

# DRAFT

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**RESTORATIVE JUSTICE AFTER MASS  
VIOLENCE:  
OPPORTUNITIES AND RISKS FOR  
CHILDREN AND YOUTH**

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## Restorative justice after mass violence: Opportunities and risks for children and youth

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**Summary:** There has been growing interest in the role that restorative justice can play in providing justice after mass violence. With its emphasis on healing victims, perpetrators and communities; rebuilding relationships through accountability processes after a crime has been committed; and involving communities in providing justice, restorative justice seems ideal for the needs of post-conflict societies.

Recent truth commissions in South Africa, Sierra Leone and East Timor have adopted some elements of restorative justice, providing victims with sympathetic hearings, affirming that crimes committed against them were wrong, recommending reparations and, in East Timor, involving communities actively in reconciliation efforts. Other post-conflict efforts related to restorative justice include, restorative encounters and dialogues between former combatants/security forces and victims in Northern Ireland and South Africa, restorative justice training for thousands of people in Bougainville, and tradition-inspired justice and peacebuilding efforts in Northern Uganda.

In the West, restorative justice is often equated with face-to-face encounters between victims and offenders or with community-supported accountability processes that facilitate reintegration of offenders. These accountability processes usually occur after the offender has been identified or arrested. This highlights the fact that restorative justice encounters usually involve some coercion, often by the state. Societies emerging from mass violence usually lack the capacity or will to hold perpetrators accountable. Many peace deals include amnesty provisions; armed factions still threaten security; the police and judiciary are often weak or implicated in violence; and too many people are usually involved in the violence to make justice for all feasible.

Restorative justice highlights the role that community plays in holding young offenders accountable for their actions. This must be done in a way that reintegrates offenders into their respective communities while addressing their responsibility for crimes they willingly committed. As institutions of justice are often weak after mass violence, this community role is particularly important in such contexts.

The willingness of communities to hold offenders responsible for crimes will be heavily influenced by the nature of the conflict. Communities in an intra-communal conflict (a conflict within the community) will find it easier, and may be more willing, to hold offenders accountable for their crimes than communities involved in inter-communal (ethnic) conflicts. This is because in an ethnic or religious conflict, communities often support the actions of offenders and see them as heroes. Restorative justice practices are much more likely to be effective if we work with conflict dynamics, instead of formulating blanket policies.

Just as governments and judicial systems have difficulty holding offenders accountable where perpetrating groups still threaten peace, communities also have difficulty holding offenders accountable even when they condemn their crimes. As a result, processes designed to help reintegrate offenders, which are sometimes called restorative justice processes, often lack the element of accountability while they focus on reintegration and unconditional acceptance.

Restorative justice must be seen, not just as a procedure involving an encounter between victims and offenders, but also as an approach to justice or as a guiding philosophy. While formal restorative justice encounters may often not be appropriate in dealing with serious war-related crimes, especially where accountability is lacking, a restorative justice approach suggests a range of actions that can be taken to help victims and offenders heal from crimes and restore social trust.

The biggest contribution may be in helping young victims heal and reintegrate on fair terms into their communities. Justice for victims may or may not include trials but a restorative justice perspective reveals that justice will never be limited to trials. Assessing justice needs of victims must begin with the open question: How can we help victims recover from this crime and reintegrate into his/her

community on fair terms? By identifying the many reintegration and justice needs of victims we can see that many practical steps can be taken, even when accountability for offenders is not feasible. While restorative justice stresses the role of the community in helping children, youth and their supporters recover from their losses, communities can – and often do – hinder fair integration and justice for victims. A key part of justice is to address community attitudes towards victims and helping communities support victims in their healing and reintegration in a way that does not further the injustice. This must be an explicit part of the justice picture.

A restorative justice perspective suggests that accountability helps offenders come to terms with their past actions and rebuild trust with communities they have harmed. In poor societies emerging from war, many people assert that offenders are too poor to provide redress. Victims therefore look to the government or NGOs to compensate them for their losses. Restorative justice helps us recognize that redress does not have to be exclusively financial. Everybody has the capacity to make amends for their harmful actions in a way that is meaningful to the victim – perhaps by helping an injured victim on his or her farm or helping rebuild a house.

Violent conflicts invariably cause a breakdown in a society's social fabric and in the relations of trust among its members. Justice processes must strive to help rebuild social trust. A restorative justice perspective is attentive to social harm caused by crime and aims to contribute to the restoration of relations at the national, group and interpersonal levels. This is particularly important in inter-communal conflicts where entrenched and high levels of mistrust between groups tend to persist over time.

While many forms of traditional justice in communitarian societies have similarities with restorative justice, the two should not be equated. Restorative justice is concerned with the rights and needs of individual victims and offenders yet many forms of traditional justice emphasize community harmony over individual justice. Often, victims are asked to sacrifice justice for the sake of communal peace. Traditional justice may also reinforce problematic hierarchies that contributed to the war in the first place and exclude young people and women from decision making. Thus tradition-inspired justice processes must be analyzed on a case by case basis if they are to be declared equivalent to restorative justice.

The most affected parties in a conflict and in a given crime are often absent or given a mere secondary role in resolution and in the debate on how to move forward. This is even more so in the case of vulnerable individuals, including children and youth. This results in a fundamental disregard for the views of those most concerned and hinders their fair healing and integration. Restorative justice calls for a broad inclusion and active participation of all stakeholders in the process of addressing a conflict.

**Keywords:** children, transitional justice, restorative justice

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## 1. INTRODUCTION

There is growing interest in the role that restorative justice can play in addressing mass atrocities committed during armed conflict, repression or political unrest. A solid body of literature on the theory and practice of restorative justice for ‘common’ crimes, as well as a wide range of practices, have been developed over the past decades, with much of it focusing on youth. However, literature and practice in the area of restorative justice after mass violence has been more recent and sporadic. How can restorative justice help provide justice for children and youth who have taken part in and/or have been severely victimized by mass violence? How can it help them reintegrate and rebuild trust within their communities? And what can the perspective of restorative justice offer as we seek to understand the possibilities and limitations of justice after mass violence?

This paper will examine the meaning, opportunities and limitations of restorative justice in societies emerging from mass violence, particularly in relation to the needs of children and young people – both those who committed serious crimes and those who suffered from crimes against them. Part I will provide an overview of the development and the central tenets of restorative justice as theorized and applied to ‘common’ crimes in peacetime societies. Part II focuses on its implementation in cases that involve youth, as offenders<sup>1</sup> and victims.

Part III examines the context of societies dealing with mass violence and challenges they face in providing accountability for serious crimes. After describing processes and mechanisms designed to deal with mass abuses that have integrated restorative justice principles, we will discuss the potential and limitations of procedural forms of restorative justice. Here we highlight the role of coercion, social trust and conflict dynamics and discuss the relationship between traditional and restorative justice.

The challenges encountered by procedural forms of restorative justice in such contexts lead us to suggest looking at restorative justice as a justice perspective (or ‘lens’) which can make an important contribution to meeting the healing and reintegrative needs of victims and offenders well beyond particular justice procedures.

## 2. PART I: RESTORATIVE JUSTICE: AN OVERVIEW

The restorative justice movement has gained popularity particularly from the late 1970s onwards, though many argue that the core idea of restorative justice as a means of resolving conflict is “as old as human history” (Zehr 2002: 12). Indeed, certain informal forms of conflict resolution as practiced by several communities from ancient to present times are regarded by many as the precursors of restorative justice. The growing influence of restorative justice, especially in Europe, North America and New Zealand, has been a response to the limitations of Western criminal justice. The movement has gathered practitioners and

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<sup>1</sup> In this paper we will follow the common practice of using the word ‘offender’ to apply to ‘common’ or peacetime crimes and the word ‘perpetrator’ to refer to crimes committed during mass violence.

academics around one main tenet: that we should rethink the way we view and deal with crime, or more broadly, wrongdoing.

Although adherents and proponents of restorative justice have developed different conceptions of restorative justice (Johnstone & Van Ness 2007), they are united by the idea found in Howard Zehr's famed expression that restorative justice implies "changing the lenses" through which we view crime, allowing us to see that "crime is fundamentally a violation of people and relationships" rather than a violation of the law (Zehr 1990: 181).

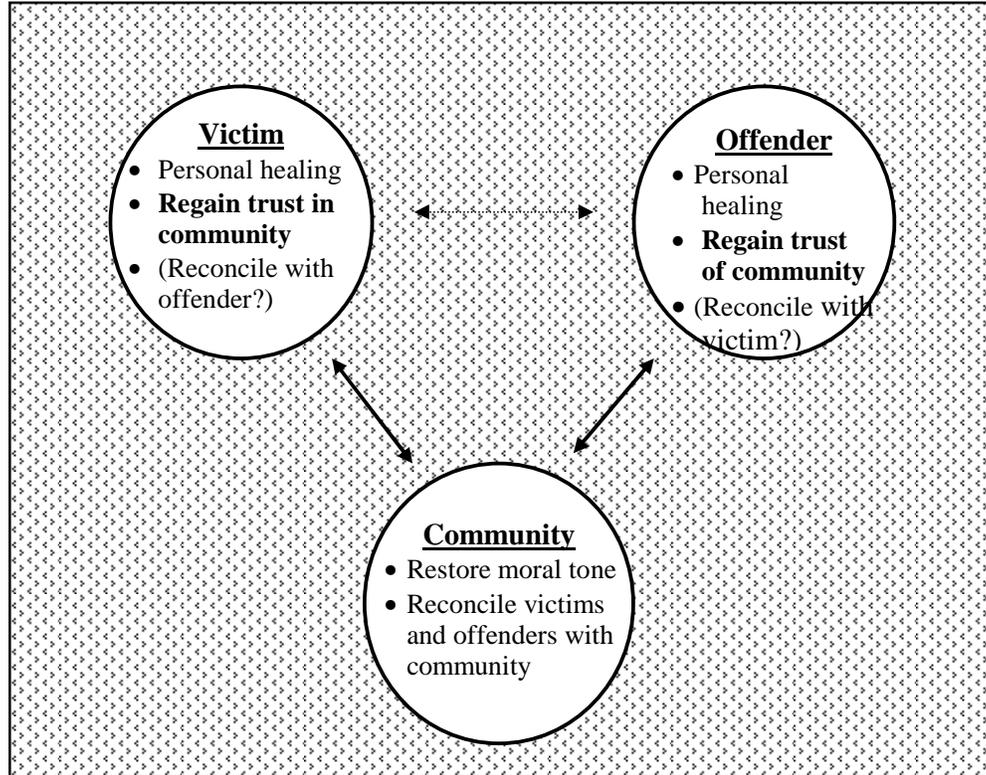
In this paper we argue that the 'lens' itself – the descriptive or ontological perspective of restorative justice – has much to contribute to an analysis of the needs, possibilities and limitations of justice after mass violence. It should therefore be distinguished from the normative aspects of restorative justice. In other words, while the restorative justice ontology may lead us to conclude that restorative justice procedures are well-suited to providing justice for children and youth in post-conflict contexts, it has much to contribute in and of itself. Paradoxically this ontology may lead us to conclude that restorative justice procedures are sometimes unsuitable or unlikely to be successful.

## 2.1 Descriptive or ontological elements of restorative justice

The restorative justice ontology views humans as relational beings who need to belong to a community. When a crime occurs it alienates both victims and offenders from the community and lowers the "moral tone" of the community itself (Moberly in Johnstone 2002: 104). The victim feels alienated by the crime because the community failed to protect him and community members may not understand the extent of his trauma. Therefore he needs to regain trust in the community. The offender is alienated from the community because of the injury he caused. He has lost the trust of community members and has to act to regain that.

As Figure 1 indicates, because of this alienation, victims and offenders need to reintegrate into, and reconcile and restore trust with, their communities. We define reintegration as physical integration and the willingness by all concerned to interact and not take revenge. It is the agreement to behave civilly and obey the law. True reconciliation requires something more. It goes beyond peaceful coexistence – which can occur even though people remain angry, distrustful and wanting revenge. True reconciliation is genuinely *felt* by those concerned. We argue, therefore, that trust is a good measure of deep reconciliation between individuals or social groups. Individual (internal) reconciliation is better described in terms of healing – psychological, emotional and physical. We return to the idea of social trust in Part III (4.4)

Figure 1: Reconciliation needs in the restorative justice ontology



Source: Stovel (2006)

Justice is a major way in which we reconcile victims and offenders with their communities. It is also the way the community restores or improves its “moral tone.” By asserting positive moral norms, assisting victims and holding offenders accountable for their offenses, the community (or society) affirms its values. Moral norms are not just words or legislation. They must be lived and acted upon. From this perspective, justice can take many forms, including trial justice, restorative justice or some form of traditional justice.

The restorative justice perspective does not just focus on the crime in isolation. It recognizes the importance of context (indicated by the patterned area in Diagram 1) and the need to address context if it is part of the problem. It also allows us to acknowledge that offenders can also be victims, a point that is relevant to child soldiers and ‘complex political victims’ discussed in Part III (Bouris 2007). For example, in the Aboriginal community of Hollow Water, Canada, a probe into high rates of alcoholism and violence exposed high rates of sexual abuse. A culture of silence and feelings of shame had prevented public acknowledgement of this fact. Community leaders decided to address this issue by using traditional justice methods consistent with restorative justice. Sex offenders who admitted their crimes, changed their behaviour, obeyed probation rules set by a community justice team and worked actively on their own healing with the help of counselling would not be sent to jail, even for this serious crime. A group of community leaders, including one former offender, supervised offenders’ healing processes, constantly affirming new moral norms

within the community (MacDonald & Dickie 2007).<sup>2</sup> In this way, the community addressed underlying social dysfunctions that likely contributed to the acts of violence and alcoholism.

