

Conceptualising Restorative Justice within a Transitional Justice Framework

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

The concept of “restorative justice” has in recent years been widely invoked in the transitional justice literature. The term is however often used loosely, inconsistently and in apparently different senses. This minor dissertation addresses this dilemma by bringing together three influential bodies of work on restorative justice and exploring what each body of work means by the term “restorative justice”. The three bodies of work are that of Archbishop Desmond Tutu, criminal justice theorists and accounts of African Traditional Justice Mechanisms. With a clearer picture of what these respective sources mean when referring to restorative justice, the discussion then turns to the potential relevance and significance of these conceptions of restorative justice for transitional justice.

The three bodies of work on restorative justice, while distinct in their own right, are brought into conversation through applying a uniform methodology. This methodology draws on John Rawls’ distinction between *concept* and *conception*. Given that restorative justice is not concerned with the rules of ordinary language usage a conceptual analysis is not possible. What is possible is to follow a route of enquiry that explores the different *conceptions* of restorative justice reflected in each body of work. These conceptions are discussed against the backdrop of a transitional justice framework.

This minor dissertation does not make any claims regarding the concept of restorative justice. Rather what are delivered are some findings about the conceptions of restorative justice that feature within the three bodies of work under discussion. The conceptions of

restorative justice differ in certain respects but also overlap in others. The crucial point of overlap concerns a sociological or relational approach to crime and wrongdoing which requires that all parties to a conflict are involved in its resolution. Herein lies the chief contribution of restorative justice to transitional justice, namely that restorative justice embodies what Jon Elster deems to be the task of transitional justice – that a society judge itself.

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Introduction

“For all men cling to justice of some kind, but their conceptions are imperfect and they do not express the whole idea”

*Aristotle*¹

This study seeks to clarify the concept of “restorative justice” by exploring what is *meant* by the term “restorative justice”. The motivation for this study is well articulated in the following comment made by Declan Roche: “While support for restorative justice may be easy to find, its meaning remains much more elusive. ‘Restorative justice’ is used to describe a bewilderingly diverse range of practices and programmes”.² Although “restorative justice” is widely invoked in the transitional justice literature, the term is often used loosely, inconsistently and in apparently different senses. The task of this minor dissertation is two-fold. Firstly to try and gain a clearer picture of restorative justice by exploring three influential sources of thinking on restorative justice, namely Archbishop Desmond Tutu, criminal justice theorists and accounts of African Traditional Justice mechanisms. And then secondly, to assess the relevance and significance of restorative justice for transitional justice.

Within the field of transitional justice, the notion of “restorative justice” emerged prominently within the context of the South African Truth and Reconciliation Commission (TRC). Generally, the term “restorative justice” is used in the transitional justice literature to refer to non-adversarial approaches that favour victim-oriented truth commissions over prosecutions of perpetrators.³ The so-called restorative character of the TRC is explained by the decision to offer conditional amnesty and forgo a retributive approach towards perpetrators while at the same time provide fora for victim-centred

¹ Aristotle, *Politics*, Book III Chapter 9, 1280.

² Roche, Declan “Restorative Justice and the Regulatory State in South African Townships” *British Journal of Criminology* 42 (2002):516.

³ See Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. (Boston: Beacon Books, 1998).

reconciliation.⁴ Within this context, restorative justice became popularised and bold claims were made suggesting that restorative justice was crucial for the TRC process and for transitional justice in general.⁵ Archbishop Desmond Tutu as chairperson of the TRC is well known for his support of restorative justice. Similarly, the Research Director for the TRC Charles Villa-Vicencio asserts that the South African TRC and other truth commissions are “essentially instruments of restorative justice”.⁶

The TRC process also led to an increase in the popularity of restorative justice amongst transitional justice scholars not directly involved in the TRC process. Following the TRC restorative justice, although a disputed concept, gained recognition amongst transitional justice scholars. International human rights law professor Miriam Aukerman notes, “Whatever words we use to describe it, the concept of restorative justice is certainly relevant to transitional justice”.⁷ Bronwyn Leebaw writes after the TRC and suggests that the TRC experience “demonstrates the potential contributions of restorative justice principles to addressing the dilemmas of transitional justice”.⁸ The overwhelming majority of literature that deals with the intersections between restorative justice and transitional justice was published during the period 1998-2000, the period following the TRC’s victims’ hearings.⁹

However, arguments for the centrality of restorative justice are not without their counter responses. Within the context of the TRC many differ with Tutu and the like and emphasise the vague and ambiguous nature of restorative justice. Stuart Wilson criticises

⁴ *TRC Report*, Vol 1, Par 55a, 117.

⁵ Lyn Graybill & Kimberly Lanegran, “Truth, Justice and Reconciliation in Africa,” *African Studies Quarterly* Vol 8, Issue 1, 2004:5.

⁶ Charles Villa-Vicencio, “Restorative Justice: dealing with the past differently,” in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: Juta and UCT Press, 2000), 68.

⁷ Miriam J. Aukerman, “A framework for understanding transitional justice,” *Harvard Human Rights Journal* volume 15, 2002:81.

⁸ Bronwyn Leebaw, “Restorative Justice for Political Transitions” *Contemporary Justice Review* 43 Vol. 4 (2001):269.

⁹ Martha Minow is perhaps one of the more prominent scholars in this regard. Minow looks at possible alternatives to prosecutions and discusses the TRC when surveying the potential therapeutic effects of truth commissions. While her use of the term ‘restorative justice’ is minimal, her discussion on the healing effects of truth commissions and reparations remains a key text for advocates of restorative justice in transitional justice contexts. Martha Minow, *Between Vengeance and Forgiveness – Facing History After Genocide and Mass Violence*, (Boston: Beacon Press, 1998). See Chapters 4 and 5 for these discussions.

the manner in which restorative justice has been used as a justification for the South African amnesty clause.¹⁰ He explores the concepts of retribution, forgiveness and mercy with a view to “expos[ing] the crumbling foundations of the TRC’s brand of restorative justice”.¹¹ Similarly Jonathan Allen discusses some of the problems associated with using ‘restorative justice’ as a model to redress human rights violations.¹² Allen acknowledges the shortcomings of an adversarial approach to criminal justice but ultimately finds that the truth commission model cannot be seen as a substitute for punitive justice but rather as a complement.

It is also the case that certain authoritative accounts of transitional justice place marginal significance on the role of restorative justice. Jon Elster’s edited collection of analyses of transitional justice from 1945 – 2006 does not make any reference to restorative justice other than a few remarks in Alex Boraine’s chapter on the South African TRC.¹³ Similarly other influential transitional justice scholars like Carlos Nino and Aryeh Neier do not include restorative justice as a central element of transitional justice.¹⁴

Thus there is a clear divergence in the literature between 1) those who claim crucial significance for restorative justice both in terms of the TRC and transitional justice in general and 2) those who either disregard the significance of restorative justice for transitional justice or highlight its ambiguity. This study aims to interrogate this divergence along the following lines.

¹⁰ Stuart Wilson, “The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty,” *South African Journal of Human Rights* 17 (2001):531-561.

¹¹ *Ibid.*, 535.

¹² Jonathan Allen, “Memory and Politics: Three Theories of Justice in Regime Transitions,” unpublished paper presented at the Transnational Seminar Series, University of Illinois. Available online at - www.cgs.uiuc.edu/resources/conf_seminars_workshops/TPSAllen.pdf. Allen develops his argument more clearly in “Between Retribution and Restoration: Justice and the TRC”, *South African Journal of Philosophy* 20/1 (2001): 22-46.

¹³ Jon Elster, ed. *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006).

¹⁴ Carlos Nino, “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina”, *Yale Law Journal* 1991; Carlos Nino, *Radical Evil on Trial* (Yale University Press, 1996) Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (New York: Times Books, Random House, 1998).

The claim that restorative justice was central to the TRC process and transitional justice in general is problematic for at least two reasons. Firstly, the available literature does not offer sufficient consensus on what “restorative justice” actually means. Secondly, it is far from clear what the relevance and significance of restorative justice is for transitional justice. Due to the lack of clarity regarding the meaning of restorative justice, it is necessary to extend our investigation into restorative justice beyond the context of the TRC and explore other influential sources of restorative justice.

This thesis commences by setting the scene in terms of developing a transitional justice framework in Chapter 1. The term ‘transitional justice’ broadly refers to “the conception[s] of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”.¹⁵ Furthermore, these periods of political change are characterised by a move from violent conflict to “peace, democracy, the rule of law, and respect for individual and collective rights”.¹⁶ Such transition involves reckoning with the legacy of human rights violations committed by the previous regime and its opponents.¹⁷ Within the realm of transitional justice there are a variety of approaches that can assist with confronting past abuses. These approaches can be judicial or non-judicial ranging from prosecutions, truth telling commissions, reparations to victims of gross human rights violations, institutional reform by lustration to reconciliation initiatives and various other forms of responses. The transitional justice literature broadly categorises these approaches into two senses of justice: retributive and restorative. While the notion of retributive justice enjoys substantial consensus and is relatively well understood, the same cannot be said of ‘restorative justice’, which is often used in different and perhaps incompatible senses. Chapter 1 will offer a canvas against which various conceptions of restorative justice will

¹⁵ Ruti G. Teitel, “Transitional Justice Genealogy” *Harvard Human Rights Journal* 16 (2003):1 <http://www.law.harvard.edu/students/orgs/hrj/iss16/teitel.shtml>. Teitel follows O’Donnell & Schmitter, in their definition of a transition as the interval between one political regime and another. Guillermo O’Donnell & Philippe C. Schmitter, *Transition from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* 6 (1998).

¹⁶ Louis Bickford, “Transitional Justice,” *Macmillan Encyclopaedia of Genocide and Crimes Against Humanity*, as cited at <http://ictj.org/en/tj>

¹⁷ David A. Crocker, “Truth Commissions, Transitional Justice, and Civil Society,” in Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*. (Princeton: Princeton University Press, 2000) 99-121.

be viewed so as to draw conclusions regarding the relevance and significance of restorative justice for transitional justice.

Chapter 2 then explores Archbishop Desmond Tutu's conception of restorative justice. Within the field of transitional justice, Archbishop Desmond Tutu is widely acknowledged as an advocate of restorative justice, predominantly through his role as the chairperson of the South African Truth and Reconciliation Commission (TRC). This study will explore what Tutu means when he speaks about restorative justice and whether his conception of restorative justice has any relevance and significance for the field of transitional justice.

Chapter 3 explores conceptions of restorative justice as developed within the field of criminal justice. Notions of restorative justice have enjoyed significant appeal within the context of criminal justice and represent an important source in any enquiry into restorative justice. While criminal justice is a specialised field in its own right and clearly differs from that of transitional justice, this study suggests that it is possible to apply insights from field to the other.¹⁸ As Alex Boraine notes;

“transitional justice is not a contradiction of criminal justice, but rather a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims, and start a process of reconciliation and transformation toward a more just and humane society”.¹⁹

Chapter 4 explores African Traditional Justice Mechanisms and how these mechanisms are described in the literature as restorative. Within the sub-Saharan African context special use has been made of customary or traditional justice approaches and practices to supplement or even replace criminal justice procedures as mechanisms for dealing with the aftermath of mass atrocity. These customary or traditional approaches prioritise the well-being of the community over punishing the perpetrator and are hence broadly classed as restorative. In this regard we will focus on the Mato Oput ceremonies practised

¹⁸ Kieran McEvoy proposes that transitional justice stands to gain from borrowing insights from criminal justice and criminology. See McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice” in *Transitional Justice from Below*, Kieran McEvoy and Lorna McGregor (eds), (Oxford: Hart Publishing, 2008), 15-45.

¹⁹ Alex Boraine, “Transitional Justice”, in Charles Villa-Vicencio and Erik Doxtader, eds., *Pieces of the Puzzle – Keywords on Reconciliation and Transitional Justice* (Cape Town: IJR, 2004), 67.

by the Acholi tribes in Northern Uganda and the Gacaca Tribunals in post-genocide Rwanda. We explore these African Traditional Justice Mechanisms in terms of how they are explained as restorative in the literature, and then based on these accounts make some conclusions regarding their overall relevance and significance to transitional justice.

The task of this thesis is to try and gain a clearer picture of the above-mentioned three influential sources of thinking on restorative justice and then to plot the potential relevance and significance of these conceptions of restorative justice for the context of transitional justice. The notion of bringing these three distinct repositories of work on restorative justice together represents a novel offering. While each of the three sources under discussion are quite distinct in their own right, they are brought into conversation through a uniform methodology.

This methodology draws on the distinction between *concept* and *conception*.²⁰ Briefly, *concepts* are concerned with the rules of ordinary language usage, the general criteria by which ordinary usage of words are determined. It follows that concepts are general and intersubjective within a particular language community. While concepts are concerned with ordinary language usage, *conceptions* pertain to certain individuals and groups and are therefore variable. The method of conceptual analysis is not well suited to the concept of restorative justice because methods of conceptual analysis are premised on the notion of concepts as concerned with the rules of ordinary language usage. It therefore follows that a concept like ‘restorative justice’, which is not part of ordinary language, is not well suited to conceptual analysis. A better route of inquiry is to explore different *conceptions* of restorative justice. It is possible to enquire into different people’s *conceptions* of restorative justice. An investigation of different *conceptions* of restorative justice will involve factual questions about the views and associations held by particular individuals or groups.

²⁰ This distinction is used authoritatively by John Rawls in his *Theory of Justice* (Harvard University Press, 1971). This study draws on John Wilson’s development of this distinction in his *Thinking with Concepts* (Cambridge: Cambridge University Press, 1963).

We are therefore not making a claim to uncover the concept of restorative justice, or justice for that matter. But rather to make some findings regarding the conceptions of restorative justice at play in three influential sources of thinking on the topic – Archbishop Tutu’s work, criminal justice theorists and African Traditional Justice Mechanisms. Based on these findings certain comments will then be made regarding the relevance and significance of restorative justice for contexts of transitional justice.

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Chapter One

A Transitional Justice Framework

As noted in the Introduction the task of this thesis is two-fold. Firstly to try and gain a clearer picture of restorative justice by exploring three influential sources of thinking on restorative justice, namely Archbishop Desmond Tutu, criminal justice theorists and accounts of African Traditional Justice mechanisms. Secondly, to assess the relevance and significance of restorative justice for transitional justice. It is therefore with a view to the overall project of this thesis that this chapter develops a framing account of transitional justice to serve as a scene-setting precursor to the discussion of three different approaches to restorative justice and their significance for transitional justice.

Section one of this chapter addresses the nature of transitional justice by considering some accounts in the literature that delineate transitional justice as a distinct field of study. These accounts discuss transitional justice as a distinct field of study in terms of distinctive themes and issues, emergent principles and as a normative conceptual framework.

Section two of this chapter discusses four watershed moments within the genealogy of the field of transitional justice; the Nuremberg Trials, the Latin American truth processes of Argentina and Chile, the South African Truth and Reconciliation Commission, and the establishment of international justice mechanisms leading up to the advent of the International Criminal Court. These four watershed moments have been deliberately selected due to their impact on how *justice* is understood within the field of transitional justice. The discussion of these four watershed moments will necessarily be selective in focussing on those developments that have a bearing on the notion of restorative justice.

The chapter concludes with a summation of key points from sections one and two thereby comprising the parameters of the transitional justice framework that applies to the rest of this study.

1.1 The Nature of Transitional Justice

In order to develop a framing account of transitional justice it is necessary to unpack transitional justice as a distinctive field of study. The question is about the ways in which the relevant *research and literature* has developed either as part of the domain of a particular discipline and closely associated with certain institutions, or as an interdisciplinary inquiry organised thematically in a holistic perspective. It is these questions that this section attempts to investigate.

1.1.1 Transitional Justice as a Distinctive Sub-field of Study

The question of whether transitional justice constitutes a distinctive sub-field of study is about whether the different positions taken on the question of dealing with the past and/or the different accountability mechanisms which have been developed and/or the typical constraints and dilemmas characterising transitional justice amount to a distinct "field of study". It could be that these various topics and issues do *not* belong together, or that they are part of other established fields of study (e.g. of criminal justice, international human rights law, the study of democratic transitions or of social and moral philosophy).

Even if we are to follow the lines of Elster²¹ and Bass²² and assume that the phenomenon of transitional justice has existed since the 4th century, research and literature dealing specifically with transitional justice is a fairly recent development. While transitional justice issues have long featured in various bodies of literature, these accounts have formed part of the general literature on criminal justice or human rights law and hence do not point to transitional justice as a distinct field of study.

²¹ See Jon Elster 1998. "Coming to terms with the past." *Archives Européenne Sociologique*, vol.39:7-48. Elster suggests that the phenomenon of transitional justice recurs throughout history and could be traced back to Athenian democracy in the 4th century BC after the fall of the Thirty Tyrants in 403 BC.

²² See Gary Bass, 2000. *Stay the Hand of Vengeance*. Bass discusses earlier historical episodes including the exile of Napoleon as well as post-World War I developments.

Transitional justice as a distinct field of study will imply that research and literature on transitional justice have become separated out and therefore constituted as a distinct field of study, which is no longer subsumed under other traditional rubrics but has acquired its own significance and identity. We do begin to find accounts of the various issues and aspects of transitional justice as a distinctive and recognisable phenomenon in the late 1980s following the so-called “third wave” of democratisation.²³ There is a recognisable body of literature that offers accounts of “dealing with the past” in the context of transitions from authoritarian rule to democracy.²⁴ However, these accounts mostly take the form of thematic surveys and cannot be deemed comprehensive accounts of transitional justice as a field.

A more comprehensive investigation into transitional justice can be found in the literature that emanated from the series of conferences organised by the Aspen Institute at the end of the 1980s.²⁵ These conferences were organised under the Institute’s “Justice in Transition” project. Richard Lewis-Siegel suggests that these conference proceedings are representative of a significant trend in the literature that designates transitional justice as distinctly concerned with “a set of issues facing countries whose previous regimes carried out widespread crimes against their own people in the interest of maintaining power and ideological control”.²⁶ The conference proceedings also reflect a clear delineation of a set of debates that fall beyond thematic surveys or existing debates in other fields rather what is found is the emergence of a new set of issues.

²³ Samuel Huntington explores the plethora of democratic transitions mostly in Latin America in his book *The Third Wave: Democratisation in the Late Twentieth Century* (1991).

²⁴ See for example Luc Huyse 1995 “Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past”, *Law and Social Inquiry* 1995, Vol. 20(1) Winter; Jamie Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?* 12 *Human Rights Quarterly* 1 (1990); Tina Rosenberg, *The Haunted Land: Facing Europe’s Ghosts after Communism* (New York: Random House, 1995); Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (New York: Pantheon Books, 1990); Timothy Garton Ash, *The File: A Personal History* (New York: Random House, 1997).

²⁵ See for example, “State Crimes: Punishment or Pardon”, Papers and Reports of the Conference Nov 4-6 1988, The Justice and Society Program of the Aspen Institute, 1989.

²⁶ Richard Lewis-Siegel, “Transitional Justice: A Decade of Debate and Experience”, *Human Rights Quarterly* 20 (1998):435.

Paige Arthur uses the 1988 Aspen Conference as her point of departure in developing a “Conceptual History of Transitional Justice”.²⁷ She goes into extensive detail in analysing the conference themes and input and finds that the conference reflects a certain conception of justice. This conception of justice is premised on “two normative aims: achieving justice for victims, and achieving a more just, democratic order”.²⁸ Arthur develops this line of thought and ultimately finds that it is this second normative aim of “facilitating a transition to democracy” that makes the field of transitional justice distinctive” from other human rights concerns.²⁹ We shall return to Arthur’s assertion in due course.

The three-volume work edited by Neil J. Kritz is in many ways an extension and development of the Aspen conference deliberations. Kritz’s volumes remain perhaps the most comprehensive collection that deals specifically with transitional justice.³⁰ Volume I explores what Kritz calls “General Considerations” ranging from issues around accountability and moral responsibility to treatment of victims. Volume II is dedicated to “Country Studies” with experiences from thirty five countries examined. Volume III is focussed on “Laws, rulings and reports” with a sample of key founding documents and primary texts. With a foreword by then President Nelson Mandela the Kritz collection represents a key step in the development of transitional justice as a distinct field of study.

Another significant development has been the formation of various non-governmental organisations aimed specifically at dealing with transitional justice issues. In 2001 the International Center for Transitional Justice was formally established “on the concept of a new direction in human rights advocacy: helping societies to heal by accounting for and addressing past crimes after a period of repressive rule or armed conflict”.³¹ In 2007 a specialised journal on transitional justice was launched as a way of promoting scholarship

²⁷ See Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” *Human Rights Quarterly* 31 (2009).

²⁸ Arthur 2009:357.

²⁹ Arthur 2009:358.

³⁰ Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 3 Vols. (Washington, DC: United States Institute of Peace Press, 1995).

³¹ As cited on the ICTJ website “Mission and History”, <http://www.ictj.org/en/about/mission/>.

from the global South on transitional justice issues.³² Domestically, an important development is the inclusion of transitional justice as a recognised research area by the South African National Research Foundation.

These and other developments have coincided with a sizable growth in literature dealing with transitional justice issues. This literature delineates and characterises transitional justice as a distinct field of study in terms of a particular set of *themes & issues*; in terms of a certain *normative and conceptual framework*; a set of *emergent principles* and also in relation to established fields (e.g. criminal justice / international law) from which it diverges and overlaps.

Kritz' work is probably one of the clearest examples of the approach that examines transitional justice in terms of themes and issues. This three volume collection includes contributions from a wide array of scholars and amounts to a balanced representation of key critical issues. Some of the themes and issues covered include - How Circumstances Shape the Available Options; Prospects for a Democratic Transition; Accountability and Moral Responsibility; Documenting the Former Regime; Criminal Sanctions; Responsibility of Superiors and Subordinates; Non-Criminal Sanctions and Treatment and Compensation of Victims.³³

David A. Crocker's work on transitional justice sets out a "normative framework for reckoning with past wrongs".³⁴ This framework is structured around eight goals or norms that Crocker identifies as important ethical issues that require attention if a society is to meaningfully deal with its violent past. He notes that most of the work that has been done on transitional justice has been of an empirical and strategic nature with legal scholars and social scientists dominating the literature.³⁵ While Crocker notes the value of these inputs he suggests that there is also a need for ethical issues relating to transitional justice to also be dealt with; and these issues cannot be adequately addressed by legal scholars or

³² See International Journal of Transitional Justice, <http://ijtj.oxfordjournals.org/>.

³³ This list is a summation of the Table of Contents from Kritz's first volume.

³⁴ Crocker, "Transitional Justice and International Civil Society" *Constellations* 5 (1998); Crocker, "Reckoning with Past Wrongs." *Ethics and International Affairs* 13 (1999); Crocker, "Truth Commissions, Transitional Justice and Civil Society," in *Truth v. Justice* (2000).

³⁵ Crocker 1999:45.

social scientists without input from philosophers and applied ethicists. The kind of ethical considerations that Crocker seeks to address concern the question of how ‘success’ ought to be viewed within the scope of transitional justice measures; and whether the means employed in transitional justice endeavours are in fact consistent with the ends achieved. Crocker discusses these and other ethical considerations through turning his attention to what he identifies as eight goals of transitional justice; truth, public platform for victims, accountability and punishment, rule of law, compensation to victims, institutional reform and long-term development, reconciliation and public deliberation. Throughout Crocker’s discussion he displays a strong appreciation for the need to balance the goals of transitional justice and the need to concede certain trade-offs.

José Zalaquett also offers a normative framework for dealing with what he calls “transitional political situations”.³⁶ His framework prioritises the tandem goals of prevention of future atrocities and the reparation of the damage done. Significantly, Zalaquett suggests that “objectives such as retribution or revenge, cannot be considered legitimate” because these objectives contradict the values contained in the Universal Declaration of Human Rights.³⁷ For Zalaquett any attempt to deal with past human rights abuses must fulfil three non-negotiable conditions in order to be deemed legitimate – the truth must be known, the policy must represent the will of the people and the policy must not violate international human rights law.³⁸

Whereas the likes of Crocker and Zalaquett have approached transitional justice in terms of a normative conceptual framework, others have approached transitional justice in terms of emerging principles. Juan Méndez locates the substance of the transitional justice debate in terms of “what is required, what the choices are, and how we should sort out the ethical, legal and political consequences of these choices”.³⁹ He goes on to discuss four guiding principles that have emerged within the field and can assist in terms of

³⁶ Jose Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints” in *State Crimes: Punishment or Pardon* (Aspen Institute, 1989).

³⁷ Zalaquett 1989:27.

³⁸ Zalaquett 1989:28-30

³⁹ Méndez “In Defense of Transitional Justice” 1997:4.

making the above-mentioned choices.⁴⁰ Méndez's principles apply specifically to the question of whether or not to prosecute those responsible for human rights violations. While he does note that prosecutions are not the only transitional justice mechanism and that truth telling and reparations are also important mechanisms, his "defence of transitional justice" hinges on criminal prosecutions and the guiding principles relevant in terms of prosecutions.

The distinctiveness of transitional justice has also been articulated by way of its relation to the fields of criminal justice, international human rights law, conflict resolution and democratic transition and consolidation. Miriam J. Aukerman approaches transitional justice by establishing a framework that views the goals of transitional justice in terms of criminal justice.⁴¹ Aukerman employs this criminal justice lens so as to critically explore the distinction between ordinary crime (as the subject matter of criminal justice) and human rights violations or "radical evil"⁴² (as the subject matter of transitional justice). She frames transitional justice within the context of criminal justice in terms of the goals of prosecution and asks whether prosecution is the best option for contexts of transitional justice. Aukerman sets out the goals of ordinary criminal prosecutions and then inquires as to whether these goals are on par with the goals of transitional justice. For Aukerman the entry point for discussing transitional justice is the field of criminal justice. For others like Ruti Teitel the entry point for discussing transitional justice is its relation to the field of international human rights law.⁴³

Others suggest that not only is transitional justice related to other fields, but it is a distinctively interdisciplinary field of inquiry. It is argued that this interdisciplinary nature is due to the fact that the requirements of transitional justice are such that existing models of justice need to be adapted in order to meet these requirements.⁴⁴ The actors

⁴⁰ See Méndez 1997:4-21.

⁴¹ Aukerman, 2002 "Extraordinary Evi, Ordinary Crime: A framework for understanding transitional justice", *Harvard Human Rights Journal* 15:39-97.

⁴² Immanuel Kant was the first to coin the term "radical evil". It has subsequently been taken up by Hannah Arendt and Carlos Nino.

⁴³ Ruti Teitel, *Transitional Justice*, 2000.

⁴⁴ See Rama Mani, "The Three Dimensions of Justice in Post-conflict Peacebuilding", in *Beyond Retribution: Seeking Justice in the Shadows of War*, 2002:3-22.

involved in transitional justice (victims, perpetrators, collaborators, bystanders and beneficiaries) have very specific needs when it comes to justice and this necessitates a distinct conception of justice that differs from existing models.⁴⁵ Furthermore, the transitional setting itself poses certain limitations on the range of accountability measures that the new government can realistically pursue. Certain economic, legal, political and ethical constraints add to the unique demands of transitional justice.

Transitional justice represents a complex and multi-faceted field of research. This interdisciplinary approach importantly acknowledges that there are legal, ethical, political and economic dimensions to the task of “dealing with the past”, and that no one discipline can on its own meet the requirements of transitional justice.⁴⁶ Writing in the late 1990s Martha Minow contributes to this interdisciplinary approach through her thoughtful accounts of different responses to mass atrocity in *Between Vengeance and Forgiveness*. She does not use the term ‘transitional justice’ but her treatment of trials, truth commissions, reparations and history education reflect a thread of continuity in that all are responses to mass atrocity. Minow’s contribution to the field is precisely her own admission of “the incompleteness and inescapable inadequacy of each possible response to collective atrocities” and therefore the challenge of crafting new creative responses.⁴⁷

This brief discussion explains our contention that transitional justice does represent a distinct field of study. And that this distinctiveness lies in the self-limiting nature of transitional justice. Renowned human rights activist José Zalaquett has remarked that truth and justice initiatives need to be self-limiting.⁴⁸ Following a period of political violence and oppression the particular society is confronted with many issues that require attention. The task of transitional justice is to promote accountability and

⁴⁵ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004.

⁴⁶ Christine Bell has recently challenged the “conception of transitional justice as a praxis-based interdisciplinary field”. Instead she suggests that transitional justice could be conceived as a “cloak that covers a range of particularised bargains on the past”. As the term suggests, for Bell this “cloak” obscures more than it reveals about the underlying assumptions and implications involved in these different “bargains” or modes of dealing with the past. See Bell, (2009) “Transitional Justice, interdisciplinarity and state of the ‘field’ or ‘non-field’”, *International Journal of Transitional Justice* 3(1): 5-27.

