

**When the enemy comes home:
Restoring justice after mass atrocity**

Introduction

Under the cover of war or military or police crackdowns on civilians in “states of emergency,” some of the worst violations of human beings occur. Murdering civilians *en masse*, planting landmines deliberately targeting civilians, torturing or mutilating people, raping, laying siege to civilians so that they starve to death or risk sniper fire, kidnapping children and forcing them to kill – organizing these things: these are the crimes of war and state terror. How can a perpetrator make up for these, even if he wants to? How can society forgive such monstrous acts? Holding individuals accountable for their acts implies, as Hannah Arendt (1958) pointed out, that there is some equation, that punishment or amends can somehow match the crime. Even attempting to do these things implies that there can be a place for the offender in society at the end of it.

Crimes of war or state terror test the limits of any justice system. In no other situation are so many implicated in such extreme violence against others – so many ordinary people who, when tested, did not rise above the pressures and temptations of a terrible situation. Paradoxically, these serious crimes are the least likely to be prosecuted. Conventional criminal justice systems, both national and international, have thus far proven incapable of consistently holding instigators and perpetrators of mass crimes accountable for their actions. Arrests and prosecutions for such crimes are usually limited to a token few – if there are any at all. Prosecutors have been constrained both by the limitations of law and by the practical limitations of arresting and trying the thousands of citizens who may be implicated in such acts, many of whom may still present a military threat to the state.

Because of this failure of conventional justice systems, many victims of mass atrocity have not seen those responsible held accountable for their crimes. This has hindered victims’ abilities, as individuals and groups, to reconcile with the state and with their larger communities. The danger of this goes beyond individual suffering and injustice; unreconciled crimes risk future retaliatory violence.

In recent years, largely as a result of the well-publicized South African Truth and Reconciliation Commission (TRC), some observers have seen restorative justice as a potential way of meeting the needs of victims of mass atrocity, acknowledging crimes and hopefully providing some form of accountability. The TRC, established in 1995 to investigate apartheid era crimes, was partially guided by a restorative justice philosophy. Forced to accept amnesty as a condition of a peaceful transition to democracy, the new ANC government designed a TRC which provided victims with sympathetic hearings, required perpetrators to publicly admit to their crimes as a condition of amnesty and thus publicly exposed many of the crimes of the secretive apartheid regime.

The benefits of restorative justice in such contexts seem obvious. It is the form of justice most directly concerned with reconciliation. It addresses the reintegrative needs of both victims and most perpetrators. In poor countries with weak judicial systems, it offers an alternative to lengthy and expensive trials. And in much of Africa, it draws on pre-existing restorative justice traditions and institutions.

While the South African TRC appeared to offer a model of restorative justice that could meet the needs of transitional societies, it fell short by failing to provide

accountability and victim inclusion in the amnesty decision. Unfortunately, many observers describe it as providing full restorative justice (see Villa-Vincencio 2000) and the model is recommended or critiqued as a justice or peacebuilding approach for transitional societies on this basis. Interestingly, except Braithwaite, (2002), restorative justice authorities remain silent on this issue.¹ A convincing analysis of restorative efforts in South Africa and Rwanda is therefore lacking and writing on this subject remains largely exploratory.

This paper discusses how an analysis of the potential of restorative justice for dealing with mass atrocity might proceed. After briefly outlining the basic philosophy, values and claims of restorative justice, I will discuss some common critiques of restorative justice that are relevant to war and peacebuilding, especially those around issue of power and community. I will then compare the expectations and functions of criminal justice in peacetime with that in post-atrocity situations. I will examine how theories and values of restorative justice might be applied given the different legal circumstances and challenges facing nations recovering from mass atrocity. I will also discuss the differences between restorative justice and a restorative approach to peacebuilding and the potential and hazards of each.

Restorative justice: A humanizing paradigm for justice?

Restorative justice is an approach to wrong-doing that is as old as the practice of making amends. When a child injures another and is encouraged to apologize and atone for it in a way that is agreeable to both children involved, that is a restorative process. It is the common-sense way of being responsible for one's actions that is part of growing up. It coexists with another justice approach with which most children are also familiar: justice as punishment for rule breaking.

These two approaches to justice, which coexist in most people's lives, reflect two distinct ethics. The ethic of the dominant legalistic justice system (Estrada-Hollenbeck 2001)² emphasises obedience to moral principles, presumed to be partly reflected in the law. It views crime as law breaking and a violation against the state and accountability as punishment for breaking a law. Restorative justice reflects an ethic of care which argues that people are ethically responsible for those around them with whom they have a relationship. Christians (2000: 142) writes:

Rather than searching for neutral principles to which all parties can appeal, social ethics rests on a complex view of moral judgments as integrating into an organic whole, everyday experience, beliefs about the good, and feelings of approval and shame, in terms of human relations and social structures.

¹ In *Restorative Justice and Responsive Regulation*, the authority on restorative justice, John Braithwaite (2002), devotes an insightful chapter to restorative justice and peacebuilding. However, even this chapter focuses on broad peacebuilding issues and only mentions restorative justice and war crimes in passing.

² Zehr (1990) calls the dominant Western model of justice 'retributive justice' and Estrada-Hollenbeck (2001) calls it 'legalistic justice'. I will use the term 'legalistic' justice because other retributive models of justice exist that are distinct from the dominant western model, for example Islamic sharia law.

Seen in this light, crime is a violation of a relationship,³ an injury inflicted on another person that harms the people involved and the community. Accountability then means trying to repair that harm and those relationships.

The two approaches hold very different ontological and epistemological perspectives. The legalistic justice ontology assumes the primacy of the state, which is responsible for creating and enforcing the law and is the dominant ‘community’ to which a person belongs. A crime is only that which is defined by the state; injuries not defined as illegal are not crimes. Humans are considered to be both autonomous beings, who alone are responsible for their crimes, and citizens (or visitors) who owe obedience to the state. A crime is determined by judicial experts who judge offences either by legal precedents or according to legal principles. Justice is viewed largely as procedural equality, equality before the law and appropriate punishment for crime. By completing the sentence, the offender theoretically becomes a full and free citizen again, however in reality offenders maintain criminal records and may be stigmatised to such a degree that reintegration may be difficult. Stigmatization is not recognized as a problem from this perspective.

In epistemological terms, judges are assumed to be impartial to those who appear before them,⁴ taking a role analogous to the positivist ‘objective’ or ‘neutral’ researcher. In this view, truth, as the TRC report (1999) describes it, is “factual or forensic truth.” It is “the familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures” (TRC 1999: 111).

Legalistic justice does not emphasize repairing relationships between individuals or their communities. Minow (1998: 26) writes:

Reconciliation is not the goal of criminal trials except in the most abstract sense. We reconcile with the murderer by imagining he or she is responsible to the same rules and commands that govern all of us; we agree to sit in the same room and accord the defendant a chance to speak, and a chance to fight for his or her life. But reconstruction of a relationship, seeking to heal the accused, or indeed, healing the rest of the community, are not goals in any direct sense.

Restorative justice, on the other hand, assumes that humans are relational beings who need to live in community with others. In other words, where the ontology of legalistic justice views individuals as autonomous, restorative justice sees them as relational. Where legalistic justice sees individuals as owing allegiance to the state, restorative justice sees them as responsible for each other and for their communities. A crime is a violation of another person, caused either deliberately or by omission of duty. The injury caused by crime not only directly affects the victim and those who care for him, it creates rifts between the community and both the victim and offender. When a crime occurs, the victim feels less secure in the community. He needs to heal from the shock and injury of the crime and see justice and concrete change before he feels like a full member of the community again. The offender has lost the trust of both the victim

³ Once a crime is committed, even against a stranger, victims and offenders are bound in a relationship.

⁴ Though judges would not be considered value neutral as positivists might claim to be.

and the community and has to work to earn that back (Zehr 1990). Moberly argues that the community too has been injured because its “moral tone” has been lowered by the crime (in Johnstone 2002: 104). All this damages individuals’ relationships with their communities which, in a restorative justice ontology, is a central human need. These relationships need to be restored.

A second facet of the restorative justice ontology is the belief that people commit bad acts but they are not, in themselves, bad people. If they regret and take responsibility for their acts, they can become full members of the community again. Restorative justice is more aware than legalistic, retributive justice of the effects of stigmatising offenders as criminals, and seeks accountability in a way that avoids stigmatization.

Restorative justice also defines justice differently from legalistic justice. Where the latter emphasizes due process and equal treatment before the law, restorative justice requires a flexible approach to justice that allows victims and offenders, with their community supporters, to decide the form that accountability will take. In other words, all offenders should be held accountable for their crimes, and should have to listen to victims and answer their questions but victims have different recovery needs and victims and offenders will decide on their own joint accountability solutions.

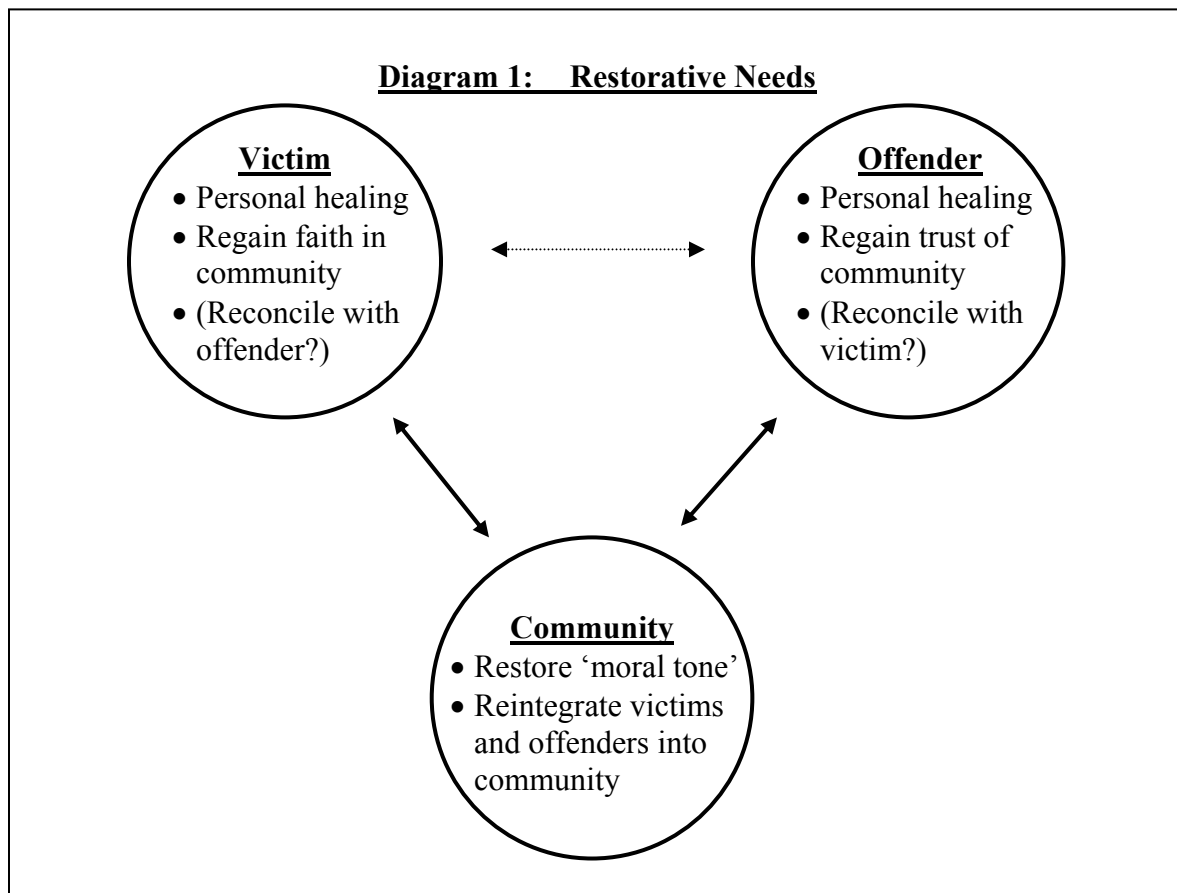
The South African TRC report describes “healing and restorative truth,” which is consistent with a restorative justice epistemological position:

(It is) the kind of truth that places facts and what they mean within the context of human relationships – both amongst citizens and between the state and its citizens... (It is) a truth that would contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious abuses in the future. It was not enough simply to determine what had happened. Truth as factual, objective information cannot be divorced from the way in which this information is acquired; nor can such information be separated from the purposes it is required to serve (TRC 1999: 114).