If many offenders are also victims it may seem inappropriate to illustrate offenders and victims separately in the diagram. We think it is still useful to address them separately to highlight the point that offenders, regardless of their previous victimhood which might gain them empathy but will not gain them trust, still need to re-earn the trust of the community. Neglecting accountability deprives them of one important way of growing, healing, and re-earning that trust. This was well demonstrated in Hollow Water.

In Diagram 1 the line between the victim and offender is dotted. The ontological perspective of restorative justice does not indicate that reconciliation between victims and offenders is necessary for peace at the broader social level. Indeed it may not be desirable. While the victim does need to agree to abide by the law and not take revenge (allowing reintegration), reconciliation is only necessary if the victim needs it for healing. This point is disputed among supporters of restorative justice as some promote reconciliation. But we contend that pushing victims to forgive and reconcile with offenders only places an added burden on them. This is especially the case with serious war violations where there is often no accountability and some crimes are too horrendous to forgive.

Our view is supported by Braithwaite's notion of "emergent values" of restorative justice which include remorse, apology, censure of the act, forgiveness and mercy. These "are values we should not urge participants to manifest – they are emergent properties of a successful restorative justice process" (Braithwaite 2003: 12-13).<sup>3</sup>

The assumptions contained in restorative justice about people's need for relationships and community, the impact of crime on those relationships, and the need to restore trust between individuals and their communities have important implications for post-conflict societies and we will return to this in Part III. These assumptions also suggest certain normative conclusions that reflect the main concerns of restorative justice. For reasons that will become clear, it is important to distinguish the ontological and the normative aspects of restorative justice but most literature interweaves them.

## 2.2 Normative aspects of restorative justice

The normative philosophy of restorative justice builds upon the insights revealed through its ontological 'lens' to suggest certain core principles on *what* the aims of a justice process are and *how* those aims should be achieved. In what follows we will elaborate on the core normative principles of restorative justice. These are: 1) the focus on the harm; 2) reparation<sup>4</sup>

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<sup>2</sup> It must be noted, however, that, once united, community members in Hollow Water had a fair amount of control over offenders – control that may not exist with dangerous youth in post-war contexts

<sup>3</sup> Braithwaite enumerates three groups of values of restorative justice: "constraining values" which consist in "fundamental procedural safeguards" and "must be honoured and enforced as constraints", "maximising values" which consist in "different forms of healing/restoration" and that "restorative justice advocates should actively encourage in restorative processes", and finally the "emergent values" as described above (Braithwaite 2003: 9-13).

<sup>4</sup> Throughout this paper we refer both to the concept of reparation and redress. Reparation is normally used in a broad sense in order to include different actions and processes aimed at repairing the harm suffered by victims

of the harm; 3) accountability as ‘active responsibility’; 4) reintegration of the parties; 5) community engagement; and finally, 6) active participation of, and dialogue between, the parties.

Because restorative justice recognizes that crime “is a violation of people and relationships”, it is not primarily concerned with what laws were broken and what punishment is appropriate. Instead it focuses on the *harm* caused by crime to those involved and to their relations, and on how those harms can be repaired (Zehr 1990: 181), Harm is central to restorative justice, and repairing harm is its key objective. Restorative justice requires, first of all, identifying *which* harm was caused by crime and to *whom* it was caused. Whereas Western criminal justice systems see crime primarily as a violation of the law and a disruption of public order, restorative justice asks which “individual, relational and social harm” was caused by a given offence (Walgrave 2008: 621). Regarding *who* suffered harm, retributive legal systems consider individual victims and the state, as the main guarantor of public order, to be the injured parties. Restorative justice, on the other hand, holds that crime not only injures victims, it also affects other community members and creates divisions between the victim, offender, and their community (or communities) that need to be addressed. Thus, Van Ness and Strong argue, from a restorative justice perspective “justice requires that we work to heal victims, offenders, and their communities” (1997: 32). Identifying harms is essential in determining what needs to be restored and how those needs can be met.

From a restorative justice perspective, harms create *obligations*. Here restorative justice draws an essential link between restoration and accountability: the restoration of those who suffered harm requires that those who caused it are held accountable; at the same time, accountability must address the needs of those affected by crime and contribute to their restoration. Measures of accountability are not seen as values *per se* but must be strictly connected to repairing the harm caused. The type of accountability that restorative justice promotes does not consist primarily of punishment by a judicial system, which further alienates the offender. Instead, restorative accountability provides opportunities for offenders to understand the impact of, and take responsibility for, their acts. Accountability in restorative justice goes beyond a mere punitive or rehabilitative ideal (Walgrave 2008: 623). It is defined in terms of ‘active responsibility’ because it encourages and expects offenders to repair the harm they caused to the victim and community. In doing so, the offender demonstrates readiness and willingness to be accepted back into the community. Accountability is thus meant to pave the way for responsible reintegration of offenders into the community.

The theory of “reintegrative shaming” (Braithwaite 1989) has been instrumental in developing restorative justice ideas about accountability and reintegration.<sup>5</sup> It argues that shaming the offender for his acts is a crucial part of restorative justice processes (in

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and communities caused by crime. But it will also specifically be used when we refer to reparations made by states in the context of transitional justice processes. Redress, on the other hand, will be used when we refer specifically to individual actions aimed at repairing the harm.

<sup>5</sup> Although the merits of this theory have been widely recognized, criticism has also been made over the fact that it focuses only on the emotional experience of the offender and not on the victim, and that it neglects other emotions beyond shame, such as empathy which also have a central role in restorative justice processes (Walgrave 2008: 638).

particular, family group conferences), but shaming needs to be reintegrative rather than disintegrative (or stigmatizing). Community disapproval should focus on the act rather than the person, and it must be followed by gestures of reacceptance. The theory posits that this emotional exchange between the offender and the other participants in the restorative justice process (including his/her community of care) will contribute to the offender's reintegration and prevent reoffending. It therefore requires that offenders are shamed by those who are close to them and whose opinion they care about.

The community is key to the process of accountability and reintegration. The community-based perspective of restorative justice means that the community is both affected by crime and has a crucial role in supporting the reintegration of the victim and offender as the latter repairs the harm. For the victim, this means being supported in regaining a sense of dignity and worth, in regaining trust in those who surround him/her and avoiding stigmatization. For the offender, it means having a chance to "right the wrongs" (Zehr 1990), being helped to avoid repeating the crime, regaining the trust of those around him/her and avoiding stigmatization.

Restorative justice expands the circle of stakeholders in the conflict resolution process and places that process into the hands of those involved and their communities. This can be contrasted with primarily retributive, Western legal systems that focus almost exclusively on the offender and give the state the right and responsibility to adjudicate justice. Restorative justice minimizes the state's role, while the 'community of care' – normally excluded from judicial processes – is given a voice. The victim has a central role in his/her own right, not merely as a witness or *partie civile*. Conflict resolution is placed in the hands of those most directly involved, and thus, returned to its 'owners' (Christie 1977).

A central tenet of restorative justice is that affected parties should be active in the justice process. The parties' active participation in a dialogical and collaborative process enables victims to describe harms and needs, for offenders to account for their actions, to understand and acknowledge their consequences, and to take responsibility by addressing the needs of victims. While engagement of the parties is important, this engagement might take different forms. Although several restorative justice practices involve an encounter between the conflicting parties, such an encounter may sometimes – as in the case of serious crimes and mass violence - be impossible or undesirable (Zehr 2002).

Restorative justice proponents have been divided between those who subscribe to a 'purist vision' of restorative justice and those who follow a 'maximalist vision'. Purists require a direct encounter between conflicting parties and an agreement on how to repair harms. They argue that participation and the agreement must be fully voluntary. Maximalists emphasize the outcome rather than the process, acknowledge that reparation may be achieved in various ways and admit that coercion may be necessary (Walgrave 2008: 621). This debate around what can be labelled a restorative justice program has given way in recent years to a more holistic understanding of restorative justice.



In our view, restorative justice should not be limited to a particular justice process nor a specific outcome; its value for societies emerging from mass violence may be in its

ontological perspective, which helps us analyze transitional justice needs and likely opportunities and obstacles to justice and reconciliation. It also lies in the guiding principles (the normative perspective) which can direct both broad justice efforts and restorative justice practices, such as victim-offender mediation, family group conferences, and sentencing/peace-making circles.<sup>6</sup> However, the term ‘restorative justice’ has too often been ‘reduced’ to these programs, ignoring the potential contribution of the philosophy itself. These practices are only a few possible ways of implementing restorative justice principles and may have limited use after large-scale violence. A flexible approach tailored to the needs of the parties in a specific situation is needed. Although there are neither blueprints nor an exhaustive list of restorative practices, the existing programs and research on them provide important information for developing appropriate restorative-oriented responses to wrongdoing.

Focusing on core principles allows us to see the potential contribution of a restorative approach to crime, first, when dealing with juvenile offenders, and second, in contexts of mass violence, especially as these relate to young people affected by atrocities. The concern of restorative justice with reintegration and with rebuilding shattered interpersonal and community ties bears a special resonance in such cases.

### 3. PART II: YOUTH AND JUSTICE

The bulk of writing on youth and justice focuses on young offenders and, despite proponents’ claims that restorative justice is victim oriented, the restorative justice literature also predominantly focuses on those who break the law. In this section – and throughout this paper – we will discuss children and youth as offenders *and* victims in relation to restorative justice. We do not provide a comprehensive overview of restorative justice programs for youth. Instead, we only address practices, issues and questions that are relevant to post-conflict contexts.

#### 3.1 Restorative justice for young offenders: Conferences and support networks

Young offenders have been the biggest target group for restorative justice practices within Western legal structures over the last two decades. The earliest case of formal victim-offender reconciliation within a Western legalistic<sup>7</sup> context famously occurred in Elmira, Ontario, Canada in 1974. After two teenaged boys were arrested for vandalizing 22 properties, probation officer, Mark Yantzi, and Mennonite Central Committee volunteer coordinator, Dave Worth, approached the judge and suggested that the boys meet with their victims and

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<sup>6</sup> Among those who focus on restorative justice practices, those who subscribe to an “encounter conception of restorative justice” emphasize the process, which should include an encounter between the parties, while those who subscribe to a “reparative conception” emphasize the outcome which should include reparation of the harm (Johnstone & Van Ness 2007). The definition of restorative justice adopted in the United Nations Economic and Social Council Basic Principles combines both approaches by defining restorative justice both in terms of its programs and of its outcomes (UN Economic and Social Council 2002). It has been widely debated how to assess the ‘restorativeness’ of a given restorative justice program. The idea proposed by Zehr and others of analysing restorative justice programs along a continuum has increasingly gained ground (Zehr 2002; Van Ness 2002).

<sup>7</sup> Zehr (1990) calls the dominant Western model of justice ‘retributive justice’ and Estrada-Hollenbeck (2001) calls it ‘legalistic justice’. We 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.

arrange restitution. The success of that effort led to the creation of the Canadian Victim-Offender Reconciliation Program (VORP), a program that would inspire similar programs elsewhere (Zehr 1990).

In 1989 the use of restorative justice practices for youth was given a big boost when New Zealand adopted the Children, Young Persons, and Their Families Act. The act requires that all children and youth accused of crimes must be referred to a family group conference<sup>8</sup> – except for the crimes of murder or manslaughter, or for minor offences that would not normally involve imprisonment. Judges must consider the recommendations of these conferences. The youth does not have to admit responsibility to be referred to a family group conference but if he/she denies the crime or if the conference is unsuccessful, the youth is then referred to the Youth Court (Maxwell & Morris 2006). To date, although many other jurisdictions incorporate restorative justice practices, especially for youth justice, New Zealand is the only example of a systematic application of restorative justice within a Western judicial system (Walgrave 2004).

The New Zealand youth justice system was not originally referred to as restorative justice, but it is now commonly described as such because the values of family group conferences are consistent with those of restorative justice. The new system drew from Maori conflict resolution practices that encouraged extended families to meet to resolve conflicts and treated crime and redress as collective responsibilities, involving the families of the offender and victim in addition to those directly involved (Maxwell & Morris 2006). However, as Maxwell and Morris (2006: 244) observe, the New Zealand youth justice system is not “the rejection of a Western criminal justice system in favour of the adoption of an indigenous method of resolution”. Rather, it is “a modern system of justice, which is culturally appropriate”.