⁴⁷ Minow 1998:5-6.

⁴⁸ Jose Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints” in *State Crimes: Punishment or Pardon* (Aspen Institute, 1989).

acknowledgement in the wake of this violence. The important issues relating to socio-economic justice and long term transformation are no less pressing but cannot be dealt with in self-limiting terms and are on our reading, not the concern of transitional justice as a field of study.

As noted earlier, Arthur suggests that the distinctiveness of transitional justice lies in its normative aim of “facilitating a transition to democracy”.⁴⁹ Given more recent transitional justice experiences Arthur questions the extent to which this distinctiveness still holds. She queries whether transitional justice scholars and practitioners should develop different mechanisms for dealing with transitions other than those from authoritarianism to democracy. For Arthur the standard transitional justice mechanisms like “prosecutions and vetting are unlikely to be adequate measures in a post –conflict setting, where the problem of ex-combatant reintegration requires at least consideration of local-level restorative justice approaches”.⁵⁰ Arthur also queries the extent to which transitional justice is applicable to contexts of historical injustice along the lines of “long term, systematic marginalization, over centuries” like the legacies of slavery and colonialism. She contends that it might be the case that transitional justice is particularly “designed for the brief duration of a political transition” whereas long term legacies of oppression require different responses in the form of redress and transformation.⁵¹ Jon Elster seems to share this caution in his separation of transitional justice from broader concerns of distributive justice.⁵² We follow this logic.

1.2 Watershed Moments within the Development of Transitional Justice

While the previous discussion has shed some light on the nature of transitional justice as a distinctive field of study, further discussion is required in order to establish a

⁴⁹ Arthur 2009:358.

⁵⁰ Arthur 2009:360.

⁵¹ See Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” *Human Rights Quarterly* 31 (2009):362. We note that conceiving of transitional justice in limited terms does depart from current trends in the literature. See a recent ICTJ publication, *Transitional Justice and Development: Making Connections*, (eds), Pablo de Greiff and Roger Duthie (Social Science Research Council: New York, 2009).

⁵² Jon Elster, “Justice, truth, peace” *Forum for International Criminal and Humanitarian Law Publication Series*, Law in Peace Negotiations, No 5 (2009:21-28). Available online at [http://www.prio.no/upload/FICHL/090325%20FICHL%205%20\(law%20in%20peace%20negotiations\).pdf](http://www.prio.no/upload/FICHL/090325%20FICHL%205%20(law%20in%20peace%20negotiations).pdf)

framework for investigating restorative justice. This section will therefore discuss four watershed moments within the development of the field of transitional justice. These watershed moments include the Nuremberg Trials, the Latin American truth processes of Argentina and Chile, the South African Truth and Reconciliation Commission, and the establishment of international justice mechanisms leading up to the advent of the International Criminal Court. The aim of this discussion is to gain a sense of how these developments have impacted the understanding of *justice* within the field of transitional justice. This kind of focussed inquiry into the four watershed moments will further assist in establishing a framework for exploring the relevance and significance of restorative justice for transitional justice.

1.2.1 Nuremberg Trials⁵³

It is important to reiterate the distinction between Nuremberg as a historical event and the principles established by Nuremberg. In terms of the former, the tribunals were flawed and problematic on many levels. However, in terms of the latter, some important contributions were made to the conception of justice. It is widely recognised that the Nuremberg Trials played a decisive role in the development and application of international law.⁵⁴ For our current purposes we will focus on what Nuremberg has come to represent as a model of *justice* in the field of transitional justice.

In order to sufficiently understand the contribution of Nuremberg it is necessary to note how accountability and amnesty featured in the traditional approach of international law. Prior to Nuremberg international law was largely governed by legal positivism, perhaps first articulated in the Treaty of Westphalia.

Following the thirty years war the Treaty of Westphalia was signed in 1648. The treaty awarded independence to the 343 separate states and cities within the Empire. Calvinism was recognised as an official alternative to Lutheranism and many of the territorial

⁵³ This generic term includes the original war crimes tribunal held 1945-1946 and the twelve minor tribunals held from December 1946-April 1949.

⁵⁴ See Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law* 2001:3-22. For an opposing view see Judith Shklar, *Legalism*, 170-171.

disputes were settled.⁵⁵ The Treaty of Westphalia (1648) is significant in terms of the development of transitional justice due to the introduction of the concept of a sovereign state governed by a sovereign. The Treaty established a precedent making the state the sole holder of external sovereignty, making interference in other states' governance illegitimate.⁵⁶ The Westphalia precedent implied that international law must work within the framework of national sovereignty. Political leaders of state parties could therefore not be subject to international law. In the event that a political leader was responsible for ordering and planning gross human rights violations, only national courts could try the political leader. Given that this would be highly unlikely, the treaty and its approach to state sovereignty entailed impunity for political leaders.

It was only with the Nuremberg Tribunals following World War II that the Westphalia precedent was finally broken.⁵⁷ Firstly, by noting that international law does apply to individuals. Secondly, through establishing the principle that a court could intervene in another society in the case of *crimes against humanity*.

This category of crimes against humanity represented a new invention. The categories of 'crimes against peace' and 'crimes of war' had long been recognised in the Just War tradition.⁵⁸ The significance of Nuremberg was as an actual application of these traditional notions in an international tribunal, and so to the development of international law.⁵⁹ It is important to note that the deviation from the Just War tradition implied a limitation to the context of international law only; the "internal" human rights violations by the Nazi-government of Jews prior to World War II could not be prosecuted as crimes against peace or war crimes. It was to overcome this limitation that the notion of "crimes against humanity" was added.

⁵⁵ Maland 1973.

⁵⁶ Philpott, Dan, "Sovereignty", *The Stanford Encyclopedia of Philosophy* (Winter 2009 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2009/entries/sovereignty/>

⁵⁷ Ratner and Abrahams 2001:6.

⁵⁸ Ratner and Abrahams 2001:4.

⁵⁹ See 'The Nuremberg Principles' in Belinda Cooper, ed. *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999):339-340.

The notion of “crimes against humanity” challenged the dominant legal positivist framework and has since been taken up into transitional justice discourse as well as the prevailing approach of international law.⁶⁰ The category of “crimes against humanity” also challenged the defence of “due obedience” or “superior orders” by stating that these crimes are of such a nature that the due obedience defence does not suffice. It represented a major development in international human rights law. The traditional approach of international law and the primacy this accorded to the principle of national sovereignty in conjunction with the prevailing notions of “due obedience” and “superior orders” ensured an effective impunity to state agents responsible for human rights violations. In principle sovereign states could always grant amnesty to their own official agents and within the positivist framework of international law that could not be challenged by external parties. So Nuremberg's challenge to the “superior orders” defence for war crimes and crimes against humanity effectively amounted to a challenge to the traditional principle of national sovereignty and the effective extension of amnesty to state agents. This extension of principles of retributive justice beyond the traditional limits of positivist international law had a significant impact on the notion of justice.

Nuremberg essentially assumed and involved a notion of *retributive* justice and the utilisation of the *criminal justice* system as the relevant forum of transitional justice (in contrast to prevailing instances of *popular justice* in the post WWII context as well as an alternative to the summary executions as a form of *political justice* which had initially been considered by the Allies in anticipation of the end of the war). From a human rights law perspective other issues, such as the new precedents in extending criminal prosecution to official agents contrary to their traditional protection by national sovereignty, are indeed important. However, for our purposes it is the understanding of *justice* that needs to be highlighted. And in the case of Nuremberg, whatever its revolutionary significance for international law, that remained very much the notion of retributive justice in the context of (an extended) criminal justice system, i.e. “prosecute

⁶⁰ See Richard Goldstone, *Prosecuting War Criminals* (London: David Davies Memorial Institute of International Studies, August 1996), occasional paper no.10, p.2.

and punish" rather than the concerns of restorative justice with an emphasis on reparation and reconciliation.

1.2.2 Latin American Transitions

In this section we will explore the transitional justice experiences of Argentina and Chile and how understandings of justice evolved and developed in each context. In both cases the transitions did not arise by way of a complete overthrow or military defeat. The new transitional governments were therefore faced with the task of crafting effective mechanisms for justice while at the same time not jeopardising the fledgling democracy.

Argentina

Following the military coup of Isabel Peron on March 24 1976 Argentina entered "the most repressive authoritarian regime in Argentine history. Popular indignation with the regime's massive human rights violations, coupled with the military's defeat at the hands of the British in the Malvinas (Falklands) War and economic disaster, forced the military to call free elections in 1982. President Raul Alfonsin won and assumed office in December 1983".⁶¹ It has been estimated that over 9 000 Argentines were abducted, tortured, and killed under the military junta.⁶²

The transitional justice measures in Argentina were official and comprised of both criminal trials and a truth process. The generals were prosecuted successfully but when attempts were made to prosecute the lower ranking foot soldiers then the military (who still wielded significant power), threatened a rebellion. The new government then decided to offer amnesty.⁶³

⁶¹ Nino, *Radical Evil on Trial* 1993:43.

⁶² Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. (Oklahoma: University of Oklahoma Press, 1991), 142.

⁶³ See a full account of these developments in Alexandra Barahona de Brito, "Truth, Justice, Memory and Democratization in the Southern Cone" in Alexandra Barahona de Brito (ed), *The Politics of Memory* (2000), 119-124.

The National Commission on the Disappearance of People (CONADEP) conducted closed hearings to investigate the “disappearances” and other gross human rights violations perpetrated under the military junta. The final report entitled *Nunca Más* (Never Again!) was completed in 1984 and published in English in 1986 and revealed the commission’s findings regarding disappearances, torture centres and the extensive collaboration of citizens with the regime.⁶⁴ It is significant that CONADEP, while primarily a victim-oriented truth process, to begin with did not function as an alternative to criminal prosecutions of the perpetrators. Rather it was conceived as a parallel operation preparing the way for criminal trials, and the findings of the Commission were handed over to the prosecuting authorities for follow-up action. Even so the publication of the *Nunca Más* report which detailed the truth process, made a major public impact in its own right. When the criminal prosecutions subsequently came unstuck and the civilian government eventually was forced to grant amnesties the significance of the Commission and the truth process remained. Though perhaps not quite intended as such the Commission thus came to have a major role in the Argentinean transitional justice experience.

Following the Commission the military’s self-amnesty laws were repealed and allowed the commencement of trials of the junta leaders. The first round of trials saw nine junta leaders convicted of over seven hundred human rights violations.⁶⁵ Human rights organisations were adamant that prosecutions should not stop there and by December 1986 over six thousand cases were due to be heard.⁶⁶ Significantly, the Alfonsín government initially attempted to avoid a direct confrontation with the military by getting them to conduct the prosecutions themselves through their own military tribunals.⁶⁷ When the military was not prepared to play their allotted part in this the prosecutions reverted to the civilian courts leading to the escalation of thousands of prospective cases by the end of 1986. In turn, the threat of prosecution now not only for the top members of

⁶⁴ Report of Conadep (National Commission on the Disappearance of Persons), Farrar Straus Giroux: New York, 1986.

⁶⁵ Alexandra Barahona de Brito, “Truth, Justice, Memory, and Decmocratization in the Southern Cone”, in *The Politics of Memory* (2000):122.

⁶⁶ Ibid.

⁶⁷ See Carlos Nino’s account of Alfonsín’s strategy in Nino, *Radical Evil on Trial* 1996: 68-104.

the junta but also of other ranks of military officers lead to the Easter Rebellion, and the civilian government backing down by introducing the Full Stop Law on 23 December 1986. This was a necessary compromise forced on the civilian government by the threats of military backlash. This law placed a deadline of sixty days within which to bring cases before a final cut off. Rather than minimise the case load the Full Stop Law actually had the reverse effect of encouraging human rights organisations to bring even more cases.⁶⁸ The situation worsened when the military embarked on a series of uprisings with the intent being to pressurise the government into halting the prosecutions. Ultimately this is exactly what happened when in June 1987 the Law of Due Obedience was passed thereby preventing the prosecution of low ranking officials.⁶⁹

The relevant understanding of *justice* involved in the Argentinean criminal trials was that of retributive justice consistent with the Nuremberg model. The difference with Nuremberg was, of course, that the context was not that of international justice but played itself out in the national political arena where the civilian government and the judiciary, though supported by a strong human rights movement pushing for trials and prosecutions, had to reckon with the still considerable power base of the military. The Argentine experience is an interesting illustration of how the residual power of the outgoing regime (the military junta) can pose a serious threat to transitional justice processes. For our current purposes the key question is whether the Alfonsín government's Law of Due Obedience represented a shift in the understanding of *justice*. Arguably the Law of Due Obedience involved an attempt to introduce a limited form of effective amnesty for certain categories of perpetrators. This represents quite a shift from Nuremberg's rejection of "due obedience" and "superior orders" as justifications for human rights violations. It could be argued that this Law of Due Obedience and the limited amnesty it offered represents a limitation of retributive justice due to concerns with political stability.

⁶⁸ Ibid., 123.

⁶⁹ Ibid.

The obvious question is why the transitional government had been so dedicated to pursuing truth and justice at the outset, and then become more and more reluctant as time went by. Right from the start President Alfonsín described the overall aim of his approach as an endeavour geared “not so much to punish as to prevent”.⁷⁰ This quote may reflect that Alfonsín may have had an awareness of the overall context and therefore prioritised certain objectives for the transitional justice process. Alfonsín’s objectives were perhaps different to those of civil society in that, the Alfonsín government, unlike the human rights movements, were not solely committed to a retributive justice approach.

The Argentine case reflects an interesting ambivalence in terms of the relevant understandings of justice. On one level the Argentine experience was characterised by a strong commitment to criminal prosecutions and retributive justice similar to the Nuremberg model. While on another level the Commission also initiated a momentous truth process while the criminal justice efforts were overtaken by enforced compromises involving amnesty.

Chile

The Chilean transition was preceded by more than sixteen years of repressive military rule involving extensive detentions, torture and disappearances of political opponents.⁷¹ In March 1990 Patricio Aylwin was elected as the first civilian president. The Chilean transition involved a complex process leading from economic liberalisation, some political reforms, the unintended outcomes of referenda to a controlled restoration of civilian government with the military withdrawing from direct political interference but retaining extensive security powers and insisting on amnesty for themselves as a condition of allowing democratic elections.⁷² Huntington classifies the Chilean transition as a top-down liberalisation that saw the military still in position of significant power

⁷⁰ Raul Alfonsín, “Never Again in Argentina”, *Journal of Democracy* Vol.4, 1993:15.

⁷¹ See *Report of the Chilean National Commission on Truth and Reconciliation*, Notre Dame: University of Notre Dame Press, 1993.

⁷² See Alexandra Barahona de Brito, “Truth, Justice, Memory, and Decmocratization in the Southern Cone”, in *The Politics of Memory* (2000):131-135, 146-151.

with General Augusto Pinochet still as head of the army.⁷³ The sustained military autonomy meant that with Pinochet still commander-in-chief he had economic and political clout that set decided limits on the extent and powers of civilian rule.⁷⁴

The amnesty enjoyed by the armed forces was stipulated as a condition for civilian rule and precluded possible prosecutions of the military perpetrators responsible for the torture, deaths and disappearances since 1972⁷⁵. This meant that any attempt to “deal with the past” could not be launched in the name of retributive justice focused on perpetrators but could at best be victim-oriented in a non-prosecutorial context. These constraints meant that “truth”, rather than (retributive) “justice” became the key concern of the Chilean transitional justice process.

At the time of transition Chilean society was buoyed by a very strong human rights movement. The influence of these human rights organisations was enhanced by the alliance formed with President Aylwin. A presidential decree established the Chilean National Commission for Truth and Reconciliation. It is significant that the Chilean commission was the first to use the designation *Truth and Reconciliation Commission*. Compared to the Argentine Commission the use of *Truth* in the name of the Commission was also significant. Most significant, though, was that the Chilean Commission was appointed in a context where there could not be any prospect of criminal prosecutions of perpetrators.

The mandate of the commission was aimed at forming as comprehensive a picture as possible of the antecedents, circumstances and evidence surrounding the violations of human rights that had been committed under the military dictatorship. Due to the clandestine nature of the atrocities the commission was also charged with uncovering the fate of the many disappeared persons. Popkin and Roht-Arriaza note that the commission’s mandate was specifically focussed on death and disappearances, not on

⁷³ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. (Oklahoma: University of Oklahoma Press, 1991).

⁷⁴ Margaret Popkin and Naomi Roht-Arriaza, “Truth as Justice,” *Law and Social Inquiry* 20 (1995):84.

⁷⁵ Alexandra Barahona de Brito, “Truth, Justice, Memory, and Decmocratization in the Southern Cone”, in *The Politics of Memory* (2000):131-135.

torture.⁷⁶ The exclusion of torture is closely linked to the power the military still enjoyed and how this impacted the limited nature of the "truth" process that was undertaken. In the case of torture surviving victims could testify to what had happened, but in the case of unexplained deaths and disappearances there were no surviving victims available to testify to the role of the military.

Another key focus of the commission was to make recommendations regarding reparations and preventative measures. The Chilean commission is often signalled out for its extensive reparations programme.⁷⁷ In February 1992 the National Corporation for Reparation and Reconciliation was established to administer monthly pension payouts, medical benefits and education subsidies to those affected by the atrocities of the past.⁷⁸ Aside from reparation programmes the commission also made recommendations for human rights education initiatives, institutional reform and memorialisation initiatives. For our purposes it is worth pondering to what extent this focus on reparation can be linked to the Commission's mandate in terms of a more general restorative mission.

It is interesting to note that Zalaquett as a key member of the Chilean truth commission argues that the limited focus of the Commission was not just a matter of an externally imposed limitation, instead he emphasises that the Chilean truth process amounted to a *self-limiting project*. On the one hand this is connected to Zalaquett's critique of the Argentinean transitional justice process as having failed due to having been over-ambitious (i.e. attempting to take on the military in criminal prosecutions when the power balance did not allow that). On the other hand, it is related to the relevant priority of "justice" and "truth" as primary principles and objectives. A certain reading and interpretation of the Chilean transitional justice process assumes that "justice" was and should be the primary principle and objective, failing which the Chileans had to settle for a more limited and constrained "truth" process. It is against this that Zalaquett reverses

⁷⁶ Popkin and Roht-Arriaza, 84.

⁷⁷ Kritz refers to the Chilean case as "exceptional" due to the interplay of a relatively small amount of victims coupled with a healthy economy. "Where We Are and How We Got Here", 2002:44.

⁷⁸ Popkin and Roht-Arriaza, 86.

the priorities and articulates the primary goal of the commission as the pursuit of “the truth, and justice to the extent possible”.⁷⁹

The Chilean truth commission was framed in terms of the objectives of “reparation and prevention”, utilising the means of “truth and justice” with the end result being “genuine reconciliation” and “a lasting social peace”.⁸⁰ From a broader transitional justice perspective the Chilean experience represents a key moment in terms of shifting from a wholly retributive paradigm towards an approach to justice that is more focussed on restoration and reconciliation.

1.2.3 South African TRC

The apartheid era saw millions of black South Africans endure the worst kind of daily discrimination and oppression.⁸¹ This systemic injustice was augmented by widespread gross human rights violations perpetrated by state personnel against anti-apartheid activists. These violations included torture, abduction and killings. The anti-apartheid struggle eventually responded with violent means, after initially pursuing non-violent options. Prior to the negotiated settlement of the early 1990s the situation in the country was of such a precarious nature that many deemed the conflict intractable. It is no small matter that the architects of the transition were able to navigate a relatively peaceful transition. Most accounts of the negotiations and the peaceful elections that followed do in fact use the term “miracle”. It is against this backdrop that the TRC needs to be understood.

Within the transitional justice literature the South African transitional justice experience is signalled out as exceptional and precedent setting for various reasons, chiefly due to the amnesty invention of the South African TRC and the way in which this invention was

⁷⁹ Jose Zalaquett, “Introduction to the English Edition”, *Report of the Chilean National Commission on Truth and Reconciliation* (1993), Vol. 1, xxxi.

⁸⁰ *Ibid.*, xxx.

⁸¹ For a thorough account of the history of oppression and human rights abuses in South Africa see “From Afrikaner State to an African State (1945-2005)” in *New History of South Africa*, Hermann Giliomee and Bernard Mbenga, eds. (Cape Town: Tafelberg, 2007), 306-416.

interpreted. Compared to the Chilean transition the South African case crucially involved a negotiated settlement with different implications for the amnesty and truth processes. The importance and nature of this negotiation process is often neglected in accounts of South Africa's transition.⁸² While a full discussion of this complex negotiation process is beyond the scope of this current discussion, it must be noted that the TRC process and the accompanying amnesty are direct outgrowths of the preceding negotiation processes.

A helpful starting point in discussing the South African TRC is the Postamble to the Interim Constitution. The Postamble speaks of addressing the past with the recognition

“that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. In order to advance such reconciliation and reconstruction, **amnesty** shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the **mechanisms, criteria and procedures**, including **tribunals**, if any, through which such amnesty shall be dealt with at any time after the law has been passed”.⁸³

For the purpose of our enquiry there are at least three key points that emanate from the Postamble. Firstly, the Postamble explicitly frames the process in terms of an acknowledged need for “dealing with the past”. In other words, the process is *not* primarily framed in terms of “justice” or even of “truth” but rather in terms of a political understanding of the need for “reconciliation”. In light of the Nuremberg, Argentine and Chilean models this represents a significant departure. Secondly, it may be noted that amnesty is presented not as an externally imposed constraint due to the power of the military as in Chile, but as part and parcel of the negotiated settlement. Even so, it obviously implied significant constraints on the new sovereign legislature of the new democracy. While the specifics of the amnesty procedures were left open for determination by Parliament the sovereign legislature was bound by the amnesty agreement written into the Interim Constitution. Thirdly, it is crucial to note that the

⁸² Two exceptions are Christi van der Westhuizen, *White Power and the Rise and Fall of the National Party* (Cape Town: Zebra Press, 2007) and George Lawson, *Negotiated Revolutions* (Aldershot, Ashgate, 2005).

⁸³ Postamble, Interim Constitution (Act no 200 of 1993).

Postamble did *not* provide for a Truth Commission or truth process. That was subsequently added by parliament and the Government of National Unity and explicitly based on the key formulations of the Postamble but it was not required by the Postamble itself.

It is also important to keep in mind that the Postamble itself emerged out of intense processes and discussions facilitated by South African civil society actors. Moreover a rigorous parliamentary process saw extensive debate in the run up to the formulation of the TRC legislation. We shall return in the discussion to follow to key moments in these parliamentary debates.

There are many unique aspects of the South African TRC that set it apart from other truth commissions; however a discussion of these aspects is not directly relevant to our current purposes.⁸⁴ We are reviewing the South African TRC as a watershed moment in the development of transitional justice. To this end we will focus on the amnesty provisions of the TRC as this has continued significance for the way in which justice is conceived in transitional contexts.

The amnesty offered was unique in its conditionality.⁸⁵ Previously amnesties typically took the form of general or blanket amnesties by sovereign decree. As such amnesty both ensured that perpetrators would have impunity in not being accountable under the law and effectively prevented truth processes. On both counts the South African version differed significantly. It required perpetrators to make individual applications and to meet the requirements and procedures of quasi-legal tribunals. And it built in a truth-process through the requirement of full disclosure. In these ways the significance and implications of the South African amnesty are quite different within a transitional justice perspective and for an understanding of the notion of *justice* involved.

⁸⁴ For a comparative overview see Priscilla Hayner, "Same species, different animal: how South Africa compares to truth commissions worldwide", in Charles Villa-Vicencio & Wilhelm Verwoerd eds., *Looking Back Reaching Forward* (2000), 32-41.

⁸⁵ Alex Boraine, *A Country Unmasked* (2000): 275-276.

Perhaps the legacy of the South African TRC is the manner in which the truth commission model was able to serve as a legitimate alternative to prosecutions without being deemed a second best option. In the 1995 parliamentary discussions in the run up to the TRC then Minister of Justice Dullah Omar made a significant statement framing the amnesty provision as consistent with the goals of promoting the rule of law and human rights. For Omar, the amnesty as tied to the TRC's "victim-centred" approach meant that the country could "deal with our past on a morally acceptable basis and make it possible to establish the rule of law". The rule of law would be established "on the basis of the recognition of human rights and the building of a human rights culture". Omar concluded, "we are building a future for South Africans" and as "there is a conflict between what the international community is saying and what is in the interests of the people of South Africa then I think that we will have to live with that kind of conflict".⁸⁶ Omar's statement was uttered in response to the submission by Amnesty International that questioned the extent to which the proposed amnesty provision would amount to a contravention of international law. Omar's suggestion that the amnesty provision was in fact in favour of human rights and rule of law - only differently conceived, is reflected in other accounts of the TRC as a "different kind of justice"⁸⁷ or a "third way".⁸⁸

Another aspect in which the TRC advanced a different understanding of justice is through the links made between truth and justice. The TRC Report identifies four senses of truth⁸⁹. 1) factual / forensic truth as evidence and information which is objectively verifiable. 2) Personal / narrative truth which could be stories and personal accounts or memories which may not be verifiable but have important value. 3) Social / dialogical truth – Albie Sachs refers to this kind of truth as the "truth of experience that is

⁸⁶ Dullah Omar, Testimony delivered to Parliament's Joint Committee on Justice with regards to the Promotion of National Unity and Reconciliation Bill, 31 January 1995, 55, Archives of Parliament, Cape Town.

⁸⁷ Charles Villa-Vicencio (1999) "A Different Kind Of Justice: The South African Truth and Reconciliation Commission," *Contemporary Justice Review* 1(4), 407-428.

⁸⁸ Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way" in Robert I. Rotberg and Dennis Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 141-157.

⁸⁹ See *TRC Report*, Volume 1, 1998, Chapter 5 par. 29-52.

established through interaction, discussion and debate”.⁹⁰ And then 4) Healing / restorative truth which suggests that through acknowledging the truth about past hurts some kind of healing or restoration is made possible.

The latter two senses of truth while possibly the most problematic and elusive of the senses of truth differentiated by the TRC, are the most pertinent for our current purposes. Writing after the victims’ hearings André du Toit sheds some light on how to understand how truth and justice featured in the TRC. Du Toit explores the moral foundations of the TRC by examining the TRC’s conceptions of *truth as acknowledgement* and *justice as recognition*.⁹¹ Du Toit explains *justice as recognition* as involving the “restoration of the human and civic dignity of victims”.⁹² While du Toit does not explicitly refer to ‘restorative justice’ he does make a clear distinction between *justice as recognition* and other senses of justice, criminal or distributive.

It is important to keep in mind that the amnesty and truth processes were not really connected. Amnesty was not decided on by the TRC commissioners but by the political elites during the negotiated settlement. The dual nature of the TRC process in terms of the largely separate truth and amnesty processes has resulted in an ambiguous dual legacy for the TRC, and perhaps for the notion of justice advanced by the TRC. The victim and amnesty hearings were quite different. The victims’ hearings were deliberately non-judicial in nature, objectives and procedures. A great deal of the interest and significance of the victim hearings was precisely in the extent to which they functioned as an *alternative* model to standard criminal trials, e.g. in being non-adversarial, victim-oriented rather than perpetrator-focused and not primarily committed to the requirements of due process and the rules of evidence. As against this the amnesty hearings were quasi-judicial, with procedures and objectives closer to those of criminal trials though not quite the “real” thing -- but also much less victim-friendly. The Commission’s

⁹⁰ Albie Sachs in Alex Boraine & Janet Levy (eds.), *The Healing of a Nation?* Cape Town: Justice in Transition, 1994:105.

⁹¹ André du Toit, “The Moral Foundations of the South African TRC. Truth as Acknowledgement and Justice as Recognition,” in Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 122-140. Du Toit clearly states that these conceptions relate specifically to the victims’ hearings.

⁹² *Ibid.*, 135.

commitment to perpetrator findings indicates a basic ambivalence in its approach to “justice”. While the TRC was widely taken to be not sufficiently committed to retributive justice (due to the amnesty process as well as the prominence of notions of reconciliation and restorative justice) the perpetrator findings amounted to a belated attempt to achieve some minimal version of retribution.

In this sense the TRC’s approach to transitional justice is marked by a residual ambiguity. This said, it remains the case that most interpretations of the TRC locate its focus in terms of a restorative understanding of justice. And, when viewed in contrast to the Nuremberg and Latin American cases, the notion of justice at play in the TRC is certainly more on the side of restorative than retributive.