A restorative justice approach sees truth as emerging communicatively in dialogue between community members (including victims, offenders, those supporting them and other interested parties). In First Nations healing circles in Canada, family-group conferencing in New Zealand, victim-offender mediation in North America and traditional courts in Nigeria or Botswana, victims have a chance to express their pain and be acknowledged, they can often ask offenders questions and hear the offender explain her side of the story. Both victim and offender are acknowledged and heard, often along with other community members, and they all participate in deciding how the offender will try to make up for the injury and what must happen for her to be reintegrated – trusted again – into the community. In some ways it aspires to reflect Habermas’ (1984) ideal speech community by creating an environment for discussion with minimized (though not non-existent for the offender) coercion in which all parties to the conflict are encouraged to leave their power positions at the door and work out a mutually agreeable solution. Knowledge, then, is communicative knowledge. It may not be identical to

forensic truth, but it is reached discursively by humans-in-relationship communicating and deciding together what the best action would be.⁵

Thus restorative justice attempts to address and balance three major concerns: the needs of the victim (including the need to reintegrate with the community); the needs of the offender (both reintegrative and the need to address causes of the offence); and the need to restore the community. These concerns, depicted in diagram one, carry different weight with different advocates of restorative justice (Johnstone 2002).



Restoring the victim

Restorative justice is often portrayed as a victim-centred process that meets victims' needs better than legalistic justice. Zehr (1990: 80) argues that when justice "is defined as applying the law," offenders are held accountable not to the victim but to the state. Beyond testifying, victims are rarely considered in criminal trial processes. Their needs to have input in the trial, receive information, ask offenders questions and receive compensation from him are rarely met.

⁵ As Johnstone (2002) argues, the communicative approach of restorative justice should permeate every facet of the process. He writes, "There is no single blueprint for building a restorative system. Rather, the method of building a restorative system must itself be decided through a collaborative, participatory process in which the stakeholders in such a system determine what is to be done: 'The process of implementing restorative process must model the principles themselves'" (Johnstone 2002: 158, citing Christie 1977).

In fact, Zehr (1990) argues, the opposite usually occurs. Because offenders need to be proven guilty in court, they are encouraged to deny their crimes. As a result, trials are ill-suited for bringing out plentiful and context-rich information because the trial's mandate is only to prove innocence or guilt on specified crimes, facts must be painstakingly proven under rigorous rules of evidence and offenders have no incentive to cooperate in the process of truth telling. Offenders do not compensate victims for the harm they caused. (Zehr 1990; Strong & Van Ness 2002).

Restorative justice processes seek to remedy this by providing a forum in which offenders listen to victims and answer their questions. Victims can hear offenders explain the circumstances behind the crime, express remorse and take responsibility. And offender and victim decide together how the offender will try to repair the harm. Acknowledgement and restitution from offenders enable victims to begin to recover and reintegrate into their community (Zehr 1990).

Johnstone (2002), however, cautions against claiming that restorative justice is a victim-oriented response to crime and the only one that can really meet victims' needs:

For all its troubling features, in its current form the institution of judicial punishment does perform certain essential functions tolerably well. It provides most of us, regardless of our means, with *some* degree of protection from predatory and harmful behaviour, without making us pay the price of oppressive conformity. Moreover, it meets some of our criteria of fairness to some extent, and gives some degree of recognition and protection to the rights of those accused of crime (Johnstone 2002: 7).

Indeed, Johnstone (2002) observes, many victims want harsh punishment for offenders – often even harsher than existing sentences. To suggest, as some proponents do, that victims don't really know what they need or that they don't know the alternatives, smacks of paternalism. In fact, victims' services have improved so much that victims' needs for information, acknowledgement and compensation are often addressed – though the latter is provided publicly. To avoid paternalism and balance victims' needs with those of the community, Johnstone (2002: 84) writes:

It could be argued that what victims are *entitled* to is moral vindication and security. The punishment of offenders is one method of delivering this. However, it is a costly and destructive method both for offenders and for the wider community. Hence, if a less costly and less destructive, but equally effective, method of delivering moral vindication and security such as restorative justice, can be found, victims must accept it, *even if they prefer punishment*.

As Johnstone (2002) acknowledges, however, public compensation cannot be equated with restitution by the offender. Public financial compensation may ease practical difficulties of victims and reflect public acknowledgement of the victim's experience but it cannot repair the psychological and relational damage of the crime. It

cannot ease the victim's anger toward the offender and it does not make the victim feel safer or more part of the community.⁶

Restoring offenders

While some see restorative justice as the best way of meeting victims' needs, others see it as the best way to reintegrate offenders back into their communities. Restorative processes enable offenders to make amends for their actions in a way that establishes a human relationship between them, victims and others in the community. The aim is not to stigmatise, but rather to focus on harmful acts and ways to both repair the injury and ensure it does not recur. According to Strong and Van Ness (2002: 81), making amends involves four things, all of which are important in restorative processes: "apology, changed behaviour, restitution, generosity."

First, *apologies* must involve *acknowledgement* of the harm ("It was wrong and I did it"); "*affect*" or private remorse; and *vulnerability*. Private remorse (or regret or shame), Strong and Van Ness (2002: 82) write, "is the most powerful factor in an offender's decision to stop offending." Vulnerability means that the victim may or may not choose to accept the offender's apology and "extend at least a measure of forgiveness... When an attempted apology fails to incorporate the element of vulnerability by shifting into an explanation and attempting exoneration, it falls short."

Ignatieff has called these "exculpatory strategies" which are used to "deflect or deny guilt." Offenders may argue "that 'everyone does it,' that the victim 'deserved' or could afford the losses, that they were provoked beyond reason" (in Zehr 1990: 49). Zehr (1990: 49) adds, there is a tendency for "offenders to be obsessed with the injustices which they feel themselves to experience... (as a) way of insulating themselves from the burdens of guilt."

Second, *changed behaviour* is important, both for the offender and the victim. Many victims seem to be especially interested in ensuring that the offender will not repeat the crime. Strong and Van Ness (2002: 83) write that "one of the reasons crime victims give for becoming involved in restorative processes is to help 'turn the offender around' in order to keep others from becoming victims."

Third, *restitution* means that the offender attempts to compensate the victim and others harmed for the damage done. It may involve monetary payment, replacing or returning stolen property or repaying the victim through direct services. However, Strong and Van Ness (2002: 86) caution that "the full restorative potential for restitution is thwarted when it is simply imposed as an obligation placed on the offender by the government." The victim may benefit from this but the offender had no involvement in the decision, a factor that is important to restorative justice.

Fourth, "*generosity*" means that the offender goes beyond what is required to "balance the books" (Strong & Van Ness 2002: 85). For example, an offender might do

⁶ The exception to this may be when the *current* state is viewed by the victims as linked with the perpetrator. Whereas in South Africa after the transition to democracy, the new African National Congress government could not be viewed as responsible for apartheid crimes, in Sierra Leone many citizens view many leaders in the democratically elected government and their practices as continuations of the old, corrupt regime that led to the rebel war. Surprisingly, given the brutality of the civil war in Sierra Leone, expectation for redress is almost entirely focused on the government and not on those who committed the war crimes themselves.

volunteer work in the community that is unrelated to the debt he or she owes. It is a way of regaining the trust of the community.

In many places where restorative justice is practiced, including Japan, many African countries, North America and South Africa (with the TRC), restorative justice is presented to offenders as an option or addition to retributive justice. Although the restorative justice system is not without coercion (offenders may agree to participate to avoid the dominant court system or to increase their chances of parole) it should be as voluntary as possible for offenders – and *always* voluntary for victims. Zehr (1990) writes that offenders often do not assume responsibility for crimes willingly:

One cannot overcome such irresponsibility quickly. What society *can* say to offenders, then, is simple: “You have done wrong by violating someone. You have an obligation to make that wrong right. You may choose to do so willingly, and we will allow you to be involved in figuring out how that should be done. If you do not choose to accept this responsibility, however, we will have to decide for you what needs to be done and will require you to do it” (p. 198)

This means that offenders who choose to participate in restorative justice processes are willing to at least partially admit to their crimes. Compared to trials, the offender has less interest in denial⁷ and she can also talk about contextual issues that contributed to the crime (perhaps a history of poverty, abuse or drug and alcohol issues or, in the case of war crimes, a fear of defying orders or a sincere belief in the evil of the ‘enemy’).⁸ This does not deny her responsibility for the crime but it does point to changes or healing that need to take place in the course of restoration (Zehr 1990).

Restoring the community

Finally, some proponents of restorative justice see it as a way of empowering communities to deal with tensions and conflicts that arise within them. As Cayley (in Johnstone 2002: 152) writes:

Community... is made from conflict as much as from cooperation; the capacity to resolve conflict is what gives social relations their sinew. Professionalizing justice ‘steals the conflicts,’ robbing the community of its ability to face trouble and restore peace. Communities lose the confidence, their capacity, and finally their inclination to preserve their own order. They become instead consumers of police and court ‘services,’ with the consequence that they largely cease to be communities.

⁷ In North America, many restorative efforts, in the form of victim-offender mediation, occur after the offender has been found guilty in a trial. Therefore, with serious crimes, restorative justice does not replace legalistic justice. After he has been found guilty and sentenced, the offender would have to admit his guilt to participate in a restorative justice process.

⁸ Although evidence of ‘mitigating circumstances’ does provide some contextual information in legalistic trials, much more background information is permitted in restorative hearings that would be deemed irrelevant in trials.

Restorative justice processes also provide an opportunity to affirm and discuss – and perhaps change – community norms in a public and participatory setting. This may be particularly important where the “moral tone” of the community, in Moberly’s sense, has been lowered by widespread crime. Community members come together to reaffirm their values and discuss the broader context that might be supporting or leading to individual crimes. Restorative justice processes encourage participants to reveal more contextual information than conventional trials do. Information that would be ruled irrelevant in legalistic criminal trials is often very relevant for healing victims, offenders and their communities and addressing the social or systemic conditions that led to or enabled the crime.

Braithwaite (1999) describes First Nations healing circles in Hollow Water, Manitoba that led to the detection of widespread sexual abuse. The circles were initially convened to deal with widespread alcoholism but participants soon realized that their community was “sweeping the sexual abuse of children under the carpet.” They learned that most citizens in the community of 600 had been sexually abused and 48 adults “formally admitted to criminal responsibility for sexually abusing children, forty-six as a result of participating in healing circles, two as a result of being referred to a court of law for failing to do so” (Braithwaite 1999: 12). This suggests that even when crime is widespread in a community and social relations and acted-out values have been massively distorted, restorative justice processes may reaffirm positive values and enable communities to address crime and conflict.

Conclusion

At a time when the legal system seems to drive a wedge between human relationships, the humanistic paradigm presented by restorative justice is appealing. However, the claims of proponents such as Zehr, Strong, Van Ness and Braithwaite, backed up by success stories and “a whole gamut of criminological, psychological and sociological theories” (Johnstone 2002: 22) tend to be overly optimistic and unconvincing. Success stories may indicate what *can* happen but they do no more than that. As Johnstone (2002: 22) observes:

It is important to clarify how proponents of restorative justice attempt to support the claim that it outperforms punishment (and treatment) as a method of preventing reoffending. Apart from presenting anecdotes which illustrate spectacular successes, the most usual way is to offer statistical evidence from experimental studies... However... such evidence needs to be interpreted very carefully... The most obvious problem with arguments based on crude statistics is that, in the majority of programmes, offenders are not diverted to restorative justice on a random basis. Rather, particular offenders are selected for diversion precisely because... it is thought that they are likely to be influenced by it.

