

Conference Report

The politics of restorative justice in post-conflict South Africa and beyond
Cape Town, 21-22 September 2006

Compiled by Kris Vanspauwen
and Ricky Röntsch



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Introduction

The South African Truth and Reconciliation Commission is a striking example of an aspect of regime-transition. In the view of some, the TRC involved an elaborate exercise in restorative justice, which brought together a selected group of apartheid-era survivors and perpetrators with the eye on reconciliation.

A decade after the formal political transition it seemed appropriate to explore the form and content of restorative justice principles and practices and to engage with the challenges confronting the institutionalisation of this model. This two-day international conference examined selected aspects of the model of restorative justice in post-apartheid South Africa.

The objective set out for the conference was to critically examine the following three themes:

1. Different forms of dialogue among survivors, offenders and communities regarding apartheid-era human rights abuses;
2. The challenges confronting restorative justice approaches for crime control and crime prevention in the high-crime context of contemporary South Africa and other African countries;
3. The consequences of a growing institutionalisation of restorative justice practices in the formal (criminal) justice system.

Whilst the conference focused chiefly on the case study of South Africa, international scholars and experts in the field of transitional justice and restorative justice were invited to foster the debate on the proposed conference themes. These debates have yielded some comparative lessons relevant to other African societies in transition.

The first session took a closer look at the different aspects of dialogue in post-TRC initiatives that were either or not explicitly labelled as restorative justice. For different reasons direct dialogue between survivors, perpetrators, and community has showed to be a major failure of the TRC. The debate on the crucial role of inter-personal and inter-group dialogue in the aftermath of a violent conflict brought to surface the key policy challenges regarding the government's contribution and responsibility in this regard. At the same time experiences from other African post-conflict societies on this bottom-up approach were discussed in this session.

The second session tried to situate the paradigm of restorative justice more squarely within a criminological engagement with crime control and crime prevention.

South Africa's political transition has been accompanied by an increase in violent crime and growing public fear of crime. This climate of insecurity poses particular challenges to the institutionalisation of restorative justice. What role can restorative justice policy play in a culture of control characterised by the privatisation of security and the fortification of residential space? What do restorative justice principles and practices have to offer in efforts aimed at addressing violent interpersonal crimes such as rape and domestic violence? International and local experts on crime control and crime prevention critically analysed the potential and limits of a restorative approach in the crime landscape of contemporary South Africa.

And finally, the third session took a closer look at the process of the institutionalisation of restorative justice in the formal (criminal) justice system. There are concrete developments in the different domains of criminal justice – most notably in the juvenile justice system, correctional services, policing sector, and probation. Are these initiatives nested in a coherent policy strategy? What are the promising, as well as the problematic aspects of this process of institutionalisation? And how should we regard the future of the informal justice practices – that have existed alongside the formal justice system – in this process? And, finally, what are the ethical considerations of implementing restorative practices into the criminal justice system? These were the most important questions that were studied in the third session of the conference.

Important lessons drawn from these three half-day sessions were discussed in the concluding session of this two-day conference. Both the reflections from the South African and from the international speakers have shown the richness of the debates and discussions that have taken place between academics, government representatives, civil society, and grass roots organisations in South Africa as well as other African post-conflict countries. The conference thereby succeeded in its overall aim to build stronger partnerships between the aforementioned actors of the South African society on the one hand, and closer relationships of understanding between South Africa and other African post-conflict countries.

Plenary Presentations and Round Tables

Opening Session

Thursday 21/9, 9:00-9:30

Venue: conference room

Chairperson: Hugo van der Merwe

Key Note Address

Advocate Johnny H. de Lange (Deputy Minister, Department of Justice and Constitutional Development, South Africa)

South Africa had to make a choice between two stark contrasting but imprecisely defined, and mutually exclusive models of justice to deal with its past violations: the justice model on the one hand, and the reconciliation (or truth) model on the other.



In the spirit of a moral and psychological healing process South Africa embarked on an honest assessment and diagnoses of the sickness within its society. This led to the establishment of a new style truth commission. It was the first time that a truth commission had been created through a highly public, participatory and democratically elected verifiable process. The contextualisation of an individual amnesty process was one of the most remarkable and innovative features. Although proclaimed to be strongly founded on restorative justice principles, the TRC formed a potent triad: the judiciary as the ‘sledgehammer’, the TRC’s human rights violations investigations as the “stick”, and the TRC’s amnesty process as the “carrot”. This multi-faceted approach was designed to attain the truth by breaking the silence and by flushing out the violators of human rights. The TRC was a soft place for victims to deal with hard issues, and a hard place for perpetrators to receive softer results. Although the TRC was largely based on restorative justice principles, it contained retributive elements in that the truth was being told, lies were exposed, and perpetrators named. Justice should not be equated with retributive justice.

Notwithstanding the positive contribution of the TRC, De Lange sketched two of the most important failures of the TRC:

1. the extremely low numbers of perpetrators that came forward and apologised for their wrongdoings; and
2. the inadequate compensation and reparation for past hurts, for which the TRC cannot be blamed.

De Lange then outlined the long process of reform of the Justice system in the new South Africa, which started from being a system that served the needs of a small minority, to one that extended services to all the people of South Africa. He noted that the Justice system is too often a source of disillusionment for many people. Furthermore, De Lange notes, no court system ‘solves’ disputes, but rather ‘resolves’ disputes. Therefore the transformation of the Justice system may require a drastic reform wherein processes such as mediation, dialogue, negotiation, and problem-solving should receive central attention.

The Department of Justice and Constitutional Development embraces and supports restorative justice in the context of their objectives under “Access to Justice for All”, providing an opportunity to attempt to resolve the underlying cause of problems rather than dealing with the symptoms.

Whatever steps will be taken, de Lange expresses the importance of drawing on the well-established international body of knowledge and experience with regards to restorative justice. The recent national developments in South African jurisprudence are a hopeful sign that the South African Justice system is underway to institutionalise the principles of restorative justice. Furthermore, the Department of Justice and Constitutional Development is in the process of establishing a policy framework regarding the court structures, including aspects of alternative dispute resolution and restorative justice.



Session One: Dialogue among survivors, offenders and communities regarding apartheid- era human rights abuses

Restorative justice – particularly as articulated in the Truth and Reconciliation Commission (TRC) – is essentially an inclusive and forward-looking approach since it aims at healing and rebuilding wounded communities.

One of the key principles of restorative justice is to promote dialogue among survivors, offenders and their communities. This session dealt with the challenges facing individual and group dialogues aimed at addressing apartheid-era human rights abuses. While the TRC provided spaces for public and individual dialogues, this process was often only able to engage the needs of individuals and communities in a partial or superficial manner. It was also not able to provide opportunities for most survivors or offenders to engage directly in such dialogues. While the shortcoming of the restorative justice opportunities presented by the TRC are now widely recognized, there is not a clear understanding of how these gaps can or should be addressed.

In the wake of the TRC, there have been a number of initiatives to take the process of restorative justice and reconciliation further to address more concrete survivor, offender and community needs relating to justice, truth, and healing. They also raise questions about official state processes of memorialisation, prosecutions, exhumations and reparations that seek to address the unfinished work of the TRC. This session provided a critical review of post-TRC restorative justice initiatives, and has attempted to unpack key policy challenges regarding government’s contribution and responsibility to the process. Furthermore, the session provided room for an international reflection on promising practices of community restorative justice, some of which are situated in a post-conflict setting.

Plenary Session

Thursday 21/9, 9:30-11:00

Venue: conference room

Chairpersons: Stephan

Parmentier and Hugo

van der Merwe

Talking about reconciliation ten years after the TRC

Yasmin Louise Sooka (Director of the Foundation for Human Rights in South Africa)

The year 2006 marks the 10th anniversary of the TRC and 10 years of Constitutionalism. Befitting such an anniversary South Africans should ask where we are in terms of the legacy of the TRC.

Quoting Mamdani, Sooka summarises the overarching success of the TRC: “The big achievement of the TRC was the discrediting of the apartheid regime in the eyes of the beneficiaries. To drive a wedge between perpetrators and beneficiaries is a political prerequisite for a successful transition.” However, Sooka maintains that the TRC has created a diminished truth, which has driven an unintended wedge between victims and beneficiaries. Ten years on, that is the major problem. It created two groups of victims: the acknowledged and repaired ones; the unacknowledged and unrepaired. The Community Reparations Bill, which provides for reparation to individuals, is still not enacted. Thus reconciliation has taken place at national and political levels, but not at local and community level.

In 2004 a National Prosecuting Authority’s Missing Person’s Task Unit was established to investigate the list of disappeared people submitted by the TRC. Notwithstanding sterling work, there is a need for civil society to put pressure on government to accelerate the work of this Task Unit.

Continued impunity is another important issue that remains unsatisfactory. Although the NPA has released guidelines for prosecutions, it became clear in 2004 that the prosecution would be granted the discretionary power to exchange indemnity from prosecution for full disclosure. The process lacks the participation of civil society, and more importantly dialogue with victims. Furthermore, in terms of the guidelines, there will be immunity from civil claims.

These and other issues have led a coalition of human rights organisations to approach the Minister to reconsider the guidelines.

Access to documentation is another pressing issue that required review. Sooka advocates for a balanced and representative board of experts that would assess the eligibility of applications, taking into account the rights of privacy and confidentiality. The current mechanism deepens the divisions between the state, civil society, and victims.