1.2.4 International Tribunals - ICTY, ICTR, ICC

The question of the relevance and significance of international tribunals for transitional justice is largely an open question, and not without controversy. For some the growth and development of international law as a dominant response to gross human rights violations speaks to a hegemony of “Western” notions of retributive justice.⁹³ The question may be asked whether and to what extent the ICC, though no doubt a major development in international law should be regarded as part of the domain of transitional justice? The permanent court could be viewed as an attempt to “normalise” transitional justice processes and interventions and to establish a permanent and longer term framework for dealing with gross human rights violations rather than in the “exceptional” context of “transitions”.⁹⁴

Security Council Resolution 808 of 1993 saw the formal establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). Dusko Tadic was the first to be convicted in 1997; twenty eight more convictions were made by 2003. The ICTY has made serious inroads by trying high ranking Serb, Croat and Bosnian military

⁹³ See Helena Cobban, 2002 “The legacies of collective violence: the Rwandan genocide and the limits of the law,” *Boston Review*, 27(2).

⁹⁴ Ruti Teitel offers this appraisal of international justice mechanisms like the ICC, see her “Transitional Justice Genealogy” *Harvard Human Rights Journal*, Vol.16 Spring 2003.

officials, not least of which is the indictment of Slobodan Milošević. Security Council Resolution 955 of 1994 formally established the International Criminal Tribunal for Rwanda (ICTR). The ICTR issued the world's first conviction for genocide to Jean-Paul Akayesu for nine counts of genocide. Furthermore the ICTR succeeded in the first successful conviction of a former head of state Prime Minister Jean Kambanda.⁹⁵ Another significant development made by the ICTR was the inclusion of rape as part of the category of crimes against humanity.

These apparent successes aside, the establishment of the two temporary tribunals for Yugoslavia and Rwanda have been met with mixed reactions. On one score the tribunals reflect a strong message that state actors can no longer enjoy impunity – that the Westphalia precedent is broken. While on another score, the tribunals have been roundly criticised for being unhelpful interventions from outside actors with a particular agenda. It has also been argued that it is problematic that both the ICTY (The Hague) and the ICTR (Arusha, Tanzania) are geographically removed from the victims and citizens of the Balkans and Rwanda. This geographical dislocation is compounded by the fact that most of the staff are internationally sourced. While Kritz suggests that this international involvement is favourable as it guards against any accusations of 'victors' justice' it can also be argued that ultimately the lack of local involvement translates into a missed opportunity for much-needed institutional reform in both countries.⁹⁶

These weaknesses have been addressed by the establishment of so-called hybrid tribunals that combine the resources of the UN with local staff. Prominent examples to date are the Sierra Leone Special Court and the Iraqi Special Tribunal. However, one could argue that these hybrid tribunals address problems relevant to an international human rights law perspective, and not in terms of the broader transitional justice concerns.

⁹⁵ Geoffrey Robertson, 656.

⁹⁶ Neil Kritz, "Coming to Terms with Atrocities," *Law and Contemporary Problems*, Vol. 59, No. 4, (Autumn 1996):130. Interestingly Kritz revises this in a later edition of this article in an edited work by Alice Henklin, *The Legacy of Abuse*, 2002:29. In this article he argues that the local society should be prioritised over the international audience.

Regardless of these divergent opinions on the merits of the tribunals the fact remains, the formation of these tribunals reflects an assumption that transitional justice necessarily ought to entail legal justice and sanction. This preference for prosecutions has been further entrenched by the establishment of the permanent International Criminal Court. The Rome Conference of 1998 saw 120 states vote to adopt the statute of the ICC. The court was officially established on 1 July 2002 with the aim of ensuring global deterrence, developing standards of international law and curbing impunity for perpetrators of human rights violations. The Rome Statute obligates its signatories to investigate and prosecute genocide, crimes against humanity and war crimes.⁹⁷ While the significance of the ICC for International Law is clear, for our purposes the question concerns its relevance and significance for transitional justice.

The ICC differs from the ICTY and ICTR in at least three significant ways. Firstly the court's statute includes the principle of complementarity which ensures that the jurisdiction of the ICC does not eclipse national courts' jurisdiction. This is a significant point in ensuring that individual countries plot their own chart for transitional justice. The ICC's intervention is restricted to instances when the country in question is either unwilling or unable to investigate and prosecute cases.⁹⁸ Secondly the Rome Statute prohibits retroactive jurisdiction so only crimes committed after the ICC's inception (July 2002) can be investigated. This principle does place serious limitations on the scope of the ICC's investigative mandate, and has implications for the Court's relevance to transitional justice in that crimes prior to 2002 cannot be investigated. Also, only state parties fall under the ICC's jurisdiction. To date 91 countries have ratified the Rome Statute and hence become member state parties, there remain a further 50 countries that have signed but not yet ratified. The ratification of the Rome Statute requires that countries incorporate the substance of the statute into national legislation. A third important difference is that the ICC, unlike the ICTY and ICTR is independent of the United Nations. Where the ICTY and ICTR were created by the UN Security Council, the ICC came about through a multilateral treaty, the Rome Statute. It is also worth noting

⁹⁷ See Articles 6, 7, 8 of the Rome Statute for the respective definitions of these three categories. The Rome Statute is available online at www.icc-cpi.int/menus/ICC/

⁹⁸ Article 17 Rome Statute.

that the ICC differs from the International Court of Justice (ICJ) in that the ICC is able to prosecute individuals while the ICJ is restricted to civil prosecution.

Due to the prohibition against retroactive jurisdiction most of the ICC's interventions have mainly been in Africa. The Court has made three significant steps in Africa. Charges against the Court's first accused Thomas Lubanga have been confirmed and Lubanga has been moved to The Hague, arrest warrants have been issued to ICC suspects in Darfur,⁹⁹ and the third development relates to the impact of ICC intervention in the tense northern Ugandan peace negotiations.

The intervention of the ICC in the Northern Ugandan situation is highly controversial and in many ways illustrates the contrasting perspectives and requirements of transitional justice and international human rights law. Briefly put the controversy is due to a tension between local Ugandan organisations and groups who favour traditional justice mechanisms to address the human rights violations perpetrated during the country's long civil war and others (mostly international NGOs) who favour the intervention of the ICC and the indictment of key ringleaders of the conflict. These tensions will be fully discussed in Chapter Four, for our current purposes it is sufficient to note that transitional justice needs to be responsive to a far wider range of actors than international law. And that international tribunals are perhaps unable to achieve acknowledgement of a painful past as well as meaningful accountability. The resistance to the ICC's intervention in Northern Uganda affirms Arthur's point that by "placing decisions about justice squarely in the sphere of international law" the implication is "the dissolution of transitional justice itself".¹⁰⁰

The Ugandan case along with the DRC and Sudanese cases have yet to be resolved and this makes it difficult to make any firm conclusions about how the development of the international court has impacted on transitional justice. Certainly, the emphasis on criminal prosecutions does tie in to notions of justice that are retributive and adversarial.

⁹⁹ Geoffrey Robertson suggests that the definitive indication of the presence of international criminal justice lies in the Security Council's authorisation of ICC intervention in Darfur. Robertson, "Ending Impunity".

¹⁰⁰ Arthur 2009:363.

1.3 A Framing Account of Transitional Justice

This chapter has sought to develop a framing account of transitional justice that will serve as a canvas for the discussion of three different approaches to restorative justice.

Section one of this chapter explored the nature of transitional justice as a distinct field of study that is concerned with a distinguishable phenomenon. The distinctiveness of transitional justice as a field lies in its self-limiting character. Transitional justice is specifically concerned with dealing with gross human rights violations perpetrated by state actors against citizens and citizens against one another. The transitional justice project is not aimed at dealing with a general sense of past burdens nor with long histories of inequality, poverty and oppression. The transitional justice endeavour is more specific, located in the period after mass atrocity, the transitional justice endeavour is about prioritising a specific set of dilemmas that have to be dealt with in order to move on and tackle broader issues of injustice and transformation.

The transitional justice question then is what needs to be prioritised. The answer to this question will by necessity be contextual and will differ from place to place. One of the major dilemmas of transitional justice is that often there is a range of pressing needs and certain difficult choices will have to be made. These choices are often informed and influenced by certain constraints.

Moreover, as a distinct field of study, transitional justice is discussed in different ways ranging from a particular set of *themes & issues* to a certain *normative and conceptual framework*; a set of *emergent principles* and in relation to other established fields (e.g. criminal justice / international law). These different approaches make for a field that is interdisciplinary. This interdisciplinary nature is heavily influenced by the different actors involved in transitional justice - victims, perpetrators, collaborators, bystanders

and beneficiaries. These actors have different and at times even competing needs when it comes to justice and this necessitates a unique conception of justice.

Furthermore, the transitional setting itself poses certain limitations on the range of accountability measures that the new government can realistically pursue. Certain economic, legal, political and ethical constraints add to the unique demands of transitional justice. This was illustrated in section two by exploring the different approaches to justice at play in the watershed moments of the Nuremberg Trials, the Latin American truth processes of Argentina and Chile, the South African Truth and Reconciliation Commission, and the establishment of international justice mechanisms leading up to the advent of the International Criminal Court. These four watershed moments each carry certain significance in terms of different understandings of justice. Luc Huyse suggests that these turning points have led to “a move from a de facto dichotomy (impunity *or* trials) to multiple conceptions of justice and reconciliation – state and non-state instruments, legal, semi-judicial and non-judicial techniques”.¹⁰¹

During the Nuremberg trials the dominant understanding of justice was one closely aligned with a retributive perspective and the trials reflected an extension of retributive principles by way of extending criminal justice to international war crimes. This retributive understanding of justice was also evident in the truth and justice processes that followed the Argentine transition. The initial focus on criminal prosecutions was tempered by the residual power still in the hand of the military. The Alfonsín government was forced to compromise on prosecutions by granting the Law of Due Obedience which saw an effective amnesty to certain perpetrators. This placed a definite limitation on the expanded retributive approach to justice as pursued in the Nuremberg case. The Argentine transitional justice experience still employed a retributive approach to justice but this was tempered by concerns for political stability.

¹⁰¹ Luc Huyse, “Introduction: tradition based approaches in peacemaking, transitional justice and reconciliation policies,” in *Traditional Justice and Reconciliation after Violent Conflict*, Luc Huyse & Mark Salter (eds), (Stockholm: IDEA, 2008), 3.

The Chilean case was marked by severe existing military power and meant that prosecutions were not an option. Some commentators interpret this state of affairs as showing that the Chileans opted for truth as oppose to prosecutions as a second best option. However, one of the architects of the commission, José Zalaquett refutes this and instead suggests that the goal of the commission was “truth and justice to the extent possible”. The Chilean transitional justice experience employed a very different understanding of justice to that of Nuremberg and Argentina, with an emphasis on truth and reparation rather than retribution. The South African transitional justice experience goes even further than the Chilean case and has been described as a “different kind of justice” with truth and amnesty as a legitimate alternative to prosecutions without being deemed a second best option. The South African transitional justice experience does reflect elements of retributive justice in its perpetrator findings but from a comparative perspective certainly advanced an approach to justice far more concerned with restoration and reconciliation.

The advent and development of international tribunals and the ICC reflects a growing ascendancy of the phenomenon of international law. This emphasis on criminal prosecutions does entail a focus on more retributive approaches to justice but not in the expanded sense of Nuremberg because there are certain limitations to the ICC’s jurisdiction and powers. The ICC’s intervention is only legitimate when a country is “unwilling or unable” to deal with the prosecutions domestically. As will be shown in Chapter 4, the development of international law has entailed a renewed appreciation for the importance of a society crafting its own transitional justice responses.

Viewed together the various aspects of this chapter have sought to sketch a framework of transitional justice that embodies at least four features. Firstly, we have highlighted the need for a conception of justice that is self-limiting and thereby focuses on a specific set of dilemmas. Secondly, a transitional justice framework ought to be responsive to the needs of victims, perpetrators, collaborators, bystanders and beneficiaries. The modalities and degrees of this responsiveness will necessarily differ from context to context and questions of dominance and power almost certainly compromise the extent to which other

actors are considered. A pertinent point in this regard is Arthur's assertion that standard transitional justice mechanisms like "prosecutions and vetting are unlikely to be adequate measures in a post –conflict setting, where the problem of ex-combatant reintegration requires at least consideration of local-level restorative justice approaches".¹⁰² This emphasis on responsiveness to the needs of particular actors opens up a space for conceiving of justice in terms not solely retributive.

A third factor noted in this chapter is the need for a transitional justice framework that is realistic and feasible within economic, legal and ethical constraints. The four watershed moments discussed in section two of this chapter illustrated that the process of working out this feasibility entails certain trade-offs and compromise. The limit to these trade-offs is provided by the fourth feature, namely that a transitional justice framework aim toward the dual goals of acknowledgement and accountability. Acknowledgement of the suffering of victims and acknowledgement of the role of beneficiaries and bystanders, with accountability for perpetrators and collaborators. If these four aspects represent the four corners of our transitional justice canvas then the actual cloth of the canvas must be Jon Elster's assertion that transitional justice is ultimately about a society judging itself.¹⁰³ Or, as Zalaquett framed it, that the policy must represent the will of the people, without violating international law.¹⁰⁴

It is with this transitional justice framework as a backdrop that we now turn to explore three different conceptions of restorative justice.

¹⁰² Arthur 2009:360.

¹⁰³ Elster 2006.

¹⁰⁴ Zalaquett 1989:28-30

Chapter Two

Archbishop Desmond Tutu's Conception of Restorative Justice

Within the emerging field of transitional justice Archbishop Desmond Tutu is widely regarded as the most notable advocate of “restorative justice”, predominantly through his role as the chairperson of the South African Truth and Reconciliation Commission (TRC). Writing in the foreword to the first issue of the *International Journal of Transitional Justice*, Tutu suggests that the goals of transitional justice are “justice, peace and reconciliation”.¹⁰⁵ He then goes on to say what he means by ‘justice’, characteristically stressing its restorative force in contrast to more traditional notions of retributive justice. He refers to the TRC’s approach as one of “merciful justice; of what can be achieved when enemies choose dialogue over violence”.¹⁰⁶ This approach, argues Tutu, embodies the goals of restoration and reconciliation. This chapter will show that for Tutu justice is not a final or absolute principle (as it might be for human rights theorists) but rather that it is a secondary value in relation to the goals of restoration and reconciliation.

This chapter investigates Tutu’s conception of restorative justice with a view to its relevance for and potential contribution to the wider context of transitional justice. In order to unpack Tutu’s notion of restorative justice it is necessary, firstly to make clear Tutu’s role in relation to the TRC. We then turn to a full discussion of Tutu’s theology concerning restorative justice and plot the extent to which there is continuity of thought before and after the TRC. With a grasp of Tutu’s theology in place we then attempt to distil certain elements of Tutu’s conception of restorative justice. This chapter concludes with some remarks on the relevance and significance of Tutu’s conception of restorative justice for the context of transitional justice.

¹⁰⁵ Tutu “Reflections on Moral Accountability”, *International Journal of Transitional Justice* vol.1, 2007:6.

¹⁰⁶ *Ibid.*, 7.

2.1 Tutu and the TRC – Distinct but Related

Desmond Mpilo Tutu was born on October 7, 1931 in the town of Klerksdorp.¹⁰⁷ In 1955 Tutu married Nomalizo Leah Shenxana. After a brief stint as a school teacher (1955-1957) Tutu commenced theological studies and was ordained as an Anglican Priest in 1961. A year after his ordination Tutu was awarded a scholarship at Kings College in London. From 1962-1967 Tutu and his family lived in London. After returning back to South Africa Tutu was made Dean of St. Mary's Cathedral in Johannesburg, the first time this post had been awarded to a black Priest. In 1976 Tutu was made Bishop of Lesotho. As political tensions worsened in the country Tutu's ministry became more public with him delivering a famous sermon at Steve Biko's funeral in 1977. In 1978 Tutu was appointed as the General Secretary of the South African Council of Churches, again this was an historic appointment as it was the first time a black person has been appointed to the position. Tutu held this position until 1985. During this period he became a prominent anti-apartheid figure, even being awarded the Nobel Peace Prize in 1984. In 1986 Tutu was enthroned as the first black Archbishop of Cape Town – the highest position in the Anglican Church in South Africa. From 1986 to 1994 Tutu played a leading role as an influential clergy person speaking out against apartheid. It therefore hardly came as a surprise when Tutu was appointed as Chairperson of the TRC in 1995. Following Tutu's involvement in the TRC he has continued to speak out against injustice, particularly against the scourge of HIV/AIDS in the country. In 2007 Tutu was instrumental in launching "the Elders" as a group of influential and well respected human rights activists from around the world to advise and lobby for peace and security in some of the most conflict ridden areas.

This highly condensed chronology of Tutu's life illustrates that the TRC was but one part of a long line of anti-apartheid work. It could therefore be said that Tutu's presence within transitional justice literature is due to an often over-stated identification of him and the overall TRC process. In terms of the TRC it is important to note that Tutu was

¹⁰⁷ This very condensed biography is extracted from John Allen's biography entitled, *Rabble Rouser for Peace*, London: Random House, 2006.

not directly involved in the origins, planning and development of the TRC framework itself. Tutu played no particular part in the whole process which led from the negotiated settlement and the Post-amble of the Interim Constitution in 1993, through the development of proposals for a Truth Commission by civil society agents, the process of Parliamentary hearings from 1994, the complicated negotiations around the TRC Act in Parliament in 1995, the public debate and response by civil society to key controversial aspects of the TRC Act, the process of hearings and nomination of the Commission. Tutu's appointment as chair of the TRC at the end of 1995 happened *after* the political mandate and legislative framework of the TRC had already been negotiated and confirmed in various ways. This means that Tutu most definitely did not have a blank slate or open mandate to fashion the TRC according to his own notions. On the contrary, in so far as particular (political) notions of reconciliation and amnesty had already been incorporated into the TRC's mandate and legislative framework Tutu's personal (theological and religious) notions of reconciliation had to relate to these, setting up potential conflicts and tensions.

Without minimising Tutu's contribution to the TRC process it is important to note that there are important differences between Tutu's appraisal of the TRC and his notion of restorative justice and the official rationale upon which the TRC Act was based. It is important to emphasise that this chapter will explore Tutu's conception of restorative justice and not the so-called restorative character of the TRC in general. Given Tutu's central role as chairperson of the TRC he did substantially influence the mood and tone of the victims' hearings; it would nonetheless be overly simplistic to equate Tutu's thought and persona with the overall TRC process.

A particular case in point relates to Tutu's understanding of the amnesty clause versus other competing accounts from within the TRC. In *No Future Without Forgiveness* Tutu justifies the conditional amnesty offered by the TRC by appealing to restorative justice.¹⁰⁸ He responds to the charge that justice was sacrificed with the amnesty clause by suggesting that a restorative paradigm of justice was at work within the TRC, not a

¹⁰⁸ *No Future Without Forgiveness*, 54-55.

retributive paradigm and therefore ‘justice’ was not sacrificed; only differently conceptualised.

It is however noteworthy that a research report written during the victims’ hearings takes quite a different view of the ‘TRC’s justice’ than that articulated by Tutu. While the author of the report Wilhelm Verwoerd does make use of key restorative justice texts,¹⁰⁹ he does not explicitly state that the TRC is deliberately employing a restorative justice paradigm. He responds to criticisms that the TRC does not bring the victims a sense of ‘justice’ by arguing that the TRC “contributes to the greater justice of a newly democratic South African social order”.¹¹⁰ He defends the amnesty offered by the TRC by noting the inevitable compromise that had to be settled for during the negotiation process. As an official research report for the TRC the stance on amnesty is surprisingly different to that of Archbishop Tutu, the Commission’s chairperson.

The Postamble to the Interim Constitution upon which the TRC Act was based does encapsulate a preference for a restorative approach: “[T]here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation”.¹¹¹ This “need for ubuntu” does not necessarily translate into Tutu’s interpretation as articulated in *No Future Without Forgiveness*. Tutu gives the impression that a restorative approach was a deliberate decision made prior to the commencement of the hearings. Verwoerd’s report seems to suggest otherwise.

While this discrepancy is of concern for more general work on the TRC it does help to illustrate that Tutu’s conception of restorative justice is not to be made synonymous with the overall TRC process. It is important to note both Tutu’s contribution to the TRC process and the lasting impact that the process had on his thoughts on restorative justice. If we examine Tutu’s theological framework prior to the TRC we will note the foundation upon which Tutu constructed his notion of restorative justice.

¹⁰⁹ Verwoerd cites Braithwaite, J. *Crime, Shame, and Reintegration*. Cambridge: CUP, 1989. Consedine, J. *Restorative Justice: Healing the Effects of Crime*. Lyttelton: Ploughshares Publications, 1995.

¹¹⁰ Verwoerd, “Research Report”, 1996: 13 of printed version.

¹¹¹ Postamble, Interim Constitution (Act no 200 of 1993), after section 251.

2.2 The Theological Basis of Tutu's Conception of Restorative Justice

An extensive survey of Tutu's sermons and writings has revealed that it is impossible to separate his theology from his conception of restorative justice. Indeed Tutu's conception of restorative justice is deeply rooted in his theology. This section will offer a bird's eye view of some of the key aspects of Tutu's theology that has a bearing on his conception of restorative justice.

What will be evident is that there is a clear line of continuity running through Tutu's pre-TRC theology and post-TRC theology. While there is this continuity, there are also clearly distinguishable points of emphasis that enjoyed more attention pre-TRC and some that enjoyed more attention post-TRC. In the period before the TRC Tutu does not yet refer explicitly to "restorative justice" but speaks more about his theology of 'reconciliation'.¹¹² The discussion to follow shows that Tutu's theology of 'reconciliation' provides the building blocks for his conception of restorative justice. It is perhaps the TRC that gives shape to these building blocks and ultimately assists Tutu in articulating his thoughts in terms of "restorative justice".

During the 1996-1998 TRC process Tutu's public statements and interventions definitely show a strong emphasis on the importance of forgiveness and reconciliation, especially interpersonal reconciliation between victims and perpetrators. This is wholly consistent with his earlier pre-TRC statements about reconciliation and with his theology in general. It appears to be only at a relatively late stage and in retrospect that Tutu explicitly designated the TRC as a model restorative justice experiment. After the TRC hearings of 1996-97 he begins to make explicit mention of "restorative justice", first in the Chairperson's foreword to the TRC's 1998 Report and then in his autobiography *No Future Without Forgiveness* (2000). Tutu's concerns with restorative justice crystallised

¹¹² For a detailed analysis of Tutu's sermons before the TRC see Hendrick Pieterse, Ed. *Desmond Tutu's Message – A Qualitative Analysis*. (Leiden: Brill, 2001).

in the years following the TRC and actually reflect the strong influence that the TRC process had on his thought.

The most salient facet of Tutu's conception of restorative justice is its theological basis. A survey of both primary and secondary literature reveals two key theological themes that inform Tutu's conception of restorative justice; namely liberation and ubuntu. While these theological concepts are definitely connected it is helpful to discuss them separately for the sake of clarity.

2.2.1 Tutu's Liberation Theology

In Tutu's authorised biography John Allen states quite clearly that Tutu's decision to enter ordained ministry was heavily influenced by the church/state confrontation over apartheid policies.¹¹³ This illustrates both Tutu's understanding of a God concerned about injustice and his faith in the ability of the church as an institution to oppose injustice. The seeds of this liberation theology would continue to germinate throughout Tutu's ministry.

Two key texts articulate his liberation theology most clearly. The first is the sermon preached at Steve Biko's funeral in 1977 and the second is Tutu's inaugural sermon for his enthronement as Archbishop of Cape Town on 7 September 1986.

In the Biko funeral sermon (25 September 1977) Tutu prefixes his liberation theology with a strong call for all to acknowledge their infinite worth as human beings created in God's image.¹¹⁴ He then goes on to talk of God of the exodus who is on the side of the oppressed and marginalised "simply and solely because they were oppressed".¹¹⁵ God is portrayed as the liberator who delivered the Israelites from Egypt and who then, through Jesus released the people from the tyranny of Roman rule.

¹¹³ John Allen, *Rabble Rouser for Peace*, 2006:53.

¹¹⁴ *The Rainbow People of God*, 17.

¹¹⁵ *Ibid.*, 18.

Tutu draws parallels between the revolutionary work of Jesus and the work begun by Biko;

“Steve...realised that until blacks asserted their humanity and their personhood, there was not the remotest chance for reconciliation in South Africa. For true reconciliation is a deeply personal matter. It can happen only between persons who assert their own personhood and who acknowledge and respect that of others”.¹¹⁶

For Tutu liberation incorporates not only liberation from external injustice but also liberation from an internal condition of low self-worth. This kind of liberation works in tandem with the justice and goodness of God;

“The powers of injustice, of oppression, of exploitation, have done their worst and they have lost. They have lost because they are immoral and wrong and our God, the God of the Exodus, the liberator God is a God of justice and liberation and goodness”.¹¹⁷

A further account of Tutu's liberation theology is found in his inaugural sermon on the occasion of his enthronement as Archbishop of Cape Town on 7 September 1986.¹¹⁸ He articulates his understanding of a liberation theology whereby God has a preferential option for the poor and oppressed. This God of the oppressed is involved in the reality of day to day living and the material or physical reality of human beings is a matter of concern for God. Tutu understands the incarnation of God in the human figure of Jesus as a call to “be concerned about where people live, how they live, whether they have justice, whether they are uprooted and dumped as rubbish in resettlement camps...”.¹¹⁹ Tutu emphasises that this concern is “not because of our politics, but because of our religion”.¹²⁰ Similarly, in a 1979 address to the Anglican Provincial Synod explaining the South African Council of Churches' (SACC) political activities Tutu reiterates this sentiment and explains that faith in God and a living relationship with God necessitates involvement in the socio-political realm.¹²¹

¹¹⁶ Ibid., 19-20.

¹¹⁷ Ibid., 21.

¹¹⁸ Ibid., 109-124.

¹¹⁹ Ibid., 113.

¹²⁰ Ibid.

¹²¹ Ibid., 31.

Tutu's liberation theology sharpens his refusal to tolerate injustice and leads to the conviction that injustice is not only ethically wrong, but spiritually reprehensible. The prophetic tradition which filters into his liberation theology advocates a God who is actively concerned with injustice. The dominant school of Latin American liberation theology interprets both the prophetic tradition and Jesus' mission as a call to active resistance against injustice, even as a call to take up arms.¹²² Tutu's brand of liberation theology does not go this far, primarily due to his equally strong focus on a theology of ubuntu.

2.2.2 Tutu's Ubuntu Theology

Tutu's ubuntu theology has its roots in his liberation theology. Through the influence of Latin American liberation theology Tutu came to re-evaluate his own context and turned to African theology.¹²³ African theology gives voice to Christianity that is not bound to a Western colonial framework and instead highlights the parallels between Christianity and an African worldview. According to Tutu,

“the African would understand perfectly well what the Old Testament meant when it said ‘man belongs to the bundle of life,’ that he is not a solitary individual. He is linked backwards to the ancestors whom he reveres and forward with all the generations yet unborn”.¹²⁴

This continuity between biblical notions of interconnectedness and an African worldview served as Tutu's foundation for his ubuntu theology. There are substantial and significant lines of continuity in Tutu's ideas about ubuntu and human interconnectedness. The same key ideas are expressed in his 1984 Nobel Lecture, 1986 inaugural sermon and then in *No Future Without Forgiveness* (2000).

¹²² For a brief introduction see the Wikipedia entry: http://en.wikipedia.org/wiki/Liberation_theology. For a more robust discussion of radical Liberation Theology see Gustavo Gutiérrez, *A Theology of Liberation: History, Politics and Salvation*. Orbis Books, 1988.

¹²³ Tutu would later go on to incorporate Black theology into his African theology. See Desmond Tutu, “Black and African Theologies: Soul Mates or Antagonists?” in *Black Theology: A Documentary History, 1966-1979*. 388-89. See also Allen, *Rabble Rouser* 137-139.

¹²⁴ Tutu, “Some African Insights and the Old Testament” 1973:42-43. And Tutu, “Whither African Theology?” 1978.

Tutu's 1984 Nobel lecture contains three building blocks of his ubuntu theology. God's goal of community for humanity is one such building block:

"God created us so that we should form the human family, existing together because we were made for one another. We are not made for an exclusive self-sufficiency but for interdependence, and we break the law of our being at our peril".¹²⁵

Like the goal of liberation mentioned above (2.2.1), the goal of community also requires that all realise their infinite worth as created in the image of God. This second building block of a sound realisation of one's self-worth means that it is therefore tantamount to blasphemy to treat any one as less than that;

"oppression dehumanises the oppressor as much, if not more than the oppressed. They need each other to become truly free, to become human. We can be human only in fellowship, in community, in koinonia, in peace".¹²⁶

A third building block of Tutu's ubuntu theology is the notion of shalom or peace. Tutu asserts that there can be no peace without justice and suggests that this is a biblical tenet:

"God's shalom, peace, involves inevitably righteousness, justice, wholeness, fullness of life, participation in decision-making, goodness, laughter, joy, compassion, sharing and reconciliation".¹²⁷

The text of Tutu's inaugural sermon as Archbishop of Cape Town (1986) reflects continuity in his thought around ubuntu. The notion of community is extended with Tutu's use of the family analogy to explain and legitimise the obligations that we have to one another. The notion of familial obligation is then extended to the imperative to

"recognise our common humanity, that we do belong together, that our destinies are bound up with one another's, that we can be free only together, that we can survive only together, that we can be human only together".¹²⁸

Tutu explicitly refers to ubuntu and explains it as such:

"It has to do with what it means to be truly human, it refers to gentleness, to compassion, to hospitality, to openness to others, to vulnerability, to be available

¹²⁵ Rainbow People, 91.