Community-based processes similar to family group conferencing have also been used in Sierra Leone to help child combatants reintegrate more successfully into their communities. After the war, child welfare committees, consisting of key community members, including traditional leaders or elders, women’s leaders, youth leaders and sometimes the police, were set up in some communities to deal with misdemeanors by returning child ex-combatants. Understanding that former combatants would have difficulty adjusting to the norms of village life, including traditional hierarchies in which children must respect and obey elders, these committees mediate between families and communities when problems arise (Williamson and Cripe 2002). As one Sierra Leonean reintegration officer explains:  
When the (former child soldiers) cause problems in the community, this committee intervenes between the parents and the community. Maybe a child steals a mango, a cassava... The man will be vexed. So the child welfare committee comes to mediate between that person and the

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<sup>8</sup> Family Group Conferences in New Zealand consist of the youth, his/her advocate, family members and other invitees, the victim or his/her representative, the youth justice coordinator, the police and possibly a social worker (Maxwell & Morris 2006). The primary aim of these conferences is to plan how to address the offense. According to Maxwell and Morris (1998) there are three main parts to this process: first, determining whether the youth admits responsibility for the offense; second, “sharing information among all the parties at the conference about the nature of the offense, the effects... on the victims, the reasons for the offending, any prior offending by the young person, and so on” (para. 4); and deciding on an outcome. After all those involved have discussed the offense and possible options for redressing the harm, victims and professionals leave the youth and his or her family to discuss privately how they will “repair the damage and... prevent reoffending” (para. 5).

child together with the parents... Those kinds of behaviour, we would not put it to them directly that they are responsible because it's from where they came from. But we have to make sure that they change it (Reintegration worker, Makeni, 2003, interview).

Although some child welfare committee members were traditional leaders, this was not a traditional support group but rather a modern response to new challenges arising from the war. In a society often described as a 'gerontocracy' in which youth are not permitted to contradict elders and some have even been heavily fined for doing so (TRC of Sierra Leone, 2004, Vol. 3b ch. 4), the incorporation of youth representatives on these committees suggests that there is some recognition that relations between youth and elders need to change. According to Williamson and Cripe (2002), child welfare committees not only mediated, they sensitized community members about children's rights and sometimes successfully advocated changing local laws to protect children.<sup>9</sup>

In recent decades, Japan, Australia (Braithwaite 1989), the United States, Canada and many European countries have increasingly incorporated restorative justice practices into their youth justice systems (Walgrave 2004). Motivations include trying to reduce high incarceration rates of youth (Dept. of Justice Canada 2002), trying to ease the strain on the court system, and trying to rehabilitate young offenders more effectively (Walgrave 2004) and reduce recidivism. Although far from the 'systemic reform' of the criminal justice system that many restorative justice proponents want, the juvenile justice system has provided an entry-point for restorative justice in the criminal justice system. This may be because certain restorative justice principles resonate with widespread views on how to deal with youth crime, namely that young offenders are less blameworthy, that responses to youth crime should be rehabilitative/reintegrative; and that the family and others close to the young offender share responsibility in addressing the crime (Bazemore and Walgrave 1999: 57).

### 3.2 Restorative justice and young offenders: Two questions

Given this growing interest in restorative justice as a means of dealing with young offenders, two questions arise. First, what makes young offenders especially suitable for restorative justice?<sup>10</sup> And second, why are we interested in young offenders in relation to restorative justice processes? The first question pertains to children and youths' actual state of development; the second pertains to social *perceptions* of that development.

Youth may be especially suited to restorative justice because of their state of biological and social development. However, it is difficult to separate children's *actual* biological development from social constructions and expectations of childhood and youth which relate to the second question. We can say that while the meaning and length of childhood and the

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<sup>9</sup> Williamson and Cripe (2002) mention that the child welfare committee in Daru was able to pass a law prohibiting children from being beaten and publicly humiliated for bed wetting. They write that "previously, a child who had wet his or her bed would be smeared with chicken faeces and paraded through the village carrying a container of chickens" (p. 24).

<sup>10</sup> A useful side-question would be: are children and youth better suited to restorative justice than adults? Lode Walgrave (2004: 585) raises the provocative question, "If restorative justice became predominant, would there be any fundamental reason for maintaining a separate juvenile justice system?" If restorative justice is good for children, might it not be equally good for adults who should also have an opportunity to repair the harms they caused?

degree of personal agency attributed to children and youth differ in different social contexts, childhood also has a universal, biological and developmental basis. As Chen and Kaspar (2004: 48) write, “Regardless of culture... some common developmental tasks and requirements in socialization, such as learning to understand and respond appropriately to social and cultural standards and acquiring personal independence... may lead to cross-culturally similar patterns in human development”.

It is beyond the scope of this paper to examine in depth specific aspects of childhood development that may support the use of restorative justice, however it seems safe to say that children and youth are in a rapid stage of socialization and character development, a process that involves an interplay between social, biological and individual influences. Especially in their pre-teen and teen years – the time in which youth are most likely to come into conflict with the law – they are asserting their independence from parents, even while they may rely on them for love, protection and the necessities of life.<sup>11</sup> Although the degree of rebellion tolerated differs in different cultures, during this time children and youth are learning and will – and are expected to – make mistakes. Most societies acknowledge that, during this experimental and formative stage, young people are not as responsible for their mistakes as adults would be, as the latter are assumed to have gone through this process. Adults therefore may be more inclined to forgive and excuse children and youth for their infractions.

As transgressions by young people are more inclined to be seen as mistakes than as crimes, a pedagogical approach makes sense. Most societies see children and youth as malleable and able to learn. However not all pedagogical norms are consistent with restorative justice. In some societies, especially contemporary Western societies, educational strategies emphasize dialogue with children and allowing them to experiment (and make mistakes), question and challenge elders and authorities. This pedagogical approach is complementary to restorative justice as many adults are used to listening to children and children are used to speaking and being heard.

In many other societies, especially more traditional societies, educational strategies emphasize learning through observing and obeying elders who impart their knowledge and wisdom. As in Sierra Leone, in many societies that emphasize obedience, young people are not permitted to contradict elders and infractions are often dealt with through punishment – in particular, beatings. This is the norm in much of Sub-Saharan Africa and it was the norm in many Western societies until fairly recently. Gender hierarchies also restrict open dialogue between females and males.

Significantly, most societies experiencing violent conflict tend toward the second, more authoritarian, approach to educating young people both traditionally and due to the militaristic culture of war or state-sponsored violence. If restorative justice requires that young people, male and female, can speak openly and be heard with respect and if it promotes non-punitive accountability for harms, major cultural shifts would have to occur in authoritarian societies for restorative justice with youth to be possible. The child welfare

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<sup>11</sup> The degree of dependency also differs between contexts as, in some traditional societies, children are considered to be adults after puberty and after they have undergone initiation processes. Also in some poorer societies many children take on ‘adult’ responsibilities very early.

committees in Sierra Leone and TRCs provide examples of new institutions or groups that might promote dialogue, reflection and cultural change where this is needed.

In Sierra Leone there are indications that this cultural shift is occurring. Stovel's field research in 2008 provided many examples of changing attitudes towards youth – in particular male youth. Youth and youth groups were active in both development and peacebuilding projects and these activities proved that youth could work cooperatively with elders for the community good.<sup>12</sup>

A second reason that people may view restorative justice as particularly appropriate for youth is that many first offenses are committed by adolescents. The view is that if youth can be helped restoratively with their first brush with the law, most will not reoffend. This view is born out in the Canadian context, where recent studies indicate that most youth offences are one-time offences.<sup>13</sup> However while this explains some of the appeal of restorative justice within contexts of peace, it does not reflect the situations of former child combatants, many of whom have spent substantial time with armed groups and have committed many serious crimes (even if they were also victims).

Thus, while attitudes about child and adolescent development and views that restorative justice is especially useful for first-time offences explain why restorative justice for youth makes sense *in the West*, the realities of childhood and adolescence in societies in conflict are very different. Restorative justice may be the best approach to meet the healing needs of former child combatants, and community- and family-supported reintegration measures are extremely important in welcoming former child combatants back into the community. However, we must be very cautious about drawing conclusions about restorative justice and youth from the peace-time, Western contexts in which most of the literature is based. While arguments about the biological development of children and youth are always applicable, different social constructions of childhood; different possibilities for dialogue between girls, boys, women and men; and extreme differences in the contexts and complexity of crimes mean that lessons from, and arguments for, restorative justice do not translate easily from Western contexts to contexts of mass violence.

### 3.3 Youth as victims of violence

Most writing on restorative justice focuses on offenders – and indeed most concern about child combatants and justice focus on children as perpetrators of crimes. Yet Lode Walgrave (2004: 572) writes that “restorative justice should not encompass offender treatment as a primary aim”. Rather, restorative justice is primarily about restoring victims and communities after a harmful act has occurred. He writes that even “if the offender is not caught, while the

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<sup>12</sup> Examples of these activities are a successful youth-coordinated effort to build six standpipes in the Kroo Bay community of Freetown. Working in cooperation with the local chief and community chairman and with help from private donors from the Netherlands, the youth organized the construction of the community's first post-war standpipes in an impressive two weeks. Another example is the largely youth-led, community-based reconciliation processes under the Fambul Tok program initiated by the Sierra Leonean NGO Forum of Conscience.

<sup>13</sup> A 2005 Statistics Canada study found that 55 per cent of youth who went through youth or adult criminal courts in Canada were one-time offenders.

harm caused is assessed, (partial) justice can be done by trying to repair or compensate the victim and by restoring public assurance that the crime is not acceptable” (p. 553).

The fact that, in discussing crime and youth, we focus on the *offender’s* age in determining the course of justice, and not the victim’s, indicates that restorative justice processes that go through correctional systems are not victim centred. Indeed, Johnstone (2002) has expressed concern that victims are being used in restorative justice conferences to rehabilitate and reintegrate offenders. If restorative justice were really victim oriented, he writes, we would begin with the question, “A crime has been committed; someone is harmed as a result. What is to be done for that person?” (p. 83).

We argue in Part III that one of the greatest opportunities for restorative justice after mass violence is to help victims heal and reintegrate and to restore or transform the moral tone of the community to one more consistent with peace and justice. An important first step in this process, as proposed by restorative justice, is to identify and expose ways in which young victims have been harmed. If we are concerned with young victims – including, but not primarily, ex-combatants who are, in the words of Bouris (2007) ‘complex political victims’ – we should then ask, “Given children’s stages of biological, psychological and social development, how can we best help them recover from harm? And how can we help the community and society provide a safer and healthier place for children and youth?”

Two examples of states that are addressing legacies of mass abuses against children are Canada and Australia where inquiries have been conducted on violations related to the institutionalisation or forced removal of indigenous children from their families, respectively. The reports of the Royal Commission on Aboriginal Peoples (1996) and of the Stolen Generations Inquiry of Australia (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families 1997) have recommended that reparations include: acknowledgment and accountability for the harm caused, apologies, access to therapy and education, financial compensation and restitution, initiatives of memorialisation and raising awareness about the issue. Canada also has a truth and reconciliation commission to deal with Indian residential school abuses which, in the words of Interim Executive Director of the TRC, Bob Watts, were “mass human rights violations of children, experienced by children and now related by adults” (Public talk, April 3, 2008, Carleton University). As Cunneen (2001) argues, restorative justice helps us identify and address the needs of children, and can also help when adults, who suffered from violations as children, come into conflict with the law by allowing current offences to be contextualised.

Given this discussion, an understanding of the possibilities and limitations of restorative justice for children and youth in conflict areas must be rooted in the contexts themselves, the subject of the following section.

#### 4. PART III: THE CONTEXT

Societies emerging from mass violence face severe challenges when it comes to bringing perpetrators of war crimes and gross human rights abuses to trial. Four challenges stand out. First, in most cases the national criminal justice system is either dysfunctional or severely compromised after years of violence or tyranny (Mani 2002). Second, as the Rwandan

government learned when it sought to bring those complicit in the 1994 genocide to trial, the sheer number of crimes and perpetrators are overwhelming. Even a well functioning criminal justice system in a wealthy country would struggle with the burden of bringing so many to trial.

Third, armed factions usually maintain the ability to destabilize the country, even after a peace agreement has been signed. This leads transitional states to prioritize negative peace (an end to the violence) over other needs, including justice. In fact, many argue that risking prolonged violence due to the threat of arrests is more unjust to the people who suffer from the violence than foregoing trials (Allen 2006).

Fourth, as a result of this very real threat, peace agreements often contain amnesty provisions pardoning perpetrators of political crimes. Even when amnesties are inconsistent with international law, the ‘international community’ lacks the capacity to enforce international law without local cooperation. And if arrests and prosecution are possible, the expense of fair trials in an international court means that only very few top perpetrators will be tried.

An additional complicating factor is that war alters the line between acceptable and unacceptable violence. Most recruits in many conflicts have no way of knowing the Geneva Conventions or other laws regulating war. Moreover, in many violent conflicts, many perpetrators are also victims and *vice versa*. This is of particular relevance to child soldiers, some of whom ‘voluntarily’ enlisted,<sup>14</sup> but many of whom were abducted and resocialized by armed groups to become violators themselves.

An excellent example of this complexity is the case of the Lord’s Resistance Army commander, Dominic Ongwen, in Uganda, the first former child soldier to be indicted by the International Criminal Court. Ongwen was abducted by the LRA at the age of 10 and, after a period of indoctrination, rose through the LRA ranks to become a senior commander. Those who knew him described him as being a “loyal” and “fearless” “killer” “with no forgiveness in his heart” (Baines *et al* 2008: 12). In their excellent discussion of Ongwen’s culpability Baines *et al* (2008: 2) argue that while Ongwen had agency and should not be exonerated, he “grew up in one of the most brutal environments known to humanity, with little room for moral development that would enable (child soldiers) to later take decisions independent of the LRA.” Any assessment of his culpability and the appropriate justice solution should recognize this.