A last, unfinished business is the reparation policy. The government regards the work of the TRC as being over, and it is likely that only the individual reparations, as planned, will be made. But, Sooka notes that there are many other ways to repair the harm done to victims other than monetary forms of reparation: acknowledgement, free access to education, access to social-welfare services, memorialisation, and training opportunities.

Further prosecution, ongoing work into disappearances and exhumations, and providing counselling and trauma recovery are all part of the reparation and rehabilitation process. But a restorative justice framework should also include the reintegration of perpetrators, and making them accountable for victims. A restorative justice package should consist of a holistic set of objectives, including:



Justice for victims;

- Accountability for perpetrators;
- Clarification of the truth;
- Establishment and rebuilding of democratic institutions;
- Dealing with the factors that gave rise to the conflict;
- Elimination of the fear of living together;
- Building trust in government and its institutions;
- Reclaiming the right to be protected by a democratic state; and
- Building of social solidarity.

Sooka envisages implementation of this set of objectives at the levels of state, community, and individual, but notes that these objectives have only been met in part at the national level.

Reconciling restorative justice with human rights principles

Ahmed Motala (Director, Centre for the Study of Violence and Reconciliation)



The keynote addressee of this conference, Dep. Minister de Lange, argued, says Motala, that the Truth and Reconciliation Commission is largely based on the principles of restorative justice. Recent reports in the media, of former Minister Adriaan Vlok washing the feet of former cleric Frank Chikane, raised the important questions whether the TRC, and in particular the amnesty element,

was indeed an instrument of restorative justice, and whether it had contributed to reconciliation in South Africa. Motala expresses scepticism and postulates that had the TRC fully achieved its role as a restorative justice instrument, Vlok would have washed the feet immediately after being granted amnesty, since restorative justice requires some form of restitution and acceptance of the harm done to victims.

Motala argues that in order to be effective, restorative justice has to be in accordance with human rights. Paramount to these human rights is the restoration of dignity, which is also the primary objective of restorative justice. The amnesty process made serious inroads into the principles of human rights and the Interim South African Constitution. This was acknowledged in the judgement of the case *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa* (Constitutional Court, 27 July 1996) in which it admitted that ordinarily amnesty obliterated the right for victims to seek redress before a civil or criminal court. But the 1996 Interim Constitution made provision for amnesty as a means to build a historical bridge between a violent and divided past and a future of human rights, democracy, and peaceful coexistence. However, the Constitutional Court envisaged a wider view of reparation, including support for education, provision of housing, etc. And yet, ten years on, the plight of many victims has not been acknowledged. Motala argues that the Truth and Reconciliation Commission would have served the objectives of restorative justice better if the following principles had been respected:

- The granting of amnesty should have been accompanied with an order for perpetrators to perform some form of community service.
- The intimate involvement of victims throughout the process, including the post-TRC process.

Victims have asked for further prosecution for those who refused to apply for amnesty or those who were not granted amnesty, but the amended NPA policy - that allows for those who refused to apply or didn't apply successfully to have a second bite at the amnesty cherry - undermines the rule of law, human rights principles, and are a direct attack on the dignity of victims. Although the amended NPA policy mirrors the criteria used by the TRC amnesty committee, it significantly reduces the role of victims, and the determination whether or not to prosecute. Also the rights of victims for a fair trial, equality before the law, and the rule of law are

undermined. Moreover, the amended NPA policy is also in contradiction with the international law against impunity.

Motala concludes by saying that the TRC was the start of a project to bring to account all perpetrators of apartheid crimes. However, addressing apartheid crimes and achieving reconciliation is far from complete. Unfortunately this process seems to have stalled, and the voices of victims of apartheid crimes are not being heard.

From a butterfly process to the blooming of restorative justice

Thoko Mojakweni (Sexual Offences and Community Affairs, National Prosecuting Authority, South Africa)

What do we mean by restorative justice? Are we weighing the interests of the victims, the accused, or justice? Can we obtain restorative justice? Mojakweni notes that there are so many notions and interpretations of justice, but that it is imperative to first define justice in order to measure achievements.

Furthermore we need to ask whether the restorative justice model is the appropriate justice model in all circumstances. Is restorative justice appropriate justice in the context of domestic violence? Should we apply restorative justice to different forms of rape? Can all interpersonal crime offenders be treated similarly? On the other hand, regarding children in conflict with the law, how can we not consider rehabilitation and keeping them out of prisons? And yet again, should we equate these restorative justice approaches with impunity?

Further complexities are: Can restorative justice only apply after prosecution or can it be applied before prosecution? What are the mechanisms? Whose interest must be taken into account? And who are the expected beneficiaries? If there seems to be a need for reconciliation, what is reconciliation?

Notwithstanding these questions, Mojakweni argues for restorative justice to be a component of the criminal justice system, particularly since it makes sense to a large proportion of South Africans. She maintains that there are enough examples in the South African tradition which show that restorative justice can be a valuable alternative. The small claims court is a good example, and to date 148,000 juvenile cases have been diverted from the criminal justice system.

However, Mojakweni admits, we have failed, to evaluate these initiatives, and to create a legal framework. We also need guiding principles to standardise justice services in which customers should be at the centre of the service delivery; where services are accessible to, and of the same standard for all people; and where we can respond with flexibility.

These caveats notwithstanding, the National Prosecutorial Authority has gone through a transformation process. It has designed different ways to solve and not just resolve issues of crime. There is a strong support for more diversion in cases of interpersonal crimes and the NPA has plans to institutionalise restorative justice.



Round Table A Restorative Justice in cases of Human Rights Abuses: Government Role and Responsibility in South Africa

Thursday 21/9, 11:30-13:00

Venue: conference room

Chairperson: Polly Dewhirst

The TRC Unit and its unfinished business

Khotso De Wee (Chief Operating Officer, TRC Unit, Dept. of Justice and Constitutional Development, South Africa)

De Wee responded to the criticisms raised by previous speakers in this session.

He acknowledged the concerns of victims' organisations about the implementation of the TRC recommendations, but argued that these are mainly due to practical problems and could be resolved through improved dialogue between the government and society.

Regarding missing persons, De Wee provided a statistical overview of progress. He admitted that the process was slow but argued that many players were involved and that the various processes should proceed in an orderly fashion.



He did, however, acknowledge that the Minister of Justice had failed to develop a proper framework in this regard, and that there were funding processes underway to increase the capacities of these processes.

Responding to the discussions of the reparation policy, De Wee cautioned that one should differentiate between state obligations to make reparations to TRC victims and the obligations of the wider community to repair victims.

With regards to the access to documentation, De Wee acknowledged the concerns of people being denied access to their own files, but added that in most instances these were due to the constraints of the Act that regulates this issue.

Finally, regarding the exhumation policy, De Wee noted that DNA research showed that only one out of three persons exhumed were TRC victims and that expectations outstripped government's resources. De Wee advocated for more coordination and partnerships between all role players involved in the issue of exhumations.

When do we get a say in the reparation policy?

Shirley Gunn (Director, Human Rights Media Centre, South Africa)

Gunn questions the capacity of the TRC Unit to carry out the TRC recommendations with regard to reparations. She points to the right of victims to remedy and reparation, and dismisses the obligation of communities to contribute to the reparation of victims. Communities, however, could and should play a more active role in assisting the government to implement the recommendations of the TRC's Reparation and Rehabilitation Commission. Already in 1998, Gunn states, victim organisations called for a think-tank to support government regarding the reparation policy. These and other communications were ignored, leading to petitions and memorandums to government. Gunn pleaded for the conference to become a launching pad for a communication process between the victim community and the TRC Unit. She urged the media to play its role in keeping victim rights in the public eye and suggested that the TRC Unit should consider setting up sub-units to carry out its work more effectively. She concludes that government cannot afford to ignore the expertise of civil society regarding a reparation policy.

Round Table B Restorative Justice and Reconciliation: Civil Society in the Wake of the TRC

Thursday 21/9, 16:00-17:30

Venue: conference room

Chairperson: Nahla Valji

Disentangling romantic visions of repairing communities

Fanie du Toit (Reconciliation and
Reconstruction Programme, Institute for Justice
and Reconciliation, South Africa)

Du Toit highlights the conceptualisation of restorative justice on the ground by pointing out the complexities of community reparations. Learning to live together is a particular challenge given the enormous level of inequality and racial division that is present in South African society. Research shows that more than 80% of the poorest of the poor in South Africa never socialise with people from other races. Du Toit praises the TRC for laying bare the legacy of apartheid with regards to racism and systematic discrimination, but contends that it rests with communities to become instrumental in overcoming the apartheid system of division and inequality and points to some examples of Cape Town communities building social cohesion.

Du Toit argues for a proper conceptualisation of the concept 'community' in the framework of restorative justice, and then explored the following two questions:

- What community are we seeking to build? Du Toit suggests two typologies: communities of need, and communities of interest. The question that emerges is whether it is only when thrust together in pursuit of a shared need that people form bonds of solidarity, or whether we can believe advocates of ubuntu that claim solidarity and cohesion are intrinsic features of life in Southern Africa?
- How do we address collective trauma? How are the communities we are seeking to build shaped by trauma? A recent Cape Town newspaper describes how gangsters serve as community role models and Du Toit warns that through the institutionalisation of violence in communities criminals could become the new community builders.

Du Toit postulates that the psychological impact of structural violence remains largely uncharted. The perception of communities 'left behind' is confirmed by the trauma of inequality. Referring to Marx, du Toit reiterates that the subjective dimension, the experience, of inequality is 'relative deprivation'.