¹²⁶ Ibid., 92.

¹²⁷ Ibid., 91.

¹²⁸ Ibid., 117.

for others and to know that you are bound up with them in the bundle of life, for a person is only a person through other persons”.¹²⁹

These key pillars of Tutu’s ubuntu theology continued to develop during the years before the TRC. Tutu’s autobiographical account of the TRC, *No Future Without Forgiveness* (2000) displays very close parallels with his earlier writings on ubuntu. He repeats the formulation that ubuntu captures the “very essence of being human” and connotes generosity, hospitality and compassion.¹³⁰ Similarly he again associates ubuntu with a deep sense of human interconnectedness that means that all are affected by injustice and oppression of others.¹³¹

Tutu’s account of ubuntu in *No Future Without Forgiveness* does take on a stronger tone than his earlier accounts. This is due to the manner in which Tutu employs ubuntu as a way of justifying the conditional amnesty offered by the TRC. He suggests that the TRC’s brand of conditional amnesty “was consistent with a central feature of the African *Weltanschauung* – what we know in our languages as *ubuntu*”.¹³² In an article written in 2004 Tutu boldly affirms that:

“We have had a jurisprudence, a penology in Africa that was not retributive but restorative. Traditionally, when people quarreled the main intention was not to punish the miscreant but to restore good relations. This was the animating principle of our Truth and Reconciliation Commission. For Africa is concerned, or has traditionally been concerned, about the wholeness of relationships”.¹³³

A very similar explanation is offered in *No Future Without Forgiveness*, Tutu explains ubuntu and shows that it accounts for why “so many chose to forgive rather than demand retribution, to be so magnanimous and ready to forgive rather than wreak revenge”.¹³⁴ He talks about the pursuit of the common good and how this should supersede “anger, resentment, lust for revenge, even success through aggressive competitiveness”.¹³⁵

¹²⁹ Ibid., 122.

¹³⁰ *No Future*, 31.

¹³¹ *Rainbow People*, 121.

¹³² *No Future*, 31.

¹³³ “Truth and Reconciliation” in *Greater Good*, Fall 2004: 12.

¹³⁴ *No Future*, 31.

¹³⁵ Ibid.

Ultimately Tutu's understanding of ubuntu suggests that "to forgive is not just to be altruistic. It is the best form of self-interest".¹³⁶

Tutu suggests that the TRC's conditional amnesty was well received by black South Africans due to the parallels with the notion of ubuntu, which according to him is very much a part of the African worldview. In a later chapter in *No Future Without Forgiveness* Tutu expresses similar sentiments regarding the notion of human interconnectedness and the attendant obligations that this interconnectedness carries. However, in this instance Tutu does not make reference to ubuntu but to universal "moral laws" that have a distinct biblical undertone:

"One such law is that we are bound together in what the Bible calls 'the bundle of life'. Our humanity is caught up in that of all others. We are human because we belong. We are made for community, for togetherness, for family, to exist in a delicate network of interdependence".¹³⁷

According to Tutu, apartheid's enforced segregation amounted to South Africans living in a situation in which the moral law of interconnectedness was contravened. Thus for Tutu victims, perpetrators, beneficiaries and dissenters have all suffered an injury to their humanity or personhood. It is against this backdrop that Tutu articulates the task of the TRC as one of healing.¹³⁸

In the epilogue to *Rabble Rouser for Peace*, Allen admires Tutu's ubuntu theology noting that, "In his formulation, ubuntu-botho equips you to look at your torturers, to realize that they need your help and to stand ready to enable them to regain their humanity".¹³⁹ Allen admits that this approach is counter-intuitive for most people, but it ultimately trumps other approaches to justice because it "empowers the survivors of torture, for it enables them to take control of their lives, to take initiatives instead of remaining trapped in victimhood,".¹⁴⁰

¹³⁶ Ibid.

¹³⁷ *No Future*, 196. See also Tutu's Nobel Address 1984 as cited in *The Rainbow People of God*, 91.

¹³⁸ *No Future*, 197-198.

¹³⁹ *Rabble Rouser*, 396.

¹⁴⁰ Ibid., 396.

He goes on to make the connection between Tutu's ubuntu theology and the Christian notion of forgiveness;

“Thus ubuntu-botho gives contemporary, practical meaning to God's forgiveness of the people of Israel recorded by the prophet Hosea, and to Christ's words from the Cross: ‘Forgive them Father, they know not what they do’. But ubuntu-botho does not allow perpetrators to escape the necessity of confessing and making restitution to survivors, since it places the needs of society – the restoration of relationship – at the heart of reconciliation”.¹⁴¹

The combination of Tutu's theologies of liberation and ubuntu provide a fertile foundation to further explore Tutu's conception of restorative justice.

2.3 Key Elements of Tutu's Conception of Restorative Justice

The theological concepts of liberation and ubuntu are manifest in certain tangible elements of Tutu's conception of restorative justice. It has been difficult to tease out defined distinctions between Tutu's conception of restorative justice and his notion of reconciliation. In many instances in the literature the two concepts are used interchangeably and show substantial overlaps. Tutu clearly states that “justice, peace and reconciliation” are for him the ultimate goals of transitional justice.¹⁴² However these three goals are not placed on the same level. Tutu places reconciliation as the primary goal with restorative justice as the best strategy for achieving this goal. Peace, largely conceived of as the absence of violence, is for Tutu a prerequisite for entering into a restorative justice process.

In *No Future Without Forgiveness* Tutu defines restorative justice as consistent with “traditional African jurisprudence” where

“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

¹⁴¹ Ibid., 396.

¹⁴² “Moral Reflections”, 6.

the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense”.¹⁴³

Tutu goes on to define restorative justice as encompassing healing, forgiving and reconciliation.¹⁴⁴ In our reading we have identified further aspects of his notion of restorative justice:

- Reliance on a restorative / retributive dichotomy.
- Reconciliation is seen as a primary goal of restorative justice.
- Public confession is a necessary prerequisite for a restorative justice process.
- Both the victim and the perpetrator are harmed by the crime.
- Reparation and restitution must be made by the perpetrator.
- Forgiveness as means of catharsis for both victim and perpetrator.
- Tutu’s conception of restorative justice acknowledges the potentially cyclical nature of gross injustice.
- Healing for the victim and perpetrator is the outcome of restorative justice.

Restorative / retributive dichotomy

When Tutu does explicitly mention “restorative justice” he often does so by making an antithetical reference to retributive justice. While this distinction is not uncommon in the criminal justice literature, Tutu’s dichotomy is problematic because he offers a confused and ambiguous definition of retributive justice.¹⁴⁵

He suggests that one of the key differences between restorative and retributive justice models is that the victim is the wronged party, not the state.¹⁴⁶ This is indeed the case with most restorative justice practices within the criminal justice domain as will be shown in the next chapter; but this is not necessarily the case with the amnesty offered by

¹⁴³ *No Future*, 54-55. The same sentiment is expressed in the Chairperson’s Foreword to the *TRC Final Report*, par 36.

¹⁴⁴ *No Future*, 55.

¹⁴⁵ See *No Future Without Forgiveness*: 51-54; “Peace is Possible”: 5; “The South African Transition”: 2,6,7.

¹⁴⁶ *No Future*, 54.

the TRC, which Tutu clearly identifies as an example of restorative justice. In fact, it is far from clear whether amnesty ought to be classified as a restorative justice practice.¹⁴⁷

David A. Crocker problematises Tutu's take on retribution arguing that Tutu's logic is flawed.¹⁴⁸ According to Crocker Tutu bases his argument against vengeance on three premises; i) punishment is retribution, ii) retribution is vengeance, and iii) vengeance is morally wrong. Crocker finds that both premise i and ii are flawed.

In terms of premise i Crocker finds that Tutu commits himself to two contradictory approaches to punishment. On the one hand Tutu rejects punishment as it represents retributive justice "whose chief goal is to be punitive, so that the wronged party is really the state, something impersonal, which has little consideration for the real victims and almost none for the perpetrator".¹⁴⁹ But on the other hand, he affirms the efficacy of the potential threat of legal punishment, noting that perpetrators have a good incentive to apply for amnesty so as to avoid the threat of punishment. Tutu also affirms the legitimacy of legal punishment as a constitutional right of all victims.¹⁵⁰ Crocker argues that Tutu is wholly misguided in his understanding of retribution because he does not "understand retribution as one important rationale or justification for and a constraint upon punishment".¹⁵¹

As will be shown in the next chapter on Criminal Justice conceptions of restorative justice; reactions to the short-comings of the retributive model have significantly informed restorative justice theory. Within transitional justice literature, the critics of restorative justice argue that retributive theory is not properly understood by restorative

¹⁴⁷ For example, Jonathan Allen locates the restorative character of the TRC not in the amnesty provision but in the victims' hearings that mimicked the restorative justice conference model. See Jonathan Allen, "Memory and Politics: Three Theories of Justice in Regime Transitions," unpublished paper presented at the Transnational Seminar Series, University of Illinois. Available online at - www.cgs.uiuc.edu/resources/conf_seminars_workshops/TPSAllen.pdf. Allen develops his argument more clearly in "Between Retribution and Restoration: Justice and the TRC", *South African Journal of Philosophy* 20/1 (2001): 22-46.

¹⁴⁸ David A. Crocker, *Retribution and Reconciliation*.

¹⁴⁹ *No Future*, 54.

¹⁵⁰ *Ibid.*

¹⁵¹ Crocker, "Retribution and Reconciliation": 3 of printed version.

justice proponents. Given Crocker's critique of Tutu's notion of retribution we need to ask whether Tutu's contradictory understanding of retribution discredits his overall conception of restorative justice.

Reconciliation as a primary goal of restorative justice

Tutu's designation of reconciliation as a goal of transitional justice is not controversial in itself, it becomes problematic when the notion of reconciliation is explained in Christian terms as a biblical concept and then transferred to transitional justice contexts. It is perhaps Tutu's belief that religion can and should speak to politics that explains his readiness to transfer the biblical notion of reconciliation to secular transitional justice contexts.

After the release of Nelson Mandela from prison a major ecumenical conference was held in Rustenburg to chart the way forward for the church in South Africa (November 1990). In the opening address to the conference Tutu outlined his vision of how reconciliation ought to be achieved in South Africa.¹⁵² The first step in the process of reconciliation requires *confession* from all those responsible for apartheid. The kind of confession envisaged by Tutu involves an expression of remorse and a plea for forgiveness. This preference is evident in many of the TRC victims' hearings in which Tutu pushed perpetrators to ask for forgiveness, even though remorse was not one of the requirements for amnesty. In the 1990 Rustenburg address Tutu does not make reference to beneficiaries only to those who literally 'gave orders'. Later, during and after the TRC he extends this call for confession to all white South Africans who benefited from the unjust status quo.¹⁵³ The second step requires that the victims forgive the perpetrators as part of a "gospel imperative".¹⁵⁴ The idea of a "gospel imperative" to forgive is clearly not an appropriate motivation to offer victims of human rights violations. The context of this statement was a religious gathering and Tutu refrained from using this kind of explicit language during the TRC victims' hearings. Finally the third step requires that the

¹⁵² *The Road to Rustenburg*, 22-23 and Allen, *Rabble Rouser*, 342.

¹⁵³ "Chairperson's Foreword", par 71 & 73.

¹⁵⁴ *Road to Rustenburg*, 23. *Rabble Rouser*, 342.

perpetrators make restitution to the victims; since according to Tutu sincere repentance necessitates restitution.

Tutu has applied this explicitly Christian model of reconciliation in contexts that are either secular or of other faith groups; in the South African TRC, post-genocide Rwanda, Northern Ireland, Israel and Palestine.¹⁵⁵ The role of religion in transitional justice is itself a wide area of debate. For our current purposes our immediate concern is rather with Tutu's conception of restorative justice. We have already noted the porous lines between Tutu's notions of restorative justice and reconciliation. Keeping this in mind it is nonetheless possible to pinpoint certain elements of Tutu's brand of restorative justice that may not be dependent upon his theological notion of reconciliation.

Public Confession

As discussed above Tutu suggests that reconciliation is only possible if the perpetrator makes a full confession of the crime. The TRC amnesty requirements did not include an expression of remorse; but full disclosure, evidence that the crime was politically motivated, and proof that the principle of proportionality was maintained.¹⁵⁶ Tutu affirms the amnesty committee's decision but nonetheless encourages remorse, confession and apology from perpetrators.¹⁵⁷ Tutu locates the TRC's precedent value in that the Commission held "public hearings for victims in a belief that public truth, through its delivery of both knowledge and acknowledgement, serves as a form of justice in and of itself".¹⁵⁸ For Tutu the public disclosure required by the Amnesty Committee entails a form of public humiliation which in turn is a form of penalty and punishment.¹⁵⁹ This line of thinking reappears in Chapter 4 of this minor dissertation when we look at the mechanisms of Gacaca and Mato Oput.

¹⁵⁵ See Allen's account of Tutu's diplomatic efforts in *Rabble Rouser*, 374-389.

¹⁵⁶ The Promotion of National Unity and Reconciliation Act No. 34, 26 July 1995. Available online at <http://www.doj.gov.za/trc/legal/act9534.htm>. [Accessed 24 January 2007].

¹⁵⁷ *No Future*, 50-51.

¹⁵⁸ "Moral Reflections", 6.

¹⁵⁹ *No Future*, 51.

Both the victim and the perpetrator are harmed by a crime

A key strand of Tutu's thought acknowledges that the harm caused by a crime affects both the victim and the perpetrator. Allen notes Tutu's observation upon returning to South Africa from London in 1984, "in many ways it was whites who needed to hear this message of self-assurance and self-acceptance, that oppression dehumanized the oppressor as much as, if not more than, the oppressed".¹⁶⁰

While Allen reports this kind of sentiment taking root in Tutu's thought as early as 1984, Graybill suggests a later period, namely after the TRC. She identifies a slight shift in Tutu's thinking arguing that during apartheid Tutu "had articulated God's preferential option for the oppressed" she then goes on to note "recently he has preached something akin to a preferential option of the former oppressor, for Tutu now views the former oppressor as a victim in need of healing".¹⁶¹ What could be argued as a misinterpretation on Graybill's part is worth some discussion as this is a central part of Tutu's theology and conception of justice. In making this assertion Graybill refers to a particular section of text in *No Future Without Forgiveness* (p.p.83-84). In the section Tutu is speaking about the relevance of theology for the commission. Tutu reiterates the same school of theology as he did in the early 1970s affirming that;

"This is a moral universe ...the death and resurrection of Jesus Christ is proof positive that love is stronger than hate, that life is stronger than death, that light is stronger than darkness, that laughter and joy, and compassion and gentleness and truth, all these are so much stronger than their ghastly counterparts".¹⁶²

Tutu explains that this theological outlook led him to distinguish between the perpetrator and the crime for two specific reasons. First, Tutu argues that writing somebody off as a monster jeopardises any claim for accountability "because we were then declaring that they were not moral agents".¹⁶³ And second, Tutu's theology holds that all human beings are capable of change and are never beyond redemption.¹⁶⁴ So what Graybill identifies as a shift in Tutu's thought is in fact consistent with his earlier work.

¹⁶⁰ *Rabble Rouser*, 150.

¹⁶¹ Graybill, *Truth and Reconciliation*, 32.

¹⁶² *No Future*, 86.

¹⁶³ *No Future*, 83.

¹⁶⁴ See Tutu, Longford Lecture, February 16, 2004.

Reparation and Restitution

In Tutu's Rustenburg address (1990) he clearly states that "those who have wronged must be ready to make amends. They must be ready to make restitution and reparation".¹⁶⁵ His formula for reconciliation as expressed at Rustenburg and throughout the TRC incorporates reparation from the perpetrator as an act of both of sincere remorse and of gratitude for the forgiveness offered by the victim.

In an interview conducted during the TRC (1997) Tutu acknowledges the impossibility of compensating a victim fully and restoring the status quo ex ante. He suggests that through reparation "the nation acknowledges that something wrong was done" and while the actual price tag is perhaps more symbolic than an actual compensation, this is an important part of national reconciliation. In the same interview and on various other occasions Tutu has also lobbied for a wealth tax to be paid by all apartheid beneficiaries, particularly businesses.¹⁶⁶

Forgiveness

Forgiveness is for Tutu extraordinary and miraculous; yet the only way for victims to move forward, and for perpetrators to be motivated to seek redemption. The title of Tutu's autobiographical account neatly captures the cost of not forgiving, *No Future Without Forgiveness*.¹⁶⁷

Tutu's response to the question posed in Simon Wiesenthal's *The Sunflower* reflects his faith in the positive effects of forgiveness. Wiesenthal tells the story of being a prisoner in a Nazi concentration camp and being led to the bedside of a dying SS soldier. The soldier asks for Wiesenthal's forgiveness for his crimes. Wiesenthal refuses and then poses the question to the reader.

¹⁶⁵ *Road to Rustenburg*, 22.

¹⁶⁶ This was a TRC recommendation (ref report). Although this has not been instituted Tutu still lobbies for it; "Turning the Other Cheek" by Sheena Adams, *Saturday Star*, p.15, April 8 2006.

¹⁶⁷ See also Tutu "The South African Transition. Any Lessons?", Oliver R. Tambo Lecture, Georgetown University, 2001.

In answering Wiesenthal's question Tutu alludes to two examples. Firstly to victims who forgave perpetrators during the TRC and secondly to Nelson Mandela's lack of bitterness after twenty seven years in prison. He marvels at these examples and recommends forgiveness. Throughout the TRC Tutu "singled out witnesses who embraced forgiveness and made their stories his leitmotif".¹⁶⁸ In his response in the *Sunflower* Tutu suggests that the forgiveness option offers an alternate form of justice that has illustrated its strength during the TRC; "It is clear that if we look only to retributive justice, then we could just as well close up shop".¹⁶⁹

A further interesting point regarding Tutu's notion of forgiveness is his suggestion that the perpetrator needn't express remorse in order for the victim to forgive. "If the victim could forgive only when the culprit confessed, then the victim would be locked into victimhood, no matter her own attitude or intention. That would be palpably unjust".¹⁷⁰ This statement offers no explanation as to the important questions around the conditions for forgiveness and in what instance forgiveness can be said to be deserved.

There is a vast body of literature that deals with the many dilemmas posed by the notion of forgiveness.¹⁷¹ Unfortunately Tutu does not engage in any of these dilemmas and appears to make prescriptive claims about victims' obligations to forgive and what he sees as the positive consequences thereof. The implication of this is that Tutu's notion of forgiveness could indeed be classified as 'cheap'. This charge of proposing 'cheap forgiveness' may well apply to the manner in which Tutu extracted an apparently insincere apology from Winnie Madikizela Mandela. Reflecting on how Tutu dealt with Madikizela Mandela's testimony before the TRC, Alex Boraine expresses his concern regarding the insincere confession and apology that Tutu eventually managed to force from Madikizela Mandela.¹⁷² Boraine notes Tutu's sincere intentions but admits that

¹⁶⁸ *Rabble Rouser*, 351. For examples of how Tutu did this see Graybill, "Forgiving the Unforgivable" in *Truth and Reconciliation in South Africa*, 2002:39-55.

¹⁶⁹ *Sunflower*, 268.

¹⁷⁰ "Truth and Reconciliation" in *Greater Good*, 2004:12. The same phrase appears in *No Future*, 272.

¹⁷¹ Hannah Arendt, *Eichmann in Jerusalem: A report on the Banality of Evil*. 1963. Karl Jaspers, *The Question of German Guilt*. New York: The Dial Press, 1947.

¹⁷² Boraine, *A Country Unmasked*, 252.

“Tutu’s impassioned plea was that of a pastor rather than a secular commissioner”.¹⁷³ Boraine’s observation rings true for Tutu’s conception of forgiveness and perhaps for his entire conception of restorative justice.

Acknowledges the potentially cyclical nature of gross injustice

Tutu’s call for forgiveness is premised on the understanding that without ‘dealing with the past’ one is caught in a cycle of retaliation. In a letter to P.W.Botha in 1979, then Prime Minister of South Africa, Tutu warns that:

“The Afrikaner has found it difficult to forget the concentration camps in which some of his forebears were incarcerated by the British. Black memories of the resettlement camps and villages may be equally indelible”.¹⁷⁴

Tutu employed a similar logic in trying to persuade white Afrikaner beneficiaries to participate in the TRC process. After visiting a memorial for Afrikaner women and children who were killed in concentration camps during the Anglo Boer War (1899-1902) Tutu is reported as commenting that “the legacy of bitterness between Afrikaans and English speaking South Africans left by the camps could have been avoided if there had been a similar process a century earlier”.¹⁷⁵ On a visit to post-genocide Rwanda in 1995 Tutu preached a sermon describing the history of Rwanda as “‘top dog’ and ‘underdog’” with the implication of “reprisal and counterreprisal”.¹⁷⁶ He preached that the only way to break this cycle “was to go beyond retributive justice to restorative justice, to move on to forgiveness, because without it there was no future”.¹⁷⁷

Healing

Tutu designates the kind of justice pursued by the TRC as “moral justice”.¹⁷⁸ This “moral justice” differs from the prevailing retributive paradigm and instead “acknowledges the way in which each of us is inextricably bound to the other and where only the restoration

¹⁷³ Ibid.

¹⁷⁴ *Rabble Rouser*, 178.

¹⁷⁵ Piet Meiring, *Chronicle of the Truth Commission*, 1999:51. Allen, *Rabble Rouser*, 352.

¹⁷⁶ *No Future*, 259.

¹⁷⁷ *No Future*, 260.

¹⁷⁸ “Moral Reflection”, 7.

and respect of this relationship will allow us to move forward, together”.¹⁷⁹ For Tutu restorative justice recognises that relationships need to be restored after a crime and that healing is required; “For retribution wounds and divides us from one another. Only restoration can heal us and make us whole”.¹⁸⁰

2.4 Relevance and Significance of Tutu’s Conception of Restorative Justice for Transitional Justice

Archbishop Tutu’s role as chairperson of the TRC has been praised as exemplifying a model example of reconciliation and restorative justice. Ranging from co-chairperson Alex Boraine to journalist Antjie Krog, to TRC Human Rights Violations Committee member Pumla Gobodo-Madikizela Tutu’s role has been praised and deemed indispensable to the process.¹⁸¹ These and the majority of other references to Tutu take an anecdotal form drawing more on his persona than his writings. This chapter has focussed more on the latter, with the overarching aim being to interrogate Tutu’s conception of restorative justice. What has emerged through this chapter is that there is a discernable conception of restorative justice that is developed by Tutu. This conception is tightly bound up with his theology.

The transitional justice framework that was developed in the previous chapter can provide a helpful grid to assess the relevance and contribution of Tutu’s conception of restorative justice. The five aspects of the framework concern the notion of a society judging itself, that transitional justice be a self-limiting endeavour, that it be responsive to the needs of different actors (perpetrators, victims, beneficiaries), that it be realistic and feasible within given constraints, and that there be dual aims of acknowledgement and accountability.

¹⁷⁹ Ibid.

¹⁸⁰ “Truth and Reconciliation”, Greater Good, 12.

¹⁸¹ Alex Boraine, *A Country Unmasked*, 90, 268; Antjie Krog, *Country of My Skull*, 152; Pumla Gobodo-Madikizela, *A Human Being Died That Night*, 81.

There are perhaps three aspects of the framework where Tutu's conception of restorative justice may hold some purchase. Certainly Tutu's conception of restorative justice is responsive to the needs of perpetrators, victims and maybe even beneficiaries. For Tutu both the victim and the perpetrator are harmed by the crime. Furthermore, for Tutu forgiveness is a means of catharsis for both victim and perpetrator and healing for the victim and perpetrator is the outcome of restorative justice. Similarly, Tutu's conception of restorative justice does promote the dual aims of acknowledgement and accountability. This is apparent through his stress on the perpetrator making reparation and restitution to the victim. The third aspect of the framework is as regards the society judging itself. Tutu's conception of restorative justice does hint at this by placing emphasis on public confession as necessary prerequisites for restorative justice.

Both the TRC report and Tutu's post TRC writings advance a misguided approach by suggesting that a restorative understanding of justice allows for a coherent connection between amnesty and justice.¹⁸² While it is plausible to argue for connections between the values of restorative justice, conditional amnesty and reconciliation, it is problematic and misguided to equate restorative justice with either amnesty or reconciliation.¹⁸³ The problem with this connection is that the report positions amnesty as a tool of restorative justice rather than as a consequence of the negotiated settlement.

It is our contention that for Tutu justice is not a final or absolute principle (as it might be for human rights theorists) but rather that it is a secondary value in relation to the goal of reconciliation. Reconciliation is seen as a primary goal of restorative justice. Given the other competing aims of transitional justice like accountability and acknowledgement, it may be questionable the extent to which Tutu's conception of restorative justice is directly applicable.

¹⁸² TRC Report, Vol 1, Par 55a, 117.

¹⁸³ See Charles Villa-Vicencio, "Restorative Justice" in Charles Villa-Vicencio and Erik Doxtader, eds., *Pieces of the Puzzle – Keywords on Reconciliation and Transitional Justice* (Cape Town: IJR, 2004), 33-8.

Chapter Three

Criminal Justice Conceptions of Restorative Justice

This chapter looks at the conceptions of restorative justice that have emerged within the field of criminal justice. Locating this discussion within the field of criminal justice may appear confusing especially from a transitional justice perspective as advocates of restorative justice typically present the notion of restorative justice as a departure from the conventional criminal justice framework. So to suggest that formulations of an alternative approach to criminal justice be discussed within the very framework that it is trying to critique may seem paradoxical.¹⁸⁴

However, the fact is that, unbeknownst to those critics of “the criminal justice model” who have been propagating the alternative conception of restorative justice within the field of transitional justice, an important set of developments in just these terms have in recent decades also been taking place within the field of criminal justice itself. To date the discussion of restorative justice within the field of transitional justice has not sufficiently been informed by the analogous debates on restorative justice within the field of criminal justice with which this chapter will deal. In a sense this is counter-intuitive since one might expect the transitional justice advocates of restorative justice to be alert to the important developments under this very rubric in a related field. But the fact of the matter is that the two sets of developments using this rubric by and large proceeded unbeknownst to each other. Some of the important recent accounts of the emergence of transitional justice as a sub-field feature little or no references to the development of notions of restorative justice in the criminal justice field. The result is that the typical transitional justice critiques of the “criminal justice model” are to some extent aimed at a straw man. It is this state of affairs that forms the main justification for this chapter.

¹⁸⁴George Pavlich notes the inherent paradox within restorative justice literature; “The basic form of the paradox lies in restorative justice’s simultaneous critique and implicit endorsement of criminal justice” (2006:1). Pavlich notes the “incongruity of a strategy that claims to establish an independent entity (i.e. restorative justice) that is radically different from state criminal justice, but which at the same time sees itself as complementing this criminal justice” (*Connections* 2005-2006).

Therefore, the task of this chapter is to explore what restorative justice has come to mean within the field of criminal justice itself. This chapter commences with a brief genealogy of the modern criminal justice model both in relation to traditional and more informal practices of dispute settlement, on the one hand, as well as with regard to the relation of the criminal justice system to criminal law and criminology, on the other hand. We then turn to a fuller discussion of the genealogy and theoretical foundations of the new and alternative conceptions of restorative justice. This is followed by a discussion of three conceptions of restorative justice. In conclusion, we make some remarks on the relevance of restorative justice, both in the criminal justice context itself and in relation to transitional justice.

3.1 The Modern Criminal Justice Model - Criminal law, the Criminal justice system and Criminology

The dominant criminal justice model is a distinctively modern construct. Historically as well as in comparative cultural terms criminal justice and dispute resolution have by no means always been synonymous with criminal law, adversarial prosecution and retributive justice. Jerold Auerbach's text *Justice Without Law?* offers a significant account of how informal justice functioned historically;

“express[ing] an ideology of communitarian justice without formal law, an equitable process based on reciprocal access and trust among community members...Sharing a suspicion of law and lawyers, they developed patterns of conflict resolution that reflected their common striving for social harmony beyond individual conflict, for justice without law”.¹⁸⁵

Throughout his book, Auerbach highlights examples of informal justice from the seventeenth to the twentieth centuries. He refers to Western examples of informal justice that “illuminate broad historical patterns that demonstrate how the process of dispute settlement expresses personal choices and, most significantly, cultural values”.¹⁸⁶

¹⁸⁵ Auerbach, 4-5.