These conditions mean that trials and punishment for the most serious crimes imaginable are the exception rather than the rule. In response, the South African Truth and Reconciliation Commission (TRC) (1995-1998) suggested that, in lieu of trials and punishment, restorative

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<sup>14</sup> In Sierra Leone, some families and communities sent boys to support civil militias that were created to protect communities. In contexts where children are seen as adults after they undergo traditional initiation processes, this may not be seen as problematic, even though it violates the UN Convention on the Rights of the Child, which the Sierra Leone government ratified in 1990. As Graça Machel’s (2001) report on *The Impact of War on Children* notes, children who ‘volunteer’ are often responding to pressures associated with poverty, loss of parents or guardians, or lack of security. “Children... may volunteer if they believe that this is the only way to guarantee regular meals, clothing and medical attention... Some children feel obliged to become soldiers for protection. Seeing violence and chaos all around, they may feel safer if they, too, have guns in their hands” (p. 11). See also Peters and Richards’ (1998) excellent interviews with former child combatants in Sierra Leone.

justice might better suit the needs of transitional societies. In the words of South African TRC chairman, Archbishop Desmond Tutu (1997):

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of ubuntu, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense (54-55).

Healing breaches, redressing imbalances, restoring broken relationships, and rehabilitating and reintegrating victims and perpetrators: these are exactly the goals of societies emerging from mass violence. Is it possible, then, that restorative justice is not a second-best solution but may be the form of justice best suited to transitional contexts?

#### 4.1 Overview of ‘restorative justice-guided’ processes and mechanisms dealing with the aftermath of mass atrocities

Despite the growing interest in restorative justice after mass violence, the way it has entered the discourse on transitional justice has been sporadic and it has lacked a systematic theoretical conceptualisation of what this approach means in such contexts and what its contribution can be. The term restorative justice has been used in the transitional justice literature to refer to a multitude of experiences, many of which were not conceived as restorative justice processes but were labelled as such after observers reflected on their “actual experiences” (Kiss 2000).

To disentangle the practices and experiences associated with restorative justice, Llewellyn (2007: 358) proposes making a distinction between “processes that are restoratively oriented” (i.e. that “might serve restorative interests”) and “those that take restoration as their goal or orientating principle”. Llewellyn’s proposal is in line with those who view restorative justice practices along a continuum, where between *fully* restorative and *non*-restorative practices there is a range of categories such as *mostly*, *partially* or *potentially* restorative (Zehr 2002; McCold 2000; Walgrave 2008). This view might also be instrumental in understanding the nuances of applying restorative justice principles in transitional justice processes.

In transitional justice contexts, restorative justice has been mostly associated with truth commissions (Llewellyn 2007; Leebaw 2001; Villa-Vicencio 2001). This is particularly true since the creation of the South African Truth and Reconciliation Commission which claimed to provide restorative justice (Truth and Reconciliation Commission 1998: vol. 1, ch. 5, para. 80 and 82). Restorative justice also gained a prominent place in East Timor’s Commission for Reception, Truth and Reconciliation, mostly in relation to its Community Reconciliation Processes (Burgess 2006). This link can be attributed to a number of characteristics of TRCs, including: their broad definition of victims; their concern with giving victims a voice and affirming their dignity; their inclusion of perpetrators and concern with their reintegration; their engagement of communities; their respect for narrative truth, in addition to factual truth; their recommendations for reparations; and their efforts to promote the restoration of relations in society, and ultimately reconciliation.

Another early example of restorative justice being explicitly associated with peacemaking was in Bougainville, an island ravaged by internal fighting over its secession from Papua New Guinea. A large program was created by the PEACE Foundation Melanesia to give restorative justice training to 10,000 people in the island, including traditional chiefs, in order to deal at village-level with conflicts arising in the aftermath of the civil war (Howley 2002; Braithwaite 2002).

Similar examples where restorative justice has been implemented by civil society groups, rather than as part of a national strategy or mechanism, occurred in Northern Ireland where community-based restorative justice programs have been instrumental in curbing violent “paramilitary punishment” between Republican and Loyalist activists. As McEvoy and Eriksson (2007) explain, grassroots restorative justice practices have increased the legitimacy and community ownership of conflict resolution, allowed ex-combatants to play a crucial leadership role favouring reintegration and embedding a “bottom-up culture of human rights”.

In South Africa similar initiatives aim to follow up on the work initiated by the TRC. The Ex-Combatants Reintegration and Restorative Justice Project led by the Centre for the Study of Violence and Reconciliation, for example, brought together ex-combatants and victims in a series of mediation and dialogue meetings (CSVSR 2005). The Glencree Centre for Peace and Reconciliation in Northern Ireland also promotes encounter and dialogue between victims and ex-combatants as part of its LIVE and Sustainable Peace projects in view of increasing mutual understanding between the parties (Bloomfield *et al.* 2003: 89-96). Even though some of these cases are not concerned with ‘justice’ in the strict sense as they may not involve the resolution of a crime between the direct victims and perpetrators, they deal with the consequences of the crimes of the past and work on repairing the relationships between former enemies.

Restorative justice has, however, undoubtedly gained greater visibility when adopted as part of an official policy of dealing with atrocities. Some have claimed that the *gacaca* courts created by the Rwandan government in order to deal with an overwhelming number of suspects and to advance reconciliation are restorative justice mechanisms (Daly 2002; Drumbl 2005; Longman 2007). These informal, extra-judicial mechanisms of justice draw on traditional community-based forms of conflict resolution which emphasize community involvement, perpetrator accountability and reintegration through public confession and the application of sanctions such as community service for lesser crimes. Because traditional *gacaca* processes were not meant to deal with crimes of this magnitude, these processes had to become more formalised and regulated. However, recent research casts doubt on whether *gacacas*, which are characterized by forced public participation and strictly controlled dialogue, are consistent with restorative justice values (Thomson 2007).

The association of community-based traditional forms of conflict resolution with restorative justice is not exclusive of the Rwandan case. The Community Reconciliation Processes in East Timor mentioned above also drew on traditional practices known as *adat* (Longman 2007). Currently in Uganda the traditional forms of justice known as *mato oput* are being proposed as restorative justice mechanisms (Latigo 2008).

Finally, some have recently suggested that restorative justice principles can inform retributive mechanisms and advance the reform of national and international criminal justice systems dealing with serious crimes (Roberts 2003; Findlay & Henham 2005; Drumbl 2000). This proposal has been made especially in relation to sentencing (Henham 2004) where restorative justice principles could be used to promote victim participation, encourage confession, and pave the way for effective reintegration. The Colombian Justice and Peace Law adopted in 2005 follows this line of argument as it provides for the application of reduced sentences at the end of criminal proceedings for ex-combatants who confess to their crimes (Díaz 2007). These proceedings, together with the National Reparations and Reconciliation Commission, have been seen as part of a peace process heavily drawing on restorative justice ideals.

#### 4.2 Can restorative justice do what legalistic justice cannot? The element of coercion

In the aftermath of mass violence, fair trials and punishment for conflict-related crimes are extremely unlikely. But are restorative justice processes – what McCold (2006: 23) calls “primary restorative justice practices”: “mediation, circles and conferencing” – any more possible? In Europe, North America, Australia and New Zealand, restorative justice practices coexist with, and rely upon, the legalistic justice system. Most offenders who participate in restorative justice processes have either been arrested and sentenced to a prison term and participate in restorative justice conferences while in prison, or they have been diverted by the courts to sentencing circles or family group conferencing. While some small-scale restorative justice practices occur outside the criminal justice system – in schools or families – most require a functioning criminal justice system.

Many proponents of restorative justice are reluctant to admit that offenders are coerced to a certain degree when they participate in restorative justice processes. They prefer to emphasize the voluntary nature of offender participation. However as Braithwaite (2002) notes, offenders usually volunteer to participate *after* they have been arrested for crimes they have committed. He writes:

Very few criminal offenders who participate in restorative justice processes would be sitting in the room absent a certain amount of coercion. Without their detection and/or arrest, without the spectre of the alternative of a criminal trial, they simply would not cooperate with a process that put their behaviour under public scrutiny. No coercion, no restorative justice (in most cases) (34).

There is no reason to believe that perpetrators of serious, war-related crimes would be any more willing to be held (even restoratively) accountable without some element of coercion or – to reverse the notion of coercion – *incentive* to do so. In Sierra Leone, for example, the Truth and Reconciliation Commission report, *Witness to Truth* (2004) wrote that out of a random sampling of 300 statements of victims and perpetrators, 31 per cent of perpetrators who gave statements said they would take responsibility and apologize for their actions, 20 per cent said they would participate in rebuilding their communities and *none* “*was willing to pay reparations to his or her victims*” (Vol. 3B, Ch. 7, ¶ 62, italics ours).

The state’s capacity to arrest and try perpetrators for crimes is one form of coercion. A second form of coercion (or incentive) is the ability of the perpetrator’s community to reject or accept him or her. This is well captured in Braithwaite’s (1989) notion of reintegrative shaming

described in Part I. The effectiveness of this form of coercion depends on the strength of the perpetrator's attachment to the community that is shaming him and whether he has alternative communities available to him. If groups of former combatants remain intact and have not been reintegrated into the peacetime society and economy, this may provide an alternative community for the perpetrator that will make his voluntary participation in restorative accountability processes less likely. Also, the more credible the threat that combatants will 'return to the bush' and the more that community members are willing to forego accountability for the sake of peace, the less likely that perpetrators will volunteer to be held accountable for their crimes.

Stovel's research in Sierra Leone supports this view. In 2003 respondents interviewed in a variety of locations across the country consistently said that if excombatants returned and made themselves useful in the community they would be forgiven. In the words of one respondent, the head of a child reintegration program:

I tell (child combatants), 'O.k...You are going to learn a skill. If you learn the skill of carpentry, if you go back to your village, you might have burned the chief's house but the chief is building. Suppose you contribute to the building of that house. You have become an actor in the development of that community. And the chief will take you now as a valuable person (Interview, Freetown, May 2003).

Moreover while all respondents said they would 'reconcile' with and 'forgive' returning excombatants – defining forgiveness as not taking revenge – none said they trusted them. When asked how trust is built all respondents said "We watch them". Thus a kind of public drama was occurring with excombatants<sup>15</sup> who wanted to reintegrate into smaller communities acting out humility and displaying usefulness while those receiving them watched their behaviour. Interestingly, five years later, Stovel found that many combatants who returned to small communities in which they harmed people were taking steps to apologize and reconcile. Often this involved the excombatants requesting mediation by respected community members. In many cases excombatants apologized to those they harmed and asked forgiveness and in some cases excombatants informally provided redress by helping those they harmed.<sup>16</sup> This supports the view that when perpetrators integrate into communities they care about and in which they have caused harm they have an incentive to address that harm. Thus, physical integration, or the perpetrator's desire for it, may be the first step towards restorative justice in intra-communal conflicts.

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<sup>15</sup> This description applies in particular to those associated with rebel forces. Although members of civil militias also committed crimes, they saw themselves as heroes who supported the government and the official narrative of the war generally supported this view. Therefore they did not have the same difficulty reintegrating as those associated with rebel forces did.

<sup>16</sup> Beginning in March 2008, a new program called *Fambul Tok*, was piloted in Kailahun District. This program encouraged community-based, community-organized ceremonies that melded traditional conciliatory practices with public narrations of injuries by victims and confessions and apologies by those who harmed them followed by requests for forgiveness. In the ceremony that Stovel attended the confessions did not go into great detail and there was no apology without an excuse – 'It was war,' or 'We were forced.' All participants lived in the same region and, Stovel was told, these public confessions followed private mediation activities. In other words, people had decided to reconcile before they participated in the ceremony.

A third form of coercion, which has become particularly important in northern Uganda but is also relevant elsewhere, is spiritual coercion or coercion that emerges from the perpetrator's culturally-rooted worldview. Many Africans maintain traditional religious beliefs, often simultaneously with Muslim and Christian ones. Although traditional beliefs vary between cultures, they typically recognise a world of spirits and ancestors that must be appeased when an offense is committed. Cleansing ceremonies, which are traditional to many African cultures and are increasingly incorporated into post-war reintegration efforts, were originally intended to appease the ancestors or spirits.

Many Acholi people in northern Uganda believe in *cen*, or the “ghostly vengeance” of spirits that have been wronged (Baines *et al* 2007). They believe that:

...the spirit of those who died violently or without respect will not rest peacefully until specific steps are taken. *Cen*...will cause ‘misfortune,’ ‘sickness’ and ‘death’ on the clan of (the) perpetrator. Some believe that *cen* is what compels most wrongdoers to confess their crimes and request to engage in steps to appease the spirit and the clan of the victim (7).

Thus in northern Uganda, more than in any other post-war context of which we are aware, many perpetrators are coming forward to confess their crimes and, with their families, provide redress to victims' families when they can. The desire to remove *cen* – defined as “spirits of people who died violently” – appears to be a major reason for doing so (Finnstrom in Baines 2007: n. 5). This contrasts with the situation in Sierra Leone where children and youth who underwent tradition-inspired cleansing ceremonies did not explicitly admit their crimes or provide redress to victims' families. These latter ceremonies simply aimed to facilitate reintegration by ritually welcoming ex-combatants back into the community (NGO reintegration worker, Freetown, 2003, interview).

Pressure by religious leaders on perpetrators to encourage them to admit their crimes, ask forgiveness and provide redress might fulfil a similar coercive function but in South Africa and Sierra Leone at least, religious leaders seem to have expended more energy encouraging victims to forgive even when perpetrators show little remorse or accountability. This pressure on victims is problematic and contributes little to peace *writ large*.