Harder questions need to be addressed regarding the nature and capacity of ‘community,’ power relationships, the kinds of crimes – and offenders – that are suited to restorative justice processes, preconditions for restorative justice and the types and nature of reconciliation being promoted. Moreover, the extreme and special conditions of civil

war and state-sponsored terror raise further questions about restorative justice frameworks in general and their suitability for dealing with mass atrocity in particular. These will be discussed in the next section.

Beyond the philosophy

Ethnic or religious civil war and state-sponsored terrorism are very different from peacetime contexts associated with most writing on restorative justice. These differences raise issues of community dynamics, definitions of crime, social norms, power relationships and the extremity and mass of violence that may be addressed but, in my view, are not adequately theorized in restorative justice literature. This section will discuss the contexts of identity-based civil war and state-sponsored terrorism and will address issues relating to restorative justice that arise from them. In doing so, and in making small efforts to discuss these issues at a theoretical level, it raises more questions than it answers. Given the exploratory nature of this work and the dearth of literature on restorative justice, it aims to initiate further discussion.

Restorative justice *per se* refers primarily to individual justice processes in which individuals need to recover from, or atone for, crime. This paper initially focuses on restorative justice as it applies to individuals-in-community. As I will discuss later in the paper, I think it is more apt to describe policies that facilitate intergroup, national and international reconciliation as being guided by a restorative *philosophy* or *approach*, rather than as restorative justice.

I Reconciliation and forgiveness

A major goal of restorative justice – indeed a major reason for my interest in restorative justice as a possible peacebuilding strategy – is to promote reconciliation. But in what form? And how does it relate to peacebuilding?

Post-conflict reconciliation occurs at three basic levels: individual, inter-group and national, but each level could be expanded further. Individual reconciliation relates best to most restorative justice efforts and it takes three forms. First, individuals who suffered from or instigated violence need to reconcile with themselves (Dwyer 1999). This intrapersonal reconciliation is often referred to as ‘healing’ from trauma, ‘coming to terms’ with events or achieving ‘closure.’ As diagram one above indicates, restorative justice aims to help both victims and offenders heal from past wrongs.

Second, individuals reconcile with one another. Interpersonal reconciliation simply means repairing relationships between individuals after a conflict or injury (Lederach 1997). Usually such reconciliation becomes important when those involved have a direct interest in maintaining ties – family members or friends for example. Zehr (1990: 187) argues that justice should promote victim-offender reconciliation, described as “healing of the relationship between victim and offender... Reconciliation implies full repentance and forgiveness. It involves establishing a positive relationship between the victim and offender.”

Many theorists agree that victim-offender reconciliation and victim forgiveness are important, but others, like Johnstone (2002), question whether it is realistic or even desirable:

Apology and forgiveness may work well as ways of healing rifts and settling disputes amongst people who are closely bound together, and who are eager to maintain and repair these bonds when they are threatened by some misdeed. But many would regard it as over-optimistic to expect it to work between offenders and their victims in contemporary Western societies, in all but the smallest proportion of cases...

Also, and perhaps primarily, it is important to ask whether, and in what circumstances, encouraging forgiveness is ethically appropriate. This involves recognising that there are some circumstances in which it may not be – that there are circumstances when, despite offers of apology and reparation, it is morally right to withhold forgiveness (Johnstone 2002: 133-4).

I would agree with Johnstone's caution and, in the case of post-conflict societies, I would go further to ask whether, in most cases, inter-individual reconciliation is relevant for peacebuilding. In many contemporary wars the attacker and victim do not know each other and do not require a future relationship with one another. While the victim and attacker need to be reconciled with their respective communities, as I describe below, they usually do not need to have a relationship with one another. For the purposes of national peacebuilding, there is no convincing reason why the victim needs to reconcile with, or even forgive, the perpetrator. The victim should be the one to decide whether forgiving or reconciling with the perpetrator is beneficial for her emotional or spiritual health. However, in the interests of peace, the victim *does* need to agree to not take revenge.

Even when the attacker and victim are from the same family or community, I do not think inter-individual reconciliation and forgiveness are important for peace and indeed pushing victims too hard to reconcile or forgive may at best trivialize the meaning of these words and at worst be counterproductive.

I have just returned from three and a half months of research in Sierra Leone, a country that has just emerged from 11 years of one of the most brutal civil wars in the last century. The war was not ethnically or religiously based; it can best be briefly explained as a backlash against a corrupt government and a grab for the countries enormous diamond wealth that tore families and communities apart. But those motives do not explain the campaign of terror against civilians, primarily in the countryside, that left in its wake thousands of amputees, rape victims and burned houses, not to mention shattered lives on all sides. Almost nobody in the country was left untouched.

At present many ex-combatants and victims are returning – or want to return – to their communities and many 'sensitization' programs are encouraging people to 'forgive' and 'reconcile' for the sake of peace, even though for all but a few top instigators and perpetrators there will be no accountability⁹. When such pressure is put on victims from many quarters they easily use the words 'forgiveness' and 'reconciliation' but the meaning is predictably superficial. Consistently, when questioned further, they say that forgiveness means they will not take revenge. It certainly does not mean that they have

⁹ Sierra Leone has a Special Court which is currently in the process of trying those accused of having the most responsibility for war-related crimes.

let go of the anger, fear and pain. It does not mean that they trust each other. But after people have said that they have forgiven and reconciled, establishing mechanisms to address the past becomes difficult. Those who want to confront perpetrators or seek justice may be accused of backstepping or of threatening a fragile peace.

A third and very important form of individual reconciliation is insufficiently acknowledged in peacebuilding literature but is important for both peacebuilding and restorative justice: reconciliation between individuals and their communities or governments. When a crime or injury has been committed, victims and offenders¹⁰ often feel disconnected from their communities. Crime victims often feel unsafe, unacknowledged or disempowered both because of the crime and the way their communities and judicial and governing institutions address it. They need to feel secure, acknowledged and respected within their community again and this ‘healing’ process can be described as reconciliation. On the other hand, the community needs to restore trust in offenders before they can be said to reconcile. That usually occurs through judicial processes in which offenders are held accountable for their acts. However, when societies and judicial processes stigmatise offenders as deviant individuals, rather than focus on their acts and the situations that led to them, reconciliation and reintegration of offenders with their communities become more difficult (Zehr 1990).

Group level reconciliation also takes intragroup and intergroup forms. Intragroup reconciliation means a group comes to terms with its own history and culture, which may have been based on enmity, war thinking or a fixation on its ‘victimization’ or inherent ‘superiority.’ Intergroup reconciliation means that conflicting groups agree to move on from the past and build an interdependent future (theoretically after meaningful acknowledgement of, and compensation for, past crimes). These forms of reconciliation are especially important in conflicts between ethnically or religiously defined groups, or when one group oppresses another on ethnic or religious grounds. They can also occur with ideologically divided (and less easily maintained) groups, often when people’s paradigms or concerns shift over time.

A third level of reconciliation: *national reconciliation*, is used in two ways. The first involves a gradual agreement or ‘coming together’ of citizens on how to deal with their shared past and future. This may take two ‘ideal’ forms. In one form, citizens may develop consensus about, and ability to discuss, their shared history, values and future. This does not mean they share identical historical interpretations but the basic facts and sense of what is right and wrong should be compatible (Dwyer 1999 and Hayner 2001). In the other form, citizens willingly agree to leave the past behind, with little public acknowledgement of, or accountability for, grievous crimes. Rigby (2001) argues persuasively, using the example of post-Franco Spain, that some countries fare better when they forget about the past and simply move on.

The second use of national ‘reconciliation’ – what I call *political reconciliation* – interprets reconciliation as (re)establishing stable, democratic government and the rule of law, rather than the rule of violence. This interpretation is often used, implicitly or explicitly, by legal theorists and human rights activists. This perspective was captured by

¹⁰ In literature on peacebuilding, those who commit war crimes or crimes against humanity are usually described as ‘perpetrators.’ This term includes both those who directly carry out crimes and those who organize or instigate them. Restorative justice literature describes those who commit crimes as ‘offenders.’ I will use both terms interchangeably, usually within the context of the literature which I draw from.

Tina Rosenberg: “‘True reconciliation’ is achieved when the population of a country, including those who have in the past illegally abused power, ‘are ready to live a normal life in a normal country’” (paraphrased in Hesse and Post 1999: 17).

As I will discuss below, at intergroup, national or international levels, restorative policies may require that groups in whose names crimes were committed recognize and atone for past crimes and injustices (through compensation and symbolic acts) and acknowledge current privilege based on those crimes. When responsibility has been taken, members of victim *groups* need to forgive and humanize members of former perpetrating *groups* so they can move on as moral equals. Reconciliation at the intergroup and national levels are not restorative justice *per se*. Rather, they are restorative (used as an adjective) measures guided by a restorative justice philosophy or restorative justice values.

II A question of community

One of the vaguer notions in much restorative justice literature – and indeed in my previous discussion of reconciliation – is that of ‘community.’ Into what community are victims and offenders being reintegrated through restorative justice and other conciliatory processes? Is it based on a municipal or village unit? Is it a civic national community?¹¹ Or can it be, as Braithwaite (1999) suggests, based on communities of interest, such as professional, church and family interests? McCold (in Johnstone 2002) argues that the definition of community depends on the conflict involved and will “depend on things like the level of harm inflicted, the relationships of the victim and offender, and the ‘aggregation’ represented” (McCold summarized by Johnstone 2002: 154). Accepting McCold’s argument, I still think it is useful to define community as a community of interest and care in relation to the conflict concerned.

Understanding the nature and dynamics of the community (or communities) touched by an offence is essential for planning restorative justice processes. Perhaps nowhere is this more important than in contexts of mass atrocity. Here I will briefly describe the contexts of ethnic or religious civil war and state-sponsored terrorism and discuss the (generalized) community dynamics of each.¹² I will then discuss three questions regarding community that are relevant for post-conflict restorative justice processes: What are the community dynamics and dynamics of systematic violence being addressed by restorative justice processes? Is it possible – or desirable – to revive restorative justice traditions? And can the community handle the demands of restorative justice after mass atrocity?

Community dynamics of war and state-sponsored terror

Most civil wars of the past decade divided people along ethnic or religious lines. While the root cause of conflict may not be ethnic or religious competition, once armed nationalists define it this way citizens often divide into ethnically or religiously homogeneous groups for their own protection. Tit-for-tat ethnic violence and propaganda

¹¹ A civic nation is one that comprises all citizens, regardless of ethnicity or religion. This is in contrast to groups that define themselves as ethnic or religious nations.

¹² I also recognize that each conflict has its own distinct qualities that are not captured in this generalized analysis.

reinforce divisions, creating solid blocks or ‘communities’ whose members share stories of loss, fear and often feelings of hatred, anger and revenge.

State-sponsored terror is very different. Marchak (1999), drawing from Arendt’s (1979) analysis of Nazi Germany, distinguishes state-sponsored terrorism from other forms of state violence. Terrorism, she writes, is “not merely force or even violence imposed by the agencies of the state.” It is not even the state’s “frequent resort to force” indicative of “the lack of moral authority and the breakdown of legal constraints.” She continues:

Terrorism is an instrument designed to frighten a larger population. In contrast to the violence that typically precedes it, it is not designed merely to kill political opponents; it is *intended to terrify people*. There is no adequate explanation for the choice of victims; *fear is engendered by unpredictability*. Although some potential victims recognize themselves as the probable targets..., many others who are not identified targets are caught. There are no rules. There is *no certainty about what constitutes a trespass*. It seems that anyone could be in the wrong, anyone could be a victim (Marchak 1999: 6, italics mine).