¹⁸⁶ Auerbach, 16.

The modern criminal justice model was an achievement of the 18th century Enlightenment associated with such reformers as Cesare Beccaria.¹⁸⁷ At a conceptual level the modern criminal justice model involved the development of the basic notions of separation of powers, individual rights, due process, the distinction of criminal and civil law and the ideal of the rule of law; at a practical level it involved the abolition of torture and of the requirement of confessions, significant processes of prison reform, elaboration of the penal code as well as of the adversarial system of criminal prosecution.¹⁸⁸ By the 20th century, this modern criminal justice model had achieved such hegemony in the West that to many it had become synonymous with criminal justice itself. From its perspective, the earlier historical practices of informal communal justice now appeared as primitive and arbitrary confections of popular justice without proper criminal law and procedure. Criminal justice had come to mean formalised due process and adversarial prosecution in state courts. However, it was precisely in response to key assumptions and features of this criminal justice model that the “restorative justice” critique and movement arose in recent decades within the criminal justice field itself.

The modern criminal justice model may be described in terms of three main components, that of criminal law, the criminal justice system and criminology as three interrelated spheres. The first component, that of criminal law, is concerned with the legal construction of crime by the state as distinct from civil law which, by contrast, is concerned with wrongs between individual citizens. “Criminal law is concerned with offences that threaten the public, is developed and enforced by the state, imposes sanctions that range from fines and imprisonment to death, and requires a standard of proof ‘beyond a reasonable doubt’”.¹⁸⁹ Because crimes have the potential to harm the broader public, the state, as the guardian of the public interest, has a legitimate stake in the criminal justice process; hence prosecution is pursued by the state on behalf of the harmed victim. This view of crime as a violation against the state follows from a notion

¹⁸⁷ In 1766 Beccaria wrote and anonymously published “*Dei delitti e delle pene*” (*On Crime and Punishment*) in which he criticized the notion of different forms of punishment for aristocrats and instead argued for equal punishment for equal crimes, regardless of one’s class or rank.

¹⁸⁸ See *Encyclopedia of Crime and Punishment*, Volume 1. 2002:414-418, 441-445. Volume 3 2002:1393-1398. Also *Encyclopedia of Crime and Justice*, Volume 2. 1983:450-461.

¹⁸⁹ *Encyclopedia of Crime and Punishment*, Volume 1. Siegel 2002:418.

of crime in relation to the law and as a violation of rights. In this light, criminal justice primarily concerns the relation between offender and the state. Civil law by contrast “refers to the body of laws governing disputes between individuals, as opposed to those governing offences that are public and relate to the government”.¹⁹⁰

The second component, that of the criminal justice system, itself consists of different institutional sectors, respectively those of the police, the courts and the correctional system. Significantly each of these three components of the criminal justice system (police, courts and correctional system) are coercive and ultimately embody an adversarial and punitive approach in dealing with crime.¹⁹¹ The criminal justice system as field of study for criminal justice studies is then concerned with the “institutional aspects of the social construction of crime: with criminal processes such as policing, prosecution, plea bargaining, sentencing and punishment”.¹⁹²

Criminology differs from criminal justice studies in that it is less concerned with the institutional aspects of crime and not necessarily limited to the assumptions and perspectives of the criminal justice model. As an academic discipline, criminology has not been restricted to the legal construction of crime only. Lacey notes the key distinguishing mark between criminology and criminal justice studies as well as criminal law in the social (or extra-legal) constructions of crime by criminology compared to its legal construction by criminal law and criminal justice studies.¹⁹³ Accordingly criminology has been prepared to utilise a wider range of perspectives and sources including those of sociology, social anthropology, social theory, psychology, history and, though more rarely, economics and political science.¹⁹⁴ This has given rise to significant methodological variation and different theoretical perspectives within the field of

¹⁹⁰ Definition accessed from the Free Dictionary available at: <http://legal-dictionary.thefreedictionary.com/civil+law>

¹⁹¹ The adversarial nature of the criminal justice system is spelled out in the criminal justice system entry in the *Encyclopedia of Crime and Justice*, 1983:459. At the institutional level there are significant differences between the Anglo-Saxon adversarial system of criminal justice and the Continental European practices of investigatory justice. But for the purpose of this discussion the European investigatory practices are part of the modern criminal justice model in other respects.

¹⁹² Lacey 2002: 265.

¹⁹³ Lacey 2002:265-266.

¹⁹⁴ Lacey 2002: 265.

criminology, including those between “consensus” and “conflict” theories.¹⁹⁵ There is divergence concerning the “causes of crime, the most effective methods of responding to crime, and even the definition and nature of crime”.¹⁹⁶ Nevertheless, mainstream criminology typically still tends to assume the modern criminal justice model while the key focus of criminology remains on individual offenders and their behaviour implying “a legalistic view of crime, seeing it as a violation of consensually generated legal statutes”.¹⁹⁷

A remaining aspect of this discussion concerns questions around the conceptualisation of justice at play in the modern criminal justice model. It can be argued that the modern criminal justice model (comprising the three components of criminal law, the criminal justice system and criminology) involves a certain conceptualisation of justice that hinges on a variation of the basic concept of retributive justice. The idea of retributivism is expressed in the concept of *lex talionis* – the law of retaliation or “an eye for an eye, an ear for an ear”: as articulated in ancient Near Eastern law codes with the accompanying notion of retribution entailing proportional punishment for wrong doing¹⁹⁸. From the perspective of modern criminal justice the *lex talionis* principle in the context of communal justice practices would be regarded as equivalent to the idea of vengeance, unless legally constructed in terms of separation of powers, due process and the rule of law. So while the modern criminal justice model may employ a slightly different notion of retribution, the origins of retribution lie in the ancient principle of *lex talionis*.

Linked to this retributive conception of justice is the role and significance of punishment in criminal justice. Generally, there are two widely recognised justifications for punishment: as (proportionate) retribution for wrong-doing, as prevention of further

¹⁹⁵ Notable sources on consensus and conflict theories include respectively, Talcott Parsons, *The Social System* (Glencoe: The Free Press, 1951) and Karl Marx and Friedrich Engels, “The German Ideology” in *Basic Writings on Politics and Philosophy: Marx and Engels*, ed. L.S. Feuer (Garden City:Doubleday, 1959).

¹⁹⁶ encyc, vol 1. 2002:433.

¹⁹⁷ encyc, vol 1. 2002:433

¹⁹⁸ Encyc of Crime and Punishment, Meyer 2002:1394.

wrong doing through deterrence.¹⁹⁹ In addition to these two arguments there is also an argument from an ethical standpoint by invoking theories of retribution whereby punishment facilitates a method of asserting the fundamental worth of human beings.²⁰⁰ On this line of thinking calls for prosecution and punishment are healthy responses by victims seeking to re-establish their human and civic dignity.²⁰¹ These different justifications for punishment illustrate that while the criminal justice model involves the concept of retributive justice, punishment has not been exclusively conceived in retributivist terms. Moreover, it could be contended that there may well be connections between the non-retributivist justifications for punishment and the emergence of notions of restorative justice. The emergence of non-retributivist notions of punishment being applied to the very concept of justice marks a defining point in the development of the criminal justice field. And it is precisely in terms of these retributive / non-retributive respects that restorative justice notions depart most significantly from the modern criminal justice model, as we will see in the sub-sections that follow.

3.2 Restorative Justice as an Alternative Conceptualisation of Criminal Justice

With the above brief description of the modern criminal justice model as a backdrop it is possible to explore how “restorative justice” has been conceived as an alternative approach to criminal justice. Restorative justice has largely developed in reaction to, and as an alternative of, standard notions of criminal justice that are centred on notions of retributivism.

The restorative justice movement responded to key features and assumptions of the modern criminal justice model. In general this reflected a growing awareness of the limitations of the conventional criminal justice system. The problems or limitations identified were of both a practical and conceptual nature. Much of the development of restorative justice as a field has been shaped by practical considerations. And most of the

¹⁹⁹ The prevention through deterrence argument was developed by Beccaria in his *Essay on Crimes and Punishment* ([1764] 1819) and expanded on by Jeremy Bentham’s notion of utilitarianism.

²⁰⁰ Jean Hampton, “The Retributive Idea” in *Forgiveness and Mercy*, Murphy and Hampton (eds.), 1988: 111-161.

²⁰¹ Paul Muldoon, “The Moral Legitimacy of Anger,” *European Journal of Social Theory* 11 (2008).

writings on the subject are authored by practitioners from non-governmental and community based organisations. At the same time, and taken together, they also amounted to a comprehensive re-conceptualisation of the criminal justice model itself as not necessarily involving retributive justice but rather an alternative conception of restorative justice. For our purposes it is this re-conceptualisation of criminal justice as restorative justice, rather than the specific details and ramifications of the various practical considerations, which is of central significance. Accordingly, we must first attempt to outline the key features of this re-conceptualisation.

These approaches and assumptions involved in the general re-conceptualisation broadly concern the *focus*, *process* and *outcome* of criminal justice.²⁰² The following discussion is descriptive and deliberately does not offer critical analysis; it simply sets the scene for the fuller discussion of different conceptions of restorative justice, which is to follow in section three of this chapter.

Focus:

As discussed above, the legal construction of crime in the modern criminal justice model conceives of it as the violation of rules and laws rather than as a personal interaction or a communal event. Criminal justice is not a matter for personal or popular retribution but properly the state has to act as the prosecutor of those charged of criminal violations that can harm the public. It follows that conventional criminal justice is essentially offender-focused. Criminal prosecution and due process are structured around proving the guilt or innocence of the offender as charged. Victims or other parties affected by the crime can only enter the legal proceedings in relation to this central focus on prosecuting the offender.

Restorative justice proponents have responded by offering a different understanding of crime and hence of the focus of the criminal justice process. At the heart of the restorative justice rationale is the contention that crime involves a violation in relations

²⁰² This structure of “focus, process, and outcome” has been borrowed from similar demarcations in the literature. See for example the entry on Restorative Justice in the *Encyclopedia of Crime and Punishment*.

between people rather than a violation between the offender and the state.²⁰³ So addressing crime, when conceived in this way, means that those affected need to be central to the process. The direct stakeholders are the victim, the offender and the affected communities comprising of the families of the victim and offender and other community members. Instead of focusing narrowly on the offender's alleged guilt for his criminal actions; restorative justice is more concerned with the after-effects of the offender's action, for the victim as well as the offender and the wider community.²⁰⁴ Restorative justice advocates thus extend the specific focus on crime to a wider set of after-effects as "social harm".²⁰⁵

The criminal justice focus on the rules of evidence to prove criminal liability are adapted by restorative justice advocates so as to facilitate the personal encounter between the offender and the victim intended to allow for the victim to explain how the crime has affected him or her and this in turn encourages the offender to take responsibility for his or her actions and ask apology.

Process:

The modern criminal justice model is characterised by a distinctly adversarial process which focuses on the offender and the state. The historical roots of this adversarial system can be traced back to so-called divine adjudication with a litigant required to defend his or her case before God with the help of confirmatory oaths uttered by "compurgators".²⁰⁶ It was believed that if the compurgator was able to make the oath without stumbling this indicated the oath's validity. The religious or superstitious origins of this adversarial system have subsequently been replaced by consequentialist and non-consequentialist arguments. The former motivating for the adversarial system due to its ability to establish the truth, protect individual's legal rights and safeguard against

²⁰³ Howard Zehr, *Changing Lenses* (1995).

²⁰⁴ Albert Eglash, "Beyond Restitution – Creative Restitution" in Joe Hudson and Burt Galaway, eds., *Restitution in Criminal Justice* (Lexington MA: D.C. Heath, 1977) 91.

²⁰⁵ See Howard Zehr (1995:182 -183).

²⁰⁶ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, New Jersey: Princeton University Press, 1988:67).

unfairness.²⁰⁷ The non-consequentialist arguments suggest that the lawyer-client relationship is valuable and that the dignity of individuals is upheld through affording legal representation.²⁰⁸ This adversarial dynamic is embodied in key principles like the presumption of innocence until proven guilty, the right to legal representation, the separate functions of judge, prosecution and counsel for the defence.

In restorative justice processes the adversarial system employed in criminal prosecutions is rejected in favour of a non-adversarial approach that places the victim as the main protagonist. Restorative justice processes take many different forms. However, common to all variations is a drive to encourage more active participation from the victim, offender and relevant community stakeholders. Furthermore, protagonists of restorative justice contest the dominance of legal professionals in the criminal justice process and much has been written about the alienating impact that these professionals have on the victim and offender.²⁰⁹ This brings to the fore the whole issue of the right to legal representation. It seems that restorative justice considers the need for direct participation of the stakeholders to take precedence over the right to legal representation. While there are variations in terms of process, the central aim from a restorative justice perspective is that victims ought to be able to ask questions of the offender directly and should not have to use the medium of legal professionals. In terms of offender participation restorative justice reacts to criminal justice processes that discourage the offender from taking responsibility for her actions.²¹⁰ Restorative justice proponents also raise concerns regarding the high financial cost of criminal trials due to the involvement of legal professionals and motivate for restorative justice mechanisms on the grounds of such pragmatic concerns.²¹¹

Restorative justice processes normally commence from the point of an admission of guilt by the offender, so the process is not aimed at establishing culpability but more about

²⁰⁷ Luban 1988:67.

²⁰⁸ Luban, 1988:67.

²⁰⁹ Nils Christie stated this problem quite forcefully in his famous lecture "Conflicts as Property", (1977) *British Journal of Criminology*, 17:1-15.

²¹⁰ Heath-Thornton in *Encyclopaedia of Crime and Punishment*, 1390.

²¹¹ Morris, 2002:598

how to deal with the effects of the wrongdoing. This breaks with the fundamental principle of the presumption of innocence until proven guilty. It is important to note that there are variations of restorative justice practices with accompanying variations in terms of process.²¹²

Outcomes:

As its name suggests the restorative justice approach aims for restoration as one of its key outcomes, while such restoration should be socially oriented rather than only offender-focused. For restorative justice advocates the outcome of the justice process ought to be less about establishing guilt and then punishing the guilty party and more about helping the offender to understand the consequences of her action and restore relations with the victim and the community.²¹³ Within the modern criminal justice framework the Correctional System is focussed on meting out some form of punitive sanction to convicted offenders as well as facilitating a measure of rehabilitation. The offender is removed from society and not under any obligation to make compensation to the victim or acknowledge his or her guilt to the victim. Restorative justice views this as a missed opportunity and advocates an outcome that repairs the harm caused by the crime both for the victim and the offender as well as the wider community.

3.3 Genealogy of Restorative Justice within the Field of Criminal Justice

The term ‘restorative justice’ is believed to have been coined by Albert Eglash at the First International Symposium on Restitution in 1975. He used the term to refer to a type of criminal justice that focused on the harmful effects of offenders’ actions and actively involved victims and offenders in the process of restitution and rehabilitation.²¹⁴ Eglash

²¹²As will be shown later, there are instances when a restorative justice practice is used in conjunction with traditional criminal justice. One example of this is when a Victim Offender Mediation session precedes a court date. Often the outcome of the Victim Offender Mediation session will be taken into account in the court hearing. See “Restorative Justice, Part 1: The Road to Healing”. Cartoon booklet developed by ESST for the Department of Justice and Constitutional Development, 2005.

²¹³ Heath-Thornton in *Encyclopedia of Crime and Punishment*, 1390.

²¹⁴ Albert Eglash, “Beyond Restitution - Creative Restitution,” in Joe Hudson and Burt Galaway, eds., *Restitution in Criminal Justice* (Lexington MA: D.C. Heath, 1977) 91,92.

was not alone in articulating a growing frustration and dissatisfaction with the conventional criminal justice framework. From the mid 1970s a notable search for alternatives to the existing criminal justice framework emerged.²¹⁵ This search for alternatives was based within the existing criminal justice system and included other fields of inquiry including informal justice, restitution, the victims' movement, mediation and social justice.²¹⁶ These emerging voices were predominantly from North American academic and civil society institutions with a few key figures in Western Europe and the United Kingdom. In the course of the late 1980s and 1990s their influence spread to Australia and New Zealand.²¹⁷ By the late 1990s academics and civil society practitioners from Australia, New Zealand, England, Canada, North America, Western Europe and South Africa had become familiar with restorative justice as a relevant newcomer.²¹⁸

To a considerable extent the critiques of the conventional criminal justice system and the growing interest in alternative forms of restorative justice were driven by practical considerations. The high financial costs of the conventional approach to crime fell under growing scrutiny.²¹⁹ There was growing concern with the high rate of prisoners awaiting trial and with the ever increasing overcrowding in prisons as well as the high rates of recidivism. But the significance of the restorative justice movement was not limited to practical proposals. On a normative and conceptual level it involved basic challenges to, and alternative conceptualisations of, key features of the modern criminal justice model. Thus fundamental concerns were raised regarding the peripheral and passive role afforded to victims in criminal proceedings, the predominant role of the state, the narrow understanding of crime and the efficacy of punishment as a form of deterrence or sanction. Legal anthropologists levelled critique at the conventional criminal justice

²¹⁵ Batley and Dodd, M & Dodd, J. 2005 "International Experiences and Lessons" in Maepa, T. (ed) *Beyond Retribution: Prospects for Restorative Justice in South Africa*. Pretoria: Institute for Security Studies.

²¹⁶ Van Ness & Heetderks Strong 2002:18-24.

²¹⁷ Johnstone and Van Ness, 2007:8.

²¹⁸ The 2002 UN Commission on Crime Prevention and Criminal Justice saw over 41 countries sponsoring a resolution on restorative justice.

²¹⁹ Allison Morris, "Critiquing the Critics – A brief response to critics of restorative justice", *British Journal of Criminology*. 2002 (42).

system for its overly professionalized structure often resulting in the exclusion of the key stakeholders from the proceedings.²²⁰

The consolidation of these various practical concerns and growing range of normative and conceptual critiques into a more coherent restorative justice movement required the elaboration of a new theoretical framework. A highly influential contribution was made by Nils Christie who, like Auerbach, invoked notions of informal justice. In 1976 Christie delivered a public lecture, subsequently published as *Conflicts as Property*, which is today regarded as one of the key restorative justice texts.²²¹ In *Conflicts as Property* Christie developed a thorough critique of the conventional criminal justice system including the academic discipline of criminology. While he did not use the term ‘restorative justice’ he proposed an alternate approach that closely resembles what is currently called restorative justice.

Christie starts his lecture by boldly suggesting the dissolution of criminology and the existing criminal justice system altogether.²²² He explains this proposal by arguing that crime involves social conflict and that the function of the criminal justice system effectively is to take conflicts away from their rightful owners, i.e. those directly involved. From the perspective of conflict theory he provocatively claims that “highly industrialised societies do not have too much internal conflict, they have too little”.²²³ This deficiency is the result of theft; Christie’s central contention is that in so far as crime

²²⁰ Auerbach, 10.

²²¹ Foundation Lecture of the Centre of Criminological Studies at the University of Sheffield, March 31 1976. Published as “Conflicts as Property”, *British Journal of Criminology*, 17 (1977). Many restorative justice texts cite Christie. Koen refers to Christie as “the leading theorist of restorative justice” (2005:5). Other texts that cite Christie include: Allison Morris, “Critiquing the Critics” *British Journal of Criminology* (2002); Lucia Zedner (2002) ... Froestad, Jan & Shearing, Clifford. “Practicing Justice – The Zwelethemba Model of Conflict Resolution” (2005), Larson Sawin, Jennifer & Zehr, Howard “The Ideas of Engagement and Empowerment” (2007), Van Ness, Daniel W. & Heetderks Strong, Karen. *Restoring Justice* (2002), Ashworth (2003).

²²² Christie specifically uses the terms “criminology” but the manner in which he explains this suggests that by “criminology” he also includes the criminal justice system as a whole, as described in section 1 of this chapter.

²²³ Christie 1977: 1.

involves social conflict, criminal justice proceedings serve to take conflicts away from their rightful owners.²²⁴

Christie suggests that conflicts, and crime as a form of social conflict, are the property of the victim, offender and to a lesser extent the community. Christie's use of the term "property" is significant and perplexing. It is certainly not an obvious term in this context, yet he clearly makes a particular point of using this term. He could have used other variations like "those involved in" or "affected by" a crime, or even the commonly used term "stakeholder". Presumably it is not meant to be only rhetorical or metaphorical. He does not provide any sort of explanation for this choice of terminology and starts using the term in the very first paragraph of his text. While the use of the term "property" is not entirely clear, there are some key ideas that do emerge and are relevant to this discussion.

For Christie conflicts are not negative only but, if dealt with appropriately, have "pedagogical possibilities" for the victim, offender and the community.²²⁵ Dealing with conflict appropriately means that one exercises his/her ownership over their conflict. The same logic applies to crime as a form of social conflict. In practical terms Christie explains this ownership by way of neighbourhood courts with as few professionals as possible and as a "court of equals representing themselves".²²⁶ The notion of the state acting as the victim's representative is for Christie, akin to stealing the victim's conflict.

At the outset of the lecture Christie refers to a Tanzanian community court and juxtaposes this kind of informal justice model to the prevailing criminal justice model in Norway (and elsewhere in the West). The Tanzanian community court is focussed on the 'owners' of the conflict with the victim and offender taking centre stage. Others also involved in the proceedings are the relatives and friends of the respective parties. Community members are also encouraged to participate by asking questions and making relevant comments. The most silent parties are the judges. Christie contrasts this account with

²²⁴ Christie 1977: 5. Christie refers to both class conflict and inter-personal conflict.

²²⁵ Christie, 8.

²²⁶ Christie, 11.

Scandinavian courts noting that the latter are “peripheral” to the daily life of citizens. From the urban location of the courts to the primacy of the judges and lawyers over the ‘owners of the conflict’ the criminal justice system ultimately acts as a “professional thief” of conflicts. He notes that “Criminal conflicts have either become *other people’s property* – primarily the property of lawyers – or it has been in other people’s interests to *define conflicts away*”.²²⁷ Christie concludes his lecture by urging his fellow criminologists and criminal justice workers to “re-establish the credibility of encounters between critical human beings”.²²⁸

As already indicated, for Christie the language of ownership and theft are not just metaphorical speech but rather involves a re-theorising of the criminal justice system. This re-theorising involves different steps. Firstly he rejects the basic assumption of “consensus theorists” that social conflict can and should be resolved and that this is part of the function of the criminal justice system. But this is itself based on a second basic assumption that crime and the criminal justice system should be conceived as a form of social conflict regulation and not just in terms of violations of the law or of rights. However, the most provocative and controversial move is that of relocating the notion of “ownership” and “theft”, not in relation to (rights of) property, but in terms of “ownership” and “theft” of conflicts. According to Christie “conflicts represent a potential for activity, for participation” and it is necessary to reclaim this opportunity for participation because “modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them”.²²⁹

Christie’s re-theorising of the criminal justice model in terms of ownership and theft have been welcomed and endorsed by other leading figures in the restorative justice movement. For example, Zehr and Larson Sawin refer to Christie’s notion of conflict as property as providing “an important theoretical basis for the argument that individuals

²²⁷ Ibid., 5.

²²⁸ Christie, 14.

²²⁹ Christie 1977:7.

and communities need to be more fully engaged and empowered in justice”.²³⁰ However, their statement is not followed by any further critical engagement with Christie’s theory; it is simply noted and affirmed.

Christie did expand upon his original ideas in some of his subsequent work; however this did not really penetrate the mainstream restorative justice literature. A key issue here is that Christie’s account hinges on an analogy between the pre-modern informal justice model and the modern criminal justice approach without however indicating how pre-modern informal justice relates to modern criminal justice. This kind of equation disregards the important differences between pre-modern informal justice and modern criminal justice.

Following Christie and Auerbach, other writers have developed a so-called historical justification for an alternate response to crime. Writers in this school suggest that pre-modern forms of justice were more community oriented and less punitive than the prevailing criminal justice framework:

“The retributive model of justice is not the only way we have envisioned justice in the West. In fact, other models of justice have predominated through most of our history. Only within the past several centuries has the retributive paradigm come to monopolise our vision”.²³¹

For our purposes this argument has significant but contradictory implications: On the one hand it undercuts any assumptions that the modern criminal justice model is the only or a ‘natural’ form of criminal justice as such. On the other hand there is a significant trend in the literature that designates restorative justice as a pre-modern form of justice.²³² On both counts this will be relevant when we consider indigenous or customary African justice practices in chapter 4.

²³⁰ Larson Sawin, Jennifer & Zehr, Howard “The Ideas of Engagement and Empowerment” in Johnstone, Gerry & Van Ness, Daniel W. *Handbook of Restorative Justice*. Devon, UK: Willan Publishing (2007:42).

²³¹ Howard Zehr, *Changing Lenses*. Pennsylvania: Herald Press (1995:87)

²³² Consedine (1995) draws parallels with the indigenous practices of the Celts, Maori and Samoan nations Braithwaite (1999) suggests linkages with ancient Arabs, Greek and Roman traditions.

Linked to notions of informal justice is an emphasis on restitution as a more appropriate form of sanction for the offender than retributive punishment.²³³ It is important at this point to briefly distinguish restitution from some other variants - compensation, restitution and reparation. Generally speaking all of these variants will fall under the umbrella term 'rectificatory justice' with each carrying different emphasis. Restitution is specifically concerned with re-establishing the status quo prior to the violation.²³⁴ If a bicycle was stolen then the appropriate restitution would involve acquiring another bicycle for the victim that closely resembles the bicycle previously owned. Compensation by comparison entails that "something [be] given to compensate for loss, suffering or injury".²³⁵ In the dictionary "reparation" is defined in much the same way as "compensation" - "the making of amends for a wrong".²³⁶ For our purposes it might be helpful to note that the TRC defined reparation specifically in terms of the stated goal of "rehabilitating and restoring the human and civil dignity of victims".²³⁷

The restitution movement has had a significant effect on the development of restorative justice as a field. As already noted, it was on the First International Symposium on Restitution in 1975 that the concept of restorative justice began to gain wider currency. Today many scholars and lay people alike make the association between restorative justice and restitution.²³⁸ In practice this has meant that the protagonists of restorative justice look for appropriate measures of compensation, such as restitution to replace the punitive sanctions typical of retributive justice.

The rise of a more pro-victim approach to criminal justice also helped to lay the foundations for the elaboration of notions of restorative justice. Victimology, or "The Victim Movement", has been identified by many as one of the key contributing pillars in

²³³ Stephen Schafer writes on the historical roots of restitution in response to wrongdoing. See Stephen Schafer, "The Restitutive Concept of Punishment", in Joe Hudson and Burt Galaway, eds., *Considering the Victim* (Springfield, IL: Charles C Thomas, 1975).

²³⁴ This is the understanding applied in the *SA TRC Report*, Volume 5, Chapter 5 par.37.

²³⁵ Oxford Dictionary 2001:170.

²³⁶ Oxford Dictionary 2001:758.

²³⁷ The Promotion of National Unity and Reconciliation Act, S4(f).

²³⁸ See for example, Chris Cunneen, "Reparations and Restorative Justice" in Strang, *Restorative Justice and Civil Society*, Cambridge: CUP (2001:83-98).

the development of restorative justice as a field.²³⁹ Morris notes how the perceived failure of the conventional criminal justice system to respond to the needs of victims gave rise to thinking around restorative justice.²⁴⁰

Another background to the development of restorative justice lies in the theological tenets of the Mennonite and Quaker traditions.²⁴¹ The first restorative justice process was initiated by Dave Worth and Mark Yantzi in 1974; both were members of the Mennonite Central Committee. The initiative took the form of a meeting between victims and offenders and resembled what is today called “victim–offender mediation” (VOM).²⁴² A number of the leading restorative justice theorists are from the Mennonite and Quaker traditions. These thinkers include Howard Zehr, Jim Consedine and John Braithwaite. This theological influence is manifested in the literature through certain key themes like forgiveness, redemption and healing. In one article Zehr even invokes the figure of Jesus; “Jesus urges us to love not just our own kind but also our enemies and to practice forgiveness”.²⁴³

This brief attempt to sketch the development of the field of restorative justice shows how restorative justice has been informed by a range of different concerns across a range of disciplines. The key notions and themes derived from different traditions and quarters but increasingly converged together into a body of restorative justice literature. To date two handbooks on restorative justice have been published.²⁴⁴ The emergence of these handbooks can be seen as an attempt to consolidate the restorative justice approach both on a conceptual and practical level. The handbooks are aimed at a cross-section of government, non-government organisations, academics and other practitioners. The

²³⁹ See Zedner (2002), Van Ness and Strong (1997).

