

***Restorative Approaches in Societies Emerging from Conflict***

***Presentation to the VUW Institute of Policy Studies Symposium:  
Towards a Restorative Society, October 10-11 2005.***

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## ***Introduction***

Before considering restorative approaches to justice in societies emerging from conflict, let us first briefly consider the relevant settings involved. While the suffering and damage that is inflicted upon populations and neighbourhoods by internal conflicts and wars travels readily in visual form, harder to communicate is the damage done to the non-material sphere: fractured community trust, wrecked institutional legitimacy, depleted social capital, and betrayed faith in public authority. While restoration of societal damage is a widely acknowledged need, priority usually goes to physical relief, rehabilitation, and reconstruction. By offering physically quantifiable results, the bricks and mortar, technical and sectoral approach designed by external donors has relegated the equally needed but necessarily longer term building of societal and citizen capacity required for durable peace settlement. Yet in moving from conditions of convulsion to civic order requires the restoration or at least initial installation of the most basic government functions and services; reforms facilitating political participation; employment generating small business, rudimentary social welfare, and essential security provisions. Often no clear “post-conflict” situation as such will obtain with statehood left weak, public service breakdowns frequent, money made though various black and grey economies; and human rights violations continuing (Macrae, 2001:159). Thus while overt combat may end, irregular violence may continue for years involving former factions, demobilised combatants, bandits or warlords.

## ***Aims and Objectives***

Confusion about the aims of post-conflict rehabilitation can arise because of the broad application of this concept. It is used interchangeably to indicate: *restoration* of the physical infrastructures and essential government functions and services; *institution building* to improve the efficiency and effectiveness of existing institutions; and *structural reform* of political, economic, social and security sectors. Overall, though, rehabilitation is both a process and an outcome, based on increasing confidence at household and community level that an opportunity for long-term recovery is emerging.

The London-based Overseas Development Institute identifies three conditions defining a transition from war to peace: the signing of a formal peace agreement (military transition); a process of political transition by elections, a negotiated or military transfer of power (which may possible involve if not secession, then discrete forms of enhanced autonomy); and the perception among national and international actors that there is an opportunity for peace and recovery.

How has the international community measured up here? The short answer suggests a record that is unimpressive. Notwithstanding a greater willingness by some governments and international agencies to admit to or learn from past failures, or to recognize and deal with specific institutional and managerial deficiencies, countervailing pressures remain formidable. They include barriers of compartmentalisation between restorative agencies and a deficit in the trust needed to perform effectively. Such a trust deficit is evident between external agencies and local counterparts, among local agencies, between headquarters and field personnel, and over budgetary discretion.

In locations emerging from conflict, the restoration of internal security and the rule of law are paramount. However to achieve that goal, we have to recognize that the conflict experience has generated power structures filling the vacuum left by broken state institutions. Violence and the threat of violence steps in to perform a functional controlling role – whether that is led by warlords, militia leaders, disaffected military and police, and whether it is perpetrated by crime, kidnapping, or extortion. Hence restoration of essential security and a modicum of order must first ask not only who is running the means violence, but importantly why they are doing so. Under conditions of disorder and where security has been undermined as a public good, then it emerges as just another tradeable commodity whether via private security companies, the buying off of state agents, selling goods, food or labour to arm one's immediate clan or village, or buying protection from criminal gangs.

Disarming and demobilising those previously armed illegally, and reducing their public role is essential but again we need to look critically at the quality of those replacing those functions. Following closely is the need to legitimise state institutions, establish a basis for economic activity by re-opening local markets, ensuring essential food and water supplies, and providing essential social services – in particular a reopening of schools. This refurbishment is usually uneven and may stagnate or regress, especially where essential state institutions are not operating. Usually the state as a structure will not function without sufficient belief by the populace that it is a going concern.

That is the matrix, but what of our specific concerns regarding a role for restorative justice? Here, we need to ask what constitutes public policy for restorative justice and who makes it under conditions where statehood is contested and public institutions are weak? External donors keen to further post-conflict restorative justice face substantial dilemmas when having to operate under conditions where the legitimacy of those holding power is under serious challenge, and where the sovereignty of such governments, such as they are, face openly contest on account of perceived inability to govern effectively. A focus on restorative justice post-conflict is salutary, however, because it underlines the importance of meeting human, not just territorial or state security needs and objectives.

### ***An Essential Inventory***

What requirements are entailed? A key point to note is that restorative approaches stand little chance on their own. Like the recovery process post-conflict more generally, they will falter should initiatives for societal recuperation lack local frameworks through which to operate. A good example is the vexed question of settling land ownership and property title disputes. That particular problem is aggravated by the sudden arrival of returnees *en masse*, whether internal or from across borders, occupancy that has been claimed through military victory or negotiated outcome, and the loss of title and registration records following a destruction of state facilities. Timor Leste and Dafur offer good current examples. Externally directed arms surrender and demobilisation, often accorded high priority, provide only temporary relief where local policing, upskilling, training and employment opportunities remain absent. Likewise needed judicial and penal reforms, core public institutional refurbishment and the establishment of operable tax systems do not emerge in a vacuum. Somehow a marriage of external and local functions has to function during a transition period that is both sufficiently resourced and not hostage to exit strategy exigencies.