#### 4.3 Coercion, community and conflict dynamics

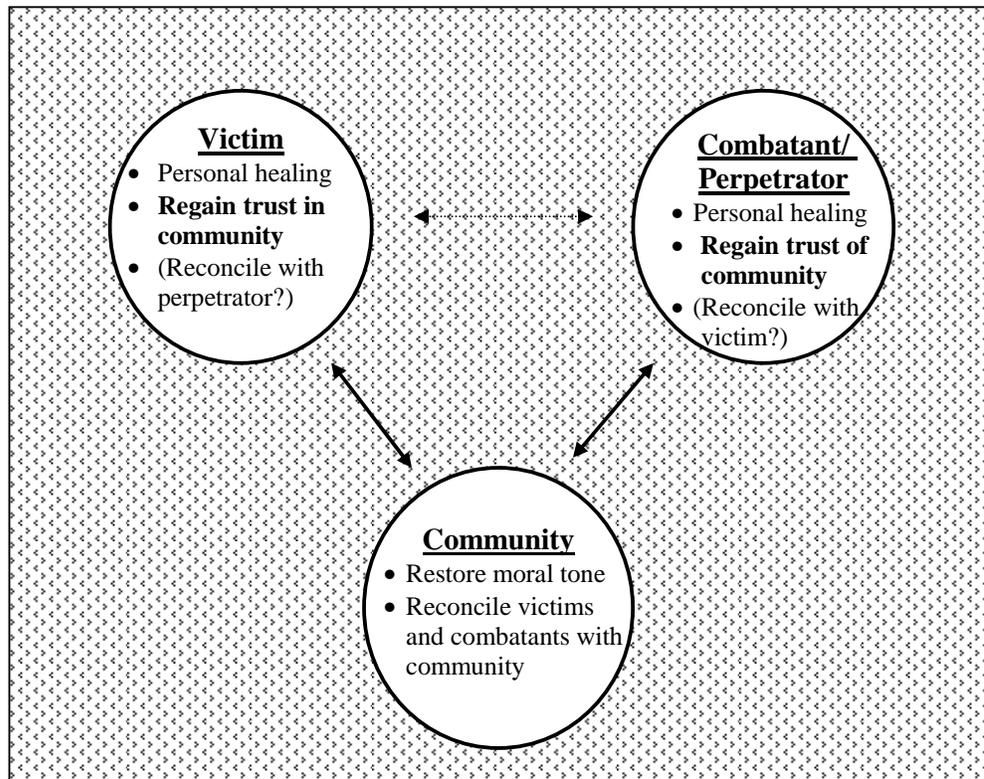
If the transitional state normally lacks the coercive capacity to require accountability by perpetrators of serious crimes (in either legalistic or restorative forms), community or spiritual (or moral) coercion may be the most relevant to accountability processes in transitional societies. This leads to an interesting observation: the coercive capacity of communities (or religion/spiritual beliefs) to encourage perpetrators to atone for a crime only exists if the community that the perpetrator wants to be part of (or the spiritual view that he holds) recognizes the crime as wrong.

In an intra-communal conflict, where everyone is recognized as part of the same moral universe or community of belonging, serious crimes are usually recognized as crimes requiring some kind of atonement. Thus in Sierra Leone, Mozambique, East Timor or among Acholis in Northern Uganda, war cleavages were/are not sustainable in peacetime. After the

violence, combatants usually have to integrate into communities that were harmed by their factions. This requires combatants to engage in a kind of *negotiation*, explicit or unspoken, to regain the trust of community members. A similar situation exists with collaborators of state violence in ethnic conflicts – for example, black policemen who worked with the *apartheid* state in South Africa or Palestinian collaborators with the Israeli state. They ultimately need to reintegrate into their own communities and therefore need to negotiate that reintegration.

This need for combatants (or collaborators) to negotiate reintegration into their communities and to regain the latter’s trust after an intra-communal conflict is depicted in Figure 2, which is only slightly adapted from diagram one. This suggests that the restorative justice ontology accurately describes two of three major reintegrative needs of societies emerging from such conflicts: reconciliation between combatants and communities; and reconciliation between victims and communities. These two reconciliation needs are a direct result of the war violence.

**Figure 2: Reconciliation needs after intra-communal conflict**



*Source:* adapted from Stovel (2006)

As Stovel’s (2006) research in Sierra Leone indicates, reconciliation between victims and their communities is sometimes more challenging than the reintegration of male combatants into their communities. Combatants who participated in the disarmament, demobilization and reintegration process (DDR) received skills training and small allowances that helped them become economically self-supporting. Most civilian victims, however, received no such help.

Female victims of sexual violence or those who were abducted or recruited by armed groups faced special reintegrative challenges because of the traditional stigma against rape or sexual relationships outside of socially sanctioned ones and stigmas against women as combatants. At best, families and community members kept a discreet silence over these issues. At worst, captives and rape victims could be rejected by their husbands or families in a society in which a woman's status is based on her role as wife and mother. This rejection could be economically devastating for women and girls as, under most customary laws, women could only hold property through their relations with men: their fathers, husbands or sons (Carlson & Mazurana, 2004; Sierra Leone TRC Report, 2004). Justice and reintegration for these women, therefore, requires addressing unfair social stigmas and discriminatory laws, in addition to treating the health repercussions of the violence.<sup>17</sup>

Some amputees also described rejection by family members as they were seen as burdens on already impoverished and struggling families. However, special assistance to amputees by international agencies helped alleviate this situation and raised the status of amputees within their families. Many amputees received skills training and some had houses built for them (Stovel 2006). However, houses for amputees were generally built in segregated communities outside of other towns and villages. Some amputees who Stovel interviewed in 2008 said they preferred to live separately as they felt safer. Others felt that their houses and property were more secure. But one amputee said he would have preferred to live in his home village but was not given the choice. What was clear was that amputees were the least reconciled with their communities and with themselves and the least reintegrated of all respondents.

Again, the relationship between the perpetrators and their direct victims is portrayed only by a dotted line, indicating that reconciliation between them is not necessary for peace. The dotted line is where a restorative encounter could occur. However, given the gravity of the crimes and the difficulties in ensuring accountability, such encounters are often not desirable, and should only take place if victims are ready for them and want them for their healing or sense of security. If the victim and perpetrator live in the same community, an encounter may be advisable so that the victim knows the perpetrator will not attack again and the perpetrator knows the victim will not take revenge. Thus an encounter may serve to establish a certain (even if minimal) degree of trust between them.

The third major conciliatory need in such contexts, reconciliation between citizens and the state, and between elites and an impoverished general population (distributive justice), is a product of the structural and distributional tensions that led to the violence. It is represented in this diagram by the background pattern reflecting the context, both past and current. Although intra-communal violence is often prompted by elite power struggles, disgruntled elites can often tap into a genuine popular frustration at government corruption and neglect and extreme inequalities within the society. While community-level reconciliation may occur, until underlying political and economic tensions are addressed the society has not fully reconciled. This latter form of reconciliation is usually the most challenging barrier to long-

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<sup>17</sup> Following the publication of the Sierra Leone Truth and Reconciliation Commission (TRC) report (2004) which recommended addressing legal and social discrimination against girls and women, the Government of Sierra Leone passed new laws dealing with inheritance and violence against women and children (Government of Sierra Leone, Domestic Violence Act, 2007; Government of Sierra Leone, The Devolution of Estates Act, 2007).

term peace after an intra-communal conflict as elites are reluctant to release their hold on power and privileges. This is where truth commissions with a mandate to examine root causes of violence, and efforts to amend discriminatory laws, promote good governance and – a harder sell – address extreme income inequalities, can have an impact.

In sharp contrast with an intra-communal conflict, in an ethnic or religious (inter-communal)<sup>18</sup> conflict, the perpetrator’s community and spiritual/moral worldview does not provide a source of coercion or incentive for him/her to atone for his/her crimes. In such conflicts war rifts are often economically, socially and politically sustainable in peacetime – although they may not be ideal and often are not sustainable in the long term.<sup>19</sup> Perpetrators reintegrate into communities that often consider them to be heroes, celebrating their acts of violence or at the very least rationalizing or denying them. Even combatants or civilians who might acknowledge crimes committed by their side face enormous pressure to remain silent and not contradict the national narrative of heroism and sacrifice.

Victims in such contexts face similarities with those in intra-communal conflicts. Violations against them may be politicised by their side, but they also bring humiliation or shame. For example, Ruth Seifert writes that rape not only humiliates women, it “carries an additional message: it communicates from man to man, so to speak, that the men around the woman in question are not able to protect ‘their’ women. They are thus wounded in their masculinity and marked as incompetent” (in Cockburn 2004: 36).

Some victims face stigmatization and rejection for the same reasons that victims do in intra-communal conflicts: because they are seen as somehow tarnished for breaking social norms, even involuntarily; or because, due to injury or trauma-induced mental illness, they are seen as less able to contribute to the economic well-being of the family.

Figure 3 below depicts the reconciliation needs and context in an ethnic or religious conflict. There is no arrow between the combatant and his/her community because no reconciliation is needed. However victims may still need to reconcile with their communities. Reconciliation between communities or between combatants and the victims and communities they harmed is minimal as there is little incentive to negotiate or cooperate and indeed there is great incentive not to. Until *communities* reconcile and recognize that a crime against members of the ‘enemy’ group is a crime, perpetrators will not likely be held accountable without state coercion or coercion by international forces.

Thus, a restorative justice approach suggests meaningful steps that can be taken to help victims reintegrate into their communities by providing health and counselling services, tackling stigma, providing skills training if needed and addressing laws and attitudes that undermine victims. However, serious challenges exist for restorative accountability in societies affected by identity-based conflicts. Before perpetrators are held accountable to

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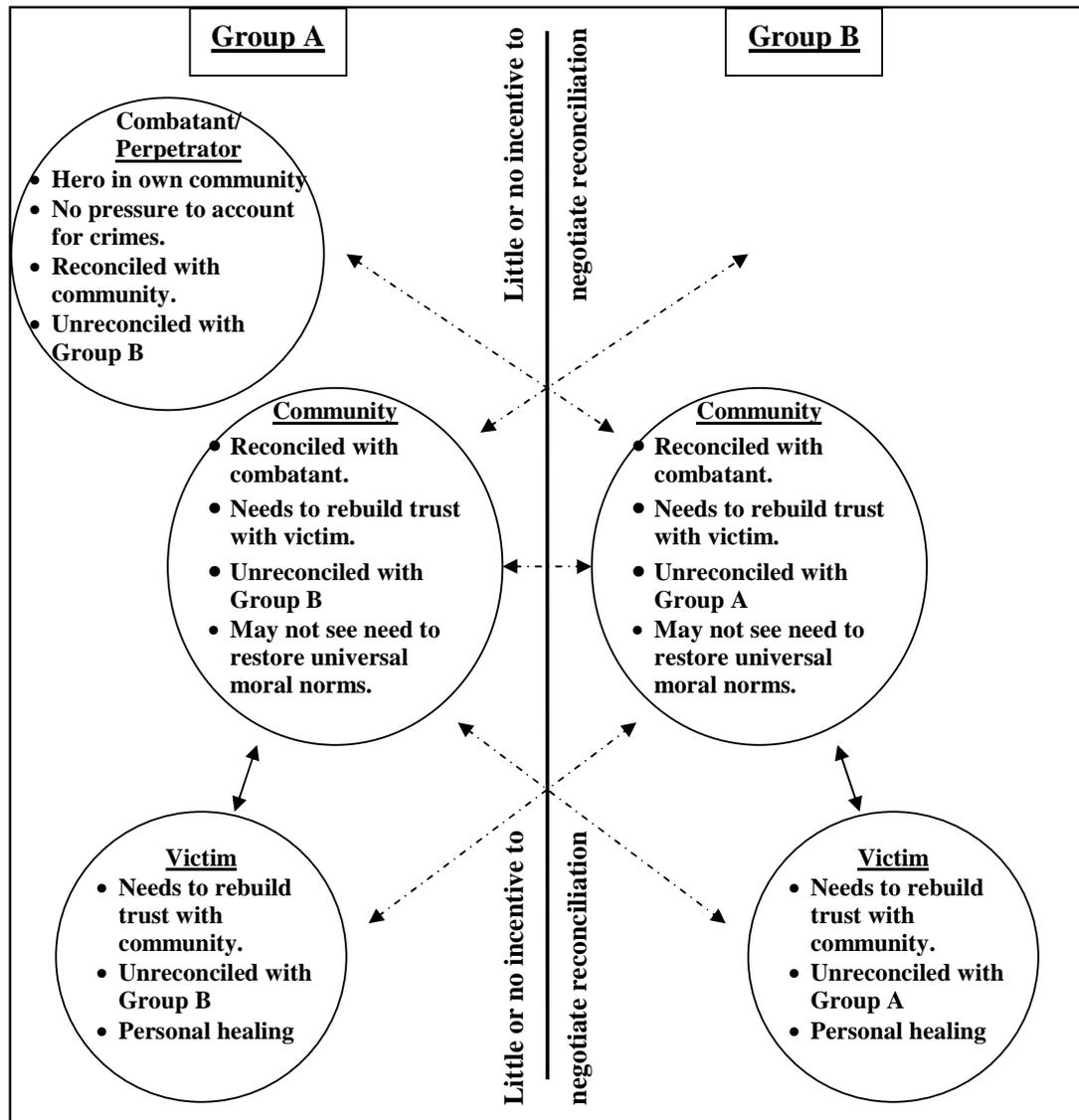
<sup>18</sup> In this paper we will use the expressions ‘inter-communal’, ‘ethnic or religious’ and ‘identity-based’ conflict interchangeably.