The key elements in this definition are *intention* (terrorism is deliberate), *creation of terror in people* and *unpredictability*. In state-sponsored terror, a state seeks to control its population and retain control by alienating and disorganizing people and thus preventing any opposition.¹³

As in the Dirty War in Argentina (1976-83) and Stalinist USSR, state terrorism destroys community. Nobody knows who to trust, who is a spy, whose company will endanger them. Even trust in families can sometimes be threatened. During the terror in the USSR and Nazi Germany, family members were known to report on one another to the authorities. In Argentina during the Dirty War, Marchak (1999: 148) writes:

Many middle-aged, middle-income parents dismissed the news of disappearances told by their teenaged children. “Left-wing propaganda,” said they. Even when their children were subjected to torture, they found it impossible to believe that the “authorities” could act arbitrarily. Some disowned kidnapped children; others simply refused to believe the evidence of torture experienced by their own adult children... It was too painful for them to acknowledge that the military forces, in whom they had placed their trust, were responsible for state terrorism.

What are the impacts of these kinds of violence on community? Identity-based civil war (defined ethnically or religiously) heightens members’ sense of ‘community’ even as it distorts its cultural traditions. In this highly polarized environment, members

¹³ A strategy of terror can also be used in war, often by rebel forces who aim to terrorize the population into submission and make the country ungovernable. Such a strategy was adopted by the Revolutionary United Front (RUF) in Sierra Leone, the rebel group known for the terror tactic of amputating civilians’ limbs in Sierra Leone. Such a strategy by a rebel group, however, does not necessarily have the affect of alienating people, destroying trust and breaking community that state-sponsored terror against its own people does.

are labelled both by the group itself and by outsiders, reinforcing group membership. The definition of the group's culture tends to be essentialized and militarised by group hardliners with increasing persuasiveness as violence escalates. Although there is often initially a wide range of views – and self-descriptions – within the identity-based group, nationalists use an essentialized and exclusive group definition and a clear view of the 'enemy' to stifle dissent from moderates who can then be labelled as 'traitors.' Group members come to hold an image of a well-defined 'enemy' 'community,' which is often incorporated into its cultural narratives and self-definition. Violence against that 'enemy' group is often condoned or at least seen as inevitable and justified away as 'deserving' because of acts of violence against the group. In this context, 'community' is an ethnic or religious community, one out of at least two in the state; 'community' does not consist of all citizens within the state.

In such a context, perpetrators or instigators of war crimes are sometimes considered heroes amongst their own group. Even when community members have full knowledge of their acts – as Palestinians know about suicide bombers – many attempt to justify such acts as a response to violence against their group. Similarly, former Serbian president Slobodan Milošević and the notoriously brutal warlord Arkan (later assassinated) were regarded as national heroes by many Serbs. Their acts were justified by many as defending Serb national interests. Since these instigators were interested in being part of a Serb community, they did not need to regret their acts. Only when their own society condemns crimes conducted in their name will perpetrators of crimes need to be concerned about reintegration and community acceptance in polarized civil conflicts.

Another important and related element of ethnic or religious civil war is that groups in conflict can often survive independently of one another in peacetime. In Bosnia, for example, Serbs, Croats and Muslims do not need to interact economically or socially – although they would likely do better economically if they did. In such situations, the need to heal rifts and interact with members of other ethnic or religious communities is weak. This also affects the desire or need of offenders to reintegrate/reconcile with the larger community and with victims from other groups and the sentiments from within the ethnic community to encourage them to be accountable.

As Sutherland (2002) notes, if restorative justice is to occur in such cases, considerable peacebuilding work may need to precede it so that members of all communities involved begin to recognize a common need for addressing war crimes.¹⁴ This should include intensive consciousness-raising about human rights, democratic decision-making and justice issues (this will be discussed in more depth below). At the same time, the humanizing discourse of restorative justice processes has considerable potential for building a larger sense of community. This implies that, under such polarized conditions, especially when governing institutions are ethnically based and ethnically divided, as in Bosnia, community-based restorative justice may be unlikely and retributive justice, imposed by a broader authority such as the international community, may be the only way of holding individuals accountable for war crimes. South Africa and Rwanda, where restorative processes have taken place, would seem to contradict this suggestion. However in both cases a single party, supported by the group most

¹⁴ My own research on peacebuilding efforts in Bosnia (Stovel 1998) and my practical peacebuilding work with youth in Sarajevo in 1999 indicates how slow this work can be and how much resistance there is to it.

victimized in the violence and with an interest in creating a civic national community, controls the government.

A state terrorist regime, by contrast, destroys community. It alienates people and destroys trust, even amongst friends and family. A society cannot function well with such extreme atomisation so the need to rebuild trust and relationships is strong. At the same time, since community is weak and many people were complicit through their silence or cooperation with the regime, individuals have few people with whom they can safely talk about the past. In other words, in Bosnia members of a single group can discuss their mutual victimization by other groups without fear of contradiction. By contrast, in Argentina instigators, perpetrators, collaborators, bystanders and victims *of the same regime* are intermixed within one society.¹⁵ In such a situation of interdependence and given the need to re-establish trust and (re)build individual relationships, restorative justice holds great promise if the population decides to address the past.

Both identity-based civil war and state-sponsored terrorism pose problems for a notion of restorative justice that relies on the existence of a single ‘community’ within which relations can be repaired. Both – one involving extreme and exclusive group cohesiveness in a polarized setting with crimes primarily (though not exclusively)¹⁶ being committed against ‘enemy’ group members; the other involving extreme alienation and community breakdown – are extremes of situations that can also be found in peacetime.

Those American cities with heightened interethnic tensions and strong in-group identification, for example, may be analogous to the polarized situation during an ethnic civil war. Proponents of restorative justice have noted the humanizing potential of restorative processes in which victims and offenders begin to recognize the humanity of the other party (Zehr 1990) but, like the South African TRC, such processes are run by people and centralized institutions that incorporate a vision of a shared community.

Urban alienation and the breakdown of geographically-based communities may raise lesser but similar concerns as state-sponsored terrorism. This too has been addressed in restorative justice literature. Hudson (1998) writes, presumably about North American and Western European society:

Most of us now inhabit not ‘communities’, but shifting, temporary alliances which come together on the basis of private prudentialism... Without the community, restorative justice is reduced to the competing perspectives of the victim and the perpetrator, and there is no social group with reference to whom the offender can experience either shame or reintegration (Hudson 1998: 251-2).

Braithwaite (1999) responds by saying that even in urban settings, where people may not be strongly connected to their neighbours, they belong to communities of interest such as churches, families and professional groups. But when alienation is accompanied by trauma, guilt and a complete breakdown of trust, the primary challenge of restorative

¹⁵ I write these categories for the sake of simplicity as if there are clear delineations between perpetrators, victims, collaborators and bystanders. However, people often belong to more than one of these groups.

¹⁶ Often enemy relations with an out-group can provide a cover for in-group power struggles. Hardliners frequently use ‘emergency’ situations to crack down on moderates within their own group as the latter can easily be labelled as ‘traitors.’ Thus, in Rwanda, many moderate Hutus were killed in the genocide.

justice is not integration of victims and offenders into communities but rather the healing of victims, offenders and their loved ones and the *recreation* of community.

Reviving restorative justice traditions

The second question regarding community asks whether traditional restorative justice processes can be resurrected to meet urgent justice needs if the cultural practices and knowledge that supported them have been seriously distorted or lost. Interestingly, on two separate occasions when I asked Burundians about the recent resurrection of the *gacaca* courts in Rwanda, they immediately replied that one cannot resurrect traditional courts so quickly. People need to be raised in a traditional culture in order to be able to participate in such courts. Courts are not just autonomous institutions. They reflect a community's paradigm of justice and conflict management that involves other cultural practices. Moreover, one Burundian friend told me, *gacacas* rely on elders who have the knowledge and experience of the justice processes. Many of the elders are dead (Ndayizigiye 2002).

War distorts cultures, their mediation and conflict resolution practices and the power hierarchies within them. Elders are often marginalized and armed forces call the shots. In protracted wars, as many recent wars have been, the damage to a culture – and culturally-rooted institutions such as courts – can be irreparable. When cultural institutions are still intact, however, traditional decision-making and justice processes can be used to maintain or rebuild peace.¹⁷

Many countries in conflict, especially in Africa, have restorative justice traditions that could be revived. But even when traditional processes are drawn upon for justice or peacebuilding purposes, the choices of which traditions to use and how they should be adapted to meet current needs are based on contemporary political objectives. Sierra Leone, for example, could have drawn on its traditional customary courts to facilitate the reintegration of excombatants and provide some redress for victims. Instead, traditional cleansing ceremonies, originally meant to appease the ancestors after someone committed an offence, are now commonly adapted to 'cleansed' or forgive the crimes of excombatants who are returning to their villages. Where the theft of a cow or a property dispute, for example, would still be settled in a customary court and appropriate redress apportioned, war crimes such as torture, rape or murder are 'cleansed' and forgiven. The choice is a pragmatic, political one, driven by the overwhelming concern to reintegrate excombatants at all costs – even at the expense of justice - to diminish the likelihood that they will return to the bush as they have in neighbouring Liberia.

The burden on community

The third question acknowledges that restorative justice processes ask a lot of community members. Citizens take responsibility for helping victims and monitoring and supporting offenders, ensuring that they live up to their commitments. The more serious the offence and the more troubled the offender, the more difficult this supporting role

¹⁷ Two examples come to mind. One occurred when inter-village conflict broke out in Northern Kenya; the other was in Somaliland in northern Somalia in 1992. In both cases, elders from villages in conflict met and agreed to take responsibility for violence or looting by members of their villages and to prevent retaliation if violence did occur. Traditional justice processes were used to hold violators from their own villages accountable (Farah ...).

may be. Because of these demands, Zellerer's (1999: 347) study of Inuit community-based justice initiatives found that "there was a 'threshold' of offence severity beyond which communities feel uncomfortable or unable to assume responsibility." She quoted an Inuit as saying:

There's no balance in our lives... Our elders, their lives aren't balanced and the only alternative right now is to send child abusers and incest people to jail and hopefully get them treated there... once they have done their time, if and when the community is ready to do the mediating process or reconciliation process, when the people are ready to deal with offenders and victims, then that would be an alternative (Zellerer 1999: 348).

When communities are severely disturbed, as war-affected communities are, people focus on basic survival and recovery from their own traumas. Supporting victims and offenders is challenging at the best of times and community members simply may not have the time, resources and emotional capacity to take on that role. The large number of people implicated in, or affected by, war violence means that the restorative demands on communities are enormous. Restorative justice in contexts of mass violence would require that people don't just have to heal themselves, they need to support others in the community in their healing. For heavily traumatized individuals, supporting the many community members affected by mass atrocity is a tall order indeed. This may be an argument for professionalization of support in unstable, post-war years.

As Johnstone (2002: 96) observes, restorative justice places an additional, and often difficult, demand on community members. The community "must shift from shunning and despising offenders to forgiving and reaccepting them." In the case of war criminals or past instigators of mass atrocities that, too, is asking a lot.

III Questions of power

Questions about community must lead to questions about community-based power: How do community-based power dynamics, entrenched in culture and relations of group and individual domination, affect community-based restorative justice hearings? Do outsiders to the dominant group in the community receive fair hearings? What happens if the community does not recognize violations against certain categories of people (e.g. women, children or 'outsiders') as crimes?

First, community-based restorative justice processes may be affected by power dynamics in the community. These can favour powerful families, men, older people and dominant ethnic groups. Writing about restorative justice in Inuit communities, Zellerer (1999: 351) observes:

There are inter-family conflicts and families with more power. Therefore, there are concerns about patronage and that the views of some residents will weigh more heavily in decisions regarding the administration of justice. Power relationships could have a significant impact on all facets of community-based justice initiatives including the perception of the seriousness of the offense, how the victim is treated, the response to the

offender, and how decisions are made. Abusers may not be confronted, or may even be supported, while victims may be revictimized.