²⁴⁰ Morris (2002). Other key texts making this argument are Margaret Fry (1951) *Arms of the Law*. Also Walklate, S. (1989) *Victimology: The Victim and the Criminal Justice Process*. London: Hyman.

²⁴¹ See Lawrence Sherman, “Two Protestant Ethics and the Spirit of Restoration” in Strang and Braithwaite (eds), *Restorative Justice and Civil Society* (Cambridge University Press: Cambridge, 2001:35-55).

²⁴² Dennis Sullivan and Larry Tift, *Restorative Justice: healing the foundations of our everyday lives* (New York: Willow Tree Press, 2005).

²⁴³ Howard Zehr, “Restoring Justice: Envisioning a Justice Process Focused on Healing – not Punishment” 33:5 *The Other Side* (September/December 1997).

²⁴⁴ Handbook of Restorative Justice, Sullivan & Tift (eds) 2006. London: Routledge. Handbook of Restorative Justice, Johnstone and Van Ness (eds) 2007. Devon: Willan Publishing.

presence of these handbooks points to the existence of a growing audience of individuals interested in restorative justice. Restorative justice ideas and concepts have been widely implemented in different contexts in a range of countries. However, there is still a gap in the literature as regards an evaluative assessment of the outcomes of these programmes.

With perhaps the exception of Christie, restorative justice literature does not reflect a strong emphasis on theory and has largely been dominated by practitioners. The influence of practitioners and the absence of explicit theorisations of restorative justice make it difficult to identify the predominant conceptions in this field in definitive terms. Nevertheless there are three distinctive conceptions of restorative justice can be identified as the following sub-section will discuss.

3.4 Three Conceptions of Restorative Justice

The previous sections have traced the emergence of restorative justice as a distinctive sub-field derived from various sources and background traditions. However, though it is a distinctive sub-field and literature has developed in this way it was not the case that there was clarity and consensus about the notion of 'restorative justice' itself. Rather, though the term 'restorative justice' came to be increasingly and widely used within this sub-field, it was also used in varying, ambiguous and sometimes contradictory senses. This sub-section will attempt to identify and clarify some of the distinctive conceptions of 'restorative justice'. These different conceptions should be taken as analytical distinctions as they do not necessarily represent different and mutually exclusive positions taken by different authors but may occur within the work of the same author or be shared between different authors.

These different conceptions can broadly be discussed in terms of three different areas of emphasis 1) personal encounter, 2) reparation, and 3) transformation. The three elements of personal encounter, reparation and transformation are singled out in Johnstone and Van Ness's 2007 *Handbook of Restorative Justice* as representing three dominant

conceptions of restorative justice.²⁴⁵ This typology is a departure from other accounts in the literature that also identify three dominant approaches or conceptions but classify these in terms of 1) process, 2) values and 3) personal encounter.²⁴⁶ However, this actually perpetuates the ambiguities and lack of clarity in the literature. Separating the elements of process, value and encounter does not assist in delineating different conceptions of ‘restorative justice’ since all three elements actually need to be present in each conception. Tony Marshall’s definition of restorative justice is perhaps the most widely cited of the ‘process’ variety of definitions. Marshall conceives of restorative justice as “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.²⁴⁷ However, such an open-ended account of the collective resolution of wrongdoing need not in fact be restorative at all; it could just as well result in a resolution to exact vengeance. This and other criticisms led to the emergence of the ‘values’ conception intended to ensure that the restorative justice intervention is in fact restorative²⁴⁸. Almost all advocates of this conception would identify the chief value as being that of repair. Restorative justice needs to be focussed on repairing harm. But in that case it may be more helpful to discuss reparation as a distinctive conception of ‘restorative justice’ next to the personal encounter conception.

This discussion will opt to follow Johnstone and Van Ness’s typology in that they offer an analytically clear synthesis of the underlying conceptions of ‘restorative justice’ informing existing approaches in this field. These different conceptions do not strictly correspond to positions taken by specific restorative justice theorists; rather the three conceptions should be seen as analytical distinctions shared by a range of scholars. This typology is also not exhaustive and can certainly be built upon in various ways.

²⁴⁵ The discussion is based on Gerry Johnstone and Daniel W. Van Ness, “The Meaning of Restorative Justice” in Gerry Johnstone and Daniel W. Van Ness, *The Handbook of Restorative Justice*. Devon: Willan Publishing, 2007: 9-16.

²⁴⁶ See Roche (2001);

²⁴⁷ Marshall, “The evolution of restorative justice in Britain”, *European Journal of Criminal Policy*, 4 (4) 1996.

²⁴⁸ See Roche (2001) for a critique of the process and values conceptions.

3.4.1 “Restorative Justice” as Personal Encounter

Broadly speaking the personal encounter conception of ‘restorative justice’ can be said to stem from the kind of concerns raised by Christie. Namely that those most affected by the crime or wrong-doing ought to have a more direct role in deciding how the crime ought to be addressed. The victim, offender and family or community members all need to be involved and encounter each other in the criminal justice process. The so-called professionals or legal experts should play more of a facilitator role with decision-making mainly being done by the victim, offender and family/community members. As such the personal encounter conception of restorative justice is intended to provide an alternative to the marginalised and passive role that victims and offenders ordinarily play in the criminal justice process where the key roles tend to be taken by the prosecutor, counsel for the defence, judge and jury. Personal encounter within this alternative criminal justice process typically takes the form of victim-offender mediation or conferencing. The encounter needs to provide a space for those most affected by the crime to discuss what happened and agree on what needs to be done to address the harm.

The central feature of this conception is thus that a personal encounter between victim and offender is conceived as a condition of restorative justice. There is divergence whether the personal encounter is a necessary or a sufficient condition for restoring the harm caused by the wrongdoing; similarly it is not always clear whether such personal encounters are conceived as constitutive of restorative justice, or as an instrumental means towards restorative justice. According to Johnstone and Van Ness the personal encounter conception of restorative justice is typically motivated along consequentialist lines with proponents claiming that the victim/offender encounters will have restorative consequences such as rehabilitation, deterrence, norm clarification, restitution, reducing fear and trauma.²⁴⁹ However, conceiving of the personal encounter within a consequentialist framework is problematic in that there is no guarantee that the personal encounter will in fact have the desired effects. Johnstone and Van Ness acknowledge this and note that some proponents suggest that such personal encounters need to be

²⁴⁹ Johnstone and Van Ness 2007:10. They only cite one source – Robinson 2003 as supportive of this view.

constrained by certain values such as “non-domination, empowerment, respectful listening and equal concern for all stakeholders”.²⁵⁰ Declan Roche suggests that in order for this personal encounter to be restorative “victims and offenders must both be given a say, and the focus of people’s deliberations must be on repairing the harm suffered by victims and reintegrating offenders into their communities”.²⁵¹

It is not clear whether Johnstone and Van Ness are correct that personal encounters are typically viewed in consequentialist terms in the literature. A close reading of Christie, for example, suggests that he has a different approach in mind, seeing the personal encounter as a sufficient condition for restorative justice and as constitutive in restoring the harm caused through the wrong doing. But this controversial position does not appear to be clearly articulated elsewhere in the literature.

Aside from these theoretical issues the personal encounter conception of ‘restorative justice’ also raises various practical concerns. Is it a condition of the personal encounter that the victim determines the level and nature of the interaction? What if the offender refuses to go along with this? At a more basic level the personal encounter seems to depend on the assumption that the offender accepts the determination of the offence as well as culpability for the crime. The literature does not consider a situation in which an offender insists that no crime has been committed and/or does not accept culpability. In terms of participation there are those who argue for completely voluntary participation in such personal encounters and then those who allow for a measure of coercion.²⁵² What if the victim’s demands are inappropriate or even amount to revenge or humiliation? When and how is non-imposed mutual agreement to be achieved? Other practical concerns relate to how the level of participation in a personal encounter is potentially influenced by the extent to which the parties can articulate themselves. From studies that have been done on various restorative justice processes, it appears that more articulate professionals

²⁵⁰ Johnstone and Van Ness 2007:11.

²⁵¹ Roche, “Introduction” in *Restorative Justice* 2004:xiii.

²⁵² Coercion is justified by appealing to consequentialist intuitions. See Lode Walgrave, “From Community to Dominion: In Search of Social Values for Restorative Justice,” in Elmar G.M. Weitekamp and Hans-Jürgen Kerner, eds., *Restorative Justice. Theoretical Foundations* (Devon:Willan Publishing, 2002), 71-89.

tend to dominate the encounter process.²⁵³ Taken together these conceptual and practical problems indicate that the personal encounter conception of ‘restorative justice’, while appealing, has not yet been adequately developed and explicated.

3.4.2 “Restorative Justice” as Reparation

As already noted the notion of reparation has been closely associated with the development of restorative justice. At the First International Symposium on Restitution in 1975 Albert Eglash advanced a notion of restorative justice that incorporated what he called “creative restitution”.²⁵⁴ The key components of his proposed notion of creative restitution involved the following. Firstly, he emphasised that the focus ought to be on the “harmful consequences” of the offender’s actions rather than solely on the action itself. Furthermore he argued for more active roles for both victim and offender with the specific aim being to “reverse [the offender’s] behaviour from one of taking or harming to one of giving or helping”.²⁵⁵

Over the years Eglash’s ideas have been taken up by others and gained currency as an influential conception of restorative justice.²⁵⁶ Howard Zehr is the leading proponent of this reparative conception of ‘restorative justice’. In his various writings he explains the relational nature of the harm caused by wrongdoing and the necessity of an encounter between victim and offender in repairing this harm. According to Zehr, the harm caused by a crime relates to the loss of personal autonomy for the victims. It is not entirely clear as to why an offender would be harmed through the crime. Zehr explains this harm in two ways. Firstly he suggests that offenders often act out of a place of previous harm done to them; “they do harm in part because of harm done to them” mostly through childhood abuse.²⁵⁷ So this existing state of harm is then made worse through the crime in that the offender may be alienated from their community as a consequence of the crime. This line

²⁵³ See Morris and Maxwell (1993: 66-67) and Young and Goold (1999: 172-173).

²⁵⁴ Albert Eglash, , “Beyond Restitution - Creative Restitution,” in Joe Hudson and Burt Galaway, eds., *Restitution in Criminal Justice* (Lexington MA: D.C. Heath, 1977).

²⁵⁵ Eglash 1977:91.

²⁵⁶ It is interesting to note that the South African Law Reform Commission follows this conception in a working definition of restorative justice as “a form of criminal justice based on reparation...”.See Thandabantu Nhlapo (2005).

²⁵⁷ Zehr, *Changing Lenses* 1990: 182.

of thinking places the harm done to the offender as a result of the way in which the criminal justice process deals with the crime. So, a different approach to dealing with the crime may avoid this harm. And similarly, an alternative approach may lessen the harm (the loss of personal autonomy) experienced by the victim first through the crime and then secondly through the criminal justice process that largely exasperates this loss of autonomy.

The reparative conception takes as its point of departure the acknowledgement that crime results in harm and suffering for both the victim as well as for the offender. Justice thus entails the repair of the harm that was caused by the wrongdoing to both victims and offenders. Ideally the form of reparation is jointly negotiated by the victim and offender and their supporting communities. Strictly speaking reparation does not need to involve a participative process.

This conception of restorative justice draws on an approach to reparation that implies the kind of participation involved in a personal encounter. It is this process of making reparation that is, according to some of the proponents, a sufficient condition of justice.²⁵⁸ No further sanction is required to punish the offender. The kind of reparation sought is non-punitive and should seek to repair the harm caused to the victim without inflicting further pain on the offender. As already noted above this conception is closely tied to the encounter conception. One would assume that a composite encounter process should accompany the reparation. Johnstone and Van Ness do note this but add that in the event that a personal encounter is not possible, a reparative outcome can still be deemed restorative if certain restorative principles are met. Whereas the personal encounter conception is primarily focussed on the inclusion of all parties to the wrong-doing having a say in how the crime is addressed, the reparative conception is primarily focussed on ensuring that the outcome of the process repairs the harm caused to the greatest extent possible. It follows that the personal encounter conception of restorative justice is a 'process' conception, while restorative justice as reparation is more concerned with 'outcomes' or 'product'.

²⁵⁸ Johnstone and Van Ness, 2007:12.

The practical difficulty with both the personal encounter conception and the reparative conception of restorative justice is that this kind of encounter is not always possible. In the event that a direct encounter cannot take place then repair of the harm caused by the crime can take place in other ways. Johnstone and Van Ness suggest the possible option of “a sentence of restitution rather than a fine or imprisonment”²⁵⁹. This kind of flexibility distinguishes the reparative conception from the personal encounter conception in that for most proponents of the latter it would be unacceptable to incorporate elements of the formal justice system because this would diminish the significance of the encounter. For proponents of the reparative conception the extent of the encounter is secondary to the chief aim of repairing the harm first for the victim and then for the offender. On Johnstone and Van Ness’s account, it seems that a more general understanding of reparation is at play, which they do not fully explain.

3.4.3 “Restorative Justice” as Transformation

For many theorists and practitioners restorative justice aims to respond to more than particular crimes or initiate various specific reforms but is concerned with bringing about a transformation of criminal justice generally. John Braithwaite, a leading restorative justice scholar articulates this transformative conception as follows:

“Restorative justice, conceived as an intellectual tradition or as an approach to political practice, involves radical transformation. On this radical view restorative justice is not simply a way of reforming the criminal justice system; it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of an holistic change in the way we do justice in the world”.²⁶⁰

Similarly Zehr and Toews explain the transformative potential of restorative justice in terms of;

“challenge[ing] our understanding of the social world...restorative justice processes contribute to the breakdown of othering and social distance. Victims, offenders and those involved in facilitating these processes begin to see beyond stereotypes and generalisations that they have about the people involved in the

²⁵⁹ Johnstone and Van Ness, 2007:13.

²⁶⁰ Braithwaite, J. 2003. ‘Principles of Restorative Justice’ in Von Hirsch, A. et al (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*.

crime event. They see the victims as people deeply wounded by an event and hear the personal impact of the crime upon their lives. They hear the individually unique perspective of offenders and their ideas for justice. Through the dialogue they are no longer in categories of “us” and “them” but rather in the category of “we”, shaped by their mutually created meaning of the crime event”.²⁶¹

At a general conceptual level the main difference between this transformative conception and the other two conceptions – personal encounter and reparative -- is that the latter two are individualist while the former implies a more holistic approach. Johnstone and Van Ness describe it as an understanding of “ourselves as inextricably connected to and identifiable with other beings in the ‘external’ world”.²⁶² While Johnstone and Van Ness don’t make the connection, it seems that this conception of restorative justice stems from linkages with the Mennonite and Quaker traditions.²⁶³ This association may tie in with Christie’s discussion of informal pre-modern responses to wrongdoing. The “transformative” conception of restorative justice appears to have implicit affinities with earlier religious traditions as well as with more radical modern political movements without explicitly stating the normative commitments involved.

Of the three dominant conceptions of restorative justice the transformative conception is perhaps the most elusive. The writings articulating this conception are characterised by a level of vagueness and a general lack of clarity. Very little explanation is offered of the nature and objectives of restorative justice as transformation.

3.5 Relevance and Significance of Restorative Justice in the Criminal Justice Context

From the above discussion of the literature in the criminal justice field it is difficult to identify a coherent and independent conceptual framework for restorative justice. Rather what have emerged are some general points of commonality and difference that overlap across all three conceptions.

²⁶¹ Zehr & Toews, 2003: 265-266.

²⁶² Johnstone and Van Ness, 2007:15.

²⁶³ Lawrence W. Sherman, “Two Protestant Ethics and the Spirit of Restoration”, in Heather Strang and John Braithwaite (eds.) *Restorative Justice and Civil Society*, Cambridge: Cambridge University Press, 2001: 35-55.

The first point of commonality relates to the definition of crime as “a violation of people and interpersonal relationships” as opposed to the legal construction of crime as a violation against the state.²⁶⁴ It is from this view of crime as a violation of people and of relationships that the characteristic concern of restorative justice with the need to restore personal and social relations follows. It also follows that the restoration of personal and social harm necessarily needs to involve the victim, offender and community. And this in turn implies a ‘process’ view of justice: what matters is not so much a ‘just’ outcome but that all those affected by the crime are involved in the decision regarding the best way to repair the harm caused by the violation. “For restorative justice supporters, the chief way of recognising the personal dimension of crime is to involve victims, offenders and their respective families and friends in the process of dealing with its aftermath”.²⁶⁵

This focus on the personal and social dimensions of crime is by far one of the most significant aspects of restorative justice. All three of the above conceptions emphasise the relational impact of the wrong doing and that it is this harm that needs to be resolved by the parties involved. Conceiving of crime as a violation against the state follows from basically conceiving it in relation to the law and as a violation of rights. So the alternative is that of a sociological conception of crime rather than a legal and formal approach. One must then ask how this kind of sociological conception of crime relates to matters of justice. Violations of people and interpersonal relations could also be addressed and framed in terms of pathology and therapy for the harm caused or trauma suffered; this need not involve justice.

The second point of commonality is the assertion that the state, public institutions and professionals cannot have the monopoly over the way that crime is dealt with; victims, offenders and communities must play an active role in criminal justice. Of particular relevance here is Christie’s point that if a society is deprived of their property rights to

²⁶⁴ Howard Zehr *Changing Lenses*, 181.

²⁶⁵ Declan Roche, “Introduction” in Declan Roche (Ed.), *Restorative Justice*. The International library of essays in law and legal theory. Second Series. Aldershot: Ashgate. 2004:xi.

their conflict the society will lose out on opportunities for norm-clarification and deliberation over right and wrong.²⁶⁶

Despite these two significant areas of commonality there are also significant differences cutting across the various conceptions of restorative justice. While some theorists and practitioners conceive of restorative justice in more limited ways in relation to specified problems and shortcomings which can be addressed while continuing to operate within the overall criminal justice model (partial restorative justice), others conceive of it more radically as a systemic alternative to the entire criminal justice model (comprehensive restorative justice).²⁶⁷ The less radical approach that of “partial restorative justice”, is characteristic of those interested in promoting practical innovations and specific reforms of criminal justice institutions and practices. This partial approach makes allowance for strict accountability through some form of sanction, although this sanction may not always be punitive. Hence this partial restorative justice is compatible with the retention of basic aspects of criminal prosecutions while introducing measures for restorative justice as supplements. Within this limited perspective partial restorative justice may also be compatible with stipulating the sufficient conditions for specified practices of restorative justice. Thus in ‘victim-offender mediation’ there must be a personal encounter between offender and survivor.²⁶⁸ In this encounter the offender must make disclosure regarding the crime. The survivor and others involved ought to explain how the crime has affected them. The offender and survivor then negotiate reparation and this form of reparation should address the harm caused by the crime and not create more harm. Proponents of partial restorative justice acknowledge that these conditions cannot always be met. An encounter is not always possible and it cannot be guaranteed that the

²⁶⁶ Christie 1977: 8.

²⁶⁷ Raymond Anthony Koen makes the “partial” / “comprehensive” distinction in his doctoral thesis, “Restorative Justice: A Marxist Analysis” (2005).

²⁶⁸ For a full assessment of the VOM model see Mark Umbreit, Robert Coates and Betty Vos, “Victim Offender Mediation: Three Decades of Practice and Research”, *Conflict Resolution Quarterly*, Vol 22. No. 1-2, Fall – Winter, 2004.

offender will make full disclosure or even admit to the crime.²⁶⁹ It is not clear if there are any necessary conditions for restorative justice.

While there are various specific proposals for partial restorative justice the notions of comprehensive restorative justice remain much more vague and undeveloped, making the “partial” version of restorative justice more applicable to contexts of criminal justice. This “partial” version seeks to address certain shortcomings in the existing criminal justice framework by trying to make the process more accessible and give it a more “human face”. Holistic in the sense that crime is viewed not only as the violation of law breaking, but also as a violation in human relations that causes far reaching harm for all parties involved. And accessible in terms of making the process more victim friendly and less dominated by legal professionals so the process seeks to include the victim, offender and their respective communities of support. So, on this reading the partial version of restorative justice does hold significance and relevance for the existing criminal justice framework.

3.6. Relevance and Significance of Criminal Justice Conceptions of Restorative Justice for Transitional Justice

This chapter has illustrated the relevance of restorative justice as a relevant newcomer to the field of criminal justice. What has also been established is that while this may be the case, it has not been possible to identify a clear and coherent conceptual framework of restorative justice within the criminal justice context. At best we have been able to identify certain dominant lines of emphasis. The two paramount lines of emphasis being that crime is approached as a violation of people and interpersonal relationships and that institutions and professionals cannot have the monopoly over the way in which crime is dealt with, rather all stakeholders need to be involved.

²⁶⁹ Declan Roche acknowledges this and suggests that an encounter needs to be constrained by certain values so as to be restorative. Roche, D. (2001) “The Evolving Definition of Restorative Justice,” *Contemporary Justice Review* 4:341-53.

Both of these points are relevant to the transitional justice framework established in Chapter 1. The insistence of restorative justice that all stakeholders be involved in dealing with the aftermath of a crime resonates with the framework's notion that transitional justice be responsive to the needs of different actors (perpetrators, victims, beneficiaries). Another point of resonance relates to the manner in which criminal justice conceptions of restorative justice appeal to the transitional justice notion of a "society judging itself". Moreover, criminal justice conceptions of restorative justice accommodates the transitional justice concern for feasibility in the face of limited financial resources.

Where criminal justice conceptions fall short is in terms the transitional justice focus on acknowledgement and accountability.

Christie's theory of conflicts as property may have special relevance to transitional justice to the extent that his theory promotes meaningful participation of those affected and involved in a conflict/crime. For Christie the victim, perpetrator and wider community all benefit from "owning" their conflict and being actively involved in its aftermath. Victims regain a sense of autonomy, perpetrators are given the opportunity to redefine their role from taker to giver and perhaps most importantly for Christie the wider community is afforded the crucial opportunity for "norm-clarification".²⁷⁰

²⁷⁰ Christie 1977: 8-10.

Chapter Four

Conception(s) of Restorative Justice in African Traditional Justice Practices as Mechanisms for Transitional Justice: Gacaca and Mato Oput

Thus far we have surveyed two sources of thinking on and around ‘restorative justice’; first, the religious and theological discourse of reconciliation articulated in the work of Archbishop Desmond Tutu (Ch.2) and next the different notions of ‘restorative justice’ developed within the criminal justice literature (Ch.3). The third and final source under review, to be discussed in this chapter, is that of the conceptions of ‘restorative justice’ associated with the adaptation of African traditional justice practices as mechanisms of transitional justice, with particular reference to the use of Gacaca in post-genocide Rwanda and Mato Oput in Northern Uganda.²⁷¹ Our interest in these two African traditional justice practices relates to their recent adaptation as mechanisms for transitional justice, and more specifically to the sense in which they have been deemed to be forms of ‘restorative justice’ by various scholars in the transitional justice literature. It must be stressed that we will not be concerned with these African traditional justice practices in their own right. Rather this chapter will survey the literature surrounding the adoption of these customary practices as contemporary mechanisms of transitional justice, and will focus specifically on the senses in which the literature describes these mechanisms as forms of ‘restorative justice’.

The chapter will commence with a brief discussion of African traditional justice practices as an instance of the general phenomenon of “invented traditions”, and of the dilemmas involved in that. We then turn to a substantive account of Gacaca and Mato Oput as mechanisms for transitional justice with a view to the conceptions of ‘restorative justice’ associated with them in the literature. The chapter concludes with a discussion of the significance and relevance of these conceptions of restorative justice within a transitional justice framework.

²⁷¹ The use of terminology such as ‘African traditional justice practices’ is a highly contested matter. While we will use the term “traditional”, others writing on the topic have preferred terms like “informal”, “non-state”, “local” or “customary”. It should be noted that our choice of “traditional” does not imply that these are static or pure practices that have been passed on unchanged from earlier generations.

4.1. African Traditional Justice Practices as Invented Traditions

In recent years some bold claims have been made literature regarding the nature and function of these African traditional justice practices and their relevance in contemporary transitional justice contexts. Over and above the claims made by some criminal justice theorists on the inherently restorative nature of “indigenous” justice mechanisms, transitional justice scholars have made equally bold claims about the restorative character of Gacaca and Mato Oput.²⁷²

In stark contrast to these bold claims are other equally bold claims that suggest that the restorative character of these mechanisms has been grossly overstated largely by international donors.²⁷³ An accessible account of this proposition is found in Tim Allen’s *Trial Justice*. Allen offers a critical perspective on the use of Mato Oput suggesting that the ceremony’s popularity has been exaggerated by traditional and religious leaders as a smoke screen for their opposition to the intervention of the ICC.²⁷⁴ He uses extracts from interviews and illustrates that the matter is not as clear cut as some accounts depict.²⁷⁵ He posits that extreme religious conservatism coupled with opportunism on the part of some religious leaders lies behind calls for forgiveness and repentance.²⁷⁶ While it is beyond the scope of this discussion to explore Allen’s hypothesis, the current discussion does not presume to align with any one approach. The chief concern of this discussion is on what grounds the available literature describes Mato Oput as restorative.

This chapter is concerned with the different conceptions of restorative justice attributed to Gacaca and Mato Oput in recent transitional justice literature on Rwanda and Uganda. It

²⁷² Alana Erin Tiemessen, “After Arusha: Gacaca Justice in Post-Genocide Rwanda,” *African Studies Quarterly*, Vol. 8, Issue 1, Fall 2004:58.

²⁷³ See Tamara Enmoto, “‘Revival’ of Tradition in the Era of Global Therapeutic Governance. The Case of the ICC Intervention in the Situation in Northern Uganda” Paper presented at the British International Students Association Annual Conference, University of Leicester, 14-16 December 2009.

²⁷⁴ Tim Allen, *Trial Justice. The International Criminal Court and the Lord’s Resistance Army* (Cape Town: David Philip, 2005).

²⁷⁵ Allen 2005:142-144.

²⁷⁶ Allen 2005:133-138, 148-154.

sets out to explore what this literature has claimed about Gacaca and Mato Oput as traditional justice practices and in what ways it has conceived their adaptations in contemporary contexts as examples of restorative justice.

Discussion around African traditional justice practices and customary law runs the risk of consolidating an array of diverse and changing cultural practices into an essentialised and ahistoric unit in order to make claims about one or other ‘tradition’ or ‘custom’. A helpful corrective to this tendency is found in Hobsbawm and Ranger’s notion of ‘invented traditions’ in their seminal work *The Invention of Tradition*.

Hobsbawm and Ranger define *tradition* as a set of practices of a ritual or symbolic nature governed by overtly or tacitly accepted rules implying continuity with the past and *customs* as the loosely defined and flexible locally based, varied, relatively unconscious development of historical patterns of conduct and thought. As distinct from both tradition and custom in these senses, “invented traditions” are responses to novel situations which take the form of reference to old situations; they are relatively self-conscious and marked by rigidity and invariance²⁷⁷. Of particular relevance is Ranger’s chapter on “The Invention of Tradition in Colonial Africa”. Ranger does not deny the reality and significance of a diverse array of customary practices for African societies but argues that in important respects the institutionalisation of ‘customary law’ was a colonial construction and an invented tradition. Ranger’s main point is that the invention (and codification) of African traditions by the European colonisers eventually led to the previously flexible and dynamic customs actually being ‘frozen’; “once the ‘traditions’ relating to community identity and land right were written down in court records and exposed to the criteria of the invented customary model, a new and unchanging body of tradition had been created”.²⁷⁸ He offers a convincing account of how “what were called customary law, customary land-rights, customary political structure and so on, were in

²⁷⁷ Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition*. (Cambridge: Cambridge University Press, 1983), 1-2, 247

²⁷⁸ Ranger 1983:251

fact all invented by colonial codification”.²⁷⁹ Ranger argues that the European colonisers misunderstood the nature of African customary laws and traditions when they construed these as characterised by strict rules and procedures. Rather, “these societies had certainly valued custom and continuity but custom was loosely defined and infinitely flexible. Custom helped to maintain a sense of identity but it also allowed for an adaptation so spontaneous and natural that it was often unperceived”.²⁸⁰ However, codified as ‘customary law’ this ‘invented tradition’ was then manipulated by elders against youth, men against women and subjects against immigrants. The implications are that supposedly customary practices like Gacaca and Mato Oput might actually rather be invented traditions and part and parcel of a neo-colonial heritage.