<sup>19</sup> It must be noted here that in some inter-communal conflict contexts, opposing groups will, for a variety of reasons (for example, demographical, geographical and resource-related), recognize a greater level of interdependence than in others. This recognition will provide more opportunities for the development of relations and eventually trust across group lines.

those they have harmed, the paradigm of inter-communal enmity must begin to shift to encompass an idea of a common moral community.

In both contexts the need to rebuild trust is vital, but the social predisposition to build trust is more likely to be present after intra-communal conflicts. Although after an identity-based conflict, social trust between communities is much more difficult to achieve, it is key to sustainable peace and the flourishing development of society. In the next section we will describe the challenges of trust building after mass violence and suggest the contribution that restorative justice can make to these efforts, especially in societies struck by inter-group conflict.

**Figure 3: Reconciliation needs and context in ethnic or religious conflict**



#### 4.4 Social trust, empathy and restorative justice

##### 4.4.1 Conceiving social trust and empathy after mass violence

One of the gravest and most pervasive consequences of violent conflict, especially civil war, is the erosion of trust among individuals from conflicting sides. When fellow citizens, neighbours, co-workers, even friends turn against each other, act as informants, take up arms or support those who do, the sense of betrayal and mistrust severely affects interpersonal relations. This has devastating effects at the individual and social or community levels. A major challenge of post-conflict societies is thus to (re)build trust among its members. Rebuilding trust is a key element in the process of social reconstruction which aims at repairing the social fabric so the society can function again (Stover and Weinstein 2004).

Trust can be destroyed and needs to be rebuilt at different levels. This can happen at an intimate interpersonal level, such as between former friends or close neighbours – people who knew each other well and had bonds of affection before the conflict. It can also happen in interpersonal relations at the social or community level, among people who interact socially but are not intimate friends (for example, professional relations, relations between families or other small groups). And it can happen at the national or macro level which corresponds both to relations between larger groups (such as between two or more ethnic, racial or political groups) and to relations between citizens and the state.

Rebuilding trust is linked to the concept of ‘reconciliation’. We have argued in Part I that deep reconciliation between individuals, between individuals and their communities, and between groups is best understood in terms of trust. In Valiñas’ field research in Bosnia and Herzegovina, ‘reconciliation’ is mostly understood as a synonym of peaceful coexistence and thus given a minimalist meaning both by international organizations and by Bosnian citizens. ‘Trust’ implies more than that. This helps to explain why most Bosnian citizens surveyed believed that reconciliation in Bosnia is possible but, on the other hand, most also said it is *not* possible to rebuild trust.<sup>20</sup>

In this paper we focus on the notion of social trust and link it to the interpersonal relations established at the community and group level (and thus not primarily to intimate relations or friendships). These relations represent, in our view, the bulk of social interactions which form the social fabric of a functioning society. For example, Valiñas’ interviewees in Bosnia often reported that some individuals, particularly minority returnees, avoid going to see a doctor of another ethnicity regardless of that doctor’s professional competence and availability.<sup>21</sup>

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<sup>20</sup> These observations result from the data collected in a survey of 855 respondents conducted in Bosnia in 2006 on opinions and attitudes towards the process of dealing with the past in the country. To the question “Do you think it is possible for people of Bosnia and Herzegovina to reconcile with each other?” 40 per cent said yes, 31 per cent said I don’t know and 29 per cent said no. In contrast, to the question “Do you think it is possible for people of Bosnia and Herzegovina to trust each other again?” 38 per cent said no, 32 per cent said I don’t know, and 30 per cent said yes. This survey was conducted in the framework of a research project carried out and funded by the Research Council of the Catholic University of Leuven.

<sup>21</sup> Cases such as these reflect the lack of social trust among citizens who belong to different ethnic groups in Bosnia even more than 10 years after the end of the war. In the above mentioned survey, when asked whether trust had already been rebuilt in Bosnia, 65 per cent of the respondents answered ‘no’, 25 per cent ‘I don’t know’, and only 10 per cent answered ‘yes’.

Social trust, according to Boslego (2005), is “an ongoing motivation or impetus for social relations that forms a basis for interaction”. It relates to the interpersonal relations that are established at the social or community level. The importance of social trust has been explained by Putnam (in Boslego 2005), who argues that it fosters “tolerance and community” and is associated with “greater levels of teamwork, knowledge-sharing, civic engagement, reciprocity, and efficiency”. It will thus play a crucial role in allowing a society to move away from a violent past, towards sustainable peace, democracy, rule of law and respect for human rights.

When this trust has been so severely shattered by mass atrocities, a long process of trust-building must begin. As Govier and Verwoerd (2002) explain, trust is an “attitude of confident expectation, expectation that the person, persons, or groups trusted will act, in the context in question, in a competent and acceptably motivated way, so that despite vulnerability, the trusting person or persons will not be harmed”. Trusting that others will act respectfully towards oneself implies a degree of openness towards them. And most of all, it implies seeing the other as an individual, as a human being who is worthy of our respect and trust. Halpern and Weinstein (2004) see this process of rehumanization – seeing the other as an individual (and not, for example, as a member of the enemy group) – and empathizing with the other as the foundation for reconciliation or, in our terminology, trust. They define empathy as “an imaginative inquiry that presupposes a sense of the other as a distinct individual” and they point to the importance of empathy in order to “accept the other’s view of past events” and as a basis for “cooperation and political or joint action among individuals”.

The challenge in terms of justice processes in the aftermath of conflict is to strive for them to contribute to empathy and rehumanization, and in that way to the rebuilding of trust. One of the most often praised features of criminal trials is their potential to curb inter-ethnic enmity by individualizing guilt (Akhavan 2001). But to what extent do they create the necessary space for individuals to grasp the perspective of the other side? To what degree are they designed to foster mutual understanding and empathy?

Empathy, in turn, requires at least a certain degree of acknowledgement, and of accountability. At a minimum it implies recognising the other’s suffering as well as one’s own. But it also implies recognising the responsibilities that may lie with oneself or members of one’s group. However, for acknowledgement and accountability to lead to an empathic connection they must not be imposed from above (for example, a product of a judicial decision); they must come from the individuals themselves.

Restorative justice aims at creating the space where such horizontal and interpersonal acknowledgement may take place. To be meaningful, acknowledgement needs to be encouraged, not imposed, and needs to come from those who committed the violations or at least supported them. Acknowledgement can come directly from the perpetrator to the victim or it can take more indirect or mediated forms. These types of acknowledgement are most likely to occur when they benefit both victim and offender, in a setting where acknowledgement is welcomed and even expected. Also, the idea of *encouraging* acknowledgement means that it is often the result of a process; a process in which listening to

the other's suffering and being moved by it will be an important step towards an "empathic recognition" (Halpern and Weinstein 2004).

We cannot assume that being confronted with another's suffering in a restorative justice process will elicit empathy and mutual understanding, and ultimately trust. However, the restorative justice understanding of 'doing justice' is more conducive to developing empathy and rebuilding trust between conflicting parties than the conventional criminal justice system. As Zehr (2002: 8) explains, "forgiveness or reconciliation is not a primary principle or focus of restorative justice. It is true that restorative justice does provide a context where either or both might happen. Indeed, some degree of forgiveness or even reconciliation does occur much more frequently than in the adversarial setting of the criminal justice system."

#### 4.4.2 Building social trust through restorative justice after inter-group conflicts

Restorative justice requires, almost by definition, that individuals involved in addressing a conflict are to a certain degree open to seeing themselves and 'others' as individual human beings. This poses a particular challenge for restorative justice to have a positive contribution to social trust in cases where group identity prevails over individual identity. In such situations, we argue, a restorative justice approach must be developed gradually, in the manner of 'stepping-stones'.

This means that recognition of the others' suffering and acknowledgement of one's own responsibility will most likely not immediately take place between the direct victims and perpetrators. For that to happen, several other steps are needed. These include, on the one hand, acknowledgement by the members of a group of the wrongs committed by 'their own' (in-group condemnation) and, on the other hand, recognition by members of one group of the other group's suffering (out-group recognition).

In their analysis of inter-group violence and "vicarious retribution", Lickel *et al.* (2006) argue that if such violence (or the resurgence of it) is to be avoided, four emotional responses must take place: in-group anger, in-group shaming, in-group guilt, and sympathy with the out-group. In cases where the state does little in order to enforce accountability, then community or group anger, shaming and guilt can indeed constitute an alternative coercive power. Assuming responsibilities, especially in such highly tense contexts, is – as we have noted – very difficult and not very likely. In this long process, out-group sympathy (or empathy in our terminology) will seem like a more reasonable first step.

The power of achieving what Lickel *et al* call a "superordinate categorization among members of both groups as 'victims of conflict'" has been realised by a number of organizations working in situations of inter-group conflict. Programs such as the International Commission for Missing Persons' Civil Society Initiatives in Bosnia and Herzegovina or the Israeli-Palestinian Parents Circle - Families Forum have tried to establish sustainable relationships between relatives of missing or killed persons who belong to different ethnic groups. These programs have the potential to play a crucial role in promoting mutual recognition of each others' suffering across ethnic lines because although the participants would normally regard each other with mistrust, their meetings bring out a shared sense of

suffering and thus foster out-group sympathy. Indeed such activity may curb a cycle of abuse that creates victim-perpetrators (or complex political victims).

Out-group sympathy among excombatants and in-group anger can also result from initiatives that bring excombatants from opposing groups together and encourage them to share their motivations for fighting and critically reflect upon their – and their group’s – responsibilities regarding the conflict. The Centre for Nonviolent Action, a Bosnian/Serbian NGO which works on peace education and nonviolent conflict transformation aims to create the space for that critical reflection among excombatants from different parts of former Yugoslavia.<sup>22</sup>

The meetings and dialogue promoted in these types of programs can be valuable stepping-stones in the long process towards empathy and rehumanization and in developing a restorative approach to dealing with inter-group conflicts. However, the reach and effectiveness of these efforts are limited, particularly where the wider context is highly divisive and hostile to such initiatives.

Restorative justice highlights the potential for multiple justice solutions for victims that extend beyond holding perpetrators accountable. In the next section we will discuss this potential and the need to look beyond face-to-face restorative justice encounters, which may be problematic in post-war contexts. Instead, we need to see restorative justice as a guiding philosophy informing justice and peacebuilding.

Stepping away from procedural justice: Defining a restorative approach to justice

#### 4.5.1 A restorative approach for victims

Interest in restorative justice as a means of dealing with gross human rights violations first emerged with the South African Truth and Reconciliation Commission. Yet the TRC did not provide full restorative justice: perpetrators were not held accountable for their crimes beyond having to provide details in public about their violations. They did not have to express remorse, nor were they asked to compensate victims. The TRC did, however, incorporate aspects of restorative justice into its process: it provided victims with sympathetic hearings; it exposed substantial detail about gross human rights violations during apartheid in a way that made these crimes difficult to deny; it publicly acknowledged that the crimes were wrong; and it recommended actions the government could take to ease the burden on victims and compensate them for their losses. While the South African government has been reluctant to fully implement these recommendations, the commission did show that much can be done for victims even when trials are impossible or unlikely.

This flexible approach to justice, the idea that there are many ways to help crime victims, is one of the major contributions of restorative justice to justice after mass violence. But to

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<sup>22</sup> In 2002 the CNA organized a series of public discussion forums in 14 different locations throughout Bosnia and Herzegovina and Serbia, in which war veterans spoke about their own experiences and opinions in relation to the war. CNA’s approach – unfortunately rather exceptional in the region - is premised on the need for individuals and groups to engage in a critical reflection upon their role and their responsibilities before, during and after the wars. (Fischer 2007)

understand this potential, we need to stop thinking of justice only as trials or as face-to-face restorative encounters and start thinking of justice *writ large*. A restorative justice philosophy shows that much can be done to help victims even when the perpetrator has never been found – as is often the case (Johnstone 2002) – or when accountability is impossible, unlikely or minimal. In other words, we must begin with Johnstone’s question: “A crime has been committed; someone is harmed as a result. What is to be done for that person?” (p. 83).

Victims’ ideas about just outcomes will differ, depending on many things, including individual personality, gender, age, power position in society, their role in the conflict, and the dynamics of the conflict. Stovel’s (2006) research in Sierra Leone suggests that in an intra-communal conflict, those who have little power in society will be more conciliatory and less inclined to seek trials and punishment for perpetrators than those with more power. This view is supported by Jackson (2004) who contrasts demands for revenge by a powerful Sierra Leonean politician with expressions of forgiveness by a poor, female amputee, Fina Kamara. Jackson writes, “Clearly, both one’s point of view and one’s tactics reflect one’s hold on power... That (the politician, S.B. Marah) gave (the rebels) no quarter was not because his anger was stronger than Fina Kamara’s, but simply because he was in a stronger position” (p. 70).

Our own observations of Bosnia and Herzegovina and Sierra Leone also indicate that victims in an inter-communal conflict (Bosnia, Israel/Palestine, Rwanda) will be more likely to describe justice in terms of trials, revenge or other forms of accountability than those in an intra-communal conflict will (Sierra Leone, Northern Uganda, Mozambique). Much more research needs to be done on the role of power positions and conflict dynamics on victims’ desired justice outcomes.

