

Developing Reasoned Framework for International Choice with Criminal Procedure

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Introduction

Recent scholarship shows uncommon interest, even fascination, with restorative justice.² International process appears to explain the majority of scholarly interest.³ Several articles critique truth and reconciliation processes throughout the South,⁴ as well as global reparations, highlighting both community⁵ and scholarly enthrallment. Yet closer scrutiny reveals an intriguing hybrid, or blending, of retributive and restorative approaches to justice being labeled as restorative. East Timor's Commission for Reception, Truth and Reconciliation is a strong contemporary example. Scholarship also describes hybrid combining of retribution and restoration in Rwanda and other parts of Africa. Shorter reports provide data for exploring this international trend in Latin America as well. While the scholars cited throughout this article assert scrutiny of what they name restorative justice, their primary focus is truth and reconciliation with significant retributive elements. Perhaps this discrete blending is how the international community has circumvented scholarly radar and debate of retributive versus restorative justice. "To our knowledge...(the) intriguing fusion of mediation and punishment has

² Restorative justice is an approach to and within criminal justice. See DANIEL VAN NESS AND KAREN HEETDERKS STRONG, *RESTORING JUSTICE* (2002). It will be more fully described later in this article. See page 21.

³ Traditionally, international has been "between nations" while domestic is within a particular nation. See page 2 of this article for further definition. Much modern criminal activity, like terrorism, knows no border, requiring transnational and often international response. See Eric Luna, *A Place For Comparative Procedure* 42 *BRANDEIS L. J.* 277, 278 (2003/2004).

⁴ Only now is truth and reconciliation being tried in the United States, as part of the Greensboro Truth and Reconciliation Project. Thus no comparative data exists---yet.

⁵ This paper is a modest attempt to review emerging interest in restorative justice; not an anthropological work of community dispute resolution around the world. Such a life-time study, though, would be an invaluable scholarly contribution.

gone largely unnoticed by the academic literature.”⁶ Conversely, some scholars use restorative “language” to describe the virtues of retributive legal systems. For example, author Roht-Arriaza lauds Alien Victim Tort Claims actions for human rights violations as giving victims a public opportunity for storytelling, publicizing harm to the wider community and ensuring recognition of harm---all practices promoted by restorative justice.⁷

While this article may initially appear prescriptive, it is merely descriptive, capturing a strong international consensus, among scholars and communities alike, that both retributive and restorative approaches to justice have necessary roles to play in international procedure addressing mass crimes. Through comparing the aforescribed scholarship and case study data, this article identifies underlying patterns. Uniform rationale for combining retributive and restorative approaches to justice within international tribunals shows itself in a relatively consistent and predictable fashion.

For the purposes of this article, international is defined in modern terms. Rather than the traditional, narrow and literal definition of international as between nation-states, here the scope of international criminal, human rights and humanitarian law⁸ is encompassed.

⁶ Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse And Apology Into Criminal Procedure*, 114 YALE L. J. 85, 88 (2004). Mediation is core to restorative process. See Van Ness and Heetderks Strong, *supra* note 2 at 21.

⁷ Naomi Roht Arriaza, *Reparation Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157 (2004).

⁸ STEVEN R. RATNER and JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 10 (2d 2001).

Crimes against humanity like torture and persecution are included.⁹ While the truth and reconciliation efforts scrutinized here may initially appear to be domestic, or within a discrete nation-state's legal and political process, the issues, as defined by law, elevate these forums to the international level. States are the responsible forum of first resort in enforcing this international law.¹⁰

Experiences with “hybrid justice” in Africa, Indonesia and other parts of the world provide rich data for international critique and procedural development. To this end, the international community must recognize and address existing limitations. As one example, comparing case studies of restorative justice in practice with its contemporary paradigm arguably demonstrates that restorative justice has just begun to demonstrate its actual potential around the world.

This article's author identifies one reason that restorative justice's contribution may be hindered--- the widespread misunderstanding that reconciliation necessarily requires forgiveness—regardless of offender remorse and accountability. A second group of articles from recent years is strongly value-based but focused on restorative justice within the United States (hereinafter “U. S.”) This group assumes that restorative justice necessarily requires mercy and forgiveness.¹¹ This assumption may be one example of

⁹ International customary law provides the bulk of guidance in determining criminal responsibility for systemic atrocities with a nexus to armed conflict. *Id.*

¹⁰Ratner and Abrams, *supra* note 8 at 160.

¹¹ See, e.g., 99-2 AMER. J. INT'L. L. 404-405, 420 (April 2005). Juan Mendez “argues that the most extreme form of tokenism in transitional justice is to set up a truth commission as an alternative to criminal prosecution, rather than as a step toward accountability. Aeyal M. Gross, *The Constitution, Reconciliation, And Transitional Justice: Lessons From South Africa and Israel*, 40 STAN. J. INT'L. L. 45, 83, n. 13

how international justice impacts domestic debate, since amnesty has been one controversial approach to truth and reconciliation.¹² One author posits options as limited to complete amnesty, selective amnesty, or traditional prosecution “strictly according to the law.”¹³ Some believe treating offenders and victims with moral parity is necessary for future societal harmony.¹⁴ Others appear to envision a magical wand, that amnesty somehow facilitates reintegration of “lesser offenders” into their communities.¹⁵ Equating restorative justice with mercy may also reflect contemporary events within the United States, specifically, the Illinois death penalty pardons and growth in faith based (“forgiveness”¹⁶) prison units.¹⁷ One author acknowledges though that “pure forgiveness” may not be sought as much as pragmatic reconciliation.¹⁸ The truth, explored later in this article, is that forgiveness, mercy and moral parity are ideas related to restorative justice but not equivalents.¹⁹

All the scholarship reviewed here builds a case for restorative justice when practiced according to its true principles and not misunderstanding. Its dialogue holds creative

(2004). Mr. Mendez’s arguments indirectly advocate the practice of restorative justice within the United States, where offenders declare themselves accountable. Class lecture, 2004. Restorative Justice, Straus Institute for Dispute Resolution.

¹² Ratner and Abrams, *supra* note 7. See also WOLE SOYINKA, CLIMATE OF FEAR: THE QUEST FOR DIGNITY IN A DEHUMANIZED WORLD xii (2004) (“corrosion of the ethical will... deadens human sensibilities, reconciles society with absolute evil...”)

¹³ Gross, *supra* note 11 at 47.

¹⁴ Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?* 53 DEPAUL L. REV. 1155, 1159 (2004).

¹⁵ Amer., *supra* note 11 at 420. For a scientific exploration of the variables instrumental to offender reintegration, see, e.g., Gordon Bazemore and Jeanne B. Stinchcomb, *Civic Engagement and Reintegration Toward A Community-Focused Theory and Practice* 36-1 COLUM. HUMAN RTS. L.R. 241 (2005).

¹⁶ While leaders in restorative justice do not necessarily equate faith and forgiveness, popular perception may.

¹⁷ Lynn S. Branham, *Go And Sin No More: The Constitutionality Of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J. L. REFORM 291(2004). Research shows reduced recidivism from faith based intervention. Class lecture, *supra* note 11.

¹⁸ *Id.*

potential and the chance of contracting, if not dissipating, our global climate of fear.²⁰

Restorative justice may prove to be not only plausible, but critically necessary, for upholding the best of retributive tradition. It deserves an opportunity to prove itself in its entirety, particularly in light of its popularity throughout the South.

Overriding international consensus advocates a hybrid blending of retribution and restoration. In the face of this undeniable trend, the international community would be well-served in collectively acknowledging the many complications that result from combining retributive and restorative practices. International dialogue and scrutiny are needed to effectively address these pragmatic challenges. Many questions arise for future study. They are also identified here.

Section I of this article introduces the increasingly popular hybrid of retributive and restorative justice. East Timor's truth and reconciliation process provides the most published case study data. Author Roht-Arriaza supplements this data with her own analysis of East Timor's process as well as hybrid process in Rwanda. Several authors elaborate retributive-restorative blending throughout Africa.

Section II elaborates global interest in hybrid justice, introducing that much of the South reveres restorative justice as reflecting long-standing cultural traditions. Other

¹⁹ Comments from Professor Daniel Van Ness, September 2004.

²⁰ WOLE SOYINKA, *THE BURDEN OF MEMORY: THE MUSE OF FORGIVENESS* 85 ("The globe needs to be saturated, almost on a daily basis, with such encounters. Certainly the proliferation of this frame of mind can slow the division of the world into irreconcilable camps.")

communities demonstrate new faith in restoration's capacity for transforming their violence. Scholars consistently laud hybrid justice in these communities, explaining essential roles for both retributive and restorative procedures.

Section III focuses on critique of retributive and restorative procedures in practice around the world when they are combined in international process. Such scrutiny is essential to building optimal response. Even the most passionate advocates for retribution acknowledge that its structural ideals are cost prohibitive for all but the most egregious of crimes. Yet the resultant restorative justice practiced to-date falls short of its potential, particularly in holding offenders accountable for repairing harm and transforming government-community relationships. Last, but not least, hybrid process creates several practical problems deserving international attention.

Section IV identifies myriad questions resulting from the current international hybrid. Extended research is needed to advance the most important rationale espoused by supporters, particularly study of what is most likely to counter the most entrenched cycles of violence.

Section V responds with a proposal that restorative justice be allowed to prove itself. While demonstrating its true and complete potential, restorative justice can relieve legal systems of less important cases. Legal systems will then be free to rectify failings and strengthen capacity to realize cherished ideals.

I. **The Commission for Reception, Truth and Reconciliation in East Timor and Several Scholars Provide Case Study Material For Assessing Hybrid Complementary Process, Or The Best Of International Justice.**

This section introduces international blending of retributive and restorative frameworks in three regions of the world. Author Naomi Roht-Arriaza, of *Reparation Decisions and Dilemmas*,²¹ and Lynette Parker, of Prison Fellowship International, provide the most description of actual community practice in the Southern Hemisphere. Roht-Arriaza details community dispute resolution in East Timor and Rwanda. East Timor's Commission also independently published data describing its process. Various scholarship is referenced to elaborate the patterns emerging internationally with blending retributive and restorative approaches to justice throughout Africa. Parker's work highlights the reasons community embrace restorative justice within Latin America.²² The Catholic church, a strong presence throughout Latin America, provides invaluable experience with and rationale for combining retributive and restorative justice relevant to article's critique.²³ Its perspective particularly speaks to the importance of holding the most powerful offenders accountable for restitution in order to prevent future atrocity.²⁴

²¹ Roht Arriaza, *supra* note 7..

²² Parker's work does not provide as much description of hybrid process so will be referenced in Section II of this article rather than this introduction to blended process.

²³ It is referenced in Section III, exploring present blending's limitations and potential.

²⁴ See Theo Gavrielides and Dale Coker, *Restoring Faith: Resolving the Roman Catholic Church's Sexual Scandals Through Restorative Justice (Working Paper I)* 8 CONTEMP. JUSTICE REV. 345-365 (2005).