Age may be another source of power which influences community members' chances for justice. Zellerer (1999: 353) points out that in aboriginal and Inuit communities in Canada "respect for elders is an important cultural value... This respect, unfortunately, often leads to overlooking or excusing violence committed by older individuals." Most African cultures share this traditional respect for elders who act as keepers of cultural knowledge and history, community decision makers, teachers and facilitators and judges of traditional courts (Elechi 1999). When elders or powerful families are implicated in war crimes, other community members may be afraid to speak out or may not receive equal justice.¹⁸

Second and relatedly, there may be community members who, by tradition, are considered to have fewer rights than others – women, minorities or children, for example – different expectations of tolerating abuse or crimes against them may not be recognized as crimes. Elechi (1999) writes that in Afikpo culture in Nigeria, where traditional courts that practice restorative justice exist, "few victims of rape are prepared to bring up the case for hearing." He writes:

Rape as a crime in Afikpo is seldomly (sic) acknowledged... Rape is treated as adultery when a married woman is involved. If an unmarried girl is raped, the offender is sometimes forced to marry her. The logic behind this practice is because the victim of rape is inflicted with a debilitating stigma, no responsible person will marry the girl victim of rape. The harshest punishment of ridicule is reserved for offenders, who rape minors. In some cases the rapist pays compensation to the parents of the victim. The rapist will also be held responsible for the medical bills of the victim and any child born of the rape (Elechi 1999: 284).

In cultures in which rape victims are stigmatised – and sometimes even formally punished – it is unlikely that victims would lodge complaints with traditional courts. One Rwandan (male) peace worker told me that rape did not exist in Rwanda before the 1994 genocide. It is hard to imagine that in such a context of denial, women would admit to having been raped. This challenges Braithwaite's (1999: 36) assertion that:

There is a moral fact of the matter that gratuitous violence is wrong and undominated dialogue will converge on consensus about contextual judgments of the wrongness of specific violent acts... Restorative justice might only work with crimes that ought to be crimes. *If a group of citizens cannot agree in an undominated conference that an act of obscenity is wrong, then the obscenity should not be a crime*; and the conference will fail in controlling obscenity. But... most criminal offenses brought to justice in democratic societies are more like the violence case

¹⁸ These concerns seem to contradict the second concern which highlights elders' roles in preserving cultural knowledge required to sustain restorative justice traditions. However, as Lederach (2002) points out, all groups, including women, children and elders, can contribute to peace or war.

than the obscenity case: they are unambiguously wrong to most citizens attending the conference (*italics mine*).

Even in democratic societies – which societies experiencing war or state terror rarely are – custom and popular opinion do not protect the rights of all. Nor are injuries – such as landlord evictions of low income people in response to new money-making opportunities – always considered crimes. Similarly, in societies with differentiated property rights for women, children¹⁹ and minorities, war-related property crimes such as looting or occupation of homes may not be recognized.

Emma LaRocque (1997) argues that blindly adopting justice programs because they are considered to be ‘culturally appropriate’ or ‘traditional’ in Canadian Aboriginal communities may harm women and children. In Canada’s highly politicised, post-colonial environment, many Aboriginal leaders are asserting a communitarian identity as a way of differentiating Aboriginal cultures from ‘individualistic’ non-Aboriginal cultures. This often means that offenders’ ‘healing’ and reintegration needs take priority over victims’ needs for security and emotional recovery. LaRocque (1997) argues that, in fact, Aboriginal cultures valued individual rights. She writes, “Clearly, ‘tradition,’ ‘culture,’ and ‘history’ are political handles with many twists that result in the continued oppression and silencing of women” (LaRocque 1997: 94). She continues:

Tradition cannot necessarily or always be of value or relevance in our times. ‘Healing,’ for instance, cannot be the sole means of dealing with the sexually violent in our midst. There comes a time when, for ethical and moral considerations, a people must confront or change their own traditions. There is no need for external forces to make us change. And we must never assume that our historical oppression has somehow made us extraordinarily moral. If there is one thing we can learn from history, it is that human beings do not become better people, that is, more morally sensitive, just because they have been oppressed. Morality is an ongoing dialogue, it is not innate (LaRocque 1997: 92).

LaRocque (1997) highlights the differences in individual perspectives on justice issues that exist within most contemporary societies – even ‘traditional’ ones. She also highlights the politicisation of concepts of tradition in post-colonial societies – sometimes intended; sometimes not. She concludes:

We live in a contemporary world, whether in a rural or urban setting. This means we have many worlds from which to draw with respect to ideals of human rights or healing. If we do not like the non-Native Canadian models... we can turn to international charters and models. In other words, Native peoples do not have only things of the past for our resources (LaRocque 1997: 91).

¹⁹ This is relevant for children in war whose entire families have been killed or have disappeared but who still need to live on the family’s home and land.

The notorious case, in July 2002, of the gang rape of a Pakistani woman in the southern Punjab, imposed as a sentence by a tribal council, powerfully illustrates what can happen when powerful families control “justice” processes and when customs disempower women (Fisher 2002).²⁰ This extreme example also highlights the danger of romanticizing or blindly accepting traditional justice processes that aim to ‘restore’ social relations but which may not fit the model of restorative justice being discussed here at all. In some communally-based cultures, entire families are held accountable for the transgressions of one of their members and restorative measures may involve marrying off a daughter to the aggrieved family or allowing a child to be ‘adopted’ by the latter family to work as a servant. These practices reflect the weak power positions of women and children in many cultures. They also highlight the fact that the restorative justice practices advocated in the literature still operate on the assumption of individual accountability which is not shared by all restorative justice traditions.

Third, concerns also arise about community-based restorative justice processes that deal with conflicts involving those who are marginalized in the community or deemed to be outsiders. In Botswana, for example, some observers felt that the marginalized, indigenous San living in the Kalahari did not get fair hearings in traditional courts run by dominant Bakgalagadi people. Similarly, will members of the marginalized Twa minority in Rwanda receive fair hearings in the resurrected *gacaca* courts, run by dominant Hutu and Tutsi, that are trying genocide-related crimes?²¹

These community-level power relationships all influence the dynamics and outcomes of individual restorative hearings but how do we analyze macro-level power dynamics, the ones that influence the decisions of national or regional governments? This is particularly relevant to an analysis of restorative justice in post-conflict settings because peace agreements or agreements on the transition to democratic government often incorporate amnesty provisions (as in the South African case) or allow previous rulers to maintain some military power (as in Chile). These decisions influence individual trials or restorative hearings.

Braithwaite (2002: 203), one of the only authorities on restorative justice to write about war crimes and peacebuilding, notes that restorative justice can be consistent with amnesty:

...so long as they are amnesties that contribute to the ending of war, so long as all stakeholders are given a voice in the amnesty negotiations, so long as those who benefit from amnesties are willing to show public remorse for their crimes and to commit to service to the new nation and its people to repair some of the harm they have done.

Thus, restorative justice processes require that victims (and offenders), as stakeholders, have a direct say in amnesty decisions or voluntarily agree to the process by which that decision is made. And amnesty does not eliminate the need for accountability. Offenders still need to compensate for some of the harm they inflicted through service. In

²⁰ This is not to say that gang rape is accepted practice in Pakistan. The fact that the case was reported to the police by an imam and the public outcry within the country attests that it is not (Fisher 2002).

²¹ Twa were not only among the genocide victims, some were also forced by Hutu attackers to participate (Gourevitch 1998).

that way they begin to atone for their crime and regain community trust, a need for trust that cannot be expunged by an amnesty agreement.

Just as restorative processes do not force amnesty on victims, military threats or power imbalances that threaten the stability of the country should not be used to coerce victims in restorative hearings. The goal of 'national unity' should not come into play to push victims into accepting impunity. Individual reconciliation (both intrapersonal and reconciliation with one's own community or civic nation) involves real trust building and emotional and psychological recovery. Such things cannot be forced and, in fact, efforts to force them may be counterproductive. Only once genuine healing and trust building occur can individual reconciliation facilitate group and national reconciliation.

IV And what is crime anyway?

In most domestic criminal law in countries with well-functioning legal systems once a criminal act such as theft, assault or murder has been reported to the police, a series of responses are automatically triggered: investigation, arrest, laying of charges, trial and, if the person is found to be guilty, the imposition of a prison sentence or restitution. It is to this context that restorative justice literature is responding.

But the nature of war crimes and gross human rights violations and official responses to them are very different from this civilian peacetime context. Important differences between war crimes/gross human rights violations and what Ratner and Abrams (2001) call 'common crimes' (a term I will use, for simplicity, to describe crimes committed by civilians in peacetime) reflect the severity of the crimes themselves and the mechanisms and likelihood of law enforcement. The suitability of restorative justice for dealing with severe human rights violations must be assessed against this reality.

The most obvious difference is that laws of war and laws governing state actions tolerate much more violence than laws governing common crimes. There are two reasons for this. First, citizens of all countries have expectations of their governments and its police and armed forces that do not preclude the possibility that state officials will act violently at times for the protection of the population, its welfare and the country's governance. In fact, most people in most democratic countries believe governments should monopolize violence to prevent vigilantism while still protecting the country from invasion and citizens from crime. Laws limit this violence and define conditions under which state violence or coercion can be used. Even in peacetime, state authority permits state personnel to detain people, force them to relocate, restrict free expression, confiscate property and even kill people under prescribed circumstances. States of emergency, like declarations of war, expand states' legal powers to detain without charge and seize and control strategic resources and institutions.

International laws of war limit war methods (defined primarily in the Hague Conventions) and regulate treatment of civilians and captured soldiers (defined primarily in the Geneva Conventions).²² As Neier (1998: 12-13) describes them:

²² According to Ratner and Abrams (2001), individual accountability for gross human rights violations is covered by four interrelated fields of law: *international human rights law* which protects individuals from human rights violations by their own governments and other international actors; *international humanitarian law* which limits methods of war and sets out guidelines for the treatment of soldiers and civilians during war; *international criminal law*; and *domestic law*. It is beyond the scope of this paper to discuss international law and individual responsibility for war crimes and crimes against humanity in depth. For excellent overviews see Sunga (1992) and Ratner and Abrams (2001).

The laws of war... rest on two broad principles: the principle of necessity and the principle of humanity. Under the first, that which is necessary militarily to vanquish the enemy may be done. Under the second,... that which causes unnecessary suffering is forbidden... They protect combatants by requiring that they enjoy certain rights as prisoners of war once they have been captured and disarmed; that they are to be safeguarded against execution or deliberate injury when they are hors de combat because they have been wounded or they have surrendered; and that certain weapons, such as poisonous gases, may not be used against them. They also protect noncombatants against deliberate or indiscriminate attacks, reprisal killings, seizure as hostages, starvation or deportation, and destruction of their cultural objects and places of worship.

Within these limits, active ‘enemy’ soldiers can be killed, maimed or arrested; landmines can be legally set and bombs can be dropped on suspected military targets, even in full knowledge that civilians may be harmed and their property damaged. States can conscript adults, force them into life-threatening situations or force them to conduct acts of violence against others. States can also invoke emergency powers during war to arrest and detain suspected enemies, especially non-nationals, and subject them to secretive military tribunals which do not accord the same rights as civilian courts.

The threshold of state violence permitted by law is also high because war crimes and gross human rights violations are largely defined by international law which is ratified by the states it governs. State authorities are mainly concerned with protecting state interests and are unlikely to ratify laws that might threaten these interests or ban practices in which they might be implicated. Thus the United States government is reluctant to ratify the International Criminal Court because of its concern that Americans might be brought before it. Similarly, the Convention against Torture was not ratified until 1984, well past the time that torture was widely recognized as a serious violation of human rights. As a result, international legislation defining gross human rights violations tends to be conservative and slow.