Ranger’s points may certainly need to be clarified on many levels, but his caution is a salutary reminder as we explore the possible significance and contribution of African Traditional Justice mechanisms like Gacaca and Mato Oput. Some commentators do acknowledge the phenomenon of “invented tradition” in this connection. Thus Luc Huyse, writing in the Introduction to an IDEA publication on traditional justice mechanisms, notes this as an “important shift in perception and evaluation...that traditional techniques, in Rwanda and in other African post-conflict countries, have been greatly altered in form and substance by the impact of colonisation, modernisation and civil war”.²⁸¹

It may also be noted that, apart from the African context, the association of traditional justice mechanisms with restorative justice has been contested and debated within the field of criminal justice. While some authors, like Howard Zehr, maintain this association, others remain more cautious. For instance, Kathleen Daly expresses concern over the tendency of some scholars to class all forms of pre-modern justice practices as ‘restorative’.²⁸² She questions the result of this homogenising approach arguing that;

²⁷⁹ Terence Ranger, “The Invention of Tradition in Colonial Africa”, in Eric Hobsbawn and Terence Ranger, eds., *The Invention of Tradition*. (Cambridge: Cambridge University Press, 1983), 250.

²⁸⁰ Ranger 1983:247. We will come back to this point in the discussion of Gacaca and Mato Oput.

²⁸¹ Luc Huyse, “Introduction” in *Traditional Justice and Reconciliation after Violent Conflict*, Stockholm: IDEA. 2008:6-7.

²⁸² Kathleen Daly, “Restorative Justice – The Real Story,” *Punishment and Society* 4 (2002):63.

“Efforts to write histories of restorative justice, where a pre-modern past is romantically (and selectively) invoked to justify a current justice practice, are not only in error, but also unwittingly reinscribe an ethnocentrism these authors wish to avoid”.²⁸³

Also writing from the perspective of criminal justice, Declan Roche notes that there is no guarantee that traditional justice will be restorative; instead vigilantism or mob vengeance could ensue.²⁸⁴ Similarly, both Harry Blagg and Chris Cunneen problematise the relationship between restorative justice and indigenous justice mechanisms.²⁸⁵ And significantly John Braithwaite, the leading scholar on reintegrative shaming, notes that restorative justice practices don’t necessarily replicate indigenous practices.²⁸⁶

With these caveats in mind we now attempt to explore how the mechanisms of Gacaca and Mato Oput have been described as examples of restorative justice. The relevance and implications of these critical points will be discussed further in the concluding section of this chapter.

4.2 The Gacaca Courts of Rwanda

Background

The customary practice of Gacaca had been largely an ad hoc “local dispute resolution mechanism” where minor disputes would be adjudicated by male community elders (inyangamugayo).²⁸⁷ Local Gacaca hearings were the first level of dispute resolution before taking the matter to the king (mwami). The Gacaca of old was primarily aimed at “the restoration of social harmony, and to a lesser extent the establishment of the truth about what happened, the punishment of the perpetrator, or even compensation through a

²⁸³ Ibid.

²⁸⁴ Declan Roche, *The International Library of Essays in Law and Legal Theory*, 2nd series “Restorative Justice”, xiii.

²⁸⁵ See Blagg (1997) “A Just Measure of Shame?” *British Journal of Criminology*, 37: 481-501 and Cunneen (1997) “Community Conferencing and the Fiction of Indigenous Control”, *Australian and New Zealand Journal of Criminology*, 30:292-311.

²⁸⁶ Braithwaite (1997) “Conferencing and Plurality: Reply to Blagg”, *British Journal of Criminology*, 34 (4): 502-506.

²⁸⁷ Waldorf 2006:48.

gift”.²⁸⁸ Ingelare notes that colonial rule saw Gacaca lose legitimacy in the face of Western written law. Following independence however, Gacaca “evolved towards a semi-traditional or semi-administrative body” with local authorities being closely linked with Gacaca and using the mechanism as an initial port of call before taking matters to the formal court system.²⁸⁹

The mechanism of Gacaca²⁹⁰ Courts was introduced by the Rwandan government as a vehicle for dealing with the massive numbers of genocide crimes perpetrated between 1 October 1990 and 31 December 1994. (A full account of the 1994 Rwandan genocide, its root causes, ramifications and consequences, cannot be attempted in this discussion²⁹¹). As such the Gacaca process was an enforced response to a critical need for an extraordinary justice process in the aftermath of a mass atrocity, a need which the regular criminal justice system was quite incapable of dealing with.

The genocide saw large numbers of the Hutu population engaged in mass killings of the Tutsi minority, killing close to one million people and displacing over a million more.²⁹² The genocide also resulted in thousands of Hutu deaths.²⁹³ The exile-based and predominantly Tutsi Rwandan Patriotic Front took control of the state on 4 July 1994 and gradually ended the genocide. Within months the Rwandan government requested the UN Security Council to establish a tribunal to prosecute perpetrators of the genocide thereby initiating the International Tribunal for Rwanda (ICTR).²⁹⁴ The ICTR was designed to

²⁸⁸ Ingelaere 2008:33.

²⁸⁹ Ingelaere 2008:34.

²⁹⁰ Most authors translate ‘gacaca’ as grass with reference to the customary practices that people would gather on the grass to settle communal disputes. Ingelaere (2008:33) suggests that a closer translation is from ‘umgacaca’ referring to a plant that has a texture so soft that it is more comfortable to sit on than grass.

²⁹¹ See Mamdani (2001), Prunier (1995), Pottier (2002) for good discussions on the roots of the genocide.

²⁹² These figures are contested with some accounts closer to 500 000 and others exceeding 1 million. See HRW, “Leave none to tell the story” 1999:15 and Waldorf 2006:29. For number of people displaced and in exile see Penal Reform International, January 2002, “Gacaca Jurisdictions and its Preparations”.

²⁹³ These included those opposing the genocide, protecting Tutsi, mistaken as Tutsi, or RPF collaborators. See Waldorf 2006:29 on figures ranging from 10 000 – 56 000.

²⁹⁴ The literature is divided on how legitimate this request was considering that Rwanda then voted against the resolution for the ICTR. See press clipping explaining the vote. Namely that the ICTR would not implement the death penalty and that the ICTR may investigate RPF soldiers.

<http://allafrica.com/stories/200505260158.html>. See the Statute of the ICTR at <http://www.un.org/ict/statute.html>

deal only with those most responsible for planning the genocide. The so-called foot soldiers or *genocidaires* would have to be dealt with by domestic courts. This left the largely non-existent Rwandan criminal justice system facing a case load in excess of 100 000 accused persons.²⁹⁵ Although significant international aid was channelled into rebuilding the justice system, at best 1500-2000 cases could be processed per year, meaning that a best case scenario would require up to 50 years to try all the detainees.²⁹⁶

These factors led to a search for alternatives to criminal prosecutions. By 1999 the Rwandan government had commenced extensive discussions and consultations in order to explore the possibility of using an adaptation of the customary informal justice practice of Gacaca at the level of local communities as a possible alternative or complement to the existing criminal trials.²⁹⁷

These discussions explained Gacaca in terms of “participatory justice” whereby:

“That former Gacaca was a court with honest men, which settled disputes arising from the family or between neighbouring families; on ordinary matters in the peoples living conditions such as temporary separation between a man and his wife, the cattle causing damages to somebody's crops, etc. Severe offences were tried before the Chief of the village, and more severe ones before the King”.²⁹⁸

Scant detail is provided in these texts regarding the nature of the “old Gacaca”. It is invoked as a practical measure to alleviate the burden on the criminal justice system and more significantly as a means of “rebuilding Rwanda”. The report from the Presidency’s year long “Reflection Meetings” with analysts and policy makers singles out Gacaca as a way of eradicating the “genocide ideology”. The report notes that some had concern about using Gacaca for such serious crimes. This concern is dealt with by noting that using Gacaca

²⁹⁵ See André Sibomana, 1999. *Hope for Rwanda*. 108-9 for a description of the situation both in terms of the judicial system and the horrific overcrowding in prisons.

²⁹⁶ Human Rights Watch, World Report 2002:79. This estimation is significantly higher according to the Minister of Justice, Minister Karugarama. See interviews on DVD “Peace beyond Justice”, IJR, 2008.

²⁹⁷ Cobban, Boston Review, Summer 2002. Also see Ingelaere 2008:35-38 for an account of these consultation meetings.

²⁹⁸ Rwanda. Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999. (Kigali: Office of the President of the Republic, 1999:53) Available online at <http://www.grandslacs.net/doc/2378.pdf>

“is not minimizing them and making them a simple offence. It is rather putting the crime of genocide and massacres at the level in which it was committed. The crime of genocide and massacres and other crimes against humanity were committed in public; and-too many people actively participated in them”.²⁹⁹

The Report recommends the new and improvised version of Gacaca as a way of engaging the Rwandan public, “It is people who are to make it up with themselves”.³⁰⁰

The Rwandan government enacted the Gacaca Law (Organic Law No 40/2000 of 26/01/2001) to establish the Gacaca Courts. This law drew on the earlier Genocide Law (Organic Law No 08/1996) which outlined the confession and guilt plea procedure for genocide suspects as well as established four categories of genocide crimes. Initially the Genocide Law identified four categories of crimes: category 1 concerns the planners of the genocide and those guilty of sexual offences; category 2 concerns those who committed one or more killings; category 3 concerns those who committed assault without the intention to kill and category 4 concerns those guilty of looting and destruction. The 2001 Gacaca Law designates categories 2-4 under the jurisdiction of the Gacaca Courts with category 1 falling under domestic criminal courts. The Gacaca legislation frames the Gacaca Courts in terms of attaining five goals.³⁰¹ 1) Establish the truth about what happened, 2) Expedite the legal proceedings of all the accused, 3) Eradicate the culture of impunity, 4) Reconcile Rwandans and reinforce their unity, and 5) Using the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom.

The Gacaca process was piloted for an eighteen month period from June 2002 in a series of trials and assessment mechanisms. The findings from the pilot phase led to a revision of the Gacaca Law in 2004.³⁰² The revisions were mostly aimed at speeding up the

²⁹⁹ Ibid, 55.

³⁰⁰ Ibid, 7.

³⁰¹ See <http://www.inkiko-gacaca.gov.rw> and the same website for Organic Law 40/2000 of 26/01/2001

³⁰² See Organic Law No. 16/2004 of 19/6/2004 Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying Perpetrators of the Crime of Genocide or Crimes Against Humanity, Committed between October 1 1990 and December 31 1994, art.51. Laws available at <http://www.inkiko-gacaca.gov.rw/En/EnLaw.htm>

process so the size of the bench was reduced, as was the quorum. In addition, the categories were amended with the former categories 2 and 3 being combined into category 2 making the previous fourth category now the third. Another important addition to the law was an alternative penalty of community service (TIG) if the stipulated confession procedure was followed. National rollout began in July 2006 with the more than 12 000 Gacaca Courts.³⁰³ From 2007 the pace of the trials increased due to the set deadline of end December 2008. In January 2008 the Rwandan cabinet approved the extension of the jurisdiction of the Gacaca courts to include all genocide crimes, including category 1.³⁰⁴

The Gacaca Law also established that the different categories of crimes would be heard at four different administrative levels – cell, sector, district and province. The cell level will deal with category 4, the sector with category 3 and district level with category 2 with the province level available to hear appeals.³⁰⁵

These amendments and adaptations as well as the dominant role of the state meant that the Gacaca Courts are a distinctly different form of communal justice compared to earlier customary practices of Gacaca.³⁰⁶ Ingelaere argues that the Gacaca Courts are a clear example of Ranger's invented traditions.³⁰⁷ This is acknowledged by Rwandan Ambassador Sezibera in an interview with Helena Cobban.³⁰⁸ Indeed, the new 'invented' Gacaca Courts are a radical departure from the former customary practice. This has important implications for the claims made about the links between traditional justice mechanisms and restorative justice. Decisions to adapt and amend the Gacaca mechanism

³⁰³ NURC "Social Cohesion in Rwanda: Opinion Survey" 2007:56.

³⁰⁴ See HRW World Report - <http://www.hrw.org/en/node/79182>

The inclusion of category 1 places different demands on the Gacaca Court process as sexual crimes require stricter protection for the victims.

³⁰⁵ Information from the official Gacaca website – www.inkiko-gacaca-gov.rw. Last visited 15 August 2009.

³⁰⁶ Filip Reyntjens offers accounts of Gacaca from the 1970s and his description of the process is markedly different from that of the Gacaca Courts. Filip Reyntjens, "Le gacaca ou la justice du gazon au Rwanda", *Politique Africaine* 40 (1990): 31-41. I have relied on others' translations of this text. Ingelaere (2008:32) notes the lack of sources for the history of Gacaca and suggests that this represents "opportunities for twisting and manipulating evidence".

³⁰⁷ Bert Ingelaere, "The Gacaca Courts in Rwanda" 2008:32.

³⁰⁸ Cobban, *Boston Review* 2002.

were motivated by pragmatic concerns, namely that the government wanted to ensure that survivors would see justice in their lifetime and that suspects would enjoy some form of due process.³⁰⁹

Description of the process

The available accounts of the Gacaca Courts sketch a picture that is far from uniform. Some accounts seem to essentialise Gacaca and do not pay significant attention to how the mechanism has been altered.³¹⁰ Other commentators stress these differences and even suggest that a Gacaca Court hearing in one district will be very different in terms of process and substance to a hearing in another district.³¹¹ As has been noted, Gacaca Courts are guided by legislation that does bring some uniformity, but it would be misguided to assume that all Gacaca Courts are identical. This discussion will be limited in that it draws on accounts from observers and officials and not from direct participants.³¹² The purpose is simply to give a general idea of how the Gacaca process unfolds so that any restorative features can be discussed in the following section.

A key feature of the Gacaca Courts is the decentralised nature of the courts with a few courts in each local community and lay people from that community presiding over the hearings. During 4-7 October 2001 254 427 judges (*inyangamugayo*) were elected through a national election process. These 254 427 judges were spread over 12 000 courts. Penal Reform International (PRI) observed the election process and described it as taking place in a “disciplined and fair manner”.³¹³ According to PRI 87% of Rwandans participated in the elections. The main criteria for the election of judges appear to be education and gender with very few female judges. The same report also finds that the training of the judges was done from a legal perspective only with Attorneys without

³⁰⁹ Interview with Minister Tharcisse Karugarama, Justice Ministry (*Peace Beyond Justice* 2008).

³¹⁰ See Drumbl’s treatment of Gacaca “Sclerosis: Retributive Justice and the Rwandan Genocide”, *Punishment and Society* 2000:300-301.

³¹¹ Phil Clark speaking in Plenary at the Institute for Justice and Reconciliation Regional Consultation, Cedar Park Hotel, Johannesburg 11-13 August 2008.

³¹² The Institute for Justice and Reconciliation produced a documentary (*Peace Beyond Justice* 2008) on the Gacaca Courts that offers helpful footage of a hearing.

³¹³ PRI 2002:33-36.

Borders (ASF) drawing up the training manuals and providing little or no input on non-legal aspects of the training or any insight into restorative justice.³¹⁴ A 2005-2007 opinion survey found that while 92% of the general population agrees that the judges are honest and respect the truth, only 69% of survivors and 32% of prisoners agree.³¹⁵

Once the judges were elected the first pilot phase of Gacaca took place from June 2002 to November 2002. This phase focussed on collecting information from confessions and accusations at the cell level (similar in size to urban neighbourhoods). The procedure for obtaining confessions was set out in the Gacaca Law.³¹⁶ The law provides for a suspect to confess, give full disclosure of the crimes, make a public apology and request a reduced sentence or conversion of jail time to community service. The manner in which these confessions are handled are dealt with in a 2003 Penal Reform International report. The report suggests that the pressure to confess may result in a presumption of guilt rather than a presumption of innocence.³¹⁷ Ingelaere detects an important shift from plea-bargain style confessions intended to promote truth telling to accusations prone to manipulation for settling scores.³¹⁸ These accusations were difficult to verify and increased the number of suspects from the initial 130 000 accused and imprisoned to well over 700 000.³¹⁹ The information gathered through confessions and accusations was then used to categorise suspects according to the categories of crimes outlined in the Gacaca Law. Initially categories 2-4 would be tried through the Gacaca Courts, but as of 2008 the Gacaca Courts now also have jurisdiction over category 1 (sexual crimes).

In a slightly different vein, the PRI report also noted certain cultural norms that view confession in front of the victim and their families as an insult from the perpetrator.³²⁰ This would seem to suggest that in the light of such cultural norms obtaining confessions would preclude the possibility of reconciliation and restorative justice.

³¹⁴ PRI 2002:48.

³¹⁵ NURC "Social Cohesion in Rwanda" 2008:5.

³¹⁶ Organic Law No. 08/1996 available at <http://www.inkiko-gacaca.gov.rw/En/EnLaw.htm>

³¹⁷ PRI 2003:4.

³¹⁸ Ingelaere 2008:42.

³¹⁹ PRI 2005:52

³²⁰ PRI 2003:3. The report states that PRI researchers who attended hearings confirmed that perpetrators adopted an arrogant stance when delivering their confession.

After this information gathering during the pilot phase the Gacaca courts commenced in July 2006. The information previously gathered could now be used in the hearings in which the accused or confessor, victim or accuser appeared. The Court gathers in a local meeting place and the judge reads aloud the information and testimonies that have been collected for the case. Witnesses and other parties are permitted to speak and raise any issues they deem relevant. Once all parties have had their say the judges discuss the case amongst themselves and then deliver the verdict to the Court.³²¹ If the accused is not happy with the verdict there is the option of appeal to the sectoral Gacaca appeal court.

Restorative Elements of Gacaca

The literature on the Gacaca hearings does not agree on the extent to which they involve elements of ‘restorative justice’. It is not even clear whether ‘restorative justice’ can be said to be a main objective of the Gacaca process. Ingelaere makes the important observation that the initial founding discussions did not view the Gacaca Courts as a mechanism of restorative justice but rather as one of accountability.³²² It is not clear when or how the association of the new Gacaca Courts with restorative justice emerged. The Gacaca Law that established the courts does list reconciliation as a goal but we cannot assume a linkage between reconciliation and restorative justice. Still, even if the initial purpose of Gacaca may not have been expressed in terms of restorative justice, others writing on the Courts have made the connection in various ways.

Helena Cobban describes Gacaca as an example of restorative justice that aims at repairing relationships rather than at punishment. Cobban does not take the retributive functions of the Gacaca courts into account and simply ignores these features of the Courts. Cobban distinguishes between a “Western, prosecutorial system” that is punitive and restorative justice that employs an “essentially communitarian view of the relationship between the individual and society”.³²³ Cobban draws on the exchanges

³²¹ This account is taken from Ingelaere 2008:42.

³²² Ingelaere 2008:38 refers to *Report on Reflection Meetings* 1999:57 to make this point.

³²³ Helena Cobban, 2002 “The legacies of collective violence: the Rwandan genocide and the limits of the law,” *Boston Review*, 27(2): 12 (page numbers apply to printed version).

between Karl Jaspers and Hannah Arendt following the Nuremberg Trials. She concurs with Arendt's assessment that criminal trials illustrate "the inadequacy of the prevailing legal system and of current juridical concepts to deal with the facts of administrative massacres organised by the state apparatus".³²⁴ Cobban transfers this acknowledgement of the limits of the law to the Rwandan case and notes that "the mass-participatory nature of the killing makes individual accountability even harder to disentangle [and], the prosecutorial method may need even more help from other disciplines and traditions".³²⁵ She concludes by noting the need for "a distinction between policy response to events in more settled times and those adopted after times of atrocity".³²⁶

Also writing prior to the commencement of the Gacaca Courts, Mark Drumbl noted that it would be highly problematic if the Rwandan government were to succumb to international human rights groups and make the Gacaca hearings more like a criminal trial. He contends that to the extent to which Gacaca is framed as a criminal trial it will fail to promote reconciliation and peace.³²⁷ However, others have noted that the potential success of Gacaca Courts is precisely its "innovative character" which is a "mixture of judicial systems and of retributive and restorative justice".³²⁸ Graybill and Lanegran suggest that Gacaca has "relevance to broader experiments of reconciliatory justice" for at least three reasons. They suggest that the Gacaca courts would promote confession, apology and reparation.³²⁹ They do not offer any explanation and simply assume that this "reconciliatory justice" can be thought of as an example of restorative justice.

Writing subsequent to the launch of the Gacaca hearings, Lars Waldorf traces the development of the Gacaca Courts from the first pilot phase in 2002 to 2006 and notes that there has throughout been a tension between the retributive and restorative elements, between "confessions and accusations, plea-bargains and trials, forgiveness and punishment, community service and incarceration". For Waldorf he considers

³²⁴ Cobban 2002:18 printed version. She cites Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* 1963:186,294.

³²⁵ Cobban 2002:19 printed version.

³²⁶ Cobban 2002:21 printed version.

³²⁷ Drumbl 2002:14-18.

³²⁸ Karekezi, Nshimiyimana & Mutaba "Localizing Justice" 2004:73.

³²⁹ Graybill & Lanegran 2004:9.

confessions, plea-bargains, forgiveness and community service to be elements of restorative justice as against accusations, trials, punishment and incarceration as elements of retributive justice.

Waldorf notes that the changes in legislation are such that “Gacaca has become increasingly retributive both in design and practice”.³³⁰ He takes a highly critical stance and challenges the common assumptions about Gacaca. He contends that the Gacaca Courts are not ‘customary’ or ‘traditional’, nor are they participative and ultimately the Courts are not restorative. Waldorf argues that the Gacaca Courts cannot be classified as “traditional”, “customary” or “indigenous” for the following reasons. The Courts represent an official state institution “linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than ‘customary’ law”.³³¹ In contrast to the previous forms of Gacaca that dealt with civil matters, the Gacaca Courts try serious crimes. Another departure from the previous Gacaca system is the fact that in the new Gacaca the judges are not the community elders, but are elected and are mostly young.³³²

In addition to the Courts no longer being ‘traditional’ Waldorf identifies other problems with the Gacaca Courts suggesting that they are biased in focus (no attention to RPF violence), do not assist with the promised reparations to survivors and that the Courts are not conducive for testimony from victims of sexual violence. He also cites the lack of participation from the population (members of local communities either did not attend the Gacaca trials, or if they attended they did not take an active part in the proceedings), the unreliability of the information that is provided and the fact that because Gacaca has become so politicised it in fact promotes collective guilt, which in turn hinders reconciliation and ultimately contributes to a worsening of inter-ethnic relations.³³³

³³⁰ Waldorf 2006:422

³³¹ Waldorf 2006:52.

³³² Ibid.

³³³ See Waldorf’s comprehensive account of the Gacaca Courts in “Mass Justice for Mass Atrocity” *Temple Law Review* 2006, vol.79(1) and “Rwanda’s Failing Experiment in Restorative Justice” in Sullivan and Tift, *Handbook of Restorative Justice*, 2006:422-434

Luc Huyse also finds that although reconciliation is one of the stated goals of the Gacaca Courts, “the actual Gacaca is strongly oriented towards retribution”.³³⁴ Another instance of this same approach is to be found in the series of research reports published by Penal Reform International. These reports are authored by researchers who attended Gacaca hearings and undertook extensive fieldwork.³³⁵ The Penal Reform reports emphasise that the Gacaca Courts in their revised format are more concerned with legalistic retribution than reconciliation.³³⁶

The Rwandan National Unity and Reconciliation Commission (NURC) commissioned an opinion survey to measure the response to and successes of Gacaca spanning 2005-2007. The findings from this survey offer helpful insight into how Rwandans gauge the process. Full details regarding the methodology and design of the survey can be accessed from the NURC website.³³⁷ The survey works with three groups of respondents – survivors, prisoners, and members of the general public. The ‘survivors’ and ‘prisoners’ are those involved in the Gacaca hearings as victims and accused while the ‘general public’ are the members of local communities who may or may not have attended a hearing.

The findings from the survey illustrate the exceedingly high expectations that all three groups have of the Gacaca Courts with 99% of the general public, 92% of the survivors and 79% of the prisoners population agreeing that the Gacaca Courts are an essential step toward peace and reconciliation in Rwanda.³³⁸ It is perhaps not surprising then that with such high expectations the actual implementation of the Courts has been disappointing for some. A majority of genocide survivors (76%) feels that public testimony during the Gacaca hearings worsens tensions between families and that the

³³⁴ Huyse 2008:12.

³³⁵ All reports are freely available at <http://www.penalreform.org/reports-4.html> last visited 15 August 2009.

³³⁶ Penal Reform International Report Interim Report on Research on Gacaca Jurisdictions and its Preparations (July –Dec 2001), 43-44.

³³⁷ The full report is available at http://www.nurc.gov.rw/index.php?option=com_content&view=article&id=65:social-cohesion-in-rwanda&catid=35:reseaches&Itemid=40

Another good commentary on the report is Ingelaere, 2007 “Does the Truth pass across the Fire without Burning?”.

³³⁸ Social Cohesion in Rwanda, NURC Report 2008:3-4.

families of those found guilty of crimes of genocide will always feel resentful (66%).³³⁹ Prisoners (71%) agree that testimony during the Gacaca Courts aggravates tensions. In terms of security the report also finds that significant majorities of genocide survivors (82%) and prisoners (54%) say they feel threatened during the Gacaca hearings.

Ultimately the report finds that public opinion on the Gacaca Courts is mixed with high expectations for closure for survivors but at the same time equally high levels of suspicion about the integrity of the process from all three groups interviewed. Importantly, the report found that there is a growing gulf between the survivor and prison populations. Respondents had high expectations of the Gacaca Courts *assuming the integrity of the process*. But they have serious doubts about the integrity of the actual process, and hence are also disappointed by the outcomes. Some of the specific issues at stake regarding the integrity of the process, such as the trustworthiness of the judges as well as the validity of testimony pose serious challenges to any prospect of the Gacaca Courts being examples of restorative justice.

Taking into account both the comments from researchers, observers and Rwandan citizens we are left with a mixed assessment of Gacaca's contribution to 'restorative justice'. There are elements of the process that can be called restorative but there are also mitigating factors that compromise the restorative value of these elements. The potentially restorative elements include the localised settings of the Courts, the fact that the judges are mostly from the community where the conflict occurred, all stakeholders are given an opportunity to speak and the alternative penalty of Community Service as oppose to punishment in prison.

³³⁹ Ibid, 4.

4.3 Mato Oput Rituals in Northern Uganda

Background

The conflict in northern Uganda is entrenched and complex – spanning at least 20 years. The conflict has its roots in a popular rebellion against President Yoweri Museveni's National Resistance Movement (NRM) government but has over the years been eclipsed by Joseph Kony's Lord's Resistance Army (LRA) into a brutal war primarily involving civilians. It has been estimated that in excess of 1.4 million people have been displaced and tens of thousands killed, raped or abducted.³⁴⁰ One of the LRA's strategies is to abduct and then force the abductees to "kill, trample, beat, mutilate, or abduct friends, relatives".³⁴¹

Following the Amnesty Act of 2000 there have been significant numbers of returning soldiers.³⁴² These "soldiers" are in many ways also "victims" because they were abducted and coerced into all manner of violent behaviour. Since 2000 a range of traditional healing rituals have been used to help reintegrate returning soldiers back into their communities.³⁴³ More recently these traditional mechanisms have gained significant attention as possible transitional justice options.

Following a 2003 referral to the ICC by President Museveni, the ICC conducted investigations and in 2005 issued arrest warrants for five of the LRA's top guard. The ICC's intervention has been met with mixed reactions. Concerns have been raised that the ICC intervention will be manipulated by the Museveni government as a way of rubber stamping their military efforts in the north.³⁴⁴ Similarly, others have noted that given that the ICC is unlikely to investigate violations committed by government forces, the ICC involvement will only worsen the already volatile north-south divide. Others have

³⁴⁰ Refugee Law Project Working Paper 11 available online at http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf

³⁴¹ *Human Rights Watch*, *Abducted and Abused: Renewed Conflict in Northern Uganda* 17-18 (2003), 20-24.

³⁴² See James Ojera Latigo, "Northern Uganda: tradition based practices in the Acholi region" in Luc Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict*, (Stockholm: IDEA. 2008), 95-97. Latigo notes the problematic nature of the Amnesty Act and how it unfairly criminalizes returnees, who are themselves victims.

³⁴³ Waldorf 2006:17.

³⁴⁴ Refugee Law Project Position Paper on the ICC, 2004.

expressed concern that the warrants will serve to complicate and prolong negotiation efforts with the LRA.

These and other concerns have featured in the Juba Peace Talks which commenced shortly after the issuing of the arrest warrants. The talks which have been running since July 2006 have seen the LRA and the government attempt to find domestic solutions to the conflict. This ties in to the ICC's principle of complementarity whereby the Court's intervention is legitimate only in cases in which the state party is either unwilling or unable to settle the matter domestically.³⁴⁵ To date three of the five points of the peace agreement have been signed - Cessation of Hostilities, Comprehensive Solutions to the Conflict and Agreement on Accountability and Reconciliation.³⁴⁶ Of particular relevance for our current purposes is the content of Agenda Item No. 3 on Accountability and Reconciliation. This item makes specific provision for traditional justice mechanisms such as Mato Oput to be "promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation".³⁴⁷

After Agenda Item 3 was signed widespread consultations have been carried out across the country with a range of stakeholders to explore different ways of implementing the Agreement so as to ensure accountability and reconciliation.³⁴⁸ These consultations have led to extensive debate not only within Uganda but also amongst transitional justice scholars more broadly. Key issues under discussion are the effectiveness of local and international justice mechanisms in addressing gross human rights violations and the extent to which these mechanisms contribute to peace and justice respectively. This distinction has been explained by some in terms of a retributive/restorative dichotomy.³⁴⁹ Other issues concern the shape and extent of the "modifications" of the traditional justice

³⁴⁵ Article 17, Rome Statute.