Scholar Chesterman, Director of the Institute for International Law and Justice, New York University of Law, likewise proposes a pragmatic hybrid for addressing international atrocities within war-torn societies—that administration of justice, or firm and clear law enforcement, be an immediate priority post-conflict. Once the rule of law has been asserted, though, it must be effectively balanced with sustainable institution building.²⁵

Transplanted legal process shows enhanced effectiveness when thoughtfully and creatively “blended with existing systems.”²⁶ Thus, optimal process is assessed on a “case by case” basis, with a range of options available.²⁷

A. East Timor

The United Nations established East Timor’s Commission for Reception, Truth and Reconciliation (hereinafter “CAVR”) to investigate numerous allegations of crimes against humanity²⁸ occurring during its long period of civil war. Restorative justice in East Timor emerged as part of the United Nations’ administration of an innovative Commission: “twenty-five to thirty regional commissioners, who are persons of high

²⁵ Simon Chesterman *Rough Justice: Establishing the Rule of Law in Post Conflict Territories* OHIO ST. J. ON DISP. RESOL. 69, 97-98 (2005).

²⁶ See Susan Opatow, POST-CONFLICT JUSTICE (2002)

²⁷ *Id.*

²⁸ “(B)ecause international law does not ‘incorporate’ all human rights law, the acts constituting crimes against humanity will generally be those characterized by the directness and gravity of their assault...As for the definition of each act, e.g., ‘torture’ or ‘rape’, in some instances, states may have an agreed upon definition in an international convention, though their definition...could be broader or narrower than other international definitions.” Ratner and Abrams, *supra* note 8 at 69. The International Military Tribunal at Nuremberg Charter first created individual criminal responsibility for laws and customs of war as well as crimes against humanity. Ratner and Abrams, *supra* note 8 at 6. Several subsequent conventions have solidified. Examples of war crimes include mistreating prisoners of war, taking hostages and attacking civilians and innocents not engaged in combat. Ratner and Abrams, *supra* note 8, Chapter 4.

moral caliber selected by a representative panel on the basis of over three hundred recommendations.”²⁹ By June 2003, eight hundred and sixty offenders had approached the Commission. Two hundred and one processes occurred.

East Timor’s process can only be described as a hybrid blending of retributive and restorative justice. Reconciliation hearings, rather than meetings, were held between offenders, victims and community members.³⁰ Some of the hearings described sound like trials. Seventeen survivors, witnesses and family members of victims testified regarding the civilian massacres that occurred in Timor-Leste between 1974 and 1999.³¹ Investigations and statements, sounding much like trial preparation, occurred.³² Furthermore, reconciliation is described in terms that resonate with traditional legal approaches. The importance of truth telling is emphasized.³³ “(True) reconciliation...calls for detailed examination of how these tragic events occurred, in terms of truth, justice and responsibility.”³⁴

²⁹ CAVR UPDATE (October-November 2003) available at <http://www.easttimor-reconciliation.org>; see also Adelino Gomes, ‘A lesson in humanity,’ CAVR Hearing on Internal Political Conflict, Dili, (15-18 December 2003) available at <http://www.easttimor-reconciliation.org/adelinoGomesOnCAVRHearing.html>.

³⁰ CAVR UPDATE, *supra* note 29.

³¹ CAVR UPDATE, *supra* note 29 at 10.

³² *Id.* Alternatively, this was viewed as topical research of political imprisonment and torture, political conflict, massacres, killing and disappearances, women and conflict, children and conflict, and international actors. A human rights database was created. CAVR UPDATE, *supra* note 164 at 4.

³³ *Id.*

³⁴ CAVR UPDATE, *supra* note 29 at 37. East Timor is also a case study for sustainable capacity building in the face of institutional collapse. Chesterman, *supra* note 25 at 84-89.

The conclusions of the Commission further stress that reconciliation must be based on justice.³⁵ The Commission once again even makes a statement that reminds the reader of the values behind the United States legal system (See section II).

Justice and the law must be applied equally to all people, it must make no difference if they are powerful or not. And justice must only be applied to individuals who broke laws made by parliament. Force, or punishment, or the mechanisms of justice can never be applied to groups because of different beliefs of those groups, or because they oppose those in power. This is an important lesson from our past.³⁶

The Commission worked with victims and communities to prepare for what was called both a hearing and a “community reconciliation process.” Traditional lawgivers, symbols and rituals were united with panels of community elders, victims and assembled villages. “(T)hose seeking reintegration tell their story and respond to questions.”³⁷ Offenders with less serious charges, like theft and minor assault---mostly low-level members of militia, could initiate a meeting with their victims and local community members through request to the Commission and approval of the Office of Prosecutor General. Victims had the option to respond. According to reports, community members were quite engaged in seeking full disclosure from offenders about their activities.³⁸ Elders sanctified

³⁵ CAVR UPDATE, *supra* note 29 at 28.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

proceedings with rituals according to local traditions.³⁹ Community leaders stated a willingness to reintegrate offenders (former militia members) if they spoke honestly about the past.⁴⁰ Victims of human rights violations likewise shared their stories.⁴¹ At one process, everyone embraced after traditional ceremonies.⁴²

The regional commissioner facilitated. Panels conferred and recommended reparations. Negotiation ensued until all were satisfied. The parties discussed the crime with the aim of reaching agreement and proposing how the perpetrator could make an act of reconciliation, such as community work, restitution, or public apology. Once the process was completed, the district court entered an order that the offense could not be pursued criminally or civilly. If the offender breached the reconciliation agreement, however, a new criminal offense emerged, punishable by imprisonment, fine, or both.

An outside observer,⁴³ present during one particular process, reports that community members gave this process “real meaning” as “deeply embedded in local culture and custom.”⁴⁴ He perceived restorative justice allowing them to publicly acknowledge what had occurred in that community and resolve “the rift that had divided them.”⁴⁵

³⁹ CAVR UPDATE, *supra* note 29 at 6.

⁴⁰ *Id.*

⁴¹ CAVR UPDATE, *supra* note 29 at 4.

⁴² Roht Arriaza, *supra* note 7 at 174. Examples of popular community service include repairing schools and churches—at least once with victim and offender working together.

⁴³ An interesting question is how non-governmental organizations fit into conceptions and actualities of restorative justice in circumstances like those described here. At what point and by whom are they acknowledged as community members? From Evenson’s description, their values espoused regarding traditional and restorative justice represent the entire retributive-restorative continuum as well.

⁴⁴ *Id.*

⁴⁵ *Id.*

This unique blending appears to be deliberate in recognition of benefits. Two types of justice are mentioned—the justice of the state and “this other justice.”⁴⁶ Some of the process, like the Hearing on Internal Political Conflict, occurred at political and collective, rather than community and personal levels. Former political leaders publicly admitted responsibility for atrocities and apologized. Rogerio Labato, for example, admitted his crime and violation of human rights with a prisoner of war.⁴⁷ Some asked for forgiveness.⁴⁸ The presence of victims at such a hearing on war crimes and crimes against humanity is a given, since often the offenders who testified were also victims. Furthermore, victims who had not offended testified about experience and knowledge of human rights violations.

Innovative victim support occurred during East Timor’s process. An Urgent Reparations Program aimed to identify particularly vulnerable victims of human rights violations so they could receive immediate support.⁴⁹ Efficient response to desperate victim need seemed to be the most important value here. Once again, however, this support reflected traditional legal values of creating historic public record rather than the restorative justice encounter model. Several healing workshops were held for survivors of severe human rights violations. They included group counseling and creative modes of expressing

⁴⁶ CAVR UPDATE, *supra* note 29 at 14.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ CAVR UPDATE, *supra* note 29 at 5.

feelings and experiences. The stated priorities were to create a safe, supportive and respectful forum for sharing and make public record.⁵⁰

The importance of reconciliation is stressed, again and again.⁵¹ Restorative values are reiterated, including understanding, or learning from the past, acknowledging wrongs, assuming responsibility, and reaching out across divisions.⁵² Explicitly aspired was healing of wounds, recognition of victims, and building of a new nation.⁵³ In some instances, misunderstandings of allegiance needed to be corrected to rehabilitate names and give victims the ability to reintegrate into their communities.⁵⁴

The words of Mr. Aniceto Guterres Lopes, CAVR Chairperson and a leading Timorese human rights lawyer, elucidate. He emphasizes the strong desire to learn from past violence so it is never repeated, along with the importance of proceeding in a way that does not leave “a residue which continues to support hatred and division.”⁵⁵ He uses the language of restorative justice and identifies its role in promoting the painful decision to open old wounds so they might actually heal. Lopes sees healing as requiring listening to victims so that “just once they have the opportunity to tell their terrible story.”⁵⁶

⁵⁰ *Id.*

⁵¹ CAVR UPDATE, *supra* note 29 at 11.

⁵² *Id.*

⁵³ CAVR UPDATE, *supra* note 29 at 12.

⁵⁴ CAVR UPDATE, *supra* note 29 at 47.

⁵⁵ CAVR UPDATE, *supra* note 29 at 11.

⁵⁶ *Id.* His desire not to repeat history is reiterated by Fr. Jovito de Araujo, Deputy Chairperson. CAVR UPDATE, *supra* note 29 at 27.

In twelve reported community reconciliation hearings, fairly equivalent numbers of offenders and victims were present, along with community, in all but two.⁵⁷ It sounds like community members and victims were invited to give testimony so their participation was self-initiated, or voluntary.⁵⁸ In one reported process, victims and offenders appear to have negotiated repair of actual harm. Fourteen offenders were present; ten victims. The offenders apologized and agreed not to re offend. Five offenders who had stolen animals made amends by giving six animals to the victims. Another who stole a bike made symbolic amends with antique coins.⁵⁹

In the eleven other reported processes, however, while offenders apologized and agreed not to repeat their offense, not enough detail is provided to discern whether victims negotiated repair of harm with offenders. Community service is reported, but sounds much like court ordered restitution.⁶⁰ Victims did, however, express desires, specifically, that massacred victims be honored,⁶¹ suffering of widows, orphans and elderly be recognized,⁶² communities be educated and helped to realize their potential, and once again, that the government ensure “that future generations do not suffer such terrible experiences.”⁶³

Forgiveness is explicitly promoted, again blending restorative and retributive elements.

⁵⁷ CAVR UPDATE, *supra* note 29 at 3.

⁵⁸ CAVR UPDATE, *supra* note 29 at 25.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ CAVR UPDATE, *supra* note 29 at 13.

⁶² CAVR UPDATE, *supra* note 29 at 15.

⁶³ CAVR UPDATE, *supra* note 29 at 19.

Forgiveness in a political context...is an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relation. Such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the humanity of enemies even in their commission of dehumanizing deeds, and that values the justice that restores political community above the justice that destroys it.⁶⁴

East Timor's hybrid is a fascinating but at times disturbing recipe blending restorative and retributive ingredients. Does it forecast the future of international practice or represent a rare experiment? Interested victims and community are included, heard and honored. Offender admission of responsibility and expression of remorse is stated to be primary. Encounter occurs. Healing and reconciliation appear foremost. Yet questions arise regarding actual offender accountability and repair of harm and government's role with justice. All will be explored in Section III of this article.