Second, laws covering war crimes and gross human rights violations are usually not enforced in the same way as common crimes. International law was mainly designed to regulate the interrelations between states, not individuals.²³ In contrast to domestic criminal law, state compliance with international human rights laws and diplomatic measures by external states to encourage compliance are largely voluntary (Sunga 1992). No impartial international policing body exists to enforce breaches of international law pertaining to war crimes and human rights abuses beyond weak and weakly mandated United Nations peacekeeping forces directed by the highly problematic UN Security Council.²⁴ It is up to other concerned states to express displeasure, primarily through public statements and diplomatic pressure.

²³ Before World War II, war crimes laws were mostly concerned with behaviour towards other states’ nationals in war and it was not until World War II that serious legal attention was paid to states’ treatment of their own citizens (Sunga 1992).

²⁴ The UN Security Council is not credible as an impartial body that even-handedly directs international interventions according to international human rights criteria (as we might, albeit problematically, expect

Concern about individual accountability for serious violations of human rights under international law is fairly new.²⁵ Before World War II, individual states were responsible for prosecuting war criminals. The 1945 Nuremberg Charter declared that individuals at all levels of authority could be held responsible for crimes against peace (planning, preparing and waging a war of aggression), war crimes and crimes against humanity as outlined in international law. The tribunal stated that:

...individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law (in Sunga 1992: 29).

Although the tribunal's findings were not precedent setting because of biases in its composition, procedures and judgments, the principles articulated in the Charter have become part of international law. Sunga (1992: 35) writes, "The norm of exclusive State responsibility gave way to the principle of individual responsibility as the Nuremberg Charter gained greater recognition." Individual accountability for such crimes has gained considerable ground in the last decade with the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the 1999 Pinochet trials.²⁶ However, enforcement of these laws remains more the exception than the rule.

Individuals can be held accountable for serious violations of human rights through individual state mechanisms or international mechanisms. Until the formation of the permanent International Criminal Court in July 2002, temporary international tribunals, such as the Rwandan and former Yugoslavia tribunals, would hear such cases. Such courts only hear a minority of the most serious cases.

Laws against gross human rights violations can also be enforced by individual states but even in such cases they are not enforced with the consistency and rigour that common criminal acts are accorded. In fact, what seems to distinguish responses to gross human rights violations, including war crimes, most from common crimes is the dominance of practical, political and military considerations (in the former) over legal principles (typical of the latter).

While domestic laws might prohibit war crimes and human rights violations, countries that have recently experienced civil war and mass atrocities are often in no position to enforce them. After years of war or state-sponsored terror, judicial systems are often in disarray with judges and lawyers either compromised, dead or in exile and resources are usually unavailable to carry out expensive fair trials. Unlike in Rwanda where military victory by the victim group was almost complete, in most cases compromises have to be made with still-militarised opposition forces that mitigate

domestic police forces to do). Its decisions unabashedly reflect the national interests of its five permanent members.

²⁵ Exceptions include laws governing piracy and slavery which often occurred outside state boundaries (Sunga 1992).

²⁶ General Augusto Pinochet's lawyers argued that Pinochet was immune from prosecution on torture charges as head of the Chilean state. The UK House of Lords found that "the Torture Convention's criminalization of torture by official actors, including through universal jurisdiction, would be undermined by recognition of head-of-state immunity for torturers" (Ratner and Abrams 2001: 140).

consistent enforcement of war crimes laws and practical considerations of national and intergroup reconciliation tend to guide enforcement policies.

Uninvolved states may have the legal obligation and capacity to prosecute war criminals and gross violators of human rights under domestic law, especially those on their soil, but decisions to do so are guided much more by political expediency and national self-interest than legal principle. This situation is beginning to change with the prosecution and extradition of a number of Rwandans accused of genocide-related crimes in European countries, especially Belgium. However, such cases are still exceptional.

The lack of consistency in prosecution for crimes of war or state may have interesting implications for the norms that these laws reinforce. Luhman (in Rehg 1996) writes that enforcing laws permits the reinforcement of legal norms even when they are breached. Rehg (1996: xxiii) describes Luhman's theory:

In virtue of its binary code of legal vs. illegal... law selects certain actions and omissions as expectable within the legal community... To handle disappointments of these expectations, the law attaches sanctions to their violation. Normative expectations thus have the property that disappointment of the expectation do not lead to "learning"; that is, one does not adjust one's expectation as one does in the case of a disappointed cognitive expectation. Rather, one punishes the violator so as to reinforce the original expectation. Learning, or development in law, occurs in virtue of its "programming," which allows the legal system to adapt to new situations by developing new "programs," that is, by creating new norms. In this way, law is "cognitively open" to its environment.

In other words, while law can adapt and "learn" through new legislation and administrative procedures that respond to the environment, it does not learn in response to violations of the law because it affirms its 'norms' by prosecuting violators. One must ask, then, what happens when prosecutions are exceptional? Do the norms themselves change or "learn" and adapt so that a greater threshold of human rights violations is tolerated? If true, this highlights an interesting and potentially important distinction between common criminal law and laws governing war crimes.

Restorative justice and war crimes

To summarize this far, war and state crimes, like common crimes, are defined by the laws that they break. All other state violence is not illegal. However, crimes of state and war differ from common crimes in the degree of tolerated violence, consistency of enforcement and, relatedly, the considerations that drive enforcement or nonenforcement. Unlike domestic law governing common crimes which tends to be driven by legalistic guidelines, international law bows to the practical and political interests of states – in particular powerful states.

But restorative justice does not define crime as law breaking. Zehr (1990: 184) defines it as "harm to people and relationships." Griffiths (1996: 181) describes it as "a violation of one person by another," (a definition which appropriately rules out accidental

harm or harm caused by, say, necessary medical interventions).²⁷ Does the concept of “war crime” or “crimes against humanity” have any meaning, then, from a restorative justice perspective? Are these crimes simply more severe versions of lesser injuries?²⁸

Like legalistic justice, proponents of restorative justice do not seem to argue that the wide range of harmful acts by state authorities, in peace and wartime, are crimes. They seem to accept state definitions of crime. Johnstone (2002: 8) writes, “It could be argued that restorative justice takes for granted most of the language, assumptions and structures of criminal justice, and that what it proposes is merely some minor tinkering with the system.” Accordingly, Braithwaite (2002), in his article on “World Peacemaking,” adopts a legalistic interpretation of what constitutes a war crime.

However, taking at face value the claim that restorative justice does not view crime as law breaking, are other concepts missing in the discussion of restorative justice that might distinguish war crimes and crimes against humanity from other, more accepted injuries conducted in war or by the state in peacetime? The concepts of ‘social norms’ or ‘necessity’ perhaps?

The *Oxford Concise Dictionary of Sociology* defines a norm as: “a shared expectation of behaviour that connotes what is considered culturally desirable and appropriate” (Marshall 1996: 359). As discussed above, citizens generally expect the state to govern on their behalf and accept that, in certain situations, state authorities need to use coercion and even violence. However rules and expectations limit the use of force and violence by the state. Within a non-legalistic paradigm these widely shared rules and expectations could be considered norms. These include expectations or norms of behaviour – legal and unstated – governing professional soldiers in war.

Any paradigm of justice must incorporate a concept of norms. The question for restorative justice might be who, according to the norms of society, has the authority to act in a way that might inflict harm and under what conditions does that authority have permission to act in such a way?

‘Necessity’ in guiding interpretations of justice in restorative justice might take a form similar to the “principle of necessity” in international law defined by Neier (1998: 12) above: “That which is necessary militarily to vanquish the enemy may be done.” But ‘the enemy’ may be defined in many ways, even to justify a war of aggression, and ‘necessity’ might be construed to include looting or forcing civilians to ‘donate’ food to unpaid soldiers (as in the case of Sierra Leone, described below).

In the context of war, only by the most extreme pacifist standards would it be reasonable to define crime as harm alone. When one’s country or village is being invaded or laid siege, when acts of great brutality against one’s people are being committed, when one’s loved ones are being threatened, it is logical either to flee or to fight back.

²⁷ The definition of crime has not been given much attention in restorative justice literature. Most literature focuses on restoration processes. The crime is usually assumed and is often defined according to legalistic justice categories. Where definitions are provided, slight differences exist between them. In a definition that anticipates a consultative solution, Hudson and Galloway (1996) and Van Ness (1996) following Christie, say that crime is a *conflict* that results in injury to victims, offenders and communities. Van Ness (1996: 23) writes that “only secondarily is (crime) lawbreaking,” an opinion that is not explicitly shared by other authors who do not mention crime as lawbreaking at all.

²⁸ Further questions raised by the previous discussion on war crimes are: Do restorative justice processes improve the chance of holding most perpetrators of war crimes accountable? If so, is restorative justice a second best option or can it be supported on its own terms? These will not be addressed here.

It is not my purpose here to outline what the norms and necessities of war are. I only observe that some concept of necessity and norm must be, at least implicitly, considered in assessing whether a crime has occurred. It is not enough to state that crime is a deliberate harm or harm caused by omission of duty.

In theory, a restorative justice definition of a war crime or a crime by a state agent could approximate legal notions of war crimes and state crimes. The difference would be that crimes defined by law are the outcome of negotiations by states (reflecting their self-interest) and interpretations by courts. Crimes defined by norms or ‘necessity’ would largely reflect ‘common sense’ notions of what is acceptable behaviour by authorities of state, including soldiers, or by individuals seeking to protect themselves from violence. Public debate about these issues and external standards such as international or national law might also shape these views. From a restorative justice viewpoint, crimes by state authorities or crimes of war may thus be more context dependent than legal notions of crime which are influenced by international legal standards.

If, however, as North American practice suggests, restorative justice does use legal definitions of crimes, then the question becomes slightly different. In the context of contemporary civil war, given the way civilians are recruited for militias and often neither paid nor trained in the laws of war, who really is responsible for their crimes? This could especially be asked in cases of “lesser” war crimes such as looting from civilians and mistreatment of captured soldiers in which irregular soldiers and militiamen may not be aware of the cut-off between accepted war practice and war crimes.

Before I continue with a discussion of the kind of crimes and offenders that are appropriate for restorative justice, it is useful to present a case study – that of child soldiers in Sierra Leone – to show how complicated these questions can be.

When victims become killers II: Child soldiers in Sierra Leone

Mahmood Mamdani’s (2001) book *When Victims become Killers* described the events that led nationalists among historically oppressed Hutu in Rwanda to turn against their Tutsi compatriots who had been historically favoured by their European colonizers. The 1994 genocide in Rwanda is a classic story (with some twists) of a chosen trauma that led to retributive violence. The story of child soldiers in many African conflicts – most famously in Mozambique with RENAMO rebels, Uganda with the rebel Lord’s Resistance Army, and Sierra Leone – is very different. It is the story of deliberate *creation* of perpetrators using the raw ingredients of the most vulnerable and malleable part of the population: disadvantaged children.²⁹ Instigators did this, not as much by tapping into feelings of resentment as in the case of tit-for-tat ethnic war, but by the mechanism of dehumanisation: by traumatizing children and implicating them in the violence so they became emotionally numb and believed they could not return home. Child soldiers have been regularly *resocialized* by being forced to watch or participate in atrocities, sometimes against family members or other children, and then becoming bonded with their battalion and loyal to their commanders who become their surrogate family. In Sierra Leone, many war crimes were carried out by such children. Here, I will

²⁹ Brett (1997: 11) writes, “Disrupted family background (orphans, female headed households, separated children, refugees, displaced street children, etc.) and lack of education are the two most characteristic features of child soldiers. The search for food, accommodation, money, basic means of survival and protection are the main reasons why children volunteer as soldiers.”

briefly describe the situation of child soldiers as a backdrop for the discussion of offenders' suitability for restorative justice.