³⁴⁶ Information from the Beyond Juba website - http://www.beyondjuba.org/transitional_justice.php

³⁴⁷ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 29 June 2007.

³⁴⁸ Beyond Juba website.

³⁴⁹ Liu Institute, GDNF, KKA. *Roco Wat I Acoli: Restoring Relations in Acholi. Traditional Approaches to Justice and Reintegration*. September 2005.

mechanisms so as to meet the requirements of accountability and reconciliation as per the Juba Agreement.³⁵⁰

It is in this context that claims have been made by traditional and religious leaders as well as civil society members regarding the restorative character of traditional justice mechanisms. While there are a range of mechanisms that fall under the banner of ‘traditional justice’ our particular focus is on claims concerning the Mato Oput ritual.

As a customary practice of the Acholi people the Mato Oput ritual is applied in cases of accidental or purposeful killings.³⁵¹ Literally Mato Oput means drinking the bitter root, and refers to a communal ritual in which both victims and offenders drink this bitter mixture as a symbolic gesture of their willingness to “swallow and wash away all the bitterness that once existed between them”.³⁵² As was the case in the previous discussion of the Gacaca Courts, there are different interpretations of Mato Oput. We do not presume to uncover an official or authoritative account of Mato Oput, but rather to draw on accounts in the literature and in so doing distil what Mato Oput entails, and how the mechanism is described as being restorative.

Description of the process

It must be noted that the bulk of the literature on Mato Oput has emerged in response to the Juba Talks and to the Agreement on Accountability and Reconciliation. This has meant that the literature is written with a specific purpose in mind, and hence may well fall into the category of Hobsbawm and Ranger’s *invented traditions*. One such piece of literature, although written prior to the Juba Talks is the 1997 report by Dennis Pain, *The Bending of Spears*.³⁵³ Pain’s report popularised Mato Oput as a central requirement for

³⁵⁰ The Beyond Juba civil society coalition has set up a project that seeks to “contribute to the codification of traditional justice processes in Uganda, through close scrutiny of traditional practices in a variety of conflict affected settings in Uganda. It will seek to identify those norms and values which can be codified in such a way that they complement formal national and international legal processes”. See website.

³⁵¹ Baines 2007:104.

³⁵² JRP *Field Notes*, 3.

³⁵³ Dennis Pain, *The Bending of Spears*.

bringing justice and peace to the north and infused Mato Oput with Christian overtones. Pain's report has been characterised as pursuing a particular agenda and has met with criticism and has led some to question the existence and relevance of Mato Oput altogether.³⁵⁴ As noted at the outset of this chapter, the very notion of "tradition" is fraught, and particularly so in contexts in which there are competing political agendas. The following account of Mato Oput has endeavoured to remain focussed on the question of restorative justice.

In 2005 the Liu Institute for Global Issues published a lengthy study on Mato Oput.³⁵⁵ The study explores what the rituals entail, how they are carried out and the value of the rituals for bringing peace to the Acholi people.³⁵⁶ The study draws on secondary accounts of over 50 ceremonies that took place between 2000-2005, with researchers attending one Mato Oput ceremony held at Pajule Camp on April 4 2005. According to the Liu Report the process of Mato Oput is voluntary and involves the "mediation of truth; acknowledgment of wrong doing; and reconciliation through symbolic acts and spiritual appeasement".³⁵⁷ There are nuanced differences of practices across Acholi clans but the general principles and beliefs are shared.

Mato Oput is a long and complex process. The Liu Report for instance studies a ceremony that takes place in 2005 to deal with a murder which occurred in 1977.³⁵⁸ The long delay is accounted for as a 'cooling off' period so as to allow anger to subside. The length of the period is determined by the parties and is often prolonged due to the offender clan not having sufficient resources to pay for the ceremony. Immediately following the murder the elders separate the clans involved so as to prevent counter attacks.

³⁵⁴ Chris Dolan, "Inventing Traditional Leadership? A Critical Assessment of Dennis Pain's 'Bending of Spears'," a *COPE Working Paper*, April 2000.

³⁵⁵ Liu Institute, GDNF, KKA. *Roco Wat I Acoli/Restoring Relations in Acholi: Traditional Approaches to Justice and Reintegration*, September 2005.

³⁵⁶ Liu Institute, GDNF, KKA. *Roco Wat I Acoli/Restoring Relations in Acholi: Traditional Approaches to Justice and Reintegration*, September 2005.

³⁵⁷ Ibid.

³⁵⁸ The description that follows is based on the account given in Liu Institute, GDNF, KKA. *Roco Wat I Acoli/Restoring Relations in Acholi: Traditional Approaches to Justice and Reintegration*, September 2005:54 -71.

It is expected that the offender will voluntarily come forward and confess his³⁵⁹ guilt. The voluntary nature of the confession is described as a central element of Mato Oput. The process can only continue once guilt is admitted.

Elders play a vital role as mediators throughout the process. Once guilt is established the elders engage with both sides of the conflict in order to ascertain the relevant facts of the crime. When the elders deem the ‘cooling off’ period to have lapsed the two clans are brought together in order to reach consensus on the nature of the crime and then to negotiate adequate compensation to be paid by the perpetrator clan to the victim clan. This process can take any length of time, according to the Elders interviewed in the 2005 Liu study,

“Once the process has begun, it can only be ended when all parties are satisfied with the account of what has happened, including reflection of the perpetrator on the motives for his or her crimes, the circumstances in which it was committed, expression of remorse, and the payment of compensation”.³⁶⁰

It is important that all parties affected by the murder remain involved throughout the process.

There is no strict formula for deciding on compensation although it is reported that the idea behind compensation is linked to progeny so the compensation is thought of in terms of a bride price. After compensation is paid, the ceremony of ‘drinking the bitter root’ is enacted between the clans; the ceremony is aimed at reconciling the two clans and facilitating the reintegration of the offender back into the community. The actual ceremony is the final part of the long process.

There are various elements to the ceremony and may vary slightly in different contexts but the key elements comprise the following:³⁶¹

³⁵⁹ In all the reports of Mato Oput only men are included in the process, women play an extremely peripheral role.

³⁶⁰ Liu Institute, GDNF, KKA. *Roco Wat I Acoli/Restoring Relations in Acholi: Traditional Approaches to Justice and Reintegration*, September 2005:56.

³⁶¹ *Roco Wat I Acoli* 2005:57-60.

The Beating of the Stick - The ceremony begins with the 'Beating of the Stick'. The symbolism attached to this ritual seems to revolve around what would happen if the anger experienced by the wronged party is not mediated and resolved. The mediator stands between representatives from either party and instructs them to "hold up long thin sticks and approach the centre as if they were to attack one another. The men were told to yell insults at each other and the women to wail in mourning".³⁶² The guilty party is then instructed to run away as an act of admission of guilt.

Slaughter of the Sheep and Goat – The offending clan slaughter a sheep, which represents guilt and the victim clan slaughter a goat, which represents unity. The slaughtered animals are cut in half and the opposite sides are exchanged between the clans representing the admission of guilt and the unity which is now possible again.

Eating Spoiled Boo ('Boo Mukwok' – spoiled greens) – The significance of this spoiled food illustrates that tension has existed long enough for food to spoil. The act of eating this spoiled food shows that the clans are now ready to reconcile.

Drinking of Bitter Root – This symbolizes the bitterness that existed between the parties. The drinking takes place while parties kneel with hands behind their backs to show reverence for the deceased. Before drinking the parties "knock heads" to show that they were once separated but are now united.

Eating of the Liver – The liver of the cooked goat and sheep is eaten by both parties. The liver is thought to be the place where bitterness is stored so eating it together illustrates that the clans are united.

Following this the rest of the food that was prepared is eaten by all present. All the remaining food must be eaten to symbolise that no further tension remains.

The elders interviewed agreed that the "principles, values and symbolic meaning of *Mato Oput*...are essential to rebuilding a devastated Acholi-land".³⁶³ However, the same elders also expressed serious doubts as to the successful modification and adaptation of *Mato Oput* for dealing with matters related to the conflict. As indicated, *Mato Oput* assumes a fairly close community in which the elders know the clan of the victim and the clan of the

³⁶² *Roco Wat I Acoli* 2005:59.

³⁶³ *Roco Wat I Acoli* 2005: iii.

perpetrator. How would Mato Oput be possible if these details are unknown, who would decide on the compensation? And, even if compensation is decided, how would the offender be able to afford this given the extremely high levels of poverty, particularly among returnees.³⁶⁴ Another concern has been raised regarding the scope of crimes committed during the conflict; a high degree of sexual violence has taken place involving men and women. Would Mato Oput be able to accommodate such crimes?³⁶⁵ Similarly, concern has been raised regarding the extent to which the conflict has compromised and weakened the social fabric, particularly the role of the Elders to such an extent that these traditional mechanisms are not feasible.³⁶⁶

Restorative Elements

Mato Oput forms one aspect of a bouquet of traditional justice mechanisms practised by the Acholi people of Northern Uganda. The literature does designate this bouquet as representing a non-adversarial and restorative approach to justice.³⁶⁷ A participant in one study remarks, “In traditional Acholi culture, justice is done for ber bedo, to restore harmonious life”.³⁶⁸ This restorative character is explained by Mato Oput’s emphasis on truth-telling, compensation and reconciliation and forgiveness.³⁶⁹

All of the accounts of Mato Oput consulted highlight the importance of how the mechanism assists in truth-telling.³⁷⁰ Given that Mato Oput can only take place once confession and admission of guilt has already occurred, the truth that emerges through the ceremony is not so much that of factual truth, but may be better explained in terms of “social/dialogical” and “healing/restorative” senses of truth.³⁷¹ The truth that emerges in the Mato Oput ceremony is arrived at through discussion and interaction between the

³⁶⁴ The Cooling of Hearts, 2007:13.

³⁶⁵ Baines 2007:105.

³⁶⁶ Erin Baines, “The Haunting of Alice,” *International Journal of Transitional Justice* Vol.1 2007:97.

³⁶⁷ Ted Nielsen, “The International Criminal Court and the ‘Peace versus Justice’ Dichotomy,” *Australian Journal of Peace Studies*, Vol. 3, 2008:34-42. Alexander Greenawalt, “Complementarity in Crisis,” *Virginia Journal of International Law*, Vol.50(1) 2009:16.

³⁶⁸ *Roco Wat I Acoli* 2005: 14.

³⁶⁹ *Roco Wat I Acoli* 2005; The Cooling of Hearts, July 2007. Beyond Juba Working Paper No.1 2009.

³⁷⁰ *Roco Wat I Acoli* 2005; The Cooling of Hearts, July 2007. Hovil & Quinne 2005:34. Beyond Juba Working Paper No.1 2009.

³⁷¹ See Chapter 1. These senses of truth are identified in the SA TRC Report.

parties. A mutually acceptable version of events is a necessary requirement before compensation can be discussed and reconciliation explored.³⁷² And, the emphasis for the mechanism is more about repairing social harmony within the community than establishing individual innocence or guilt of the perpetrator. This phenomenon has linkages with Du Toit's notions of *truth as acknowledgement* and *justice as recognition* as features of the South African TRC.³⁷³

A further aspect of the restorative character of Mato Oput is the emphasis on compensation as oppose to punishment. According to a series of interviews and focus groups undertaken in 2008-2009 it was this aspect of material compensation that was "the most elemental and ubiquitously discussed aspect of traditional justice".³⁷⁴

The emphasis on reconciliation and forgiveness is also invoked to explain Mato Oput's restorative character. Truth-telling and compensation are precursors to a reconciliatory act of eating and drinking, which then signifies forgiveness. Reconciliation is understood as a way of ending cycles of violence, or according to an interviewee, "Mato Oput is the only way to stop the escalating killing. It is not about revenge".³⁷⁵ Caution has been raised regarding the unquestioned link between reconciliation and restorative justice.³⁷⁶ The association made in this case differs in that Mato Oput is viewed as a means to restoring relations, and in this way deemed as a mode of reconciliation. Mato Oput is not viewed as an end in and of itself. This opens the way for reconciliation to be understood as a possible outcome of restorative justice, but not as a given. Interestingly, this reconciliation is conceived in simple terms of sharing a celebratory meal together. This sharing then seems to entail forgiveness in the sense that the victim no longer holds the perpetrator ransom to the wrongdoing and relations are normalised between the parties.³⁷⁷

³⁷² Beyond Juba Working Paper No.1 2009:21.

³⁷³ André du Toit, "The Moral Foundations of the South African TRC. Truth as Acknowledgement and Justice as Recognition," in Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), 122-140. Du Toit clearly states that these conceptions relate specifically to the victims' hearings.

³⁷⁴ Beyond Juba Working Paper No.1 2009:23.

³⁷⁵ Beyond Juba Working Paper No.1 2009:29. .

³⁷⁶ See Wilson (2001:542-556) arguing that restorative justice should not be framed by notions of forgiveness and reconciliation.

³⁷⁷ Beyond Juba Working Paper No.1 2009:30.

This restorative approach to justice that underpins Mato Oput is in turn premised on a notion of community that is very similar to what Archbishop Tutu terms “ubuntu”.³⁷⁸ A respondent in the 2005 Roco wat I Acoli study explained that “In Acholi, one lives because of the other”.³⁷⁹ The study further explains that for the Acholi,

“one person’s crime extends to the entire family, and the family of the injured party is likewise affected. Thus one person’s crime causes a rift within the entire community that can only be resolved after establishing the truth, payment of compensation and followed by a series of rituals or ceremonies in order to reconcile ‘bitterness’ and chase away ill will or spirits that threaten the unity of the clan”.³⁸⁰

This understanding of the effects of a crime are paralleled with the criminal justice understanding of a sociological approach to crime.

On this reading Mato Oput carries four characteristics that account for it being classified as restorative. Mato Oput is restorative to the extent that it emphasizes truth-telling, compensation, reconciliation and forgiveness and a communal/sociological approach to wrongdoing.

4.4 Relevance and Significance for Transitional Justice

This discussion has touched on the complexity of adapting customary practices of “traditional justice” such as Gacaca and Mato Oput as mechanisms of transitional justice. In both the Rwandan and Northern Ugandan cases it must be acknowledged that the substance of the respective traditional justice mechanisms is contested and continually evolving. With this complexity in mind we have nonetheless sought to explore the Gacaca Courts and Mato Oput with a view to how and in what sense the literature has construed them as examples of restorative justice.

³⁷⁸ See Chapter 3, pages 46-50.

³⁷⁹ *Roco Wat I Acoli* 2005: 16.

³⁸⁰ *Roco Wat I Acoli* 2005: 16.

In the case of the Gacaca Courts the assessment is that while articulated in terms of fulfilling a restorative agenda, in practise the hearings are perhaps more accurately described as retributive. The retributive factors relate to the adversarial nature of the hearings with accusations a common occurrence and concerns that social relations worsen following the hearings. The potentially restorative elements include the localised settings of the Courts, the fact that the judges are mostly from the community where the conflict occurred, all stakeholders are given an opportunity to speak and the alternative penalty of community service as oppose to punishment in prison.

To the extent that Mato Oput forms part of a broader bouquet of traditional justice mechanisms it carries significant grassroots support and is widely regarded as a legitimate option for a transitional justice package. The discussion has shown that Mato Oput can be broadly classed as restorative in terms of an emphasis on truth-telling, compensation and reconciliation and forgiveness.

As a traditional justice mechanism Mato Oput does raise some important flags in terms of its applicability to transitional justice.³⁸¹ The peripheral role that women and youth play in the Mato Oput ceremony severely compromises its relevance to transitional justice. Similarly, the role and status of Elders in contemporary Ugandan society is reportedly in flux. This could pose problems for the future implementation of Mato Oput as part of a transitional justice process. And finally, as was the case with the Gacaca Courts, there are serious concerns regarding the relevance of traditional justice practices in tackling gross human rights violations.

In spite of the above-mentioned reservations both Gacaca and Mato Oput display one of the key aspects identified in Chapter 1's transitional justice framework, namely that the transitional justice response is about a society judging itself.³⁸² Accounts of both Gacaca

³⁸¹ These limitations are raised in "Tradition in Transition", *Beyond Juba Working Paper* No.1, July 2009.

³⁸² Elster 2006.

(“It is people who are to make it up with themselves”³⁸³) and Mato Oput illustrate that the mechanisms enjoy widespread community support and legitimacy. Some accounts in the literature caution that this community legitimacy will be compromised by codifying and formalising “traditional” justice mechanisms. The argument is that in order for traditional justice mechanisms to be effective they need to be independent from the state and function within the local community according to the accepted socio-cultural practices. However, for transitional justice mechanisms to be effective they ideally should have official standing and comply with international human rights standards and principles of due process, hence codification and formalisation enter the picture. This tension is important and deserves serious attention. Could it be that assumptions about what transitional justice mechanisms ought to look like need to be challenged and scrutinised?

³⁸³ Rwanda. Report on the Reflection Meetings Held in the Office of the President of the Republic from May 1998 to March 1999. (Kigali: Office of the President of the Republic, 1999:7) Available online at <http://www.grandslacs.net/doc/2378.pdf>

Conclusion

This minor dissertation has attempted to do two things. Firstly, to try and clarify the concept of restorative justice by exploring three different sources of thinking on the topic; and then secondly to make some statements regarding the relevance and contribution of restorative justice to the field of transitional justice.

On the first score our investigation into three different sources has shed some light on what is *meant* by the term restorative justice.

Archbishop Desmond Tutu advances a conception of restorative justice that has its roots in his theology of reconciliation. Tutu's brand of restorative justice is such that justice is not an absolute principle on its own but rather a secondary value in relation to the overarching goal of reconciliation. This reconciliation is possible only after there has been confession, forgiveness and restitution. In turn these three processes are assisted and made possible in community. "Ubuntu" or human interconnectedness frames Tutu's conception of restorative justice in that it explains the harm that a wrongdoing causes, as well as provides the context for its resolution. For Tutu, all human beings are relational beings whose very essence is one of community.

It follows that for Tutu, because of this interconnectedness, a crime or wrongdoing affects not only the victim and perpetrator, but the wider community too. This breach in human interconnectedness cannot be left to continue, and so must be resolved. The route to this resolution is through confession and remorse from the offender, which should be met with forgiveness from the victim, and then made good by restitution from the offender. For Tutu the greater the harm or wrongdoing, the greater the breach of human interconnectedness and hence the greater the need for reconciliation.

This is why Tutu has called for reconciliation, which is for him the same as restorative justice, in contexts of gross human rights violations ranging from post-Apartheid South Africa to post-genocide Rwanda. Without reconciliation (restorative justice) the breach in

human connectedness will only worsen and lead to more harm. Tutu's conception of restorative justice was intact prior to the South African TRC, and was galvanised during the TRC process.

There are significant parallels between Tutu's conception of restorative justice and what emerged through investigating Gacaca and Mato Oput. While it cannot be said that there is one coherent conception of restorative justice emerging from African Traditional Justice Mechanisms, certain elements did emerge that are broadly classed as restorative. In these cases, as with Tutu justice is conceived in relational terms with social harmony and community as key priorities. Conflict and crimes therefore affect the wider community, and hence the resolution of conflict ought to include the wider community.

The conceptions of restorative justice advanced by Archbishop Tutu and the African Traditional Justice Mechanisms (Gacaca and Mato Oput) share discernable points of overlap. Both advance conceptions of restorative justice that are grounded in community based understandings of human interaction. Tutu expresses this through his theology of ubuntu and this same sentiment is found in accounts of Acholi community codes, and to a lesser extent in the case of Gacaca. What follows is a relational or sociological approach to crime and wrongdoing. Tutu's three-tiered understanding of reconciliation involving confession, forgiveness and restitution is paralleled in the Mato Oput ceremony, and again to a lesser extent in Gacaca. These synergies suggest that restorative justice draws on and finds expression in what could be termed 'religious' and 'pre-modern/informal' conceptions of justice.

This connection has been noted in criminal justice literature as was illustrated by the discussion in Chapter 3 of the development of restorative justice within the field of criminal justice. The fact that this insight has already been noted within the criminal justice literature, and not elsewhere speaks to a general lack of communication between the disciplines of criminal justice and transitional justice. This lack of communication is unfortunate as there have been significant developments within the criminal justice thinking on restorative justice that can enrich the transitional justice discussion.

Within the criminal justice thinking on restorative justice there are different approaches to restorative justice, and while these different approaches do not represent a coherent independent conceptual framework, there are nonetheless two key aspects that are worth noting. The two paramount lines of emphasis being that crime is approached as a violation of people and interpersonal relationships and that institutions and professionals cannot have the monopoly over the way in which crime is dealt with, rather all stakeholders need to be involved. The definition of crime as “a violation of people and interpersonal relationships” as opposed to the legal construction of crime as a violation against the state is one of the defining restorative justice characteristics.³⁸⁴ It is from this view of crime as a violation of people and of relationships that the characteristic concern of restorative justice with the need to restore personal and social relations follows. It also follows that the restoration of personal and social harm necessarily needs to involve the victim, offender and community. And this in turn implies a ‘process’ view of justice: what matters is not so much a ‘just’ outcome but that all those affected by the crime are involved in the decision regarding the best way to repair the harm caused by the violation. And then secondly that the state, public institutions and professionals cannot have the monopoly over the way that crime is dealt with; victims, offenders and communities must play an active role in criminal justice. Of particular relevance here is Christie’s point that if a society is deprived of their property rights to their conflict the society will lose out on opportunities for norm-clarification and deliberation over right and wrong.³⁸⁵

On the second aim of this minor dissertation, the three sources of thinking on restorative justice touch on different elements of transitional justice as per the working framework developed in Chapter 1. The discussion in Chapter 1 set the scene for restorative justice by highlighting moments in the development of the field that point the way to a notion of justice that is not only retributive. Significantly, Arthur notes that standard transitional justice mechanisms like “prosecutions and vetting are unlikely to be adequate measures

³⁸⁴ Howard Zehr *Changing Lenses*, 181.

³⁸⁵ Christie 1977: 8.

in a post –conflict setting, where the problem of ex-combatant reintegration requires at least consideration of local-level restorative justice approaches”.³⁸⁶ Similarly Luc Huyse suggests “a move from a de facto dichotomy (impunity *or* trials) to multiple conceptions of justice and reconciliation – state and non-state instruments, legal, semi-judicial and non-judicial techniques”.³⁸⁷

Chapter 1’s working transitional justice framework is primarily made up of Jon Elster’s assertion that transitional justice is ultimately about a society judging itself.³⁸⁸ Or, as Zalaquett framed it, that the policy must represent the will of the people, without violating international law.³⁸⁹ We would like to suggest that this is probably the chief contribution of restorative justice to a transitional justice framework. Elements of this contribution have been noted in the conceptions of restorative justice articulated in each of our chapters. Other points of contact relate to transitional justice as a response to the needs of different actors and the emphasis on acknowledgement and accountability. The over-arching contribution remains the extent to which the conceptions of restorative justice are able to engage with this important element of transitional justice.

In addition to the above mentioned points of overlap and contribution, this study has also identified various key issues that require further attention regarding the relationship between restorative justice and transitional justice. A key recommendation is that if restorative justice is to be taken seriously within the field of transitional justice then attention must be directed to the rich body ever evolving work that is emerging from the field of criminal justice. Core debates on the nature of restorative justice are occurring within the criminal justice field, and this appears to be happening unbeknown to transitional justice. This can be remedied.

Another potential issue that has been flagged as central to future discussions on the role of restorative justice within transitional justice is the connection between ‘restorative

³⁸⁶ Arthur 2009:360.

³⁸⁷ Luc Huyse, “Introduction: tradition based approaches in peacemaking, transitional justice and reconciliation policies,” in *Traditional Justice and Reconciliation after Violent Conflict*, Luc Huyse & Mark Salter (eds), (Stockholm: IDEA, 2008), 3.

³⁸⁸ Elster 2006.

³⁸⁹ Zalaquett 1989:28-30

justice' and 'reconciliation'. Crucial questions in this regard are whether 'restorative justice' and 'reconciliation' are regarded as synonymous or as distinct but complementary; whether there can be reconciliation without justice, or justice without reconciliation; and whether 'restorative justice' ensures both reconciliation and justice?

The connection between restorative justice and the South African TRC has led some scholars to equate reconciliation with restorative justice.³⁹⁰ Broadly speaking, reconciliation encapsulates a wide spectrum of initiatives, ranging from political coexistence and reparations to interpersonal healing and the promotion of civic trust. While it is plausible to argue for connections between the values of restorative justice, conditional amnesty and reconciliation, it is problematic and misguided to equate restorative justice with either amnesty or reconciliation.³⁹¹ The TRC report advances this misguided approach by suggesting that a restorative understanding of justice allows for a coherent connection between amnesty and justice.³⁹² The problem with this connection is that the report positions amnesty as a tool of restorative justice rather than as a consequence of the negotiated settlement. The conflation also extends to reconciliation being equated with the work of the TRC, whereas it is more accurate to note that reconciliation in South Africa did not begin with the TRC.³⁹³ By equating reconciliation with the TRC's work many assessments of the TRC confuse the TRC's legislative mandate. Moreover, the conflation with restorative justice and reconciliation stands in contrast with the criminal justice conceptions of restorative justice.

Another issue that has been flagged concerns the extent to which restorative justice can make a meaningful contribution to transitional justice given that transitional justice is concerned with gross human rights violations of a mass scale. The model of restorative justice has mostly been associated with individual crimes where offenders have admitted

³⁹⁰ See Lyn Graybill and Kimberly Lanegran "Truth, Justice and Reconciliation in Africa: Issues and Cases", *African Studies Quarterly*, 8/1 (Fall 2004): 1-18. www.africa.ufl.edu/asq/v8/v8i1a1.html. Also Kader Asmal, Louise Asmal, Ronald Suresh Roberts, *Reconciliation through Truth* (Cape Town, 1996).

³⁹¹ See Charles Villa-Vicencio, "Restorative Justice" in Charles Villa-Vicencio and Erik Doxtader, eds., *Pieces of the Puzzle – Keywords on Reconciliation and Transitional Justice* (Cape Town: IJR, 2004), 33-8.

³⁹² TRC Report, Vol 1, Par 55a, 117.

³⁹³ See Erik Doxtader 2009. *With Faith in the Works of Words: The Beginnings of Reconciliation in South Africa, 1985-1995*. Cape Town: David Philip.

to the offence.³⁹⁴ Moreover, further reflection is required on how the kind of sociological or relational conception of crime advanced relates to matters of justice. Violations of people and interpersonal relations could also be addressed and framed in terms of pathology and therapy for the harm caused or trauma suffered; this need not involve justice?

This study commenced with a quote from Aristotle's *Politics* - "For all men cling to justice of some kind, but their conceptions are imperfect and they do not express the whole idea".³⁹⁵ This study has explored three dominant conceptions of restorative justice and while much clarity has been gained on these conceptions, this study concludes by affirming Aristotle's charge. The three conceptions of restorative justice under discussion do not, from a transitional justice perspective "express the whole idea".

It may be, however, that the very extent to which these various conceptions of restorative justice are not exhaustive accounts of transitional justice, is in fact their abiding contribution. It has been noted by various scholars that the kind of justice required for transitional justice contexts needs to remain an open question. Diane Orentlicher captures this well, "Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?".³⁹⁶ Similarly, Jon Elster suggests that while justice can be defined in intrinsic (deontological) or in instrumental (utilitarian) terms, this choice is not helpful. "Full-blown non-consequentialism – let justice be done even though the heavens might fall – is absurd. Full-blown consequentialism – such as allowing the killing of innocent individuals "pour encourager les autres" – is no less absurd. Any reasonable policy must have both consequentialist and non-consequentialist components".³⁹⁷

In the first chapter of this thesis Martha Minow was singled out for her contribution to the field. Minow's admission of "the incompleteness and inescapable inadequacy of each

³⁹⁴ Declan Roche, *The International Library of Essays in Law and Legal Theory*, 2nd series "Restorative Justice", 57.

³⁹⁵ Aristotle, *Politics*, Book III Chapter 9, 1280.

³⁹⁶ Orentlicher 2007:18.

³⁹⁷ See Elster, "Justice, truth, peace" p22

possible response to collective atrocities” is pertinent as we conclude our discussion of different conceptions of restorative justice.³⁹⁸

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³⁹⁸ Minow 1998:5-6.

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