B. Africa: Rwanda, Sierra Leone and South Africa

Roht-Arriaza relates the gacaca system in Rwanda---indigenous dispute resolution or traditional justice, with village elders, victims, perpetrators and community members negotiating reconciliation.⁶⁵ A modified system is being used given local courts'

⁶⁴ *Id.*

⁶⁵ Roht Arriaza, *supra* note 7 at 173.

inability to address an enormous backlog of suspects accused of genocide, with over one hundred and thirty thousand in jail. The modified compromise allows for all offenders,⁶⁶ except for leaders and organizers of genocide, to appear before gacaca courts. Lay judges are elected at the village level as persons of integrity.⁶⁷ If offenders chose to proceed, assembled villagers may testify. While this modified process is quasi legal and allows for sentencing of jail time or restitution, offenders are also free to apologize and make acts of contrition for victim acceptance. If the suspect confesses, half of the sentence may be converted to community service. For lesser offenders, the entire sentence may be served with community service.

Author Wierzynaska describes Rwanda's gacaca process as restorative even though the government has granted authority to order retribution within the process.⁶⁸ Wierzynaska sees the procedure as restorative because it encourages community voicing of concerns openly.⁶⁹ She observed gacaca and reports great value placed on "the accused's admissions of guilt and on expressions of shame and regret."⁷⁰ Roht-Arriaza perceives community members as wanting justice, truth and a place to tell their stories.⁷¹

Community initiated symbolic acts of reconciliation, such as traditional and religious ceremonies, including consecrating sites of mass killing and erection of memorials. More

⁶⁶ Interestingly, when ex-combatants were surveyed about this process, one asked that the Special Court educate the public about "the bad people," seeing himself as a victim and not one of the "bad". The largest consensus among ex-combatants appears to be behind prosecution of commanders. *Id.*

⁶⁷ Details of this process of choosing a "person of integrity" or how integrity is defined were not described.

⁶⁸ Aneta Wierzynaska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y. U. L. Rev. 1934, 1942 (2004).

⁶⁹ Wierzynaska, *supra* note 68 at 1934.

⁷⁰ Wierzynaska, *supra* note 68 at 1945.

⁷¹ Elizabeth M. Evenson, *Truth And Justice In Sierra Leone: Coordination Between Commission And Court*, 104 COLUM. L. REV. 730, 733 (2004).

than once, offenders have asked their communities for forgiveness and been received by traditional leaders—restorative practices. Rwanda’s process is also restorative in its apparent inclusiveness of all stakeholders, encounter between offenders and victims and offender accountability. Whether harms are repaired, amends negotiated, government relationships transformed, and victims or offenders reintegrated into villages as contributing members are questions yet to be answered.

Prosecutor Crane also modeled an intriguing hybrid. For four months, he met with citizens throughout Sierra Leone to “feel, taste, touch, smell and see” their stories.⁷² Simultaneously he introduced himself to the community, stressing his strong belief in being independent of outside influence. Yet he was also able to publicly acknowledge that not all players were brought to justice.⁷³

Another writer argues that rule of law itself requires such elements of restorative justice in transitional societies. Otherwise, previously excluded and oppressed groups may perceive the mere continuation of power elites imposing their will. “Democratic transitions are best understood as a ‘dangerous hour.’ With the collapse of authoritarian regimes, there emerge new nations full of needs...and full of rage.”⁷⁴

⁷² David M. Crane, *Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an Int’l Tribunal After Third World Armed Conflicts* 37 CASE W. RES. J. INT’L. 2, 4 (2005)

⁷³ *Id.* (“(J) ustice often upsets the political and diplomatic applecart.”)

⁷⁴ Opotow, *supra* note 26 (quoting Nancy Scheper-Hughes, *Undoing: Social Suffering and the Politics of Remorse in the New South Africa*, SOCIAL JUSTICE 116 (1998)). Moving towards more inclusive and participatory decision making optimally encompasses negotiation and drafting of constitutions as occurred in South Africa.

South Africa, like Rwanda and Sierra Leone, combined retributive and restorative justice---at least in part and rhetoric. The restorative approach broadened community access and inclusive narrative. Public voice was invited. Meetings were scheduled throughout South Africa. Anyone could submit objection. Accountability was sought through asking the Constitutional court to certify the resultant agreement.⁷⁵ At the same time, public acknowledgment of offenses and creation of a history or record were promoted, along with victim reparations.⁷⁶

II. Practically Within The International Community Retribution And Restoration Transcend Debate As Necessary Complements.

This section briefly summarizes the espoused purposes of traditional Northern and Southern justice relevant to this article's analysis, providing context for understanding the passionate interest expressed for both, domestically and internationally. Even within the United States, however, this task is involved, as commentators assert differing ends: order and crime control, with a secondary value of efficiency, versus due process protections seeking to honor individual dignity and protect from State power abuse.⁷⁷ Likewise globally several traditions purportedly reflect different priorities. Common and civil law receive most scholarly interest, though Islamic law is now gaining attention along with Southern reconciliation. The latter is emphasized in this article, along with

⁷⁵ Gross, *supra* note 11 at 52.

⁷⁶ Gross, *supra* note 11 at 55.

⁷⁷ Luna, *supra* note 3 at 281. The risk exists that such dichotomous analysis and rhetoric may blind recognition of shared values.

common and civil law, since these three are most strongly influencing international law and procedure.

Those from the South recognize that without law, there would be “wanton abuse of humanity” but simultaneously ask the North to remember that the same law can be used to “rationalize the abuse of the humanity of the ‘Other’.”⁷⁸ Ideally common law esteems judicial precedent to promote equivalent treatment and incremental change through accurate case by case determination. American criminal procedure is recognized for “providing constitutional protections not merely to the in-groups of society, but also to social outcasts, minorities, the poor and the weak, buttressed by the convention of judicial review.”⁷⁹ Common law countries often promote procedural fairness as their primary value with truth viewed as emerging through adversarial competition according to strict rules, including the presumption of innocence, before impartial decision makers. Civil law promotes comprehensive codes and the ideal of ready lay access.⁸⁰ Civil law societies are described as preferring objective truth over procedural fairness, achieved through an inquisitorial approach and allowing more victim involvement.⁸¹

One possible explanation for radically different approaches with common and civil law is that the United States is comfortable with engaging police in its adversarial procedure, as the State views itself as the victim of crime. Civil law countries like Great Britain, however, shun pressure by the police that historically resulted in abuses and coerced

⁷⁸ In short, law is essential but unjust when abused. Conversation with Munashe Furusa, October 28, 2005.

⁷⁹ Luna, *supra* note 3 at 280.

⁸⁰ *Id.*

confessions. Yet U.S. procedural protections are simultaneously posited as venerating individual freedom and limiting State power.⁸² “Retribution demands that an offender receive the punishment he deserves, no more and no less.”⁸³ Ideally, reason counters emotions so that punishment is impartial.⁸⁴

Restorative justice presents a completely different paradigm. It is defined by one leader in the field as

a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders, and communities caused or revealed by crime. Practices... reflecting restorative purposes will respond to crime by: 1) identifying and taking steps to repair harm,⁸⁵ 2) involving all stakeholders,⁸⁶ and 3) transforming the traditional relationship between communities and their governments in responding to crime.⁸⁷

⁸¹ Luna, *supra* note 3 at 285. Professor Luna analogizes the systems as football versus soccer. Those who find incredulous the idea that procedural unfairness can promote objective truth are encouraged to scrutinize independently. Exploring this challenge in greater detail is beyond this article’s scope.

⁸² *Id.*

⁸³ Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, And Mercy*, 82 N. C. L. REV. 1319 (2004).

⁸⁴ *Id.* Needless to say, the traditions described are truly just; not the corrupt mockery found in some systems. See Soyinka, *supra* note 12 at 103.

⁸⁵ Soyinka, *supra* note 20 at 81 (“If the fabric of society ruptured by... violence was to be healed, there had first to be restitution... It has little to do with crime and punishment but with inventiveness---devising a social formula that would minister to the wrongs... chasten those who deviate from the humane communal order... serve as a criterion for the future conduct of that society...”)

⁸⁶ Stakeholder is broadly defined to include “any group or individuals who can affect, or is affected.” CAROLINE NELIGAN, *INCREASING ACCOUNTABILITY THROUGH EXTERNAL STAKEHOLDER ENGAGEMENT* 4 (2003).

⁸⁷ Lynette Parker, *Restorative Justice: A Vehicle for Reform?*, paper presentation, 2004, Annual Meeting of Latin American Studies Association, Las Vegas, Nevada, citing Van Ness, Daniel W. *Justice that Restores: From Impersonal to Personal Justice*, 23 SOCIAL WORK. 93-109 (2004).

The basic values of restorative justice can be summarized as encounter,⁸⁸ inclusion, amends with offender responsibility,⁸⁹ and reintegration (of all concerned).⁹⁰ These values will be elaborated throughout this article. Strong indigenous traditions exist around the world, particularly throughout Southern culture, mirroring and providing restorative justice. They will also be detailed throughout this article, showing that communities throughout the South revere inclusive encounters between victims, offenders, families and communities aspiring to reintegration.

A. Southern Communities Seek Restorative Justice.

An unexpected discovery from this article's review is the overlap between Southern traditions and what the North calls restorative justice. Southern interest in restorative justice reflects long-standing cultural tradition.⁹¹ Many Southern cultures have practices of restoration between victims, offenders, their families and communities. As the North asks the South to join in creating international law based on Northern common and civil law traditions, the North has the opportunity to extend reciprocal respect for Southern dispute resolution by recognizing and embracing restorative justice.⁹² When communities, like many in the South, have cherished traditions of restoration, they are well-prepared to proceed with victim-offender-community encounters, reconciliation and

⁸⁸ Encounter and dialogue alone can counter the frenzied illusions rallied by monologue and fueling violence. Soyinka, *supra* note 12 at 63-64.

⁸⁹ Soyinka, *supra* note 20 at 31. ("Justice assigns responsibility.")

⁹⁰ Class lecture, *supra* note 11.

⁹¹ See, e.g., JOHN PAUL LEDERACH AND JANICE MOOMAW JENNER, INTO THE EYE OF THE STORM 159 (2002).

⁹² See, e.g., Lederach, *supra* note 91 at 288-299.

reintegration. Some are positioned to guide and educate the North's attempts at restorative justice.

Strong African traditions exist for facilitating restoration of reciprocal wholeness between victims, offenders and their families.⁹³ The African concept of "ubuntu"⁹⁴ is often used to describe these traditions. It stands for acknowledging community interconnectedness, with corresponding shared responsibility to extend respect to all.⁹⁵ Ubuntu sounds like the restorative justice values of solidarity and respect: "treating all with dignity and respect."⁹⁶

Dr. Munashe Furusa describes Shona restorative traditions. From his insider perspective, ideally Shona culture acts as a critical resource for cultural resilience,⁹⁷ incorporating longstanding familial understandings about appropriate and trusted mediators for families with conflict. The Shona give these designated mediators cultural space and credibility. Conflicting family members know they can confide in them openly and honestly. Elders mediate with cultural stories and proverbs. If a conflicted party has died or if death has occurred in conflicted context, these same mediators may enact the deceased's life to create ambiance for conflict resolution among the living. For example, mediators might "joke" in accepted ways to diffuse conflict.⁹⁸ Shona parties to conflict also rely on

⁹³ Conversation with Dr. Munashe Furusa, November 8, 2005.