The war in Sierra Leone began in March 1991 as an insurrection by the Revolutionary United Front (RUF) against a notoriously corrupt All Peoples' Congress government of President Joseph Momoh. The RUF, led by Foday Sankoh, sought to mobilize disillusioned students and socially marginalized youth using a populist, youth-oriented platform informed by Libyan president Muammar Qaddafi's *Green Book*. The ideological foundations of the RUF were soon abandoned as the group switched to a strategy of using terror against civilians to make the country ungovernable and seize control of the diamond regions of the country. In 1992, discontented junior officers in the army led a military coup and formed the National Provisional Ruling Council (NPRC) government. The NPRC also mobilized unemployed youth to fight against the RUF forces (Peters and Richards 1998; Hirsch 2001).

Government, militia and rebel forces used youth extensively in the fighting. Boys and girls were used as combatants and labourers and girls as sex slaves. Many children were kidnapped, others 'volunteered.' An ILO (1997) report states:

Some, after the loss of home, family and friends joined the army for security and protection, others were persuaded by young military personnel or by other child soldiers, some willingly offered themselves to fight for their country, many were attracted by the sheer "fun and adventure" of wearing military gear and carrying an AK-47 around (ILO 1997: 15).

Peters and Richards (1998a) interviewed three male former child soldiers, all of whom volunteered as irregulars with the Sierra Leone army after they lost their families in the fighting. Irregulars were unregistered fighters with the Sierra Leone army, many of whom were recruited in the front by officers who fed, equipped, trained and paid them out of their own resources. They write: "Ces irréguliers jouèrent un rôle majeur au cours de la guerre. Profondément attachés à leurs officiers (leur *bra* - < grand frère >), ils étaient prêts à se faire tuer pour ces derniers" (Peters & Richards 1998a: 583).³⁰

Describing a 12-year-old irregular, they write:

Socialisé à travers le combat et ignorant les règles de la guerre, notre informateur décrit le maniement des armes, les pièges tactiques et les atrocités pratiquées contre les prisonniers de guerre en des termes simples, comme s'il s'agissait de leçons techniques bien apprises (Peters and Richards 1998a: 583).³¹

³⁰ Translated: These irregulars played a major role in the war. Deeply attached to their officers (their *bra* – 'big brother'), they were ready to kill for them.

³¹ Translated: Socialised through combat and ignorant of the rules of war, our informer describes the maintenance of arms, tactical traps and atrocities practiced against prisoners of war in simple terms, as if it was a matter of reciting well-learned lessons.

One child irregular said he was paid \$15 a month, which was very little, and “unlike a corporal or a sergeant, you don’t get [a free] bag of rice.” Therefore, after fighting the rebels in a village, he and his companions took what they could and sold stolen items for additional income (Peters and Richards 1998a: 593). This practice was common. Peters and Richards (1998a: 586) write:

Le NPRC n’avait pas de ressources pour instruire et approvisionner décentement le grand nombre de nouvelles recrues utilisées pour stopper l’avance du RUF/SL... Les combattants de la région en guerre se payaient eux-mêmes par le pillage.³²

Another child irregular who Peters and Richards (1998a) interviewed described the ‘normal’ practice of torturing, mutilating and executing captive ‘soldiers’ He also described capturing women for labour and sex:

We and the rebels, sometimes we used one woman. Because when the rebels come into a town, the women are in the town, the rebels take them to go with them. OK, then our side takes over, we capture the rebels or capture the ground. We deal with the rebels [and then] we take the women [...] the women are there for us. Any woman, any woman that you like. And by force she is going to like you... we are the ones who have power over them. So we get food, the military has food. They carry it for us, from Freetown. Because every day they are supposed to feed us... That was the way they were so loving us. Because there is no other place where you can get food. Except from us (Peters and Richards 1998a: 598).

The main rebel force, the RUF, captured children as young as nine and trained them for service. They preferred to use children because they were viewed as “more compliant and easier to manipulate.” A documentary shown on the Canadian Broadcasting Corporation television show *Newsworld* showed rebel leader Foday Sankoh bragging about how he could turn very young children into killers (CBC Newsworld, 2002). Part of this training involved resocializing children into a culture of violence. Zack-Williams (1999: 154) writes:

This period of indoctrination could be quite gruesome: witnessing or participating in collective punishment, and in some cases punishing parents or near relatives, in order to bond the child to the RUF, by reducing any desire to return to his village...

In similar processes in Mozambique and Uganda, Terburgh (19...) writes:

Children have... been ‘hardened through witnessing one or both parents being used as a target to be shot as part of the soldiers’ training. Nearly

³² Translation: The NPRC (government) did not have the resources to instruct and provide decently for the large number of new recruits used to stop the advance of the RUF/SL. ... The combatants in the war-affected region paid themselves by looting.

none of the child soldiers were spared from being regularly ordered to torture, maim or kill children or adults, or to destroy or burn down properties. The level of fear induced through threats, intimidation and torture caused them to obey like robots.

It is not surprising then that children carried out a large proportion of the war crimes in Sierra Leone, some out of fear and “like robots”; others, undoubtedly, for the pleasure and power of seeing terror on victims’ faces. All could be said to be victims as well as perpetrators. Few, if any, would have had knowledge of laws of war or, in other words, knowledge of where ‘normal’ war practice ends and criminality begins. All were resocialized into a culture of violence, some deliberately and at an extreme, others simply through the context of war. Their practices and experiences often depended on who their commanders were.³³

V What criteria determine the suitability of a crime or offender for restorative justice after mass atrocity?

Social norms and necessity also arise when one asks: What criteria determine the suitability of a crime or offender for restorative justice? Three interrelated elements of crime and offenders appear in restorative justice and peacebuilding literature: the severity of crime; the context of the crime; and the offender’s willingness to take responsibility for the crime. These are described in diagram two. Two sets of two questions arise out of these elements. The first set determines the suitability of the crime and offender for restorative justice. The second set determines expectations of restorative justice.

The first set of questions, which determines whether restorative justice may be appropriate, assumes that offenders are adults capable of moral reasoning and in control of their actions. It would not apply to child soldiers. The first question focuses on the past and determines the severity of the crime. It asks: is the crime forgivable *by society*? If society can forgive the crime, eventual reintegration may be possible and restorative justice may be appropriate. The second, future-oriented, question follows: Will the offender acknowledge the crime, admit it was wrong and take full responsibility? If the answer is yes, restorative justice is appropriate *if the community can support the victim and offender in their healing*. If it is no, restorative justice may not be appropriate.

The second set of questions is slightly different and is appropriate for child soldiers. The first, past-oriented question asks: what is the severity of the crime and is the offender responsible for it? At this point it is reasonable to ask whether highly traumatized child soldiers are responsible for any of their crimes, even if they participated willingly. If the offender is not deemed to be responsible for his crimes then issues of acknowledgment, regret and accountability are irrelevant for the establishment of justice and restorative processes are *always* appropriate (though questions of the ability and willingness of the community to support victims and offenders remain). The second, forward-looking questions become: what does the victim need to heal? What does the offender need to heal and reintegrate? And what does the community need to heal and

³³ Not all child soldiers lacked discipline. One irregular described by Peters and Richards (1998a: 602) fought under a responsible officer who forbade looting and raping and enforced strict discipline and training. That boy was able to avoid the “prevailing combat ‘culture’ of drugs and liquor,” explaining that he planned to resume his education and rejoin his family.

trust the offender again? Even when offenders are not required to acknowledge and regret their crimes to reintegrate into the community, they will still need to deal with these issues to heal.



The severity of the crime:

When Hannah Arendt (1958) wrote about “radical evil”: those crimes that are so serious they cannot be forgiven, she was not referring to the severity of harm alone. In the context of most contemporary civil wars, injuries caused by one person may be horrific and massive but most perpetrators can still be forgiven by, and reintegrated into, society.

Child soldiers in Sierra Leone, for example, killed, raped, tortured and mutilated civilians on a massive scale. In many of these cases, the defense of ‘necessity’ does not hold; many children, enthralled by the power that guns provided and freely obedient to their commanders, willingly performed these acts.³⁴ Yet they were also victims. No

³⁴ One child describes dancing with his RUF comrades around the burning bodies of civilians they had just massacred, feeling happy at the time (CBC...). Peters and Richards (1998b: 186) write, “Male and female

amount of restitution can compensate most victims for their losses and psychological and emotional trauma. But still one can imagine that society has – and must have – the capacity to eventually forgive and reintegrate most child perpetrators. On the other hand, instigators and organizers of the violence, such as Sankoh, bear much more responsibility for these crimes, even if they never bloodied their hands, and it is to these instigators that Arendt likely refers.

Crime severity, then, has two components: severity of injury; and intent and responsibility for the crime (including organizational influence and control, capacity to reason morally and reasonable knowledge of laws and social norms). An assessment of the severity of the crime and its forgivability would have to consider both. I think some crimes by instigators and perhaps some perpetrators are so horrendous that the offender should never be reintegrated into society, even if he sincerely regrets his crimes. In that sense, from a restorative justice viewpoint, prison would not be seen as a form of punishment through which offenders pay off their crime, as Arendt suggests. Rather it would be seen as a form of exile from society. This does not mean that restorative measures cannot be taken to assist the offender to restore or reconcile himself as a human being.

In Western restorative justice processes, practitioners also tend to carefully assess offender's suitability to participate. A major part of that assessment is the offender's willingness to admit to and take responsibility for the crime.³⁵ As Strong and Van Ness (2002: 186) write:

Seriousness of crime is a factor in determining which offenders should not participate in encounters or other restorative responses, but other factors are more important. Some of those include the willingness of the offender to accept responsibility for the crime and its resulting harm, the appropriateness of the offender's motivation for participating, (and) the psychological health of the offender... These may be present or absent in offenders who have committed minor crimes as well as serious crimes, and that presence or absence is more important than the seriousness of the offense.

Three offender-related factors must therefore be considered in assessing the crime and the offender's suitability for restorative justice processes. First, the seriousness of the crime will affect the nature of restitution and the community's ability to forgive. Second, and closely related, the context, intent and knowledge of the offender will affect interpretations of the seriousness of the crime, the offender's responsibility and again the community's ability to forgive. Third, the offender's attitude after the crime, his

under-age irregulars are rated highly by their officers. Under-age irregulars fight without inhibitions... and kill without compunction, sometimes casually..., sometimes as an extension of play. They are good in ambush situations, one of the main combat tactics."

³⁵ Strong and Van Ness (2002: 186) write that "unsuitable offenders should not meet with their victims but other restorative options are available, including relationship-building programs, victim awareness training and community service projects. They also state that restorative justice "can and does work for dangerous offenders – for those who are not suitable candidates to meet with their victims and who must be locked up." However, in such cases, participants must be carefully prepared and screened and programs must be specially designed to meet the needs of each case.

willingness to admit his actions, repent, atone for them and change his lifestyle so they are unlikely to recur is important in determining whether the offender is suitable for restorative justice processes in the view of many proponents.

A fourth consideration is the dangerousness of the offender, even if his crime is forgivable and he is willing to take responsibility for it. Zehr (1990: 180) writes that the current justice perspective in North America “builds upon the unusual, the bizarre.” Procedures are designed for these extreme cases and applied to “‘ordinary’ offences”:

Some offenders are so inherently dangerous that they need to be restrained. Someone must make that decision, guided by rules and careful safeguards. Some offences are so heinous that they require special handling. But these special cases should not set the norm (p. 180).

But in war, there is no “ordinary offence.” As discussed above, war crimes are extreme and heinous almost by definition and in a time of unstable peace, instigators can easily manipulate fearful and traumatized people and reignite the fighting. In such cases, instigators and perpetrators who are likely to reoffend and further instigate fighting probably should be restrained.