The TRC recommended a number of practical interventions to promote more humane community life. Nine years later, a coherent response and policy to these recommendations is still not forthcoming. NGOs have taken up the task of collective reparation in isolated communities, but a more systematic approach, co-ordinated by the state and supported by faith communities and business, is needed. To this end a national policy on reparations is vital. A nationwide series of well directed projects would go some way towards addressing this need. But more is needed, du Toit urges. Clarity about what constitutes community and clear criteria for who qualify for community reparations needs to be determined. The promotion of social cohesion is crucial across traditional divides, which is under pressure from two opposing sides: deprivation and globalisation. There needs to be a centralised and capacitated implementation mechanism. Symbols of acknowledgment of past sacrifice need to be integrated into the broader developmental agenda. At the same time, development is not the same as reparations, since all reparation is symbolic.



Realising symbolic reparations starts with tackling bread and butter issues

Ereshnee Naidu (Centre for the Study of Violence and Reconciliation, South Africa)

With regards to symbolic reparations, the TRC identified all black people as victims of apartheid. However, apartheid survivors are often marginalised despite the memorials that honour them. Naidu avers that memorialisation has moved from the Great White Man to the Great Black Man, while marginalising everyone in between.

Naidu reports on the Sharpeville project where a facilitative process was partially designed, which included the conceptualisation of community. Naidu pointed to the importance of the facilitative role of building communities on the one hand, and to process-oriented issues assisting the re-imagining of identity. She concluded by stating that 'bread and butter' issues had to be met before symbolic reparations could be realised.

Personal healing and the response to human pain

Michael Lapsley (Director, Institute for the Healing of Memories, South Africa)

Lapsley argues that South Africans have over-emphasised the response to human pain in the aftermath of the TRC. Wisdom, however, is to be found in the faith and culture of families and Lapsley urges that the emphasis should move from individualising healing to the healing of families.

Furthermore, Lapsley points to the risk that people who persist in perceiving themselves as victims will become the victimisers of others. Lapsley views himself not as an object of history, but as a victor.

Lastly he reports on the experiences of the 'healing of memory' workshops his organisation runs, in which the largest part of the participants were black people. They often longed for reconciliation but often had nobody to reconcile with – pointing to the absence of white participants.

Victim-offender mediation in political violence cases

Happy Kwetana (Centre for the Study of Violence and Reconciliation, South Africa)

Kwetana reports on a pilot study conducted by the Centre for the Study of Violence and Reconciliation in collaboration with U Managing Conflict (UMAC) that aimed at bringing together victims and perpetrators of apartheid crimes that were – in most instances – unresolved through the TRC, and mediating this interchange.

He highlights some of the key principles for a successful mediation: the creation of a climate that allows for accepting active responsibility; the acceptance of a full confession (factual truth); giving a voice to victims to share their experiences (personal truth); and gaining empathy for the victim (dialogue truth). Outcomes of such encounters could be either monetary or symbolic measures (restorative truth).

He concludes with lessons from the project:

- perpetrators do want to speak – by doing so they start their personal healing process;
- some victims wanted to participate in order to seek alternative ways of obtaining monetary reparation; and
- some participants utilised the process to dispose of false accusations and rumours.



Round Table C

African perspectives on restorative justice and reconciliation

Friday 22/9, 11:00-12:30

Venue: conference room

Chairperson: Carnita Ernest

The place of traditional justice mechanisms in dealing with the past. With examples from Mozambique, Uganda, Rwanda, Sierra Leone, and Burundi

Luc Huyse (Prof. Emeritus, Catholic University of Leuven, Belgium; International Institute for Democratic and Electoral Assistance)

Huyse differentiates three main types of strategies in dealing with the past: 1) the silence/impunity model; 2) non-judicial measures; and 3) the retributive justice model. Although the most inappropriate, the first model is still the dominant approach. The retributive model is often preferred as the primary model since it:

- avoids unbridled revenge;
- protects against the return to power of perpetrators;
- fulfils an obligation to victims;
- individualises guilt;
- complies with international law;
- strengthens legitimacy and the process of democratisation;
- enhances peace; and
- breaks the cycle of violence.

However, the retributive justice approach has many political, cultural and social shortcomings and risks, such as:

- the negative effects of trials on economic development;
- justice not being the most urgent issue;
- the risk to a fragile peace;
- prosecutions that are too offender-focused;
- the incapacity to explore structural patterns of violence; and
- trials that may not correspond with local cultural customs.

If the retributive model is flawed, what then has traditional justice to offer? Huyse asks. In reply he reviews the response of five different African countries: the rituals of Mozambique led by the traditional curandeiros; the practice, known as mato opot, in Northern Uganda led by local chiefs; the gacaca tribunals led by elected lay judges in the aftermath of the genocide in Rwanda; the rituals of reconciliation that take place in Sierra Leone; and the bashingantahe led by wise elders in Burundian communities.

Huyse notes that all these practices or mechanisms suffer to a greater or lesser extent from the following problems and difficulties:

- unclear and unwritten rules of conduct;
- ad hoc functioning;
- lack of procedural safeguards;
- power inequalities (gender, age, minorities); and
- the pressure of modernising (e.g. the Rwandan gacaca).

In addition, practical difficulties, such as using such mechanisms in the artificial environment of refugee camps, and the problematic relationship with other transitional justice instruments bedevil these traditional models.

Huyse concludes that traditional mechanisms have their problems too, and thus should not be romanticised. The challenge rests in how to modernise these rituals without destroying their original characteristics.

The truth about traditional practices. A view from Liberia

Ezekiel Pajibo (Centre for Democratic Empowerment, Liberia)

Pajibo agrees with Huyse that traditional mechanisms should not be romanticised. In Liberia, he recounts, the war ended and was followed by ten years of oppression and a criminalised economy. Only in June 2005 was the final Truth and Reconciliation Commission Act passed, with a mandate to: promote national peace, security, unity and reconciliation by investigating gross human rights violations; providing a forum to address impunity; establishing of a record of the past; and the compiling of a report with findings and recommendations. The Commission was officially launched in June 2006. Pajibo warns that only once the political situation is stable in a country, can restorative justice practices be undertaken.

Obstacles in the peace and reconciliation process in the Democratic Republic of Congo

Theodore Kamwimbi (Institute for Justice and Reconciliation, South Africa)

During the almost 20-year civil war in the DRC a huge amount of human rights violations were perpetrated. Kamwimbi asserts that although the Congolese society wants these perpetrators to be punished, there are many challenges to prosecutions and that this is where restorative justice can come into play.

Although at a societal level it is difficult to change from being less punitive to more restorative, at the political level the Pretoria Agreement of 2002 showed that the political parties were willing to enter into dialogue. Among other mechanisms, it was decided to establish a truth and reconciliation commission.

However, Kamwimbi maintains that the Congolese Truth and Reconciliation Commission has not been successful, and appears to be merely a political compromise. He emphasises that such mechanisms should be organised in and with the support of the community, but that in the DRC the involvement of civil society is absent.



Session Two: Crime control, crime prevention and restorative justice

Restorative justice is often referred to as a backward-looking approach to justice since it focuses mainly on repairing harm. During and after periods of political transition periods, new democracies face high levels of uncertainty often accompanied with rising levels of crime. This state of affairs may fuel popular punitiveness and it may question the policy relevance of the restorative justice paradigm in the high crime context of contemporary South Africa. African experiments in the regulation of social order and the provision of citizen security, as well as the tension between punitive and restorative practices were examined in this second session. Furthermore, the potential for, and limitations of restorative justice vis-à-vis particular forms of interpersonal violent crime – such as rape and domestic violence, as well as the applicability of the restorative justice paradigm to particular groups of offenders were discussed in this session.

Plenary Session

Thursday 21/9, 14:00-15:45

Venue: conference room

Chairpersons: Elrena van der Spuy and Kris Vanspauwen

Restorative justice: moving beyond reparations

Clifford Shearing (Prof. of Criminology, University of Cape Town, South Africa)

In his paper Shearing focuses upon whether it is possible to envisage a restorative justice process that is risk oriented – a forward looking, preventative process. He postulates that envisaging such a restorative process requires a broader conception of “restoration” and “restorative justice” than is usual, and agrees with the scholar, John Braithwaite, that it is useful and sensible to define restorative justice in terms of a broad set of values that do not limit our understanding of it to processes that promote

reparations and healing, but include wider values, such as community self-direction, inclusion rather than exclusion, a focus on a better tomorrow and, most importantly, respectful dialogue.

In order to test his hypothesis, Shearing interrogates the workings of the 1992 Goldstone Commission of Inquiry regarding the prevention of public violence and intimidation, which appointed a multinational Panel to advise it on the lawful control of demonstrations in the run up to South Africa's first democratic elections. Shearing deliberately chooses this Panel for scrutiny, as its focus was on what might be called the 'hard end' of security governance, rather than the 'soft end', which is the more traditional focus of restorative justice.

What the Panel's recommendations proposed was a process that would bring together safety partners in small gatherings across the country on a routine and sustainable basis. These gatherings would include local governments as community representatives, civil society organisations and the South African Police. These participants would participate in many hundreds of deliberative gatherings to develop policing plans that would express restorative values. In doing so they would bring restorative principles and processes into the very heart of processes of public order policing, illustrating that prospective restorative processes can have an enormous effect on changing not the soft but the hard end of policing. This mechanism undoubtedly made a major contribution to the success of the 1994 elections.