⁹⁴ Nina, Daniel, *Beyond Mediation: How South Africa's 'other mediation' is challenging conventional models* at <http://cerweb.ccr.uct.ac.za/two/1/p22.html>.

⁹⁵ *Id.*; Andrews, *supra* note 14 at 1165, n. 15. Class lecture, *supra* note 11.

⁹⁶ Class lecture, *supra* note 11.

⁹⁷ Interview with Dr. Munashe Furusa, December 15, 2005.

⁹⁸ *Id.*

cultural traditions to guide their own participation in resolution. For example, if a daughter-in-law is conflicted with her mother-in-law, she may create and sing a song of amends and thus avoid direct confrontation.⁹⁹

A West African mediator describes restorative justice's value. While he recognizes the value of international initiatives on behalf of African communities, he describes them as

foreign impositions that seem to have lost touch with the people and culture for which they were established. These initiatives disregard the cultural heritage and symbols of the people...and the way they handle disputes. (Without their own traditions of reconciliation, despite international justice) nothing has been done.¹⁰⁰

The Western mind may find incredulous South Africa's leaders asserting restoration in the face of apartheid and its legacy.¹⁰¹ Is attempting vulnerable encounter between enemies who do not desire close relationship overly ambitious? Africans honoring their heritage say no. Africans respecting cultural traditions say that ubuntu, reconciliation and related cultural practices are critical to healing the essence of their being.¹⁰² They must somehow revere their legacy.

⁹⁹ *Id.*

¹⁰⁰ Lederach, *supra* note 91 at 168-169.

¹⁰¹ The Lome Peace Accord for Sierra Leone also provided for a truth and reconciliation commission. It articulated the restorative justice values of storytelling for both victims and perpetrators, facilitating reconciliation and healing, as well breaking the cycle of violence and rehabilitating victims. Evenson, *supra* note 71 at 740.

Restorative customs may explain why eighty percent of those who applied for amnesty with South Africa's truth and reconciliation commission were Black Africans.¹⁰³ If the persons of integrity described with Rwanda's process are overseeing cultural wisdom and those involved share cultural beliefs, the restorative traditions described facilitate reconciliation and healing,¹⁰⁴ even across African cultures and communities.¹⁰⁵

Likewise, Latin communities articulate strong valuing of restorative justice. A study of victims and family members from Chile, Argentina, El Salvador, and Guatemala¹⁰⁶ identifies values as 1) official and societal acknowledgment of the wrong done against them, 2) restoration of victims' good names, 3) knowledge of offender identity and method, 4) justice and 5) moral reparations.¹⁰⁷ Lynette Parker, a restorative justice specialist working throughout Latin America, further explains Latin America's widespread interest in restorative justice, specifically in Argentina, Brazil, Chile, Costa Rica, and Mexico. She reports the top motivator as concern for victims, with community involvement and alternatives to untrustworthy, inhumane legal systems as close seconds.¹⁰⁸ Writing in 2004, Parker adds Columbia to the above list, and describes the aspirations of community organizations¹⁰⁹ promoting restorative justice. They aim

¹⁰² Furusa, *supra* note 93.

¹⁰³ Long Night's Journey Into Day: South Africa's Search for Truth and Reconciliation.

¹⁰⁴ In such traditions, however, mediators are often close to victims and their families. *Id.*

¹⁰⁵ These groups may share beliefs but have different ceremonies. Furusa, *supra* note 93.

¹⁰⁶ "...as well as South Africa,"

¹⁰⁷ Roht Arriaza, *supra* note 7 at 166.

¹⁰⁸ Lynette Parker, *The Use of Restorative Practices in Latin America*, paper presentation, 2002. Third International Conference on Conferencing, Circles and Other Restorative Practices. Minneapolis, Minnesota; see also Price, Marty, *Restorative Justice Warmly Received in Mexico*, ADR Report (1999); *Reforms Create Open Door for Restorative Justice in Chile at <http://www.restorativejustic.org/rj3/Feature/Feb02/Chile.htm>*.

¹⁰⁹ Specifically, she describes non-governmental organizations, law schools and universities, and churches.

to: 1) transform violence in schools and other “localized cultures of violence”¹¹⁰ through building communities of peace and responsibility, and 2) create transparent processes and greater access for justice, while 3) satisfying the needs of victims and offenders.¹¹¹

Parker cites dramatic examples of the underlying faith exercised in restorative justice as the vehicle for desired change throughout Mexico. A former gang member sees the popular movie Gandhi, negotiates ceasefires with rivals, and devotes himself to mediating with victims and offenders of crime.¹¹² While apparently preventative rather than restorative, a Mexican group serving crime victims, and later a Catholic church, further exemplify the strong community desire to transform violence. They advocate mediation¹¹³ and other alternative dispute resolution¹¹⁴ as non-violent means to resolve local conflict in “one of the most violent neighborhoods in Guadalajara.”¹¹⁵

Southern communities around the world uniformly embrace public encounter between victims, offenders and concerned community, allowing them to honor restorative cultural traditions with storytelling and witnessing or acknowledgement of wrongs. Victims

¹¹⁰ Parker, *supra* note 108. Likewise, Rwanda’s restorative justice process is strongly promoted as necessary for preventing future interethnic violence. Wierzyńska, *supra* note 68.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Mediation is one form of ADR. In the simplest terms, a third party, or mediator, assists parties negotiate resolution. *See, e.g.*, John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLOR. ST. UNIV. L. REV. 839 (1997), *citing* CHRISTOPHER MOORE, *MEDIATION PROCESS* 8, 41, 53 (2d ed. 1996).

¹¹⁴ Alternative dispute resolution encompasses a broad continuum of response to conflict that falls between avoidance and escalation. LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES AND THE LEGAL SYSTEM* (Westview Press 1994).

¹¹⁵ Parker, *supra* note 87.

appreciate gaining knowledge of the circumstances surrounding loved ones' death and the opportunity to restore their reputations.

B. Scholars Promote Both Retribution And Restoration.

Despite distinct practices, arguably restoration and retribution share similar, if not the same, visions for society.

(T)he existence of nations and organizations that establish structures for contesting inhuman acts not merely on moral but on agreed-upon legal principles....are reminders...of a constant striving toward the option of healing, and the establishment of just and humane communities.¹¹⁶

All scholars reviewed here espouse a mix of retributive and restorative elements in responding to international crime. Their reasons are elaborated below.

1. Restoration Is Advocated For Future Co-Existence, Non-Monetary Accountability, Repair of Harm, Emotional Healing, Victim Empowerment and Public Truth-telling Through Encounters Between Victims, Communities and Government.

In describing East Timor's process, author Roht-Arriaza stresses value when 1) offenders and victims must somehow co-exist in relatively intact communities, 2) power disparities are minimal, and 3) the state and perpetrators cannot pay monetary compensation. She further recognizes the importance of moral reparations, recognition of harm to the whole community as well as particular victims, victims' ability to confront

¹¹⁶ Soyinka, *supra* note 12 at xxiii.

offenders, perpetrators' public atonement for wrongs, and the community's involvement in storytelling, resolution and reintegration.¹¹⁷

Roht-Arriaza reiterates these contributions when critiquing Rwanda's process: 1) repair of at least some of the harm, 2) public truth telling, 3) encounter between offender and victim and 4) opportunities for apology by the offender and acceptance by the victim. Optimally, she views Rwanda's process as fostering reintegration into communities and social reconstruction.¹¹⁸

Wierzynska views Rwanda's hybrid process as bridging critical gaps between government and citizens and the two warring ethnic groups and reintegrating both perpetrators and victims into their society through reconciliation.¹¹⁹ Wierzynska specifically advocates engaging the people of a post conflict society "directly in justice processes that engender civic behaviors in order to develop the necessary citizen base for an integrated democracy."¹²⁰ She believes that empowered¹²¹ citizenry is absolutely necessary for preventing reoccurring violence.

Larson and Tian report research of conflict resolution and peace building in South Africa and Guatemala that supports Wierzynska's premise about empowered citizenry. Larson

¹¹⁷ Roht Arriaza, *supra* note 7 at 175.

¹¹⁸ *Id.*

¹¹⁹ Wierzynska, *supra* note 68 at 1939.

¹²⁰ Wierzynska, *supra* note 68 at 1935.

and Tian found that grassroots, rather than government or outside, leadership most effectively prevented violence, a reflection of their “vested” interest in safety, intimate knowledge of what is needed within their communities and flexibility—ability to act in “diverse and changing situations” and build necessary relationships.¹²²

While strongly preferencing retribution, Evenson simultaneously values restorative justice, concurring in most ways with Roht-Arriaza and Wierynska. She includes truth telling, public acknowledgment of wrong doing, reconciliation, tension reduction or catharsis, offender reintegration (with possible eventual forgiveness), broad social participation, insight necessary to prevent future violence, and civic/social transformation among her reasons for promoting restoration.¹²³ She also adds accountability, stressing institutional. Then Evenson articulates her own values and preferred means to justice, again blending restorative and retributive. Her values include accountability, deterrence, healing, reconciliation and reintegration, particularly of ex-combatants, sounding once again much like restorative premises.¹²⁴

Evenson cites another author assessing Sierra Leone that recognizes restorative justice’s potential for “drawing out” the best of human nature, including secondary victims, and

¹²¹ Dr. Munashe Furusa of Zimbabwe asserts that allowing Southern people to honor their traditions empowers. Culture gives power. Corrupt African leaders have abandoned or abused their cultural heritage. Furusa, *supra* note 93.

¹²² Mary Jo Larson and Xiaoping Tian, *Strengthening Women’s Contributions to Sustainable Peace: The Benefits of Flexibility* 23-1 CONF. RESOL. Q. 53-54 (2005).

¹²³ Evenson, *supra* note 71 at 737.

¹²⁴ *Id.*

promoting common good, emotional expression, and healing.¹²⁵ Reiterated are the importance of reconciliation, or repairing harm to live in peace with each other, respect for cultural traditions and offender and community involvement that encompasses victims and families.¹²⁶ This author also adds a new perspective---that restorative justice constrains both bureaucratic authoritarianism and victim vengeance.¹²⁷

Professor Andrews posits South Africa's process as "looming large" for restorative justice and articulates values of social reconstruction and nation building, racial healing, harmony and reconciliation, and symbolic movement towards accountability. Andrews lauds these restorative means: victim storytelling engaging the broader South African community as witnesses confronting pain together, creating history from the stories of victims and offenders, providing catharsis, and facilitating transition from authoritarian to democratic rule.¹²⁸ Andrews perceives the "open display of pain and trauma on the part of victims and victims' families" as a ritual and metaphor "for the society moving toward healing and reconciliation and lauds the resultant "vibrant and vigilant civic culture."¹²⁹ She views truth and reconciliation as primarily victim centered, allowing "victims to tell their stories unencumbered by legal methods such as cross-examination."¹³⁰

¹²⁵ *Id.*

¹²⁶ Ganda, Ambrose, *New Emphasis Should Be On Making Up, Not Breaking Up The Nation's People 2* Focus at <http://www.focus-on-sierra-leone.co.uk/Issues%20of%20Peace%20and%20Reconciliation>.