While the third criteria – offenders’ willingness to take responsibility for their crimes – seems most important for proponents of restorative justice, the first two are most important in determining whether a crime is, in fact, a war crime and whether it is forgivable. The second criteria, relating to context, knowledge and intent, may help determine the offender’s level of responsibility for the crime and the kinds of crimes suitable for restorative justice.³⁶

VI Intergroup, national and international reconciliation: a restorative approach

I have written about justice, the kind of acknowledgment and accountability that rebuilds trust and restores victims, offenders and their communities. But what about peacebuilding or reconciliation between warring groups or between former oppressor groups and those they oppressed?

The job of bringing about peace between warring groups is primarily considered to be that of elites. Negotiations and mediation are conducted between powerholders with the assumption that ‘the people’ will follow the outcomes. Most conflict and peacebuilding analysis, led by international relations, reflects this top-down approach. Yet grassroots peacebuilding work is so unrecognised and has been so under-researched that we have no credible understanding of its nature, effectiveness and potential.

We do know that the dominant practice of negotiating exclusively with military and political hard-line leaders, who have a vested interest in war, marginalizes more moderate voices, often feeds the fighting and may mitigate against sustainable peace

³⁶ This second factor raises questions about norms surrounding crimes and issues of justifiability. What could the offender reasonably know about laws or ‘norms’ of war? If the offender was not given training in laws or norms of war, when thrown into the chaos of a war situation, he could not be expected to know the cut-off between ‘acceptable’ and ‘unacceptable’ war behaviour. Moreover, a child recruit (whether kidnapped or volunteer) who has not been fully socialized in civilian society will likely take the military norms she is surrounded with as her own. As stated above, unless war and all war activities are deemed to be criminal, any notion of crime in war must acknowledge norms that inform individual actions.

agreements. Experience shows that factional leaders cannot be sidelined in negotiations³⁷ and that populations differ in relation to both their support for war and their influence on their leaders.³⁸ However, as Bosnia and Cypress show, an imposed peace agreement without mass public support is a fragile agreement indeed. Popular intergroup grievances and chauvinisms, if left unaddressed, can easily reignite into war if an ambitious political leader chooses to tap them. In Indonesia, Braithwaite (2002: 187) writes:

Peacemaking among elites will not be enough to secure democracy in Indonesia. Peacemaking is needed on the ground, among the ordinary people, in local languages and with local courtesies that connote the respect that tackles feelings of humiliation, anger, hurt, unacknowledged shame, and distrust. Outside peacemakers cannot deliver this. But if local leaders manage to achieve this healing with the democratic participation of all locals who feel grievances acutely enough to bother engaging with the reconciliation dialogue, then aspiring tyrants and outside agitators will find that there are fewer local flames of hatred to fan.

This is not an either/or argument. As Braithwaite (1999), Lederach (1997) and Diamond and McDonald (1996) convincingly argue, peacebuilding needs to occur at all levels: elite; intermediate and grassroots. Restorative justice may provide values that can guide such democratic peacebuilding.

But restorative justice is a judicial *model*, a *system* of interdependent activities involving victims, offenders and their communities. It involves commitment by all stakeholders to engage in respectful dialogue, acknowledge the crime and its wrongfulness, jointly develop a plan through which offenders can atone for their actions, help victims and offenders ‘heal’ from the crime and reintegrate victims and offenders into the community. All these must be present, at least in design, in a restorative *justice* process. This is depicted in the top part of diagram eight below. Beyond dealing with offences and resolving conflicts at the community level, then, how can restorative justice be applied to peacebuilding?

Here restorative *justice*, the model, must be distinguished from the restorative *philosophy* which is incorporated in the adjective ‘restorative’ – for example, restorative process, restorative approach – and encompasses a set of values and assumptions. If we think back to the restorative justice ontology, a restorative worldview sees individuals as being in relationship with one another, not just with their own group but also with those with whom they are in conflict. Its ethic is one of care, which is shown both to the victim and offender. As the South African TRC emphasised, extreme sensitivity must be shown to the victim, with space provided to listen to his story and respect his expressions of emotion and needs for justice and compensation. The offender is also shown respect and is encouraged to acknowledge and take responsibility for his actions. Care is taken not to stigmatise or humiliate the offender, but to engage him in a humanizing dialogue about the consequences of his actions.

These values apply equally to intergroup (including interstate) diplomacy and peacebuilding. Writing about “restorative diplomacy,” Braithwaite (2002: 170) argues

³⁷ Somalia case...

³⁸ Ireland vs. Lebanon

that “a diplomatic practice is needed that heals (the) hurts of abused peoples” and avoids humiliating the parties involved. He cites Robert Kennedy’s lessons from the nearly disastrous Cuban Missile Crisis. Kennedy (1969) wrote:

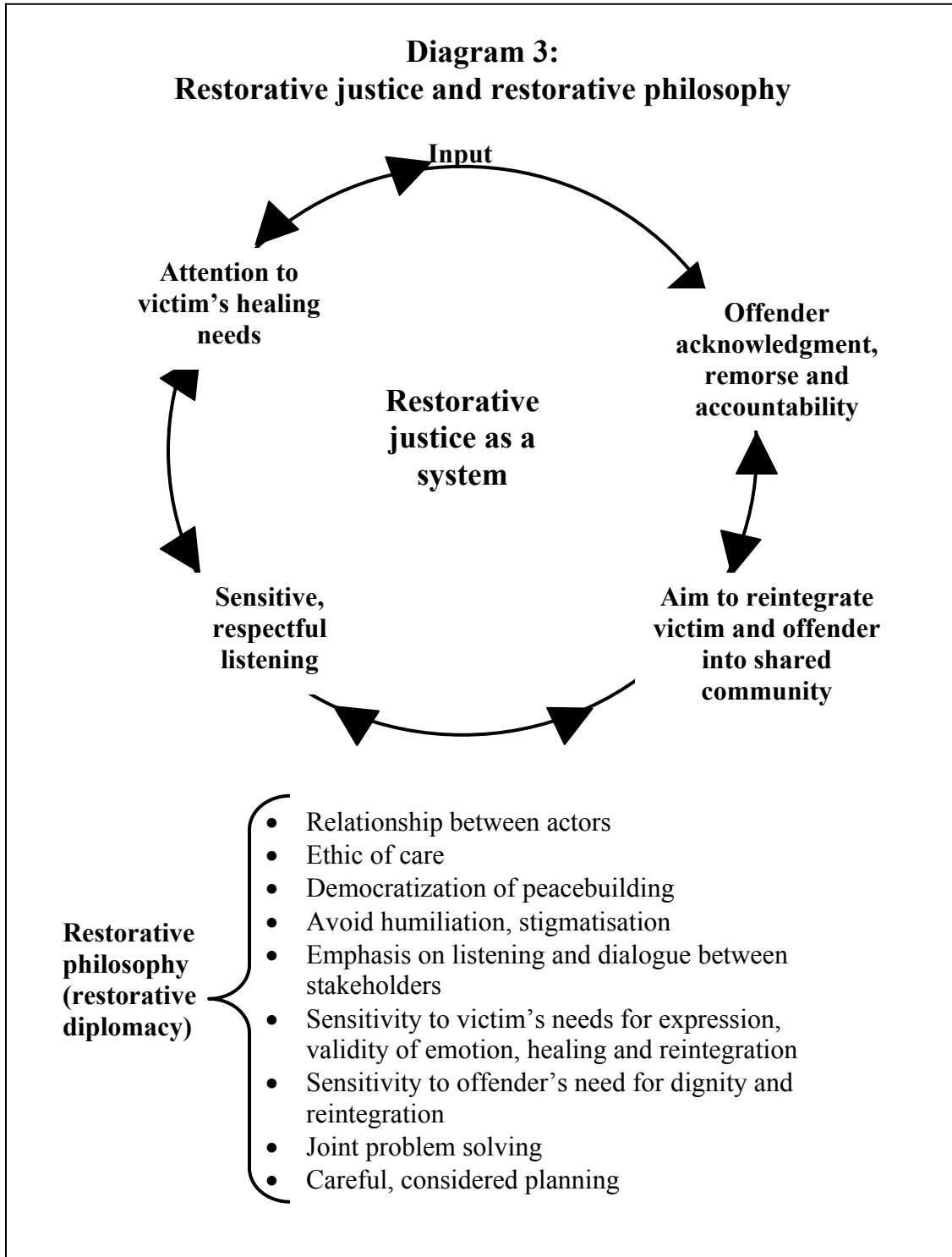
1. Take time to plan; don’t go with your first impulse;
2. the President should be exposed to a variety of opinions;
3. depend heavily on those with a solid knowledge of the Soviet Union;
4. retain civilian control and beware of the limited outlook of the military;
5. pay close attention to world opinion;
6. don’t humiliate your opponent;
7. beware of inadvertence (in Braithwaite 2002: 190).

Braithwaite (2002: 191) writes that this advice aptly fits restorative ‘justice’³⁹ processes, or restorative diplomacy. Restorative diplomacy must be “planful, plural, solicitous of expert advice, democratised, on guard against humiliation, and attentive to inadvertence.” He adds that “high-quality listening to and dialogue with the adversary and other stakeholders” are also part of restorative ‘justice.’ As diagram three illustrates, these are all values of restorative diplomacy or a restorative approach to peacebuilding. They can be inserted where possible and appropriate but do not have to be applied as a whole as, I believe, restorative justice must. Thus, the South African TRC did not provide restorative justice – it did not provide all the systemic elements of the model – but it did use a restorative approach or philosophy in its proceedings.

Is there ever a time that restorative justice may be appropriate as a complete model to deal with intergroup conflict or grievances? One application of the complete judicial model may be when one group has clearly aggrieved another, as Euro-Canadians have aggrieved aboriginal Canadians or as white South Africans have aggrieved black majorities there. A complete restorative justice model would involve truth telling mechanisms that would reveal not only the facts but would establish that historical (and current) oppression was wrong and needs to be publicly recognized and compensated for.

In South Africa, where people from victim groups now dominate government, public compensation is inadequate. Compensation should come from the white beneficiaries of apartheid abuses – not only crimes covered by the TRC but also the abuses of the apartheid system itself.

³⁹ Braithwaite does not distinguish between restorative justice as a system and ‘restorative’ as an adjective to describe a process as I do so I include his use of the term here.



Braithwaite (2002) claims that “the restorative justice peacemaking of Tutu and Mandela *has* changed basic distrust between blacks and whites in South Africa” but I doubt that is true. Beyond Braithwaite’s problematic assertions of causality, I think all that can be claimed in South Africa is that it is difficult for people to deny the crimes of the apartheid era (narrative reconciliation) or to defend those crimes. White South Africans have not generally taken responsibility for apartheid, either by acknowledging their culpability and responsibility in it or by atoning for their actions. There is little reason, therefore, for distrust of white South Africans to change. The significant thing that has changed is the power position of white South Africans so that it is more difficult now to impose their privilege. In other words, the restorative *approach* of the TRC accomplished some goals such as narrative reconciliation and some degree of moral consensus. But trust-building requires white South Africans to take responsibility and atone for their support for apartheid – it would require full restorative justice.

Conclusion

Restorative justice seems to offer a promising alternative or complement to legalistic justice for countries in transition. It’s emphasis on the need of both offenders and victims to reintegrate into healthy communities that respect the needs of all citizens meshes well with the peacebuilding priorities of many transitional societies. The question of whether restorative justice is a second-best judicial option, given the notorious difficulty of prosecuting war criminals, or whether it is an ideal way of dealing with gross human rights violations is premature, however. Restorative justice theory simply has not been thought through enough to answer that question.

This paper raises more questions than it answers. But in doing so it aims to provoke much-needed discussion among criminologists, restorative justice practitioners and peacebuilders about what the meaning, limitations and possibilities of restorative justice really are, especially as they relate to extreme crimes such as war crimes and gross human rights violations. Only once restorative justice theory is persuasively thought through can peacebuilders and decision makers in transitional governments make informed decisions about its utility as a judicial and peacebuilding option.

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