Although the work of the Commission has had an impact on international policing practices, particularly in Northern Ireland and Canada. Shearing notes with regret that very little research has been undertaken on the events outlined by him as a risk-focused expression of restorative values.

Challenges to implementing crime prevention and community-based policing

Arno Lamoer (Divisional Commissioner, Operational Response Services and Crime Prevention, South African Police Service)

Lamoer is of the opinion that the South African Police Service does not have a clear understanding of crime prevention or restorative justice, and that it shows. He further argues that a restorative justice policy should start within the police service before it can deliver services to the public or be supportive to the other criminal justice departments.



By way of illustration Lamoer briefly sketched the history of his own career in the police up to the present where he heads the SAPS Crime Prevention Unit. He points out that part of the SAPS transformation was the adoption of the term 'community police officers'. However this name change implies that the SAPS would know what community needs are, and yet five years after the new dispensation the police service was still not the one envisaged for our communities. Change from a 'hard' policing approach towards community-based policing requires trust and time. This restoration, both within the police, and within the communities is still underway. That notwithstanding, Lamoer argues for a more effective, community-based approach that centralizes the restoration of the dignity of offenders and victims, rather than the often bureaucratic, lengthy, and costly (in human and financial resources) criminal justice process. In addition there is also the urgent need for police officers to be accepted in the community in order to be able to serve the community needs. Lamoer ascribes this as his chief goal, which, if successful, should obviate the need for the recruitment of more police officers and the building of more prisons.

Situating restorative youth justice in crime control and prevention

Adam Crawford (Prof. of Criminology, Centre for Criminal Justice Studies, University of Leeds, UK)

The challenges of implementing restorative justice practices into the criminal justice system in the UK have focused on youth justice in particular, despite the fact that restorative justice remains by and large very marginal. Through the Youth Offender Panels restorative justice moved to centre stage of the youth justice system in England and Wales. Since the New Labour government came to power in 1997, it set out a new youth justice system based on the 3 'R's: restoration, reintegration, and responsibility. England and Wales has since introduced restorative justice practices in every stage of the youth justice system. In his paper Crawford focuses particularly on the Youth Offender Panels and Referral Orders.

Referral Orders from court mean that restorative justice takes place in a highly coercive context. The Court Order refers the youth offender to a Youth Offender Panel, comprising lay people and a professional, which aims in a deliberative discussion between all stakeholders to look at the causes that gave rise to the conflict. In theory such orders and panels are thus bound by restorative justice principles. The outcome of the deliberations is a signed contract, containing two distinct elements: 1) Reparation either to the victim or the community; and 2) a program or activity, being the preventive element.

Research has shown that these panels, despite limits and the coercive context, received high levels of satisfaction from victims, offenders, and the families. They allow space for emotional and effective responses to crime, which courts often fail to deliver. Referring to Shearing's paper, Crawford notes that the processes of the Youth Offender Panels seek to account for the past and to govern the future by emphasising the offender's active responsibility for future behaviour. However, one of the major failures of the panels is the lack of direct victim involvement: only 13% of victims attended such panels.

Further endorsing Shearing's views, Crawford argues for restorative justice also to be a means of governing future relations, not merely reordering the past. In order to do so we need to explore the type of regulatory regime that restorative principles

evoke and the implications for compliance. He draws on John Braithwaite's enquiry of linking restorative justice to notions of responsive regulation and finds that Braithwaite's regulatory pyramid can be identified in the youth justice system of England and Wales. Crawford then probes what the possible consequences of responsive regulation for future compliance are and identifies four broad, ideal assumptions of how regulatory regimes might seek to foster compliance.

He must buy what he stole and then we forgive: restorative justice in Rwanda

Bruce Baker (Applied Research Centre for Human Security, Coventry University, UK)

Baker contends that across Africa – and he has conducted research in some 12 different countries on the continent – restorative justice is ubiquitous. Faced with civil and criminal disputes, most Africans used informal justice outside of the criminal justice system. Using the local structures of justice system in Rwanda as an example, he illustrates in his paper how most African traditional justice practices use large elements of restorative justice.



In Rwanda the lowest level of local government has the responsibility, amongst other things, for law and order matters in its community, including resolution and reconciliation mechanisms either individually or in a local 'court' of advisers, known as a gacaca, and meting out punishment for misbehaviour. If there is a problem with security, people almost universally go to their local government leaders. Each local leader seeks to resolve as many of these issues as possible, either personally with the disputants or in a court setting with representatives of the community as advisers.

Baker then evaluates this justice model as a restorative process. First he outlines the many positive restorative and reconciliatory aspects of the process, which he says can be encapsulated by the Rwandese maxim: "If he buys what he stole then he is forgiven". Baker then outlines the shortcomings of this justice system and notes that in terms of international standards, these 'home grown' justice systems are 'rough and ready' and more a hybrid system of restorative and punitive justice than pure forms. Such justice tends towards restorative justice not necessarily for reasons of principle, as for practical reasons, and a history of experience in informal negotiations, mediation and local customs. Yet these inadequacies must be set against a background of equally failing state systems.

Baker concludes that given that most cases go through these non-state and restorative procedures in Africa, it is worth reflecting whether security sector reform is focusing its energy on the right justice system.

Round Table A Crime policies and crime prevention

Thursday 21/9, 11:30-13:00

Venue: pool room

Chairperson: Jan Van Dijk

Along the golden highway: justice twelve years on

Bill Dixon (Research Institute for Law, Politics and Justice, Keele University, UK)

Dixon studies the interconnection between retributive justice, restorative justice and social justice with the aim of looking to which type of social policy (a combination or integration of the three mentioned models) would serve South Africa best to achieve social justice. Dixon is critical of the capacity of local restorative justice practices to bring about structural changes in safety, security and development. He promotes an approach of crime prevention, social policy and development, whereby criminal justice and social justice are the key frameworks. The ultimate goals of this policy should be the improvement of living conditions for all, the fostering of social well-being for the deprived, and the promotion of the participation of all in the political process.



Crime control developments in post-modern societies and in societies in transition: looking for possible common features between seemingly unrelated discourses and practices, also with regard to the implementation of restorative justice

Hans-Jürgen Kerner (Prof. of Criminology, Univ. of Tuebingen, Germany)

Kerner starts out by drawing a distinction between developments in crime control in post-modern states that are already in, what he terms, an environment of 'routine' and those states or societies in transition. The latter environments could be termed 'critical' or 'hypercritical' depending on the level and extent of violence and victimization experienced prior to the transition. He is of the view that these two contexts are so divergent and the challenges for the development of crime control so different as to appear incomparable. Nonetheless, the transitional society needs, speedily, to gain closure on the past so as to arrive at a shared sense of the value of legality and the rule of law. Thus it is of value to scrutinize the developments of restorative justice in 'routine' contexts, such as in Europe, and Kerner pays particular attention to those developments in the Federal Republic of Germany.

Restorative justice in such post-modern states are embedded in a crime policy that is still, or once again has become, structurally dominated by the idea that crime has to be 'fought'. The war metaphor has more recently gained huge momentum, particularly in the USA, which may, in the long-term have repercussions for the entire system of every-day crime control. In Europe, however, the predominant mode of responding to crime is still, largely, event oriented, based on reactive law enforcement, and only bifurcated in respect of sentencing into retributive justice for serious and dangerous offenders, and rehabilitative or even diversionary for all other offenders. Such a system does not appear conducive to the wholesale incorporation of restorative justice, particularly since the underpinning principles appear out of step with the punitive approach regarding serious crime.

This notwithstanding, restorative justice principles and practices often take root in such environments in response to pressures on the criminal justice system. Examples of such pressures are a system overburdened by an increasing number of lesser offences, and recidivism.

In addition, reform-inclined practitioners and scholarly research aimed at the renewal of legal theory provide further impetus for change. In many European countries new developments premised on principles of restorative justice came in 'waves' during the 1960s and 1970s, and so too in Germany. However, in Germany, the late 1990s saw a parallel and more punitive development with the so-called measure of preventive detention for dangerous offenders. Of late some federal states are even proposing the imposition of preventive detention for dangerous young and very young offenders. On the whole, though, the criminal justice environment in Germany is now more, rather than less, receptive to restorative justice practices, and in particular to victim-offender mediation. But despite increased receptiveness, still only some 5% of criminal cases are dealt with in a restorative manner. And in the correctional systems of most European countries – with the exception of Belgium – restorative justice is still embryonic.

Having broadly sketched the developments of crime control in Europe, Kerner then turned his attention to crime control and restorative justice in transitional societies.



He is of the view that an individualised justice approach to redressing past injustices in such societies is doomed to failure, if only due to the sheer number of such cases and the time it would take to process them. Nor does punishment, meted out in the traditional sense, solve the individual and societal need for restoration and restitution. Collective procedures with a restorative core appear thus to have the greatest potential for collective peace and for addressing individual victimisation. Restorative justice is thus an appropriate mechanism not only for dealing with the past, but for paving the way for the entrenchment of the rule of law and a society in 'routine' that is able to respond to future crime and crime prevention in a primarily non-repressive manner.

Kerner concludes by arguing that societies in transition face such enormous justice challenges that they will inevitably have to borrow and adapt a set of mixed approaches from societies that have in the past undergone such transitions, as well as from societies stable enough to have tested various criminal policies and crime prevention schemes.