¹²⁷ Arguably, empowered critical citizenry are better prepared to confront unbridled state power, unreflective extremism, and isolationist monologue. Soyinka, *supra* note 12 at 42, 67 and 79.

¹²⁸ Andrews, *supra* note 14 at 1157; Gross, *supra* note 11 at 47.

¹²⁹ Andrews, *supra* note 14 at 1165.

¹³⁰ Andrews, *supra* note 14 at 1158.

Others posit enhanced dignity for the self-determining¹³¹ citizen victim.¹³² As articulated by a West African mediator, outsiders cannot simply fix what they perceive as wrong. Those in conflict must find a way to live together. He advocates for trust building and honest relationships.¹³³

Latin American practitioner Parker also stresses the importance of inclusive dispute resolution, community level solutions and access to resources.¹³⁴ Reparations can provide a sense of future for younger generations while facilitating societal recognition and atonement for harms.¹³⁵ In her perspective, moral reparations satisfy: 1) felt need for storytelling, 2) prevention of future harms, 3) justice, 4) public acknowledgment, 5) accountability including removal of offenders from positions and other structural reform, 6) victim assistance, 7) culturally appropriate procedures, 8) public memory and remembrance, 9) reintegration of victims, and 10) social reconstruction/development.¹³⁶

Scholars, like Southern communities, consistently promote the value of public encounters between victims, offenders and communities, seeing such encounters as instrumental to community building, restoration and reintegration. Also like community members, scholars assert offender, including institutional, accountability, healing, bridging government-community gaps, transformation of violence and deterrence of crime as their reasons for promoting restorative justice.

¹³¹ Soyinka, *supra* note 20 at 72.

¹³² Andrews, *supra* note 14 at 1165.

¹³³ Lederach, *supra* note 91 at 284-285.

¹³⁴ Roht Arriaza, *supra* note 7 at 166.

When offered the opportunity, many victims and offenders wish to try restorative justice.¹³⁷ The more emotionally upset the victim, the more they want to meet the offender.¹³⁸ In fact, some bring civil litigation to this end. In one domestic study within the U. S., one-fourth of families suffering prenatal injuries sued physicians to force honest disclosure.¹³⁹ With sexual assault, many civil claimants seek an opportunity to be heard, validated and receive an apology.¹⁴⁰ Crime victims want information about their case, an opportunity to tell offenders how their crime impacted them, hear offenders answer their questions and understand why the crime occurred, as well as apology and emotional healing.¹⁴¹

Restorative justice may prove superior to retributive justice in the following ways.

Research shows that with juvenile crime recidivism is reduced.¹⁴² When future crime occurs, it is less serious.¹⁴³ Eighty-two percent of victims participating in mediation see

¹³⁵ Roht Arriaza, *supra* note 7 at 157.

¹³⁶ Roht Arriaza, *supra* note 7 at 158 and 162.

¹³⁷ Bibas and Bierschbach, *supra* note 6 at 85.

¹³⁸ Bibas and Bierschbach, *supra* note 6 at 94.

¹³⁹ Bibas and Bierschbach, *supra* note 6 at 95.

¹⁴⁰ *Id.*

¹⁴¹ Bibas and Bierschbach, *supra* note 6 at 101.

¹⁴² Monya M. Bunch, *Juvenile Transfer Proceedings: A Place For Restorative Justice Values*, 47 HOW. L. J. 909, n. 10 (2004); Carolyn Copps Hartley and Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL'Y 133 (2004).

¹⁴³ *Id.* Whether restorative justice reduces crime is also being scrutinized. Research to-date shows the type of crime committed is key. Intriguing, particularly within the context of truth and reconciliation and international crimes, in some studies, violent offenders are less likely to reoffend after restorative justice than non-violent offenders. In a study from Australia, violent offenders and drunk drivers reduced repeat crime but shoplifters did not. In another study from Canada, significant reduction in family violence, particularly child and domestic abuse, was found. Several studies show reduced juvenile recidivism. Theo Gavrielides, *A reply to Mr. Philip Johnston's article "A quick fix for crime doesn't pay,"* (January 12, 2005). For some reason, in the U.S., judges not trained in mediation are attempting to rectify this crisis

their criminal justice as fair, compared to fifty-six percent going through traditional process.¹⁴⁴ Likewise, seventy-eight percent of victims are satisfied after mediation, compared to fifty-six percent of victims after traditional proceedings. The most satisfied victims were more likely to feel their opinions had been considered and that the offender had been held accountable.¹⁴⁵ Last but not least, “empirical studies of restorative justice programs show that they control crime at least as well, if not better than, traditional criminal justice.”¹⁴⁶

As mentioned earlier, proponents of restorative justice with the most horrendous systemic crimes, like sexual abuse within the Catholic church, assert that restorative justice deters more effectively than retribution.¹⁴⁷ They describe the full restorative process, however; not simply victim catharsis, public storytelling, a focus on forgiveness or even sincere offender remorse. Instead, the process described is highly pragmatic, focused on negotiating ways to ensure that harm does not repeat itself. Vehicles include community oversight and offender restitution—not merely symbolic—but actually working to repair the harm done and restore victims and communities.

2. Scholars Promote Retribution For Punishment, Accountability, Deterrence, Healing and Public Record.

themselves rather than partner with qualified impartial. “Criminal mediation is an emerging reality, for better or worse.” Judicial “muscle mediation”, however, risks widespread involuntary waiver of constitutional rights. Bunch, *supra* note 142 .

¹⁴⁴ Bibas and Bierschbach, *supra* note 6 at 99.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Gavirelides, *supra* note 24.

According to Roht-Arriaza's account, the preferred and valued approach in Rwanda, at least espoused by the post-genocide government, is punishment rather than restoration—except when members of the government's own ethnic group are accused of war crimes, raising the daunting question of how to counter government power abuse in selectively pursuing retributive justice with the “enemy” while promoting restorative justice within their own group.¹⁴⁸ It is unknown from Roht-Arriaza's account whether victims, offenders and community members share the government's desire for punishment. Traditional prosecution through the International Criminal Tribunal for Rwanda is seen as holding the leaders and instigators of genocide accountable.¹⁴⁹ Aspired is deterrence.¹⁵⁰

Author Evenson, in describing Sierra Leone's process, likewise strongly favors traditional prosecution. The means she promotes to obtain the restoration described earlier are retributive: punishment and establishing public history with record. It appears that Evenson, in favoring retribution, puts most of her faith in punishment as the means necessary to deter crime. She may also believe that retribution is essential for healing. She lacks faith in restorative justice's record-keeping or ability to document history.

The Catholic church's example suggests that retributive justice—not just criminal but civil liability—is necessary to force institutional response with internal wrongs and

¹⁴⁸ Wierzynaska, *supra* note 68.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; *see also*, Gavrielides, *supra* note 24 (discussing deterrence within Catholic church).

perpetrators. Not until the church faced vicarious liability involving billions did it finally speak out against sexual crimes. Until then, it actively colluded in covering up crimes, protecting offenders, and pressuring victims to remain silent.¹⁵¹

Evenson, analyzing Sierra Leone's process, sees "prosecution preference" internationally, as exemplified by former Yugoslavia's process and the International Criminal Court, with punishment as the predominant goal.¹⁵² As mentioned earlier, Evenson apparently believes that the traditional retributive approach deters. She relates fear that circumventing punishment diminishes legal authority.¹⁵³

Evenson is supported by Wierzynska's analysis of Rwanda's international criminal court. Wierzynska posits traditional prosecution as reinforcing democracy through fostering respect for rule of law and human rights.¹⁵⁴ She goes on to argue that international tribunals enhance legitimacy of new governments through creating moral distance from criminal elites.¹⁵⁵

3. Scholars Conclude Their Restorative-Retributive Critique Advocating Both.

¹⁵¹ Gavrielides, *supra* note 24 at 350.

¹⁵² Evenson, *supra* note 71 at 736.

¹⁵³ Evenson, *supra* note 71 at 743, n. 11.

¹⁵⁴ Wierzynska, *supra* note 68 at 1938.

¹⁵⁵ *Id.*

While recent scholars critiquing truth and reconciliation uniformly advocate retributive justice, they simultaneously laud the fundamental practices of restorative justice—in process and outcome. First and foremost, scholars stress the importance of community involvement, emphasizing the fundamental need for social reconstruction and democratic nation-building. Aspired are reintegration of offenders and victims and prevention of future violence. Some understanding of historic injustice and its roots is advocated to “not repeat the past.”¹⁵⁶ Victim stories and offender responsibility are viewed as preventative vehicles. These scholars see restorative justice as necessary to comprehensive truth-telling and broad healing.

Clarifying responsibilities about what has happened is a necessary but not sufficient condition for obtaining truth. At both the individual and collective levels, the capacity for being *moved* ethically and emotionally must be recovered. This restoration of responsiveness can only happen when all social groups, especially those previously silenced, marginalized or excluded, have legitimate voices in the public sphere. Truth will be achieved only when literally everyone knows and acknowledges what happened during the military regime. Once truth is established, a generalized mourning process can take place, alleviating the victims of their suffering and the rest

¹⁵⁶ Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, POST-CONFLICT JUSTICE (2002).

of the society of their guilt.¹⁵⁷

Secondary, but repeated by several authors, is the importance of recognizing harm to communities as well as victims, transforming relationships with government and repair of harm. Author Andrews sees potential benefit from hybrid process in educating the broader public and providing critical transition to democracy.¹⁵⁸

Wierzynska also stands for a hybrid after analyzing Rwanda's needs. She sees blending restoration and retribution uniquely strong through its combining of indigenous, or community, process and state involvement; thus building a "critical communication bridge between the people and the State that did not exist before."¹⁵⁹

III. Building Sustainable International Forums Requires Rigorous Acknowledgment of Existing Limitations.

Scholars uniformly laud both restoration and retribution. To move forward with the development of effective international institutions, whether or not hybrid, weaknesses must likewise be acknowledged. Hybrid retributive-restorative procedures may be growing in popularity precisely because of their capacity to rectify the shortcomings of either approach standing alone. Yet combining two distinct systems naturally creates its own problems. These will be identified below.

¹⁵⁷ *Id.*, citing David Becker, et. al., *Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation*, 46 JOURNAL OF SOCIAL ISSUES 133 (1990).

¹⁵⁸ Andrews, *supra* note 14 at 1156.

¹⁵⁹ Wierzynska, *supra* note 68 at 1942.

A. Retribution Is Primarily Critiqued For Its Inability to Provide Restoration As Well As Its Cost. Providing Retributive Justice For All International Atrocity Is Cost Prohibitive.

All articles referenced here acknowledge universal inability to actualize retributive ideals.¹⁶⁰ While several authors espouse the virtues of prosecution and punishment, they acknowledge that most countries lack the resources needed to pursue an adversarial process reflecting U.S. ideals.¹⁶¹

Scholars critiquing the U.S. system itself assert that the U. S., despite comparatively vast resources, falls far short of retributive ideals. The undisputable pragmatic reality within the North is not a question between retributive and restorative justice but between restorative justice and plea bargaining.¹⁶² Some state that U.S. crime is increasing, not decreasing, as punishment intensifies.¹⁶³ From the perspective of contemporary scholarship, legal crisis joins North and South.