For all these differences, victims’ ability to heal from crime involves at least two components. First, if crime alienates victims from their communities then steps need to be taken to ease that sense of alienation. After war, considerable attention is paid to reintegrating ex-combatants through disarmament, demobilization and reintegration (DDR) programs. Very little comparable efforts were expended on victims of serious crimes, especially those whose wounds were invisible. Survivors of rape or sexual torture and those who were seriously wounded or traumatized (leading to serious mental illness) often had great difficulties reintegrating. Discriminatory customary laws that prevented females from owning or inheriting property compounded their difficulties. Such laws and social practices placed widows, those who were either rejected by men or did not want to marry, in very difficult positions.

Concrete steps can be taken to help victims reintegrate and make them feel more secure in their communities. ‘Sensitization’ programs and dialogue efforts can encourage communities to accept and support victims of violence and challenge stigmas against survivors of rape, females associated with armed groups, and those who suffer from physical and mental disabilities. Discriminatory laws can be changed and laws preventing violence against women and children can be strengthened, as they have been in Sierra Leone. Victims can be provided with medical assistance, counselling, and job training or education. Victims and marginalized groups can be supported in making real economic choices for their futures without being limited to gender and class roles or cast as dependents (Carlson and Mazurana 2004). And

communities can be made safer for victims by, for example, training police to respond sensitively to domestic violence, and changing norms that permit violence against children or endanger them.

Some of these steps are being taken in post-conflict countries – for example laws are being reviewed and police are being trained to better respond to domestic violence and violence against women and girls. However *these actions need to be prioritized and become an explicit part of the justice picture*. We can also note that these reintegrative challenges for victims, while varying between contexts depending on the cultural and legal situations, are fairly similar in inter-communal and intra-communal conflicts. Addressing these challenges should not threaten the peace, though they do have financial costs and may threaten some existing social hierarchies. *We are underachieving in recognizing and addressing this important aspect of justice for victims*.

The second component of justice for victims involves addressing the loss and trauma of the crime itself. Here we can ask: “What do victims need in order to feel that justice has been done?” To this we need to add a further question: “How does this correspond with the needs of the broader society, including the need for peace?” It is in this aspect of justice that compromises can be expected in post-conflict societies given real security concerns; a lack of resources and capacity to hold thousands of perpetrators accountable; and, in ethnically divided societies, a wide disjuncture between the desire by victims for accountability (or even revenge) and an unwillingness by the perpetrator’s community to hold him or her accountable.

Still, many things can be done for victims to provide elements of justice: 1) fact finding; 2) investigating and addressing the root causes of the violence; 3) public acknowledgement of the crime and assertion that the crime was wrong; 4) state action to compensate victims (acknowledging its failure in its duty to protect its citizens) and address the problems of the past that contributed to the violence; and 5) serious efforts to hold instigators and perpetrators responsible for their crimes, to the extent that such action is fair and reasonable for the society at large.

Truth commissions can go a long way in addressing the first three of these elements of justice. First, the tremendous research capacity of a truth commission can dig up an enormous amount of information about the events in question, information that no other single process can expose.<sup>23</sup> This corresponds with many victims’ need to find out what happened to their loved ones and who was responsible for their losses.

Second, if a truth commission has a mandate to look at both gross human rights violations and the root causes of the war, as the Sierra Leone TRC did, its recommendations, *if*

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<sup>23</sup> This does not mean that truth commissions provide irrefutable histories – far from it. But TRC interviewers and statement takers typically compile thousands of interviews and statements from which information, including names, places and crimes can be taken and cross-checked, often with the help of computers, identifying patterns and verifying claims. If the truth commission report is detailed and substantive, containing thorough references and statistical information, and if the report acknowledges where multiple interpretations of events exist and explains its own reasoning, other researchers and writers have a treasure trove of information and arguments with which to engage.

*implemented by government*, can contribute greatly to positive peace – peace with justice – in the society.

Third, credible truth commissions that hold public hearings, by their very nature, publicly expose and acknowledge crimes committed by all sides, making it difficult to deny that they occurred – especially if perpetrators admit to their crimes (Hayner 2001). While some might still defend violations committed as part of a liberation struggle (as some ANC supporters did in South Africa) or in defence of civilians terrorized by rebel groups (as supporters of civil militias did in Sierra Leone), these truth commissions have been fairly successful in asserting moral norms, even pertaining to war conditions. Further steps can be taken to promote public acknowledgement, including creating public memorials, incorporating a credible history of the war in school curricula, and public apologies by leaders of groups implicated in violence or oppression.

While truth commissions can do much to expose and acknowledge the past and make recommendations for just outcomes, they are not generally able to pay reparations<sup>24</sup> or otherwise act on their recommendations. This step in the justice process requires government action, often working in concert with donors. This is where the justice process often falls flat as governments often display a lack of political will to pay reparations or to implement changes. Civil society and donors can play important roles in pressuring the government to implement changes and supporting these changes financially.

#### 4.5.2 A restorative approach for perpetrators

If restorative measures for victims offer more justice possibilities than trials and face-to-face restorative justice encounters (while still not precluding the latter) what can such an approach offer perpetrators? This is much more challenging because we are still confronted with severe obstacles to accountability and helping perpetrators come to terms with what they have done.

As discussed above, in an ethnically or religiously divided society, unless a critical mass of the population has come to accept the interdependence and common humanity of all sides, there will be little social pressure on perpetrators to come to terms with what they did. Still, many combatants are haunted by violations against the ‘other’ that they committed or witnessed. Especially when these violations contradict the group’s narrative of heroism, making it unsafe for combatants to talk about these crimes, many combatants suffer terribly.

A heart-breaking quote from a letter cited by South African writer Antjie Krog (1998) captures this agony. ‘Helena,’ the wife of a former apartheid-era special forces officer, closed her letter with the words:

I end with a few lines that my wasted vulture (husband) said to me one night when I came upon him turning his gun over and over in his lap: ‘They can give me amnesty a thousand times. Even if God and everyone else forgives me a thousand times – I have to live with this hell. The problem is in my head, my

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<sup>24</sup> The Moroccan Equity and Reconciliation Commission was an exception as it was mandated to provide redress for “damages to the victims and/or their inheritors through material compensation, rehabilitation, social integration, and all other adequate means of reparations” (Moroccan Equity and Reconciliation Commission website: [http://www.ier.ma/article.php3?id\\_article=1305](http://www.ier.ma/article.php3?id_article=1305)).

conscience. There is only one way to be free of it. Blow my brains out. Because that's where my hell is' (p. 195).

Such combatants or officials know that the crimes they participated in or saw are wrong but they have few outlets for expressing and coming to terms with what happened. A peace worker in Croatia told Stovel (1998) that a number of soldiers were trying to register in her organization's peace education classes. "We would not enrol them," she said. "It was too early for them. They needed counselling first".

Indeed combatants who feel remorse for what they did and who, perhaps, are tormented by their actions – or failure to intervene when crimes were being committed – may be the best candidates for restorative interventions. Psychological or religious counselling that helps perpetrators or witnesses come to terms with what they did or did not do, accept responsibility and find ways to move on may be an important first step. In an ethnic nationalist conflict this service is especially needed as few other outlets exist for dealing with the past, yet few counsellors may be neutral enough to deal sensitively and constructively with a perpetrator's remorse.

After former perpetrators have received sufficient counselling, opportunities need to be made for those who feel responsible for violence and oppression to contribute to peacebuilding work or to assist the former 'enemy.' These may not be programs explicitly designed to enable redress. Rather, in an unstated way, they enable former perpetrators to work through the past by channelling their energies towards a positive future. One can imagine that counselling and such opportunities might greatly assist the healing of 'Helena's' husband.

In an intra-communal conflict, counselling and opportunities for ex-combatants to contribute to peacebuilding and community development are also needed *for those who choose to use these avenues*. In such contexts, more outlets exist for discussion of the past and the provision of redress yet there is also tremendous social pressure to 'forget' the past for the sake of peace. Pressure to forget often reflects civilians' fear that fighting will continue/resume and excombatants', collaborators' and beneficiaries' fears that they or their loved ones will be held accountable for their actions.

Yet forgetting may not be the best option, even for complex political victims such as child soldiers. A restorative justice approach suggests that accountability, though often dreaded, can be valuable both for the perpetrator and for the society at large. For young perpetrators, a non-punitive, reintegrative justice process, such as that carried out at Hollow Water, could explicitly help them come to terms with what they have done, allowing them to acknowledge their actions and accept some responsibility while envisioning ways to provide restitution and forge a positive role in the future. Justice, if conducted in a reintegrative way, can bring positive attention to young offenders.

There is an unsettling tendency in some impoverished post-conflict societies, to dismiss the possibility of redress because the offender (or the family of the offender) is too poor. This ignores the many ways in which the offender can atone for harms he caused – for example by assisting a widow on her farm after he killed her husband.

Accountability and acknowledgement of past offences were not encouraged in Sierra Leone, in the years immediately after the war. Indeed, some observers, including anthropologist Rosalind Shaw (2007) and Sierra Leonean reintegration officers that Stovel (2006) interviewed, asserted that it is culturally inappropriate to encourage people to talk about the past. Interestingly, in 2008 Stovel found that many people were asserting the *need* to talk about the past and were claiming that open discussion was both healthy and traditional. The truth probably lies somewhere between the two claims. This should serve as a warning not to reify claims about ‘tradition’ but to see tradition as dynamic and subject to interpretation based on political circumstances, people’s feelings of security and their level of psychological recovery. Above all, assertions that it is culturally inappropriate to talk about the past run the risk of creating facts on the ground. While many people did not want to talk about the war, it did not follow that all, or even most people preferred silence. Opportunities need to be made for those who want to discuss the past, publicly or in private, to do so. This emphasis on cultural appropriateness leads us to the important discussion of the relationship between traditional and restorative justice.

#### 4.6 Restorative justice and traditional justice

Much writing in the field of restorative justice treats traditional (customary or indigenous) justice processes and restorative justice as closely related, if not synonymous. When describing *gacaca* in Rwanda, Drumbl (2005) links these traditional community-based dispute resolution mechanisms to ‘what the Western tradition might call restorative justice’. In the *Handbook of Restorative Justice* (Sullivan and Tift 2006), Stuart and Pranis describe indigenous North American peacemaking circles; Louw describes the Southern African concept of *ubuntu*; and Dinnen describes the use of traditional justice processes in Papua New Guinea. And the recent publication, *Restoring Justice after Large-Scale Violent Conflicts* (Aertsen *et al* 2008) examines traditional responses to violence in Kosovo, the Democratic Republic of Congo, and Israel-Palestine, implying a close connection between traditional and restorative justice. Most – though not all – of these authors acknowledge that the two are not the same yet the facility with which the two are linked must be addressed.

Traditional justice practices are as diverse as the cultures from which they arise and while many traditional practices are consistent with restorative justice values, many others contradict them. Dandurand and Griffiths (UN Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 2006) write with suitable caution that “*aspects* of the restorative justice approach are found in many cultures” (p. 29, italics ours) and Kamwimbi (2008) writes, “African traditional justice systems are widely acknowledged to contain *elements* of restorative justice” (p. 371, italics ours). Thus, instead of lumping restorative and traditional justice together, we should ask, “What is it about these traditional practices that are consistent with restorative justice and in what ways do they contradict both restorative justice values and internationally accepted principles of human rights?”

Traditional forms of justice may appeal to proponents of restorative justice for at least three reasons. First, restorative justice promotes justice that is meaningful to, and owned by the community, where community members have a meaningful role in justice, conflict resolution and problem-solving processes (Christie 1977). Traditional justice is, almost by definition,

familiar to the people in the community concerned and it is likely, though not necessarily, meaningful to them and consistent with their worldviews.

Second, reintegrative shaming, as described by Braithwaite (1989) works best in closely-knit, communitarian societies where people have a strong interest in belonging to the community. Traditional societies are often communitarian so these are societies in which reintegrative shaming tends to work well. Third, restorative justice promotes certain kinds of reconciliation – in particular, reconciliation between the victim and the community and reconciliation between the offender and the community as described in Part I. Some proponents of restorative justice also stress reconciliation between the victim and the offender. Communitarian societies are conciliatory in nature; social harmony is often the objective of their justice efforts. As Zellerer and Cunneen note, “the community-based, peace-oriented, and deliberation-driven ways of native people in North America and New Zealand of dealing with conflicts and norm transgression deeply influenced restorative practice and thinking” (in Walgrave 2008: 618).