Restorative justice in the South African National Prosecuting Authority

Karen van Rensburg (Restorative Justice Task Team, South African National Prosecuting Authority)

Van Rensburg outlines the strategic initiative around restorative justice in the NPA, post 1998. Almost ten years on, the NPA is in a phase of implementation and justice outcomes are an eclectic mix of retributive, rehabilitative, and reintegrative measures. Restorative justice and crime prevention is a new strategy in this mix for the NPA, and requires for the department a better understanding of what restorative justice really means. In effect the Restorative Justice Task Team of the NPA will be testing the partnerships to the restorative justice process with the various stakeholders in the various sectors.

Round Table B Restorative justice, victims and interpersonal crime

Thursday 21/9, 16:00-17:30

Venue: pool room

Chairperson: Ashley

Green-Thompson

Restorative justice and domestic violence in South Africa

Lillian Artz (Gender, Justice and Health Unit, University of Cape Town, South Africa)

Artz mainly presents her personal views on the applicability of restorative justice in cases of domestic violence. She holds the belief that the restorative justice system should not be utilised for sexual offences. Setting out the current feminist debates she points to the extreme complexities of violence arising from intimate relationships. Fear, control and anxiety are important factors that make restorative justice inappropriate to deal with these matters. She mentions situational couple violence and 'intimate terrorism' as two particular problematic types of domestic violence.

The potential of restorative justice is restricted, Artz contends, to cases where women don't want to leave their partner. She cautions, however, that there is no empirical evidence on the effects of restorative justice in these cases of violence.

Artz concludes by noting that feminists and restorative justice proponents, although at opposite poles are nonetheless both striving for the common goal of ending violence, but holds firm that the priority in domestic violence cases should always be a protective approach for the victims.



Victim-offender mediation in cases of serious violent crimes

Mark S. Umbreit (Centre for Restorative Justice and Peacemaking, University of Minnesota, USA)

Umbreit presents his own research on and practice of victim-offender mediation in cases of severe violence, citing two recent successful dialogues with family members of people killed in domestic violence cases. He points out that there is no specific protocol for such processes in the USA. The impact of the trauma and the horror of such an experience takes time to repair, and Umbreit refers to research in Ohio that has shown that an average of six months to three years was used to prepare victims for the confrontation with the offender. Yet his research shows that 90% of the participants showed their satisfaction. The research also found extremely high figures of expressions of forgiveness and remorse, and of restorative actions by the offender. Indeed, Umbreit has no negative data to report. In closing he stresses that the most important factors for a successful mediation are proper preparation, timing, and a victim-centered approach.

Round Table C Social justice and restorative justice

Friday 22/9, 11:00-12:30

Venue: pool room

Chairperson: Clifford Shearing

Social and spatial justice: exploring the impact of gated communities on peace-building in South Africa

Karina Landman (Council for Scientific and Industrial Research (Built Environment), South Africa)

Landman explores the impact of spatial development and responses to crime and insecurity, and the role that spatial development can play in the promotion of social justice and peace building.

The context in which gated areas are established is a culture of fear, a culture of control as a response, and a particular rise in crime in South Africa during the transitional period. The establishment of security estates and enclosed neighbourhoods are forms of social control that collide with human rights, cause

social exclusion and division. This institutional fragmentation will lead to divided cities and will affect the metropolitan governance and the distribution of scarce resources.

Landman argues that spatial justice forms a crucial element in the building of a sustainable peace. Linking peace with spatial development she identifies and gives examples of three types of peace landscapes: peace gardens, peace parks, and peace squares. She concludes by arguing for a multi-dimensional approach to peace-building, which includes social and spatial justice, maintaining that physical development of places of peace where social processes could take place are crucial in contributing to peace-building.

Development, social justice and global governance: challenges to implementing restorative and criminal justice reform in South Africa

Tony Samara (Assist. Prof. of Sociology, George Mason University, Virginia, USA)

Samara avers that attempts at implementing institutional transformations in the criminal justice system face a number of seemingly insurmountable obstacles. In his paper Samara examines one specific set of challenges relating to governmentality and the practice of urban governance in the post-Cold War era. He argues that governmentality and its practices act as impediments to the implementation of restorative justice in South Africa. Taking three steps to build his argument, he starts by discussing governance and governmentality at the global scale. He then addresses the importance of examining these as they are expressed at the level of the city. And finally he offers the results of a case study of urban renewal in Cape Town as an illustration of a particular manifestation of post-Cold War governmentality at the local/municipal level.



He holds that the case study will show that attempts at criminal justice reform, including restorative justice, potentially contradict the contemporary practice of governance at the global, national and local scales, as well as the discursive field from which it derives. Thus efforts at institutionalising progressive reforms will face resistance – both active and passive – when they challenge the exercise of power by state and dominant non-state actors, as these attempt to realise a particular vision for the post-Cold War social landscape. This conflict will be particularly pronounced at the city level.

Restorative justice is directly impacted by this global governmentality in that it challenges the individual legal-centric approach. In essence restorative justice is in fact part of a developmental strategy rather than a criminal justice or security strategy, as it situates crime and responses to it in their broader social context, and seeks solutions that invoke and employ that context. Thus restorative justice places justice and peace above order. Current governmentality, on the other hand, places the highest priority on order and threats to that order, notwithstanding the progressive rhetoric of reform. The two approaches are thus contradictory at the levels of discourse and practice. This contradiction underscores the need to better understand the relationship between order, governmentality and governance.

Building social capital, social justice and ‘proudly Manenberg’: A Community Turnaround Strategy Irvin Kinnes (Independent Consultant, Cape Town, South Africa)

Kinnes presents the ‘Proudly Manenberg’ project in which a typical, criminogenically labelled community reclaims its social space by uniting all sectors and organisations in the creation of positive opportunities to rebuild the community. The initiative is built on strong democratic principles in which all citizens have a say. Kinnes maps the social conditions of Manenberg and describes the process in which the project aims at changing the perception of the people themselves as well as those outside by creating opportunities for change. Areas on which the project has concentrated are: education, health, housing, economic development, youth, sports, arts and culture. The main focus of the Proudly Manenberg project is on positive campaigning, inclusiveness, building social networks, challenging government structures, building partnerships with government and business, and building accountability into these initiatives.

Session Three: Opportunities and challenges for the institutionalisation of restorative justice

The concept of restorative justice has received increasing recognition from various sectors of society and state institutions. It has to some extent been incorporated into policy and even into draft legislation or different government sectors. In some respects, particularly in respect of child justice, restorative justice is being increasingly applied in practice. At the same time, civil society organisations are developing creative and innovative approaches to restorative justice, testing its limits, and its applicability in different (criminal justice) contexts. This last session provided an overview of the institutionalisation process of restorative practices in the South African criminal justice system as well as in the broader international context. Thereafter the discussions focused around the challenges and obstacles involving this process by critically unravelling the relationship between the informal or non-state and the institutionalised or state developments. And finally the session has looked at some of the ethical considerations and implications of the implementation of restorative justice practices in the current justice system.



Plenary Session

Friday 21/9, 9:00-10:30

Venue: conference room

Chairpersons: Amanda Dissel
and Elmar Weitekamp

Opportunities and challenges for the institutionalisation of restorative justice

Mike Batley (Director, Restorative Justice Centre)

In order to begin to perceive challenges and opportunities for the institutionalisation of restorative justice, Batley starts by describing some realities within the South African context, namely the feelings of 'unsafety', and the need to be safe. He notes two dimensions to this sense of being unsafe, namely very low levels of service delivery by all government departments in the criminal justice system fuelling the 'nothing works' hypothesis; and the evidence of lawlessness in society that we are confronted with on a daily basis.

Typical solutions to unsafety are limited to target hardening through technological and human security systems (gated communities and CCTV systems) and calling for more police and tougher measures generally. Improving the economy, improving levels of education and reducing unemployment also feature on this list. Batley is of the opinion that, in terms of solutions, South Africans remain locked in a crime control and punitive pattern of thinking because, in our national consciousness, we have never known anything besides a retributive approach.

The above leads Batley to question whether restorative justice can meet the challenges of feelings of unsafety and high crime and whether there are any opportunities for the institutionalisation of restorative justice in South Africa at present. Batley is convinced that there are at least two areas of opportunity that arise from the above context. The first resides in the nature of restorative justice itself. The second lies with some current processes.

He then goes on to highlight some positive signs, such as the readiness to link responses to crime with socio-economic matters, and a willingness to recognise that a fresh approach is required.

Restorative justice, he avers, provides a sound basis for developing a holistic response to crime and for addressing the following concerns:

- the need to provide opportunities to build social cohesion in society by clarifying norms in situations of dispute and conflict;
- deepening democracy by creating opportunities for meaningful participation in the administration of justice;
- developing a range of programmes that will address the needs of both victims and offenders, including moral development and linking these to socio-economic issues.

Batley ends with the pithy statement that challenges present opportunities, and opportunities present their own challenges.

The institutionalisation of restorative justice: justice and the ethics of discourse

Barbara Hudson (Prof. of Law, University of Central Lancashire, United Kingdom)

Hudson's paper focuses on the mode of restorative justice, calling restorative justice 'discursive justice'. The starting point is that restorative justice is based on the idea of examining and reconciling different claims on justice and different perspectives on undesired events through discourse. Focusing on the 'discourse' of restorative justice, Hudson presents three main arguments:

- Western modern societies are divided societies that barely acknowledge conflicts. Residues of these conflicts remain and new conflicts emerge, such as between rich and poor, male and female, black and white.
- Theories and models of justice presently being advocated to establish discourse as the fundamental principle of justice are better suited to solving conflicts in deeply divided societies than established formal modes of justice. Restorative justice in this respect comes closest to what Hudson calls the discursive justice.
- The discursiveness of restorative justice is threatened by this process of institutionalisation. Hudson argues that another future for restorative justice is possible.