The international community is even less likely to fill this gap.

In the twentieth century alone there have been 33
million military deaths, 205 million victimization

¹⁶⁰ Analogous is the incapacity of the United Nations, regional organizations and traditional international mediation with policing global crisis. See JANE BOULDEN, *DEALING WITH CONFLICT IN AFRICA* (2003).

¹⁶¹ *Id.*

¹⁶² “Overburdened courts (in Massachusetts) are causing critical breakdowns in the criminal justice system...annually more than nine thousand cases are referred out of district courts by district attorneys and judges to dispute settlement centers; over seven thousand or more are resolved prior to possible court involvement...”Gabriel H. Teninbaum, *Easing the Burden: Mediating Misdemeanor Criminal Complaints* available at <http://law.bepress.com/expresso/eps/820>.

¹⁶³ *Id.*

deaths, and an unknown number of people who have survived enslavement, torture, and rape... As former United Nations High Commissioner for Human Rights Jose Ayala Lasso has stated 'a person stands a better chance of being tried and judged for killing one human being than for killing 100,000.'¹⁶⁴

Needless to say, legal incapacity is compounded with mass atrocities. International institutions are inevitably overwhelmed. In too many parts of the world, the rule of the gun reigns supreme.¹⁶⁵

The commitments to sustain (initiatives to stop future human rights abuses and discourage others from committing heinous crimes against humanity) are often weak and unsustainable. The international community reacts with vigor and enthusiasm. Although such reactions are most often ephemeral, they raise unprecedented expectations of victims of violent conflicts to the extent that they are psychologically affected when their hopes are dashed.¹⁶⁶

Several international agreements recognize victims' rights.¹⁶⁷ Emphasis on government implementation, however, has repeatedly resulted in disillusionment. Resources for

¹⁶⁴ Opatow, *supra* note 156; *see also* Roger Alford, *On War As Hell*, CHI. J. INTL. L. 207 (2002) ("The great irony of war is that the more catastrophic and widespread its destructive consequences, the less likely that those caught in its path will ever be repaid for their injury. There simply is not enough salve to heal the wounds of war.")

¹⁶⁵ Crane, *supra* note 72 at 4 ("The real threat to humanity on several levels is bred in the fields of lawlessness... (f)ertilized by greed and corruption.")

¹⁶⁶ Lederach, *supra* note 91 at 169.

reparations are limited. The truth commissions of South Africa, Guatemala, El Salvador and Panama have all recommended extensive reparations but been slow to act.¹⁶⁸

Author Evenson views truth commissions as primarily legal, emphasizing evidence, witnesses and other legal elements instrumental to creating historic record, along with the goals of punishment, remedy and institutional reform, while also using the language of restorative justice, accountability and reconciliation to describe goals. Building a society capable of preventing future crime is prioritized.¹⁶⁹ She represents the perspective that transitional justice's primary mechanism for effectively confronting human rights violations is prosecution, with truth commissions only necessary, or of value, when prosecutions are barred or impractical. Values beyond punishment are recognized but seen as secondary. This perspective appears more likely to view truth commissions as authoritarian bureaucratic mechanisms used to respond to overwhelming conditions, with efficiency and fairness the priority rather than more inclusive community negotiated process. Evenson herself explains the interest in truth and reconciliation is predominantly practical. Systems are overwhelmed with potential prosecutions.

Resources are scarce.¹⁷⁰

¹⁶⁷ See, e.g., Roht Arriaza, *supra* note 7, Appendix.

¹⁶⁸ An interesting alternative with potential is proposed preferential access to vital services for victims or opportunities like micro credit—an option to relying on government. Roht Arriaza, *supra* note 48 at 174.

¹⁶⁹ Evenson, *supra* note 71 at 730.

¹⁷⁰ Evenson's perspective might seem logical at first glance. It fails, however, to consider systemic offense, myopically assuming individual culpability alone, as if international crimes equate with domestic. This perspective intrigues, particularly in the context of Evenson's article, Sierra Leone, where she acknowledges "long-simmering resentment against government elites for their perceived exploitation of the country's resources at the expense of the general population." Interestingly, while her description calls to mind the U.S. courts, author Evenson does not anticipate guilty pleas with truth commissions. Evenson, *supra* note 71.

Acknowledging these realities, one of this article's central premises is that, regardless of philosophical difference, societies, North, South and international, need credible alternatives capable of addressing their most pressing priorities. Identifying and preserving the institutions that prove themselves most effective in practice must be one of the international community's first priorities.

B. Restorative Practice, In Contrast, Is Critiqued For Its Failure to Fulfill Its Own--- Relatively Low Cost--- Potential. Only Partial Restorative Justice Is Generally Seen Around The World. Widespread Misunderstanding Likely Explains Some Of This Missed Opportunity.

Despite widespread acclaim for restorative justice, no evidence can be found that the most serious offenders are actually repairing damage done to their victimized and often desperate societies or that government-community relationships are being transformed. While scholars describe communities valuing restorative justice's role in transforming violence, bridging gaps with government and otherwise building their societies, no evidence exists that most egregious of offenders, like South Africa's apartheid leadership, have significantly repaired the harm they have done or contributed to nation building even when the government is the offender. In East Timor's process repair of harm was rarely negotiated. While a statement is made that reparations prioritized education, small business start-up, as well as health care, no detail describes how reparation occurred.

Transforming relationships between community and government is not even mentioned. East Timor's process left victims with the responsibility of communicating with government for traditional justice. The Commission had no mandate to deliver justice, only investigate and recommend.¹⁷¹ The earlier mentioned East Timor-Leste hearing did not attempt to be comprehensive. Instead, its stated purposes were publicizing lesser known crimes and honoring specific victims and survivors,¹⁷² public education on human rights and "reconciliation through truth."¹⁷³ Acknowledged is that such hearings were symbolic and representative rather than comprehensive. While great efforts were purportedly made to accommodate all victims who expressed interest, reports infer that many did not participate.

Complex challenges arise when attempting restorative justice with international crime--challenges not often faced domestically. Preliminary determination of victims, perpetrators and harm can greatly limit the confronting of structural violations. In South Africa, as one instance, while apartheid is defined as a crime against humanity under international law, the truth and reconciliation commission focused on individual acts of gross violations of human rights, thus "sparing" examination of systemic crime (and accountability).¹⁷⁴ Lines between offenders and victims are often blurred, as many offenders are also victims.¹⁷⁵ Determining beneficiaries of international crime evokes questions about the role and responsibility they should have in reparations and

¹⁷¹ *Id.*

¹⁷² *Id.* CAVR UPDATE, *supra* note 29 at 25.

¹⁷³ *Id.*

¹⁷⁴ Andrews, *supra* note 14 at 1159.

¹⁷⁵ Evenson, *supra* note 71 at 740.

reconciliation. In South Africa, beneficiaries implicated transnational corporations. Thus the question of who is to be reconciled is far more reaching and tough in scale. Furthermore, repairing the harm with long standing systemic crimes is likely to take generations.¹⁷⁶ In case of war and mass dislocation, there is often no traditional community that remains for reintegration.

The explanation for the above described failure to implement restorative justice in its entirety may be widespread misunderstanding equating restorative justice with mercy. Several scholars framed the Illinois death penalty pardon in contrast to what they called retributive justice and equated restorative justice with mercy.¹⁷⁷ Mercy was emphasized even though the pardoning governor explained his actions, not as compassionate, but responsive to “his mounting distress with the error and capriciousness that he had found in Illinois’ ‘deeply flawed’” criminal justice system.”¹⁷⁸ In apologizing for systemic failures, arguably the State of Illinois admitted culpability—that it was an offender. Nevertheless, American jurisprudence reframed the debate as mercy and “the question is always what is wrong with mercy, rather than when mercy might be justified or even obligatory.”¹⁷⁹ Rather than viewing forgiveness as sought by certain offenders as they are moved by remorse but not necessarily given, restorative justice is viewed as synonymous with mercy. Why are scholars emphasizing forgiveness rather than offender remorse and restitution?

¹⁷⁶ Andrews, *supra* note 14 at 1160.

¹⁷⁷ John Charles Boger, *Foreword: Acts Of Capital Clemency: The Words And Deeds Of Governor George Ryan*, 82 N. C. L. REV. 1279, 1291 (2004). Mexico and South Africa were some of the Southern countries congratulating Governor Ryan and offering “warm support” for his pardon.

¹⁷⁸ Boger, *supra* note 177 at 1279.

¹⁷⁹ Robert Weisberg, *Apology, Legislation and Mercy*, 82 N. C. L. REV. 1415, 1416 (2004)..

(J)ustice itself is defined in terms of an active extension of mercy to, and between, victim, offender, and community, each helping the others through the process of making things right again... The momentum of the restorative encounter thus takes advantage of the good nature of the victim and community, riding on the strange but compelling power of the combined discomfort and euphoria we feel over the sinner who repents.¹⁸⁰

International process reinforces the association of restorative justice with forgiveness. Some truth investigations, throughout Central and Latin American, the Caribbean and some African countries, have given broad amnesty.¹⁸¹ Dom Carlos Felip Ximenes Belo, Nobel Peace Laureate is quoted as he describes East Timor's process.

We should all give recognition to the Commission for Reception, Truth and Reconciliation because it will give us the opportunity and space to sit together and speak the truth and be reconciled. In humility we shall offer all our shortcomings and sins and ask for forgiveness from our political foes.¹⁸² (emphasis added)

Yet offenders admitting culpability and seeking forgiveness must be recognized as radically distinct from amnesty. Most of restorative justice cannot be equated with impunity, or exemption from accountability.¹⁸³ Impunity occurs when international

¹⁸⁰ *Id.* The author quoted, Acorn, seems to relish her disdain for restorative justice, which she associates with mercy. Only a few words are quoted here.

¹⁸¹ Ratner and Abrams, *supra* note 8 at 153.

¹⁸² CAVR UPDATE *supra* note 29.

¹⁸³ Opatow, *supra* note 156 at 202.

crimes are not investigated or otherwise addressed—ignored for political reasons or neglected due their overwhelming number.¹⁸⁴

Restorative justice, in contrast, seeks offender accountability. Asking victims to forgive rather than offenders to restore is misguided. Offender admission of wrong is fundamental. One of restorative justice's core operational values is active responsibility.¹⁸⁵

International crimes, particularly war crimes, raise unique challenges. Apartheid governments and warring factions may demand amnesty as a condition to ending violent and oppressive conditions.¹⁸⁶ How the international community responds to such demands in negotiating justice, restorative and retributive, is at the heart of its future credibility.