Where there is a strong bias towards immediate relief post-conflict, and also evident state weakness, then the incentives for external donors to acquire needed local familiarisation suffers. Lack of local knowledge can leave donors flying blind when it comes to knowing which indigenous systems to engage for the purposes of post-conflict reconstruction or dispute settlement. In some instances although not others, local systems of authority can perform valuable functions by reining in militias that are heavily populated by unskilled, poorly educated young men conducting activities violating customary rules and principles of acceptable social conduct. These functions are less effective when authority figures are viewed locally as compromised by their known involvement in local patron/client rent seeking conduct for the resource extraction of timber and minerals, or where authority figures flaunt their indigenous authenticity to attract, but then divert externally provided resources designed for public reconstruction to private ends. Under RAMSI in the Solomon Islands, traditional modes of dispute settlement and their potential to act as a useful adjunct to restorative justice have often been compromised where those traditional systems have become the conduits for rent seeking – as in timber exploitation

Beyond traditional authority structures, societies emerging from conflict can evolve a variety of coping strategies. When such strategies operate they can play a useful role in breaking the spiral of relief dependency that can accumulate following conflict. However it is difficult to tackle relief dependency post-conflict without also confronting patronage. Patronage is a good example of an important widely prevalent, informal indigenous relationship that is upheld by mutual agreement among the social sectors involved, even while remaining exploitative. It sustains power differentials and is governed by norms and actions that leading to a widespread construction and enforcement of social inequality (de Wit, 2000: 12). Restorative justice post-conflict, and considered for purposes of its enduring sustainability, is negatively affected by the distortions inflicted by patronage systems.

Restoration post-conflict has to maintain a wary eye on the volume and direction of externally provided relief. Under state weakness, insurgency and warlord formations to manipulate external assistance and reward followers through food and medical distribution, play off NGOs and agencies competing for relief contracts, monopolise local trade by cornering local markets.

So far as establishing post-conflict judicial functions is concerned, a realistic appreciation of what may often exist is needed. Here we may find the following:

- Demobilisation of individuals into society bringing with them possibly years of inculcation into habits of violence;
- The release of arms with light arms, cheap, long lasting, easily stored, traded or hidden, and suitable for criminal conduct;
- Lack of job opportunities in war shattered economies;
- Where work is available, a lack of marketable skills;
- Consequential incentives to engage in criminality
- Retention of group affiliations potentially valued for the planning, intelligence and conduct of violent conduct, evident where wartime criminal receive amnesties;
- Familiarisation with combat dangers of a magnitude greater than the risks accompanying criminality

(Call and Stanley, 2001:154).

Call and Stanley (2001:168) maintain that international actors have not adequately promoted judicial reform; domestic constituencies for such reform being often slow to form, especially in countries lacking a proper judiciary. Peace settlements generally negotiated by

the executive branch (should a government exist) may include commitments which do not provide autonomous judicial branches of the government. More broadly, judicial system reforms are neglected in most civil war settlements. This relates to a broader point about the nature of inclusion in peace settlement processes: one that relies exclusively on negotiations between leaders of combatant groups can result in an agreement that satisfies their core interests but without addressing the underlying substantive issues of greatest concern to the public.

### ***A Package Approach?***

Justice and reconciliation are fundamental to peace building, but there is a lack of adequate theorising about how these relate to one another or even a common language of what they may mean in the context of post-conflict peace-building (Pankhurst, 1999: 254). Key headings around which to build an adequate theory of justice and reconciliation would need to include questions about the appropriate ownership of such processes; their timing and impartiality; the clarity with which their objectives are determined; relevant issues of jurisdiction; necessary modes of publicity and information; and questions of both reparation and punishment.

Plunkett (1998: 68-69), sees the core objectives of justice packages comprising establishment of a functioning criminal justice system; an independent, impartial and competent judiciary; the appointment of qualified public prosecutors and defenders; a trained, responsible and respected police force imbued with a strong public service ethic; humane detention centres; and suitably conducted programmes of legal education. Add to this, due attention to alternatives to imprisonment and services designed to foster mediation, dispute resolution and reconciliation. Conditions are required that provide physical security for justice personnel, detention personnel, police, as well as offering witness protection when required. In many instances, post-conflict, basic legal texts and materials are seriously deficient as are pay and working conditions for counsel. The same goes for filing and registrations systems, basic computing and rudimentary training functions. Timor Leste is experiencing these difficulties, as has Cambodia.

The United States Institute for Peace and the Irish Centre for Human rights, in cooperation with the United Nations office of the High Commissioner for Human rights and the UN Office on Drugs and Crime are coordinating a project designed to offer tools for the establishment of rule of law post-conflict. This includes a set of codes that focus on criminal law legislation for the effective delivery of criminal justice – including those on criminal procedure and detention. In addition work is underway on developing standard operating procedures on policing and transitional law enforcement (O'Connor, 2005: 7). The UN Office on Drugs and Crime has included restorative justice as part of its ongoing programme. In these programmes there is scope for mixing and matching over compensation and restitution, although injured parties should have scope to voluntarily accede to any such package.