The essence of the discursive justice model follows Habermas's discourse of ethics, where the goal is to reach intersubjective understanding rather than domination, and where democratic states are seen as 'communicative contexts' in which conflicts can be accommodated and minorities be included.

For Hudson a secondary principle is that justice discourses need to be relational: that is, individuals need to be considered in the context of social groups of which they are members, and relationships of advantage and disadvantage, oppression and dominance, inclusion and exclusion should be taken into account, as will as the established justice relationship of individual to state/community. A further secondary principle is that justice discourses should be reflective, which means that cases should be discussed in their fullness and uniqueness rather than being constrained by the bounds of legal admissibility and relevance, with consideration set against a horizon of key justice values such as equality, respect, human rights and freedoms.

She then turns her attention to the promises and risks of the institutionalisation of restorative justice and suggests that, since these new models of justice are proposed because of the deficiencies of established justice theories and institutions, there is a danger that institutionalisation may mean that the mentioned principles have to be abandoned or trimmed back in order to reach accommodation with the modalities and objectives of the formal criminal justice system.

Apart from these concerns, Hudson highlights examples of at least some of the ideals and characteristics of restorative justice being incorporated into mainstream criminal justice in positive ways. She mentions examples from Canada and Brazil. The Brazilian example upholds the elements of relationalism and reflectiveness.



Advancing restorative justice from within – the role of jurisprudence

Judge Eberhard Bertelsmann (High Court of South Africa, Transvaal Division)

Judge Bertelsmann starts by laying bare the failure of the criminal justice system, using, as examples, two court cases (a civil and a criminal case) where grave injustice was done to parties to the processes. Against this background he avers that, although slow, the need for alternatives is gaining ground.

Bertelsmann then links the failures of the criminal justice system, the current crime crisis in the country, which he attributes to the 'low level of caring' in the South African society, and the resultant punitive attitude of most South Africans. The combination of these crises, the judge argues, calls for serious alternatives.

He then stresses the importance of the involvement of all nine government departments (as opposed to only the criminal justice cluster) and urges that the implementation of ideas should happen in collaboration with NGOs.

In addition, at a criminal justice level, he suggests:

- the extension of the possibilities for plea bargaining;
- the right to divert criminal cases at any stage in the process, and exploring opportunities for alternative dispute resolution and restorative justice;
- the obligation for magistrates to consider alternatives to imprisonment, and, if applicable, the reason for rejection of alternatives as part of the record of the sentence;
- the recognition of traditional African courts.

Above all, the judgements of the High Court, Bertelsmann reminds, is the law, unless overturned. And thus, sensitising and training judges in the principles of restorative justice is essential.

The Judge concludes by reverting back to the lack of caring in South African society and urges that fundamentals of the justice paradigm will be impossible unless we regard the correctional services as our institutions, unless we regard the criminals as our people, unless we regard victims as our people, unless we regard crime as our problem. Courts, in this regard, have a constitutional obligation to take the lead.

Round Table A Mapping the institutionalisation of restorative justice

Thursday 21/9, 11:30-13:00
Venue: crowned eagle room
Chairperson: Wilfried Schärf

The implementation of diversion programmes in South Africa

Arina Smit (National Institute for Crime
Prevention and Reintegration of Offenders,
South Africa)

Smit focuses her presentation on the diversion programmes carried out by NICRO in the field of juvenile justice. Smit emphasises the important balance between justice and welfare and the need for behavioural experts to look at the underlying motives for crime. Although diversion is seen as innovative, cost effective and early intervention, Smit is critical and lists the following dangers:

- the ad hoc approach;
- the popular attractiveness of restorative justice;
- the lack of quality assessments;
- the difficulties in monitoring;
- scarce resources; and
- the knowledge gap.

If we want to make progress, Smit argues, we need to:

- educate the various stakeholders better on what restorative justice means;
- tackle the present high turnover;
- allocate more resources to restorative justice programmes; and
- conduct more evaluative research on its impact.

European developments in victim- offender mediation

Ivo Aertsen (Prof. of Criminology, Catholic
University of Leuven, Belgium)

Aertsen provides a brief overview of the recent developments in Europe with regards to restorative justice practices, stating that restorative practices only gained ground in the late 1990s and is largely confined to victim-offender mediation and conferencing.

Conceptual clarification of the term ‘restorative justice’ is still an ongoing debate in Europe. This lack of consensus is reflected in the United Nations definition of restorative justice, which in effect amounts to a compromise between the different stances.

Further critical issues still under debate focus on whether restorative justice should be process oriented or outcome oriented; whether processes should be led by professionals or volunteers; to what degree should practices be individualised; and whether practices should be institutionalised in the formal system or should become community-based.

This notwithstanding, restorative justice is now a widely and officially accepted set of new interventions. The growth of restorative justice practices at the national level has benefited from supranational regulation and policies, such as the Council of Europe Recommendation R(99)19 concerning mediation in penal matters (1999) and the UN Basic Principles on the use of restorative justice programmes in criminal matters (2002). A further positive step is the Council Framework Decision of 15 March of 2001 that has embraced victim-offender mediation. The latter is not ‘soft’ law, but is binding on all 25 member states of the European Union.

One of the critical issues for Aertsen is the ‘instrumentalisation’ of restorative justice at the service of criminal policies. The main focus of debate is on the relationship of restorative justice to criminal law and criminal justice, whereas its community orientation is much more neglected in research and theory. Aertsen urges that more attention both in practice and research should go to the specific role of the community and much can be learnt from traditional contexts and special settings such as that of the TRC.

Gacaca courts: reinventing tradition. Rwanda after the genocide

Klaas de Jonge (International Institute for
Democracy and Electoral Assistance)

The gacaca tribunals – based on the original gacaca courts, a community-based practice for conflict resolution – were initially established to accelerate the Rwandan genocide-related trials, to bring justice to the people, to establish the truth, and to promote reconciliation. De Jonge briefly describes the jurisdiction, the process, and the set up of the tribunals.

Although the tribunals were widely lauded for being a primary example of a restorative justice response to gross human rights violations, de Jonge is very critical about the gacaca's achievements. He lists the following obstacles that emerged from its work:

- minimal public participation;
- a coercive process (victims received fines if they refused to attend);
- victims were sidelined in the process;
- state coercion;
- decisions based on strict rules of law; and
- judges were appointed by the state.

De Jonge argues that the gacaca experiment was a hybrid justice model, taking some elements from the retributive state justice systems, combined with some informal traditional elements. This undermined the voluntary nature of the gacaca process and curtailed public participation. In addition, this hybrid model was further constrained by high levels of state intervention and poor donor funding. In conclusion, de Jonge holds that the reconciliatory powers of gacaca are heavily over-estimated in the international community.

Round Table C Challenges and potential of the institutionalisation of restorative justice

Thursday 21/9, 16:00-17:30
Venue: crowned eagle room
Chairperson: Amanda Dissel

The Challenges and Potential of the Institutionalisation of Restorative Justice from an Integrated Justice System Perspective

Adv. Pieter du Rand (Chief Director,
Court services, Department of Justice and
Constitutional Development)

Du Rand starts out by stating the aims of his Department, being to uphold and protect the Constitution and the rule of law, and to provide accessible, fair, speedy and cost-effective administration of justice in the interest of a safer South Africa. This, and the Constitutional mandate to effect changes to the judicial system, places an obligation on government to consider all the possible applications for restorative justice across the

whole integrated justice system, and to further its institutionalisation.

The existing backlog of outstanding cases in South African courts, and the continued pressure on the entire integrated justice system should, in du Rand's opinion, be a galvanising opportunity to institutionalise the principles and processes of restorative justice for the benefit not only of an overburdened system, but also for the restoration of communities, victims of crime, and offenders. This, however, will demand that our present punitive society will need to make a fundamental shift as to how we view a criminal act. Indeed, du Rand argues that restorative justice should not only be viewed as a 'soft option' applicable only to minors and minor crimes, but should be mainstreamed as an option at various stages of the criminal justice system for all who encounter the system.

Further features of the current justice landscape that facilitate the advancement of the institutionalisation of restorative justice are:

- the history and precepts of customary law;
- an increasing openness among judicial officers to the principles and applications of restorative justice; and
- a favourable policy environment.



Having sketched a justice system in need of and ripe for change, du Rand pointed to the enormity of the task at hand, which would require a partnered approach between government and civil society at all levels of intervention. What is still unclear, du Rand asks, is the nature of such partnerships? Batley and Skelton, in their publication entitled 'Charting progress, mapping the future – restorative justice in South Africa' argue that the role of the state is that of enabler, resource-provider, and guarantor of quality practice, but that civil society should be the implementer. Du Rand questions the exclusion of government from the role of implementer, particularly if the aim is to mainstream restorative justice. Further partnership issues that require debate and solutions are the practicalities of building communities and increasing social cohesion that would, for instance, ensure increasing community involvement in the provision of community service and alternative sanctions.