How various societies, North, South and international, counter the abuse of those who hold most power and their institutional support may be the most important inquiry here. “Quick forgiveness” might actually circumvent offenders’ process of internally confronting themselves and building redemption through amends fully making victims whole and restoring relationships. Proponents of restorative justice tackling

¹⁸⁴ “(I)mposed silence on a world of poverty, pain, injustice, and persecution.” Opatow, *supra* note 156. (Elaborating three types of impunity, structural, strategic and psychological/political, with “manipulation of fear, distrust, and isolation among citizens to crush hopes for freedom, social equality, or justice.”)

¹⁸⁵ Class lecture, *supra* note 11.

¹⁸⁶ Opatow, *supra* note 156.

systematically rampant abuse like the sexual crimes of the Catholic church argue that offenders may never feel remorse, begin to see their victims as human or face and know the harm they have done except through honest encounters with their victims.¹⁸⁷ They further argue that legal punishment and incarceration cushions the offender from the consequences of his or her wrongs.

Whatever the results of this debate, inversely correlating all of restorative justice with mercy fuels gross misassumptions. Outsiders learn that all offenders are necessarily released from moral accountability.¹⁸⁸ Restorative justice is consequently attacked for encroaching on the making of formal criminal systems around the world.¹⁸⁹

The international community cannot afford to perpetuate the linking of restorative justice with automatic mercy, particularly since it is repeatedly promoting restoration in its processes with the most horrendous of crimes. While revering restorative traditions, Southern communities must also find ways to stop enemy exploitation. Power abuse by the most corrupt is often institutionalized—part of structural violence.¹⁹⁰ Restorative justice, as defined in this article, includes transformation of government-community relationships---arguably also one of the South's most pressing needs and too often neglected in the case studies described here. In the face of structural power abuse, victimized community cannot be asked to restore justice alone. The international

¹⁸⁷ Gavrielides, *supra* note 28 at 356-357.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Larson and Tian, *supra* note 122 at 55.

community must find ways to assist victims through holding non-remorseful and insincere offenders accountable---perhaps pressuring them to repair the damage they have done. The Catholic church is presented as a case study example of offender restitution aimed at preventing future harm.¹⁹¹ After reviewing recent scholarship, this article concludes that retributive international justice must prioritize this end. The author asks the global community to reserve and preserve the best of common and civil law traditions for “self-policing”---ensuring that nation-states and transnational institutions, those officially responsible for policing crime, practice what they preach.

In watching the documentary *Long Night’s Journey*, South African victims seem fiercely frustrated and angry with lack of offender accountability. Several authors, including Andrews, describe a strong community tension throughout South Africa between values of forgiveness and revenge.¹⁹² Still others argue that local communities’ desire for retributive justice was prevalent and disregarded.¹⁹³ An alternative perspective, through Southern eyes, is that only twenty percent of those seeking reconciliation were White. Eighty percent of those who applied for amnesty and sought forgiveness in South Africa were Black.¹⁹⁴ If the stated purpose of the truth and reconciliation proceedings--- to crack through societal denial---was truly advanced, what explains this low participation by the perpetrators and beneficiaries of apartheid. Critics stress the resultant lack of

¹⁹¹ See Gavrielides and Coker, *supra* note 24 at 345-365.

¹⁹² Andrews *supra* note 14 at 1161.

¹⁹³ Andrews, *supra* note 14 at 1168, n. 59; Gross, *supra* note 7 at 82, n. 149. While recent scholarship rarely references such retributive community spirit outside of the United States, apparently some of Latin America joined in the outcry against the Illinois death penalty pardon.

¹⁹⁴ *Long Night’s Journey*, *supra* note 103.

societal change and nation-building. The rhetoric and hopes preceding and during truth and reconciliation have yet to show themselves on a broad scale.¹⁹⁵

When Northern offenders do not share Southern heritage and thus do not voluntarily participate in restorative traditions, reliance on Southern culture alone may be incomplete, frustrating those honoring restorative tradition. The world community is still waiting for an international process that emulates restorative justice's full potential as defined in modern terms¹⁹⁶---where the most powerful offenders initiate restitution: rebuilding the nations they have damaged and destroyed. Would international prosecution of the most culpable in South Africa like what is occurring with international tribunals today cracked offender denial and promoted repair of harm and broader societal movement forward? The answers are waiting further study.

Restorative justice recognizes the moral harm resulting from loss of trust in one's governmental ability to protect or secure public safety and order. Procedural justice research concludes "people are (most) concerned about their long-term social relationships with the authorities or institutions acting as third parties."¹⁹⁷ Citizens want

¹⁹⁵ See, e.g., Krisztina Z. Tihanyi and Stephanos F. du Toit *Reconciliation Through Integration? An Examination of South Africa's Reconciliation Process in Racially Integrating High Schools* 23-1 CONFL. RESOL. Q. 25, 27 (2005).

¹⁹⁶ See Section I. See also Laurie King Irani, Ph.D., *To reconcile or to be reconciled? Agency, accountability and law in Middle Eastern Conflicts* 28-3 HASTINGS INT'L. & COMP. L. R. 387 (2005) ("Absent any current or future judicial and legal mechanisms to resolve than simply manage conflicts, TRCs by themselves are likely to reconcile Lebanese, Israelis and Palestinians, not to each other, but rather to structural inequalities, essentialized identities and more of what they have known too long.")

¹⁹⁷ Bibas and Bierschbach, *supra* note 6 at 99.
Class lecture, *supra* note 11.

their empowered leaders to be truly impartial.¹⁹⁸ Fairness of procedure is valued more than outcome.¹⁹⁹ When the State and enforcement of its laws can be trusted, citizens are motivated to follow.

International law appears to be using civil and common law as its primary base and influence. When civil and common law are described and promoted in this article, they are assumed to be truly just (and not the unjust instruments of those most privileged). How the international community constrains and exposes abuse of the most powerful is one of its most pressing challenges, largely determining whether the South will ever trust its law and legal institutions as truly international.

The question of trust joins governments and communities around the world. Government mistrusts community self-determination, while communities mistrust government justice. Can we face our shared mistrust by mutually exploring whether all may be able to contribute what the other cannot alone, through corresponding complementary rather than exclusive roles?

More and more, the international community appears to be bridging historic distance between conflict resolution and democratic governance.²⁰⁰ The international community

¹⁹⁸ Bibas and Bierschbach, *supra* note 6 at 85.

¹⁹⁹ Hartley and Petrucci, *supra* note 142 at 140.

²⁰⁰ CHESTER A. CROCKER, FEN OSLER HAMPSON & PAMELA AALL, *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 753 (2003).

is exploring ways for peace and justice to co-exist.²⁰¹ Rather than giving all concerned---offenders and victims---moral equivalence like the even-handedness stressed in South Africa, accountability is being sought with the most egregious of crimes according to universal norms of justice. At the same time, communities are being supported in exercising their own cultural norms and practices for reconciliation. This evolution brings to mind an ethical discussion regarding domestic mediation--- mediator neutrality (“value free”) versus impartiality. Most seasoned practitioners now agree to mediator ethics including the duty to recommend that parties seek legal advice and otherwise “balance power.” Perhaps the human rights community could play a similar role with truth and reconciliation, educating parties about all criminal and civil avenues available to them, retributive and restorative, while respecting parties’ self-determined choice. No longer does international justice need to be framed as an either-or discussion: reconciliation or accountability; short-term versus sustainable resolution.

Equally important is these societies’ often desperate need for repair of harm in the interest of nation-building. Most striking in one of the Latin American studies cited in Section II of this article is victims’ widespread desire to secure their children’s education.²⁰² The proponents of truth and reconciliation in South Africa also speak to the need for nation-building. The mother of one South African victim hinted at the need for more investment in her society’s future when she said, “Saying sorry will not help....(Our grandchildren---murder victim’s children-have no education and no means to

²⁰¹ *Id.* See historic discussion, pgs. 759-60.

²⁰² *Id.*

pay for education).”²⁰³ In response to this widespread need, some have created the following definition of reconciliation, distinguishing between restorative justice within pre-existing community and justice between institutional oppressors and oppressed:

a metaphor that initiates, guides, and sustains processes of social, political and economic change in order to overcome divisions that originate in the past yet continue to reproduce various forms of economic and social inequality and discrimination.²⁰⁴

Given many Southern communities’ often desperate need for development, they would strongly benefit from restorative justice’s full potential. The ideal requires offender restitution to repair harm done, in addition to requests for forgiveness and symbolic gestures. The South victimized by oppression asks, first and foremost, that their children be educated.

Likewise, a movement within reparations discourse regarding communities affected by genocide and massive conflict, “reparations as development,” recognizes the restorative value of more intimate community involvement.²⁰⁵ The nation building required after international crimes, such as apartheid and the human rights violations of military dictatorships, democratically embraces the community’s role. Acknowledged is

²⁰³Long Night’s Journey Into Day, *supra* note 103. Also seen in South Africa is victims’ desire to know more about the circumstances of their loved ones’ deaths, along with the belief, expressed by several instrumental to South Africa’s process, that facing pain and facilitating emotional catharsis heals and provides some resolution.

²⁰⁴ Tihanyi and du Toit *supra* note 195 at 27 .

²⁰⁵ Roht Arriaza, *supra* note 7 at 169.

community wide harm and need for repair. Advocated is community participation in defining priorities. Restorative justice is perfectly situated to facilitate this critical task.

Most recently, Parker has stressed the role restorative justice can play in catalyzing and facilitating critical government reform---perhaps in response to the widespread alienation acknowledged earlier. She advocates bridging the government-civil society divide, acknowledging specific ways governments, like the Colombian National Congress and Chilean legislature, international development organizations, and regional groups, like the Organization of American States, have supported restorative efforts.²⁰⁶

3. Blending Retribution with Restoration Creates Challenges That Deserve International Dialogue And Scrutiny.

Despite widespread international acclaim and growing popularity, practically a hybrid quasi legal process creates problems. Public disclosure in truth commissions may undermine prosecution. What if each body reaches a different conclusion about accountability?²⁰⁷ If truth commissions are quasi legal, those judged arguably deserve appeal and review. Quasi legal process requires a limited and easily identifiable group of victims. Discerning appropriate collective reparations is challenging.²⁰⁸ So is the task of distinguishing between various degrees of harm.

²⁰⁶ Parker, *supra* note 108 at 7, 11 and 12.

²⁰⁷ Evenson, *supra* note 71 at 760.

²⁰⁸ Roht Arriaza, *supra* note 7 at 162.

Author Andrews notes the inherent dilemma in combining fact finding, or “evidentiary” exploration with victim storytelling and healing.²⁰⁹ She names four kinds of truths: forensic, narrative, social dialogue and healing, the latter restorative, with only forensic, or factual, determined through traditional legal process and compromising the other truths.²¹⁰

Until the international community consciously acknowledges the popularity of hybrid process, the resultant procedural challenges and dilemmas will avoid the attention they require. If, however, scholars begin prioritizing this critique, improved, sustainable and effective international institutions will more likely result.

IV. Extended Empirical Research Of The Most Essential Questions Facing The International Community Regarding Mass Crimes And Hybrid Procedure Deserves Priority.