While traditional, communitarian societies are indeed consistent with these aspects of restorative justice we must be wary of romantically clinging to these qualities and to the notion that what is traditional is somehow more authentic and good – and restorative. In relation to the first reason for linking the two – traditional justice is more meaningful for the people concerned – we must consider the power structures within the community, ask who claims to speak for the community and whether marginalized people have a voice within justice processes. In many traditional cultures, older males claim to speak for the entire community and minorities, young people and women – especially younger women – may have little voice or are only permitted to speak through intermediaries or about specific issues. In some conflict contexts, such as Sierra Leone, these hierarchies contributed to the economic and social tensions that led to the war. Strict hierarchies and the inability to challenge leaders also prevented Sierra Leonean society from dealing with conflicts and tensions as they arose and adapting to new circumstances. Blindly reinforcing these hierarchies after the war through automatic support for traditional processes may prematurely reinforce problematic social structures. In our view, citizens first need opportunities to openly discuss the past, discussion that may occur in a very non-traditional institution: a truth commission.<sup>25</sup>

The second reason for linking traditional and restorative justice is that communitarian societies can be effective at reintegrative shaming: shaming that is not stigmatizing and does not emphasize punishment. However, despite recent rhetoric in post-conflict societies, such as Uganda, Sierra Leone and South Africa, about the forgiving nature of their traditions,<sup>26</sup> many traditional cultures, including these, can be very punitive. In Sierra Leone, practices of ostracism, heavy fines and harsh punishment drove many young men from their communities where they became easy recruits for armed forces (TRC 2004). Beating of children is considered to be good parenting practice and is common in schools. Even where reintegrative

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<sup>25</sup> Truth commissions have the added advantage of being accessible to illiterate people because testimony is given oral and the proceedings are often broadcast over the radio and heard in public forums.

<sup>26</sup> These concepts were famously encapsulated in the Southern African expression ‘ubuntu’ (people are people through other people) and the Sierra Leonean expression ‘There’s no bad bush to throw away a bad child’ (see Stovel 2008).

practices are used, such as the use of ‘cleansing’ ceremonies and initiation processes to reintegrate child soldiers, it should be acknowledged that some components of these practices may be inconsistent with international children’s rights standards. One example of this is female genital mutilation, which is commonly part of girls’ initiation processes.

Relating to the third reason, communitarian societies are inherently conciliatory as they place a strong emphasis on social harmony. But reconciliation is not necessarily just, or a good thing. As the 1985 *Kairos Document* by South African theologians pointed out, reconciliation under unjust conditions – for example, conditions of apartheid – is not justifiable. In post-war situations, where there is little accountability for often-heinous crimes, should reconciliation between victims and their direct perpetrators be promoted?

Even in contexts of peace, reconciliation for the sake of social harmony may mean that victims may be encouraged to forgive or return to bad situations so that social structures are not disturbed. For example, an abused wife may be encouraged to return to her husband for the sake of family harmony. Also, in communitarian societies where justice is not regarded as an individual matter and entire families are held responsible for the transgressions of one of their members, weaker members sometimes pay the price when a crime is committed or a debt incurred. In some West African cultures, families would sometimes give a child for labour or a girl for marriage to settle a debt or to compensate for a serious crime committed by one of their members. This is dramatically depicted in Chinua Achebe’s (1959) famous novel, *Things Fall Apart*. In such contexts, social reconciliation comes at the expense of individual rights, especially of weaker members such as children.

We are not presenting an argument against traditional justice. Given the diversity of traditional justice and peacebuilding practices, such an argument would be foolish. However we are saying that proponents of restorative justice must be very careful when equating restorative justice values with communitarian or traditional values. They must recognize that restorative justice *is* individualistic: it is concerned with the individual victim and offender, even while it recognizes the individual as needing to live in community with others. While traditional practices may satisfy the restorative justice emphasis on justice as being locally rooted, reintegrative and conciliatory, these qualities are not enough to ensure that restorative justice has occurred and the rights of individuals – especially individual children – have been protected.

Bob Watts, Interim Executive Director of the Canadian Truth and Reconciliation Commission to deal with the legacy of Indian Residential Schools, recently said that the TRC provides “an opportunity for Aboriginal communities to present their very best to themselves, to Canada, and to the world. We have considerable strengths and knowledge that we can draw upon” (public lecture, Carleton University, April 3, 2008). Tradition is a wonderful resource for peacebuilding and justice (Huyse & Salter 2008). It is, in Mahmood Mamdani’s (2001) words, a “treasure trove” (p. 277) into which citizens can dig and find inspiration and meaningful tools to help them with challenges as they arise. However, traditions are neither apolitical nor stagnant. They reflect power structures embedded in culture (many of which, in post-colonial societies have been heavily distorted by colonialism), they are constantly evolving to meet new political circumstances, and they can absorb new ideas or be complemented by new institutions and approaches. What is most important is that traditions

reflect the aspirations and wishes of *all* segments of the population and, if they do not, a safe dialogue needs to occur to discuss social norms – even if such dialogue was not traditionally possible. A restorative justice approach could be very helpful in guiding this important discussion.

## 5. CONCLUDING REMARKS - What can restorative justice offer young victims and young offenders in the aftermath of mass violence?

What does a restorative justice perspective tell us about the opportunities and limitations for justice and healing for children and youth affected by mass violence? What does it have to offer young victims and offenders, and what should we be wary about in its application?

### 5.1 Restorative justice as an ontology and approach to justice

A restorative justice perspective (ontology) shows us that much can be done to provide justice and healing for young victims and offenders even when trials are not possible. However there are two major reasons that restorative justice efforts may have more to offer young victims than young offenders.

First, if justice for young offenders requires accountability – both for the offender’s healing and community healing – and if accountability usually requires some form of coercion, the conditions required for the offender to ‘volunteer’ to make up for his or her offence are minimal. In post-conflict societies, the state usually lacks the capacity to arrest and enforce accountability,<sup>27</sup> an important but underacknowledged element of restorative justice practices in the West. In the absence of state coercive abilities, accountability for young offenders would have to rely on the capacity of the community to shame in a reintegrative way or on the offender’s own spiritual/moral beliefs (his or her own inner struggle). In post-conflict societies, where combatants still pose a threat, communities usually lack the power to enforce even restorative accountability. If they did so, the fear would be that young combatants would simply return to the armed groups. As the Sierra Leone case study indicates, restorative accountability may be possible in intra-communal conflicts after some time has passed as armed groups lose their hold on society and as young offenders feel a need to redress their crimes for their own healing. Opportunities for such redress should be made and can be facilitated by NGOs and other community groups. Second and relatedly, in inter-communal conflicts, unless the community recognizes that the crimes were wrong, it will have little incentive to hold young offenders accountable. Simply put, their actions are usually not seen as offences.

By stressing the accountability element of restorative justice, we are highlighting the fact that reintegration without accountability falls short of justice. While accountability processes should be reintegrative and not stigmatizing, this does not mean that reintegrative efforts alone constitute restorative justice. This point is not uncontroversial, as some proponents of restorative justice emphasize reintegration and forgiveness whether or not the offender has been held accountable.

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<sup>27</sup> This is either because the state lacks the capacity to enforce the law or because the state’s security and justice apparatuses have been severely discredited (Mani 2002).

The restorative justice perspective and our analysis of conflict dynamics do show us, however, that young victims in all conflict contexts require justice and healing, including assistance reintegrating into their own communities. This may be the biggest contribution of restorative justice. It allows us to see that much can be done both to reintegrate and provide justice for young victims and this may or may not involve the direct offender (whether a young offender or not). As Walgrave (2004) and Johnstone (2002) suggest, instead of assuming that restorative justice must occur through restorative encounters, we should begin with the question: What can be done for victims? And victims need safe opportunities to express what happened and how the crime affected him or her and to suggest possible solutions.

## 5.2 Restorative justice principles and processes

The opportunities offered by a restorative justice approach to young victims and young offenders can be grouped around the following key issues: participation and dialogue, community engagement, reparation, accountability and reintegration.

Restorative justice posits that there should be broad participation of the parties in the justice process. For children and youth, who are typically excluded from justice processes or relegated to very minor roles (as witnesses, for example), restorative justice can provide a framework that promotes their inclusion in these processes and invites all involved to hear and understand the harm they have suffered and their specific needs in overcoming its consequences. Truth commissions and community-based processes can be very useful in enabling this participation.

The emphasis placed by restorative justice on the discursive and flexible nature of justice processes aims precisely at ensuring that children and youth will not only be included in justice processes but will be given the space to express their own views on what happened and what steps should be taken to repair them. Participation and dialogue, thus, go hand-in-hand. And both require that a safe, welcoming and respectful environment exists for the experience to be meaningful and not harmful in any way.

The involvement in the justice processes of those who are close to the children/youth affected – members of their ‘community of care’ – as well as members of the wider community to which they belong, aims at providing a familiar and supportive context. This creates the opportunity for these persons to become well aware of the problems and needs faced by the child or young person. But it also creates the opportunity for them to become engaged, and thus share the responsibility in supporting that child/young person overcoming the effects of the violence and in their reintegration. It is important to involve those who constitute the child’s/youth’s social and support network because violence often severs the bonds between them. Children who were involved in and victimized by mass violence often find themselves under suspicion or distrusted, often due to preconceptions or misjudgements. These must be addressed and the vulnerabilities of children/youth must be recognized. Restorative justice can contribute greatly to rebuilding trust between young victims and excombatants and their communities by creating the space where empathy may develop.

If community involvement presents valuable opportunities, it also carries with it some dangers. We cannot assume that community-based processes welcome meaningful participation by youth or are non-punitive or non-stigmatizing. An excessively dominant and authoritarian attitude by carers or community leaders is at odds with the interested, open and supportive values advocated by restorative justice particularly when it comes to dealing with youth. The presence of the community is thus meant to be supportive and reintegrative, rather than stigmatizing and disintegrative. As the Sierra Leone case study shows, NGOs and community groups can be very useful in raising the profile and involvement of youth and generating dialogue about the rights of children and youth.

The concern of restorative justice with victims, helps us recognize multiple justice solutions both for children/youth who have been only victims of the violence, and for those who also committed offences. When opportunities are made for victims and offenders to meet, for dialogue to take place and for offenders to apologize and try to repair the harm, this is closer to a conventional restorative justice ideal. However, given the gravity of the crimes this may not be suitable for victims. Also, as we have seen, societies emerging from mass violence face serious obstacles to holding those responsible for the atrocities accountable.

But restorative justice principles also help us conceive how young offenders might be held accountable for their role in the violence. Opportunities need to be made for young offenders to contribute to the communities that they harmed, either by helping their direct victims or victims of similar crimes or by contributing selflessly to the community at large. This is where volunteer organizations may also play a role. The restorative justice emphasis on dialogue also highlights the need for young offenders to share their experiences – including the harms they suffered – and motivations so that there is a better understanding within their communities about what really happened and a better preparation of these communities to accept them back. And finally, in a restorative justice understanding, the process of accountability and any amends associated with it should always contribute to the reintegration, rather than the alienation, of the young offender.

## 6. RECOMMENDATIONS AND COMMENTS:

1. A restorative justice perspective should be used to help identify the needs of young victims and offenders and a range of steps that can be taken to provide justice for young victims and accountability with reintegration for young offenders.

### **Restorative justice as a means of holding young offenders accountable while reintegrating them into their respective communities**

2. Where possible, the young offender's 'community of care' and wider community should be actively involved in holding him/her accountable, supporting integration, and overcoming the effects of the violence.

3. An assessment of appropriate restorative justice action must begin with an analysis of conflict dynamics. This will heavily influence the appropriate steps that will promote justice in each context.

4. Recognizing the security risks of enforcing accountability, yet also recognizing the persuasive power of communities, we need to find innovative and nurturing ways of helping young offenders atone for their crimes while addressing their psychosocial needs. This may involve providing them with opportunities to voluntarily apologize for their offences, provide direct or indirect redress, and receive counselling and emotional support.

5. Governments and NGOs should support the restoration and reintegration of victims, and governments often owe victims compensation for failing to protect them. However, governments and NGOs should not diminish the young offender's obligation to provide redress to victims. Instead, they should help offenders find their own means of atonement and support them in that process.

6. Recognizing that communities and families carry much of the burden of providing justice and reintegration, governments and local and international organizations need to provide them with financial and practical support as they carry out these functions. Community-based or restorative justice should not be seen as a low-cost alternative to trials. To be effective, communities, families and local NGOs supporting this work need adequate resources.

### **Restorative justice as a means of supporting and providing justice for young victims**

7. Assessing justice needs of victims must begin with the open question: How can we help victims recover from this crime and reintegrate into his/her community on fair terms? By identifying the many reintegration and justice needs of victims we can see that many practical steps can be taken, even when accountability for offenders is not feasible. This must be an explicit part of the justice picture.

8. Support more research on the justice needs of victims in different types of conflicts. Both ethnographic and comparative research is needed.

9. Identify obstacles to just (fair) integration of victims into their communities and provide sensitization for communities to change prejudicial attitudes towards victims and practices and attitudes that infringe on their rights and hinder their choices.

10. Recognize that communities and families carry much of the burden of supporting and reintegrating victims. Government and local and international organizations need to provide them with financial and practical support as they carry out these functions.

**Restorative justice as a means of restoring or building social trust**

11. Create spaces and opportunities where victims, offenders – in particular young ones – and communities may develop empathy even across group borders and the rebuilding of social trust may take place. Processes of justice should be scrutinised as to their implications on the rebuilding of social trust.

**Restorative justice and traditional justice**

12. Tradition-inspired justice processes must be analyzed on a case by case basis if they are to be declared equivalent to restorative justice.

**Involvement of children and youth in national and community dialogue**

13. The active participation of the affected parties and their communities in justice processes must be ensured. Moreover, opportunities must be created for dialogue both at the national and community levels in a safe and welcoming environment where young victims and offenders may express their own views on what has happened, allowing all involved to hear and understand the harm they have suffered and their specific needs in overcoming its consequences. Such opportunities should be used to further address preconceptions and distrust towards children who were involved in and victimized by mass violence, as well as their vulnerabilities.

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