Before grappling with the fundamental question of how restorative justice can best fit into the integrated justice system, du Rand enumerates what government has already done to advance restorative justice:

- Research conducted by the South African Law Commission that seeks ways to give recognition to informal mechanisms of justice (Project 94), that simplify the criminal procedure (Project 73 – out-of-court-settlements); and a sentencing framework (Project 82);
- Promoting awareness of and training of judicial officers in restorative justice;
- Alternative methods of finalising cases, viz. plea bargaining, admission of guilt, diversion, and mediation;
- Policy initiatives since 1995, e.g. the Inter-ministerial Commission on Young People at Risk (1996), The National Crime Prevention Strategy (1996), the White Paper on Social Welfare (1997), and the recent draft policy of the Department of Corrections that adopts restorative justice as an official departmental approach;
- The 2004 Victim Charter, and the Victim Empowerment Programme located within the department of Social Development;
- The Child Justice Bill;
- The enactment of the Probation Services Amendment Act, 35 of 2002, which contains a definition of restorative justice;

- The development of jurisprudence at Constitutional and High Court level that takes cognisance of restorative justice, e.g. *S v Maluleke and Others* CC 83/04 TPD;
- The use of diversion for young offenders, in partnership with civil society service providers such as NICRO and Khulisa; and
- A more community- and victim-involved approach to bail, and sentencing and parole decisions.

These advancements have, however, happened in the absence of a holistic policy framework. Du Rand reiterated the earlier commitment of Deputy Minister de Lange that his Department was in the process of establishing such a policy framework, which should be available for public consultation by end 2006.

However, such a framework would require serious engagement with how best to fit restorative justice into our court system. Referring to the work of Zehr, du Rand listed the three system possibilities:

- replacing the present adversarial criminal justice system entirely;
- a parallel-track system, i.e. a restorative justice system independent from, but running parallel to the present adversarial system; and
- a parallel, but inter-dependant and interlinked system, such as the approach adopted in the Child Justice Bill.

A number of projects are currently underway that pilot models of implementation and should provide guidance on best practices, reports du Rand.

In conclusion, du Rand cautions that, in taking these debates and processes forward, we should remain realistic; alive to the need for proper costing and planning; and rigorous in designing and conducting evaluations that measure not only conventional outcomes such as court and corrections usage percentages, but also more far-reaching indicators, such as the extent of victim healing, offender empathy changes, and community ownership of crime-related problems.

The Zwelethemba model – a local governance project

John Cartwright (Community Peace Programme, South Africa)

Cartwright described the Community Peace Programme, a conscious experiment in poor communities that, from the outset, defined itself as an autonomous governance model with no formal links to the criminal justice system. This is its crucial and distinct characteristic. The Peace Committees work at community level and aim at complementing the work of the state agents. They deliberately eschew use of the adversarial/ justice jargon, such as victim or offender, and even terms such as restorative justice, truth, and reconciliation. The Programme has had great impact in the communities in which it is based and 20 to 30 more Peace Committees are planned for the coming few years.

Ambivalences of restorative justice deriving from projects in Zululand prisons

Richard Aitken (Phoenix, Zululand, South Africa)

The restorative justice work of the Phoenix organisation in all eleven prisons in Zululand is in name and policy committed to restorative justice. However, Aitken is of the view that doctrine and methodology remain hugely problematic.

Restorative justice is an orientation rather than a type of programme. The burden on curriculum design in prison projects is thus considerable. Most exponents of the theory predicate practice on assumptions of the identification of a victim, the willing participation of the victim in a healing process, and an acceptance by the offender of moral responsibility for wrongdoing or criminal action. Accordingly, prison programmes in the tradition of restorative justice often seek to develop a learning process that heightens individual agency in personal moral growth. Individual offenders are prompted to take responsibility for deeds committed and ready themselves to face up to victims and the communal context of wrongs committed, sometimes with the help of an intermediary. Learning opportunity, in the hidden curriculum of this assumption, is thought of as a moral imperative.

Aitken suggests that a conception of restorative justice translated into the prison context in practical educational programmes that are fired by a moral imperative is problematic. Prison projects consonant with restorative justice should be alternatively concerned with the freeing or opening of discursive and narrative space. This stands opposed to winning converts to a predetermined idea of a personal moral agency, which tries to get people to say in effect 'I know what I have done and I shall face my victim in contrition'.



Round Table A Ethical issues surrounding restorative justice practices

Friday 22/9, 11:00-12:30

Venue: crowned eagle room

Chairperson: Chris Giffard

Narrating the Spirit of Justice

Carl Stauffer (Regional Peace Network,
Southern Africa)

Stauffer starts by saying that discussions on religion are often seen as ethical discussions rather than topics that belong to the core business of restorative justice. He argues that the very conception of justice is rooted in the spiritual. The legal system is in fact built on the foundations of ancient religious values and practice. Precipitated by the rise of restorative justice, we now see a global movement that is rapidly surfacing ancient forms of indigenous justice practice – all of which have deep spiritual roots.

Restorative justice becomes the channel through which Spirit-Justice is narrated. To understand 'Spirit-Justice', the justice debate must be reframed – a new language must be nested in new images of justice.

Many efforts have been made to encapsulate restorative justice values and practices in relation to spiritual frameworks. Stauffer suggests that the 'Spirit' of restorative justice is present in a set of core values, which can be visualised in the images of an anchor, a reservoir, and a beacon. The anchor image speaks to the necessary moorings of personal safety and security. The reservoir image describes the essentials of networks of relationships or community-building that must accompany restorative justice processes. Finally, the beacon image indicates the pivotal hope of well-being, harmony and life-purpose being restored.

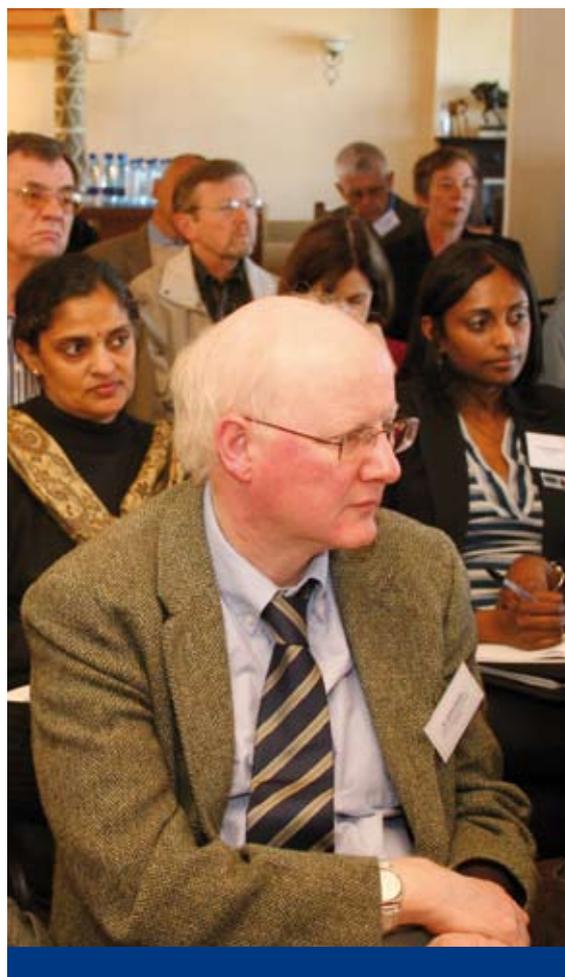
It is Stauffer's belief that if we abide by the principles presented here, we will not only protect restorative justice from potential religious manipulation, but we will also invite all parties involved in restorative justice encounters to a higher standard of both spirituality and humanity.

Ethical justifications for implementing restorative justice

Robert MacKay (Youth Justice Co-ordinator,
Perth and Kinross Council, Scotland, UK)

This paper sketches a new theoretical justification for the institutionalisation of restorative justice practices.

Mackay holds that restorative justice, as a rectificatory concept, is an indispensable element of a legal system, but that practitioners have embraced a reciprocal concept of justice. These need to be reconciled. Law as Peacemaking provides that mechanism, whilst at the same time challenges our concept of Law. Whether Law as Peacemaking can stand the pressure of exposure as a theory of law will depend on whether it can satisfy the tests of legal and ethical theory. He concludes that it can, and in doing so will provide justification for the development of peacemaking practices, including those of restorative justice, but a restorative justice restored to its own good, but limited, domain.



Traditional justice and restorative justice

Nkosi Mzimela (Traditional leader, South Africa)

Nkosi argues that traditional courts need to be legitimised as part of the criminal justice system. Restorative justice is grounded in traditional justice mechanisms. In his opinion, the criminal justice system has failed because it has failed to recognise traditional courts. South Africa should recognise that African principles of justice are based on reparation rather than retribution. We should therefore restore the role of victims in the process.

Ethical principles of restorative justice in prison settings

George Lai Thom (Khulisa, South Africa)

Lai Thom reports on his experience as a mediator in violent crimes conducted in correctional facilities. There are no standards for mediation in this context. Standard setting is needed for ethical reasons. He presents some concrete cases and highlights some critical issues, such as the role of confidentiality and informed consent.



Closing Session: Lessons for the future

Friday 22/9, 13:30-15:30
Venue: conference room
Chairpersons: Elmar G.M.
Weitekamp, Hugo van der
Merwe and Kris Vanspauwen

Closing Address

Advocate Pieter du Rand (on behalf of
Advocate Menzi Simelani, the Director-
General Department of Justice and
Constitutional Development)

Looking back at the proceedings of the past two days, du Rand notes with satisfaction that the conference has provided an opportunity for networking and sharing experiences with persons from South Africa, Africa and various parts of the world. This will assist with future interaction and in ensuring that we keep abreast of developments regarding restorative justice.

He urges that we now have to look beyond the conference on how to take forward some of the issues that were touched upon in the past two days.

