Restorative justice and International law in the aftermath of mass violence: Talk softly, but carry a (big) stick.

The reform of creating ICC, (the International Criminal Court) is something I applaud. But I do not applaud it for the conventional set of reasons that cause most human right lawyers to applaud it. They usually argue that it is a major task is to bring to court the most culpable and mete out a ‘just’ punishment for ‘crimes against humanity’. Much has been written about the prime forerunners, ICTR (International Criminal Tribunal for Rwanda), and ICTY (likewise for previous Yugoslavia). Currently a central issue is whether and how to implement arrest and bring to court Joseph Kony, head of LRA in Northern Uganda. He has instigated enormous suffering, rape, murder, all kinds of bodily mutilations, abducting children and forcing them to kill parents or siblings etc. etc.

For me a major argument against prime reliance on institutions as ICC is that it (at least so far) implies that the local populations are deprived of the sense of ownership of the process, and thus their dignity is not respected. Quite the contrary may happen, people in former Yugoslavia generally felt alienated regarding the trial against Milosevics in The Hague, and most people in Rwanda care little about the proceedings in Arusha (Tanzania). Today there is not any great support in Uganda for bringing Joseph Kony to Hague - a warrant for his arrest has been issued.

What is the alternative? Most societies plagued by mass violence have their own indigenous rituals for reconciliation. The stage is set such that discovery/rediscovery of the humanity of the transgressor(s) is made possible and empathy again can be brought forth. Reconciliation may be marked by for instance a ceremonial breaking of spears followed by a specially prepared meal. This is an important part of restorative justice.

There is, however, no unequivocal evidence for benefits of restorative rituals in Uganda, (e.g. mato oput) Rwanda (gacaca), and even the effects of the celebrated TRC in South Africa have been contested. Further work should start with a close study of extensive use of indigenous rituals which have been leading to lasting viable relations, and use this as an inspiration. The prime example of such a successful story is from the autonomous region Bougainville in Papua New Guinea. Here mass violence was on a scale comparable to Rwanda, from 1988 to 1997. Two aspects of restorative justice deserves to be mentioned:

First: Reconciliation ceremonies took place on several levels, from chief war-lords, to local communities, to reconciliation after individual murders. A much rewarded film ‘Breaking Bows and Arrows’ records ceremonies on the last two levels and interested participants can see this film [Write time and place]. In the present context the basic message to underscore from the film is what one of the women says: ‘Reconciliation is important whatever happened during the war. It is not just for ourselves but for the next generation that the war is not passed on. What we do now is important for the next generation, – for our children and the children of our children’. Furthermore children may participate in reconciliation.
ceremonies as shown in the film (children have no place in traditional Western justice procedures).

Second: Local leaders were extensively trained in peaceful, dialogical approaches by peace workers from neighboring areas. Many local leaders had to change their ways from authoritarian approaches to emphatic, dialogical ways. When I read e.g. Howley a Gandhi quote was frequently brought to mind ‘Be the change you want’. Extensive spade work was often required before a reconciliation ceremony could take place. Here women played an especially important part!

An important question is whether then ‘justice’ is adequately taken care of. This, of course depends upon how ‘justice’ is construed. A conventional Western conception is retributive justice, which usually implies delivering what is considered a suitable amount of pain, a carefully meted out punishment for the prime transgressors. In contrast restorative justice can be taken to be a holistic conception where healing is the primary consideration. The first task is to (as far as possible) repair harm and thus restore dignity and empowerment for the persons involved. The further aim is to promote and strengthen a viable, and peaceful community characterized by empathy, trust, and committed to rebuilding society, as largely has happened in Bougainville.

Are, however, ‘crimes against humanity by definition unforgivable’ (as Robertson, 2006, p.327 states)? My question is who should have the power to make such a decision. Allen (2006, p. 79) reports that an informant said about Kony that “he has the will to behave peacefully but the evil spirits in him would make him appear violent most of the time”, and this is not a lone voice in Uganda. If this is a widespread opinion why not give the ‘peaceful will’ a chance to blossom forth? Local reconciliation ceremonies are more likely to bring forth the peaceful will than conventional criminal trials. By regarding Kony as an unforgivable case any ability he might have to face his victims and ask for forgiveness is denied, and this implies a lack of respect for his dignity!

Braithwaite strongly brings forth that all of us have the equivalent of ‘peaceful will’, capacity to act virtuously, but also tendencies to act irrational – cf. ‘evil spirits’. However, the tendency to act virtuously varies widely not only between persons/institutions but also between different situations. The challenge is then to foster and support situations which are best suited to bring forth the peaceful, virtuous sides. There is now a massive amount of evidence that generally dialogical/ non-punitive, that is restorative, approaches are more successful than punitive measures (which often are buttressed by a naïve faith in ‘deterrence’). This applies both for a variety of ordinary criminal cases and for many illegal/unethical business practices.

Some of you may think that the comments on Kony above imply an overly romantic view of the possibility of non-punitive reconciliation. This is where my subtitle comes in, talk softly – use reconciliation ceremonies as far as possible. When, however, this proves impossible it is necessary to carry a stick. The trick, of course is to make this clear in such a way that it (rarely) is necessary to put the stick e.g. criminal proceedings to use! (I take this quote from Braithwaite who frequently uses this metaphor.) An example: The existence of ICC may encourage perpetrators to participate in procedures supported by local authorities, and motivate bad guys to take restorative procedures more seriously. Put otherwise, ICC may
be valuable as a back-up when more productive ways of responding to crimes against humanity fail. The symbolic value is not less important; such crimes cannot be treated less serious than crimes of common street criminals.

The woman we quoted in the film said: ‘concerning human rights: We have dealt with reconciliation according to our tradition. But what about human rights, and violations of human rights? We do not like to talk about that. Some people will not agree with me, but I still think we should discuss this.’ In my view the Bougainville reconciliations might be important for suggesting exceptions (or special adaptations) for formal international proceedings. On the other hand international law might provide some restrictions on local procedures (for instance a tradition in some countries that the perpetrators hand over a nubile woman to a victimized group).

In his careful study of ICC and Uganda Allen noted that the judiciary arm of ICC is capable of learning from past mistakes. In response to serous critique of arrogance of ICC officials, and irrelevance of Western retributive ideas in Africa, he mentions the possibility that ICC ‘may be adapted to recognize some combination of adapted “traditional rituals” with more conventional judicial measures’.

In my view we can never give formulas for when and how to apply strict measures. Retributive vs. restorative justice may be less important than a truly overriding conception of a universal value, “all human beings are born free and equal in dignity and rights”. This makes restorations of dignity after violations thee prime task in peace building, and require extensive cooperation and dialogue between the most afflicted victims and survivors, ICC, peace workers and human aid agencies. Bear in mind what Gandhi told us: There is no way to peace, peace is the way!
Main sources used:


An excellent source on the situation in Uganda. Discussions of different views on ICC especially valuable.


Response to critique by R. Dowden


‘Talk softly and carry a big stick’ is elaborated in the concept of a Regulatory Pyramid. Applications discussed for international relations, business practices and ordinary criminal proceedings.


Major source on Bougainville, see also P. Reddy below


Valuable comparison of operations in Bougainville vs. (unsuccessful) operations in Somalia.


Extensive discussions of international and national procedures concentrating on Rwanda and previous Yugoslavia
