor-Leste, Paraguay, Congo, Liberia, Kenya, Tunisia and Fiji. Each of these countries has indigenous groups still living there. In my opinion, further research should be done into these indigenous cultural practices as they could offer other ways to deal with conflicts.

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