A package of needs and proposals approach can perform useful functions but may not do so where the constitutional foundations providing for judicial independence are in place. For the public at large the acid test is whether the courts are strong enough to say no to the executive when that is needed, and having said no, to make such a determination stick. Guatemala offers a good example of this tension. Constitutional considerations also raise questions about whether viable systems of restorative justice are possible outside a more general momentum towards democratisation. For example it's hard to see an

Ombudsman's office operating outside a democratic framework. If no more than a quasi democracy is operating following conflict, then the focus may have to shift elsewhere, for example ensuring that attempted decentralisation and refurbished local government functions are operating within a legal framework.

Real scope exists post-conflict to advance restorative justice in relation to juvenile offending. For young people who have been involved in combat as child soldiers, such offending is objectively less serious than other forms of conduct, including killing that they have either perpetrated or been party to. The widely ratified Convention on the Rights of the Child (notwithstanding holdouts such as Somalia and the United States) provides opportunities for the development of a separate legal code for children.

Police reform is often essential, but donors have often approached this in a largely technical manner relying predominantly on the use of police expertise. Programmes tend to concentrate on expertise transfer when a bigger need exists of ensuring civilian oversight and monitoring of these functions. Relatively few countries in the donor community have legal mechanisms in place to provide assistance to foreign police forces. Helping states that have remained corrupt and not serious about reform has disillusioned some donors from doing anything further in this field.

### ***Issues of Impunity***

Impunity occurs where a state fails in its obligations to investigate, try, prosecute and sentence those responsible for systematic rights violations, obviously impeding the rights of families to learn the truth of such violations and to gain the satisfaction of having seen justice done. The link between state terrorism and impunity is both intimate and unhealthy. One view is that decisions about who to prosecute are less contentious in societies that have held truth commissions. This allows for decisions as to whether individuals who have used conditions of combat to perform criminal activities should receive amnesties though that does not vitiate the use of customary international law to prosecute on rights to remedy and rights to protections to life and liberty. Torture, an accomplice of impunity, is banned outright as non-derogable, legitimising its prosecution any time any place.

Constantly lurking however is possible amnesty abuse and where a supposed "reconciliation" acts as a green light for continued impunity. Accordingly scepticism remains about whether a wholesale amnesty or pardon is the approach most likely to facilitate national reconciliation. In fact punishment may be an essential foundation for reconciliation. When decisions are made that entail overlooking crimes of the past, then the social and moral costs of doing so are quite high. Families of victims find it hard to forgive what cannot be punished.

More helpful perhaps is a need to avoid the dichotomy suggesting either punish or pardon, amnesty or accountability, since these dividers present unduly narrow options. They detract from more constructive efforts to balance the demands of justice against those of reconciliation and ultimately to promote reconciliation within a framework of accountability. Restorative justice options can offer a mid-point between retributive justice and outright pardon or blanket amnesty. However for this to work, the modalities developed need to look to tradition and custom where it is intact as well as forms of public participation and support. Potentially useful adjuncts to restorative justice including restitution and compensation will

not work if those processes themselves have been abused or compromised as occurred in the Solomon Islands.

To operate at all, restorative justice post-conflict requires a working criminal law system and official recognition by ruling authorities of their obligations under existing protections through human rights, humanitarian and refugee law as well as a growing body of relevant customary international law. Restorative justice modalities can relieve the load on already over-burdened criminal justice systems. It may also help dilute political abuse of the justice system as security conditions post-conflict may often see retributive justice not only retained but also strengthened in order to incarcerate known regime opponents put away under trumped up charges.

A focus on restorative justice, post-conflict, helps move attention beyond the state and its executive functions to consider other authority sources including international standards. Certainly a re-establishment of the rule of law and a working criminal justice system are essential foundations for realisation of the Millennium development Goals of peace, security, poverty alleviation, human rights, democracy, good governance and protection of the vulnerable.

### ***In Conclusion***

In Conclusion, lack of long term resource commitments by the international community leaves many rehabilitation programmes as little more than crisis management interventions. Complex emergencies usually have neither a clear beginning nor a definitive ending and any return to 'normalcy' is lengthy.

An appropriately designed agenda of restorative justice post conflict, like its implementation, constitutes a major call on the resources, skills and patience of local officials and external assistance modalities. Competing to hold let alone advance this particular square of space is a daunting challenge given the many other demands facing post-conflict societies. However the resources allocated more than pay their way when we consider the economic advantages of rule governed property, market and investment behaviour, the political advantages of ensuring the executive is governing constitutionally and the social benefits that accrue from determinations of guilt or innocence not at the barrel of the gun but through duly instated judicial procedures.

There is a huge amount to do so far as advancing restorative justice post-conflict to have operable, clearly understood restorative justice nomenclature in use. There is no consensus on best practice for restorative justice post-conflict. Determinants of such best practice need urgent identification, as do obstacles to their implementation and means of overcoming such obstacles.

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