The most tragic of loss and brutal injustice, whether domestic or international, sparks deep passion while carving lasting trauma. Even in the face of overpowering emotional reaction, all agree, scholar and community alike within the U. S. and around the world, that, first and foremost, societies must find a way to manage violence.²¹¹ Both restorative and retributive visions of justice arguably share this end. The scholars reviewed in this article consistently reiterate the value of inclusive restorative encounter allowing communities to honor cultural traditions, restore government-community relationships, facilitate nation-building, and prevent future violence. (emphasis added) They likewise

²⁰⁹ Andrews, *supra* note 14.

²¹⁰ *Id.*

²¹¹ Soyinka, *supra* note 20 at vii; 33 (1999). (Will it truly heal society?)

mention the importance of preventing future crime and violence when advocating retributive justice.

These same scholars, however, do not offer hard evidence that the latter occurs. Whether resultant rehabilitation and reintegration, victim and offender, are sustainable needs to be studied over time. This article concludes that scholars have an obligation to tackle this pragmatic task as well as debate philosophical difference. We require concrete answers to several unanswered questions about the impact of retributive and restorative approaches to justice. Which public forums are truly proving themselves as our most viable options in preventing violence? Whether Uganda's referral of the Lord's Resistance Army leadership to the International Criminal Court is compatible with efforts to end the conflict in northern Uganda, for example, is still unknown.²¹² Despite shared legacy of brutal adversity, the global community, North and South, appears to be just beginning to investigate key questions in practical rather than abstract ways.²¹³

The international community has reached some consensus about crimes that require response. Discussion though is quite polarized regarding appropriate dispute resolution with past and present violence, especially with power imbalance. Some argue for legal intervention—that an encounter between victim and offender is ill advised—even unethical, while others argue the opposite---that restorative justice more effectively deters

²¹² AMER. J. INT'L. L., *supra* note 11 at 404-405 (“Thus far, the empirical evidence suggests that international commitment...has contributed to LRA's incapacitation”). The ability of a non-signatory to the International Criminal Court to protect this leadership from prosecution is a clear and present challenge.

²¹³ Soyinka, *supra* note 20 at ix.

future violence.²¹⁴ Retributive process, though, might be essential for holding insincere and non-remorseful offenders accountable, particularly those with most power.²¹⁵

Examining critical issues from an empirical as well as a philosophical perspective would do much to advance both retributive and restorative justice. Is actual healing most powerfully facilitated by retribution, restoration, or a combination of both? What most effectively deters crime as well as prevents future violence? Is history, public record or “memory” advocated to this end?²¹⁶ If so, what is the most fair, impartial, or inclusive, means to truth telling? Which truths are most essential to record?

Most communities and scholars reviewed here laud inclusive restorative encounter between victims, offenders and communities. Communities in particular appreciate opportunities to honor cultural traditions. Notably lacking in actual restorative process, though, is institutional offender responsibility, repair of harm and other restorative elements vital to nation-building. No evidence is found evaluating sustainable reintegration of offenders and victims over time as well as transformation of government-community relationships. Did resolving the rift as described with East Timor’s process restore or make the victims whole? We do not know. Whether East Timor’s process was fully restorative, in both process and outcome, as defined in Section II, is uncertain. While offenders and victims met and included concerned community members

²¹⁴ See, e.g., Gavrielides and Coker, *supra* note 24 at 345-365.

²¹⁵ *Id.*

²¹⁶ Soyinka, *supra* note 20 at 30 (describing the trial of Mariam Mengistu in Ethiopia) (“(no) ever was mass murder more meticulously bureaucratized.”)

(apparently all stakeholders); then purportedly negotiated amends, questions arise about how much the appointed court, or arbitrators, made decisions for victims, offenders and community. Most importantly, long-term scrutiny is needed to assess this hybrid's actual impact on societal violence.

VII. Can The Blending Embraced By The International Community Create A Working System That Proves Optimal?

Reviewing recent scholarship inspires a modest proposal. Why not reserve the best of our prosecutorial process, civil and common law, domestic and international, for our most important, high profile cases and give offenders willing to admit culpability, along with the victims and community interested in encounter, the opportunity to discern restorative justice's best practices, particularly with less serious offenses?²¹⁷ If long-standing traditions exist in the South, like those described throughout Africa empowering communities to address their own disputes, they can be used to preserve law and "fill in the gaps." Rather than intellectually discard options all legal systems, North and South, desperately need, this survey asks: can we create a procedurally fair system that balances structure and flexibility,²¹⁸ taps the strengths of restorative justice, while preserving the best of retributive tradition?²¹⁹ Being willing to fully explore restorative justice's potential could slow erosion of our highest held legal principles for our most significant and weighty cases, and survival of what we have spent centuries building— legal

²¹⁷Professor Luna suggests that the U.S. might benefit from studying restorative justice in foreign context, specifically to learn less costly alternatives to our current prison system, reduce recidivism through a more humane approach and develop alternatives that resonate with Islamic values such as victim restitution and forgiveness. Isn't the least costly what most effectively deters? Luna, *supra* note 3.

²¹⁸ Class lecture, *supra* note 11.

²¹⁹ *Id.*

systems themselves.²²⁰ “An overly broad mandate can create a foundation for a tribunal that is built on sand.”²²¹

Recent articles present no persuasive argument for overburdening systems with less consequential cases. Acknowledging the overriding role of government with criminal harm does not need to unnecessarily burden administration or limit restorative justice. Furthermore, victims and communities are often better positioned than government to take the time needed to fully explore, discern and repair harms.

At the same time, the case studies reviewed here indicate that retributive justice might be necessary to “force” non-remorseful offenders “to the table.” Retribution at its best is suited to confront the most powerful of offenders and the most horrendous crimes.²²²

Conclusion

Support for restorative justice is growing worldwide—both among scholars and communities. Universal consensus lauds public encounters between victims, offenders

²²⁰ Soyinka, *supra* note 20 at 10. Dr. Martin Luther King Jr. is a prominent example of an advocate who relied on the rule of law to birth the civil rights movement and advance his oppressed community. Soyinka, *supra* note 20 at 103-104. After showing an Ethiopian, Tibetan and indigenous leader within Latin America a documentary of Dr. King’s work, they uniformly expressed longing for impartial legal institutions to support their struggles and concerns.

²²¹ Crane, *supra* note 72 at 5 (describing Sierra Leone’s international tribunal).

²²² Remorse is acknowledged as a powerful action, even ritual, strongly linked with reconciliation, facilitating necessary healing; repairing damage and relationships. Bibas and Bierschbach argue that victims equate sincere apology with justice. Bibas and Bierschbach, *supra* note 6.

and communities acknowledging wrongdoing. Southern communities uniformly appreciate respect for their cultural customs: restoration and reconciliation integrating storytelling, public acknowledgment and offender request for forgiveness. Latin countries in particular wish to support victims.

Societies ravaged by war and genocide cannot afford to fixate on the past at the cost of the future. International prosecution may establish critical norms yet fail to assist those who are harmed. Is it just and fair to use their tragedy for future generations and disregard the present? Can we simultaneously pursue justice and rebuild destroyed institutions and distressed economies? Essential nation-building with reconstruction is one of the most lauded reasons for embracing restorative justice with international crimes.

We are just beginning to discern whether key differences exist between values domestically and internationally. Does it make a difference that many of the crimes discussed here are international: war crimes, gross violations of human rights, crimes against humanity, apartheid? How do we repair harm when the State is offender?²²³ When racism is perpetuated by the legal system whose procedural fairness we revere?

The common sense of humankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power

²²³ The Illinois pardon reveals that State apology may be well-received in the South, perhaps most of the world, while condemned in much of the United States.

and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.²²⁴

Realistically, international reconciliation is radically distinct in scope---encompassing not merely cases being assessed, with closure, but complex societal conditions requiring extended effort and capacity building, democratic and institutional, with reflective evaluation over time. Nevertheless, clear themes emerge, bridging North and South, as well as domestic and international systems. For example, scholars commonly express belief that punishment deters. Yet unfulfilled rhetoric regarding punishment continues as legal systems, particularly international, face overwhelmingly caseloads.

In response, scholars promote restorative justice. Social reconstruction leads their list of reasons. Lebanon, like East Timor, is using cross-community dialogue, not just in truth and reconciliation process, with the hope of nation-building, but in the process of post war reconstruction itself.²²⁵ Reintegration, mostly offender but also victim, and community involvement, are closely intertwined and correspondingly valued in scholarly analysis of restorative justice's contribution.

Closer scrutiny, however, reveals a retributive-restorative blend being promoted as restorative. The retributive voice is still strong. Desire for revenge is mentioned simultaneously with the importance of creating moral distance from criminal elites.

²²⁴ Crane, *supra* note 72 at 9, quoting Chief Prosecutor for the United States before the Intl Military Tribunal, Nuremberg, Germany.

Needed institutional reform is likewise asserted as rationale for maintaining retributive traditions.²²⁶ If the most prominent offenders refuse to acknowledge culpability and participate in restorative process, retribution may be necessary. The most pronounced reasons behind advocating retributive approaches are beliefs that punishment increases respect for legal authority and deters crime. Establishing public record, a written history of atrocities, is another theme in scholarship, also providing reasoned justification for traditional methods. Some go so far as to assert that restorative justice facilitates retributive ideals, such as comprehensive truth telling and critical institutional reform.

In addition to discovering prevalent international blending of restorative and retributive justice, close scrutiny reveals that while retribution is promoted, its actual use is limited as cost-prohibitive. Apparently in response to this challenge, rather than strategically assessing when retributive approaches are most necessary, on the surface the international community appears to be randomly experimenting with restoration, retribution and a combination of both.

As an unintended result of the above experiment, the full contribution of restorative justice at its best is missing. Encounter and healing predominate. Actual repair of harm and transformation of government-community relationships seem secondary---if recognized at all.

²²⁵ Institute of World Affairs, COMMUNITY-BUILDING IN POST-WAR LEBANON: A PROJECT TO

We must rely on future scholars to rationally critique international hybrid and guide us in discerning the most viable options for actualizing cherished ideals. Recent scholarship shepards the way, illuminating pivotal questions. Is healing facilitated by retribution, restoration, or a combination of both? Are there ways to further negotiation of amends to facilitate integration and lasting institutional reform? Is the forensic, or legal, determination of truth imminently more factual than restorative narrative or does restorative process enhance truth telling?

This is the cardinal issue: what most effectively deters crime, prevents violence and promotes movement forward, domestically and internationally? Legal systems, domestic and international, are increasingly overwhelmed. Restorative justice is just beginning to show its role. Could restorative justice prove the unlikely redeemer of traditional ideals? As its effectiveness is scrutinized, a golden opportunity exists to build on the best of both paradigms--- in the service of justice, ideally and diversely defined.

What I would offer to peacebuilders from the North may not be advice on how they could work in the South, but a partnership on how we can work together to transform the global system into a more just and humane order for the benefit of not only the South but the North and all who inhabit the world.²²⁷

ENHANCE ETHNIC TOLERANCE AND CIVIC IDENTITY (best citation available).

²²⁶ It is worth noting that South Africa is widely recognized for using restorative justice to this end.

²²⁷ Hizkias Assefa, pioneer with reconciliation in West Africa, Ethiopia and Rwanda, quoted by Lederach, *supra* note 91 at 290.