Du Rand then itemizes some of these key issues and how the Department of Justice and Constitutional Development anticipates engaging with these in the months to come.

The first session took a closer look at the different aspects of dialogue in post-TRC initiatives that are either or not explicitly labelled as restorative justice. For different reasons, direct dialogue between survivors, perpetrators, and community has shown to be an issue that we will have to continue to grapple with – and at the heart of this is continued communication so everyone understands the processes we embarked on and the progress on aspects flowing from the TRC. The debate on the crucial role of inter-personal and inter-group dialogue in the aftermath of a violent conflict has brought to the surface the key challenges regarding government's contribution and responsibility in this regard.

The discussions about the TRC also raised concerns about the fear of a culture of impunity. We will need to address these fears in the processes set up to take the conference discussions forward. And finally, the reparations processes have challenges as well. It is clear we will need to revisit some aspects, even possibly some legislative aspects, and the resources set aside to deal with reparations. But most importantly we will have to improve communication in this regards. We will need to continue and sharpen the dialogue between government and civil society.

The second session situated the paradigm of restorative justice more squarely within the criminological engagement with crime control and crime prevention. Very important aspects were raised relating to what restorative justice principles and practices have to offer in efforts aimed at addressing violent interpersonal crimes such as rape and domestic violence. These are aspects which will require further unpacking and dialogue as they may provide us with approaches to help deal with these challenges.

And finally, the third session took a closer look at the process of the institutionalisation of restorative justice in the formal (criminal) justice system. In different domains of justice – most notably in the domain of juvenile justice, correctional services, policing sector, and probation – one can notice concrete interest in and attention to restorative justice. We were provided with the promising as well as the problematic aspects relating to possible institutionalisation and received input on the informal justice practices – that have existed alongside the formal justice system – in this process.



We should take to heart what has been said in this regard. Non-state forms of justice do provide a backdrop for debate and their continued existence alongside the mainstream civil and criminal justice system do indicate broad acceptance amongst communities for different ways of doing justice. We need to foster ways to promote a participative role for communities in the resolution of problems. Of course, those practices in traditional justice processes that do not accord with restorative justice practice in a modern constitutional society or our constitutional values must be excluded.

We need to bear in mind that restorative justice, in general and in particular, as utilised during the South African context provides us with the scope for experimenting and piloting options in various scenarios. Our current integrated justice system simply cannot deal with its heavy workload in the required efficient, speedy and affordable manner that will provide justice to both victim and perpetrator in a formal court setting alone. To heal the wounds caused by disputes, there has to also be a process that provides opportunities for mediation, dialogue, negotiation and problem-solving. This is why restorative justice processes are so crucial.

From the viewpoint of the Department of Justice and Constitutional Development, we fully embrace and support restorative justice in the context of our objectives under Access to Justice for All, as this provides an opportunity to attempt to resolve the underlying cause of problems rather than repeatedly dealing with the symptoms. Our support is much more than just moral support. We are guiding and empowering some of these initiatives and will continue to do so.

So how do we take all of this forward? The main problem with the many projects and initiatives and even research studies and legislation has however been that it is done in the absence of a holistic framework. The intersectoral Justice Crime Prevention and Security Cluster (JPCS) departmental clusters will be requested to also see how we can integrate and coordinate the various activities relating to restorative justice in the Programme of Action of government. A national action plan on restorative justice will also be pursued from the Justice department. This department is also in the process of establishing a comprehensive policy framework regarding our court structures, including aspects such as alternative dispute resolution and other restorative justice mechanisms. The idea is that we should have draft framework document ready for public consultation by the end of 2006.

Some of the other challenges we need to address relate to the following:

- the future of the Child Justice Bill – in this regard the Minister has requested a meeting with officials in order to look at the costing aspects and a way forward and we await that.
- restorative justice/alternative dispute resolution/alternative sentencing will continue; so will workshops to promote awareness relating to restorative justice and to help deal with operational aspects thereof through processes such as the national and provincial (JCPS) Development Committees.

The Restorative Justice Watershed? Stopping on the Road to Review the Past and Predict the Future

Ann Skelton (Centre for Child Law, University of Pretoria, South Africa)

Many African writers have equated restorative justice with African justice processes. Thus it is possible to say that restorative justice is not new in South Africa. However, the mainstream systems operating in the courts in South Africa today are adversarial in nature and for the most part deliver retributive justice. Having demonstrated another, more restorative, way of doing justice at the macro level, South Africa has been slow to adopt restorative justice thinking into criminal justice.



Skelton's paper describes the beginnings of restorative justice in South Africa, including the resonance with African justice systems, and the more modern practice initiatives. She then explores eight challenges, emerging from the conference proceedings, which South Africa will be engaging with as it moves toward a wider application of restorative justice. These are:

- The dangers of a bifurcated system that provides different responses for offenders charged with serious and those charged with less serious crimes;
- Ensuring that restorative justice processes operate with an understanding of relational justice approaches, to ensure social justice for all;
- The controversial issue on the role of reintegrative shaming in restorative justice;
- The need for state and civil society engaging in partnerships of productive synergy, in which government does the steering and civil society does the rowing;
- The need for the state to play the role of main resource subsidiser, role enabler, trainer of state role-players, and guarantor of quality practice;
- Standard setting for restorative justice practices in order to ensure conformity with human rights. Here Braithwaite's categorisation of standards is useful;
- The need for linking the African traditional justice processes with a referral system to the formal justice system;
- The need for sustained development of South African jurisprudence in the field of restorative justice, building on the favourable High Court judgment in *S v Joyce Maluleke*.

Skelton concludes by quoting a statement made by one of the conference participants: 'challenges create opportunities, and opportunities create challenges'.

Lessons and reflections on the appropriate response to gross human rights abuses

Ezzat Fattah (Prof. Emeritus, School of Criminology, Simon Fraser University, Canada)

Proponents of restorative justice in the West often forget, says Fattah, that Africa is the cradle of restorative justice. Social evolution in pre-industrial African societies saw the move from private vengeance to group retaliation, which, in turn, paved the way for a system of composition, the earliest form of restorative justice. The current punitive system was imposed by the colonial powers and surprisingly remains in place long after independence was achieved. Fattah notes that it is baffling that despite the manifest advantages and benefits of restorative justice over a punitive, retributive system, whose sole aim is to inflict pain and suffering on the wrong-doer, there is still a reluctance to do away with the ideas of expiation and penitence in favour of reconciliation and compensation. The strong support for victims of crime, coupled with the fact that victims are the main losers in a punitive system of justice, have not succeeded in convincing politicians, lawmakers or the general public to abandon this, what Fattah terms, medieval practice. And yet, the destructive and detrimental effects of punishment are too evident to ignore. There are many reasons why punishment can never be an appropriate response to harmful and injurious acts.



The unanimous view is that for punishment to be morally acceptable in a democratic, just society it has to be proportionate to the injury or the harm done. This noble objective of fairness is in Fattah's opinion utterly impossible to achieve in practice. This is why transitional justice is becoming the preferred mode of dealing with atrocities committed by previous regimes in countries in transition to democracy. All of this suggests that the time is right for a paradigm shift in society's response to crime. In earlier writings Fattah suggested that this can be achieved by moving from a guilt orientation to a consequence orientation, thus removing the artificial boundaries arbitrarily erected between civil and criminal law. Fattah expresses the hope that this goal will be attained by the implementation and full institutionalisation of restorative justice.

In conclusion, Fattah makes the following comments on the conference, presented in the form of four questions and sub-questions:

- What do we mean by restorative justice? Do we have a better understanding of the concepts now after this conference? Fattah urges that conceptual clarity is an imperative.
- What do we mean by the institutionalisation of restorative justice? What are the benefits and drawbacks? Fattah enjoins that institutionalisation should not be rushed unless and until we have reasonable evidence that the outcome will be favourable.
- Is restorative justice a viable alternative to the current punitive system? If yes, why the reluctance to remove the punitive system? Fattah holds that it should be an important goal of any restorative justice conference to highlight the failure of the punitive justice system.
- Are the restorative justice and retributive justice models mutually exclusive or are they compatible? Fattah is of the opinion that the vision of a dual system is faulty and misguided, since punishment and healing are mutually exclusive, and thus only a fundamental paradigm change can remedy the problems of our current justice system

Closing of the conference

Friday 22/9, 15:30-15:50
Venue: conference room

On behalf of the Royal Danish Embassy of South Africa

Erik Næra-Nicolajsen

December 2004 was a first step and commitment to move the process forward. This conference has shown significant progress in terms of policy readiness and government has voiced that implementation of restorative justice is taking place. An example is the Overcrowded Prisons Task Team.

Næra-Nicolajsen is aware that a strategic policy framework is in progress within Department of Justice, and a White Paper is being prepared.

The Danish Embassy would welcome continued debate and is encouraged by the consultation from the Department of Justice with South African civil society. With regards to the role of donors in South Africa, Næra-Nicolajsen warns that we have come to a point where not too many expectations should be raised. In fact, in the next five to six years a winding down should be expected. Therefore, the Royal Danish Embassy would appreciate a further commitment from the Justice Department with regards to further investment in the development of restorative justice.

On behalf of the organising committee

Stephan Parmentier

Sincere appreciation was expressed to all who made the conference a reality and a resounding success.

Parmentier suggested that the two objectives of the conference were reached, mainly to conduct an intensive debate on restorative justice and provide for networking opportunities among the participants. A selection of papers, as well as a conference report would be published in the coming months.





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