Victims’ rights, international wrongs, and restorative justice: how to square the circle of accountability and redress for international crimes?

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International law is increasingly focusing on criminal avenues to deal with past human rights abuses. In this frame, the role of victims is often marginalised, if not totally ignored, and they are sometimes further victimised. It is put forward that the problem lies largely in the punitive character of criminal law and its focus on prosecution. The paper explores the shortcomings of this approach and suggests possible solutions. Two promising alternatives are worth investigating. First, states’ liability can now be invoked for international offences, through other avenues than penal justice. Secondly, more individuated compensatory and restorative mechanisms, grounded in tort law, contract and restitution, sidestep the tensions underlined. Reliance on both states’ liability and traditional private law remedies presents the significant advantage of perfectly fitting in the human rights paradigm and repositioning the victims at the centre of the proceedings.

Keywords: international crimes, human rights, restorative justice, accountability, redress

Introduction

International law is increasingly focusing on criminal avenues to deal with past human rights abuses and violations of humanitarian rules in post-conflict societies or, indeed, in the midst of armed conflicts. This transforms the traditional conception of human rights law, as a shield against public abuses, into a sword aiming at the penalisation of the offenders (Cartuyvels, 2007). In addition, it leads to a collapse of the boundaries between international human rights and

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criminal law, for gross violations of individual rights, and the two disciplines are now seen as the two sides of a single coin. The contemporary “shift from a defence-based to a prosecution-based perspective […] has resulted in significant tension and even incoherence” inside the human rights regime (Schabas, 2004: 155). The question then arises of the reconciliation of the paradigms underlying the different branches of international law and of the respect of the rights of all involved individuals; be it victims, witnesses or accused.

In the current frame, the role of victims is often marginalised, if not totally ignored, and they are sometimes further victimised. It is put forward that the problem lies largely in the punitive character of criminal law and its focus on prosecution. The paper explores the weaknesses of this approach, relying mostly on an analysis of the statutes, rules of procedure and evidence, and case law of the two United Nations ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC); a choice motivated by the comparative significance of the former, as well as its lasting impact on the development of the entire discipline (Sluiter, Zahar, 2008: x), and the core position of the latter in the international legal system. While some of the identified shortcomings stem from the misapplication of institutional, substantive and procedural norms by the three tribunals, their inadequacy is also illustrative of the broader problems generated by a reliance on the criminal paradigm to promote respect for human rights and humanitarian rules.

The paper suggests that two promising alternatives are worth investigating, as possible solutions. First, states’ liability can now be invoked for international offences, through other avenues than penal justice. Secondly, more individuated compensatory and restorative mechanisms, grounded in tort law, contract and restitution, sidestep the tensions underlined. Reliance on both states’ liability and traditional private law remedies presents the significant advantage of perfectly fitting in the human rights paradigm and repositioning the victims at the centre of the proceedings.
International criminal law between penalisation and human rights

Aims of international criminal justice

The traditional human rights paradigm is protective, preventive and compensatory. It is centred on the victims of the abuses committed by the state or state agents and gives them a legal claim to stop the violation of their rights and ask for redress; restitution, reparation or compensation for their sufferings. By opposition, criminal law aims at determining the individual accountability of the accused for past offences that he is suspected to have committed. As a result, it does not sit very well with the preventive, protective and compensatory rationale classically underlying international human rights and humanitarian law. Furthermore, human rights law traditionally aims at inhibiting the state’s arbitrary powers and protecting individuals against its encroachment upon their fundamental freedoms and entitlements. Conversely, criminal law is historically rooted in a diametrically opposite logic and actually aims at the consolidation of official prerogatives and authority; which explains the natural suspicion of human rights lawyers towards penal justice. Correspondingly, human rights advocates were habitually siding with the accused and not the prosecution (Guellali, 2008: 165-169 and 191; Schabas, 2003a: 297).

The statement of the International Military Tribunal at Nuremberg, that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”,¹ lies at the core of international criminal law and constitutes its essence. Hence, international criminal law, which basically regulates the international responsibility of individual actors, has an obvious punitive character. It looks backwards and mostly aims at retribution for past offences. Although it additionally claims to further serve a vast array of other goals, it largely ignores reconciliatory considerations in practice because it does not consider it as its main purpose. Moreover, the adversarial and condemnatory nature of penal justice tends to produce the exact opposite effect and generate further antagonism between members of (former) belligerent countries or factions.

¹ Nuremberg International Military Tribunal, Trial of the Major War Criminals, Part 22.
Besides, it is centred on the parties to the criminal trial – namely, on one hand, the prosecutor and, on the other hand, the accused or the defence—and typically downsizes the role of victims to that of third parties in the proceedings. The position of the victims in the judicial process is especially marginalised during genocide trials, where the systematic and structural nature of the crime of genocide means that the competent tribunal looks at the pattern of conduct and intent to target a given group as a whole rather than at the individual experience of victims, who are often kept anonymous, including from the accused and defence. Whereas this is partly inherent to the definition of genocide, the same considerations also widely apply to other international crimes.

International criminal law attempts to square the circle of accountability and redress for international crimes, which mostly constitute gross violations of human rights in conflict situations. As a result, it tries to breach the gap between the traditional human rights and criminal paradigms, by endorsing the aims of both branches of the law and fulfilling their conflicting requirements. It thereby creates a hybrid regime, which is partly punitive and partly compensatory. This is evidenced in the statutes, rules of procedure and evidence, and case law of the ICTY and ICTR; which are considered to be the first “truly international” criminal tribunals for the prosecution of persons responsible for violations of international humanitarian law and gross human rights abuses.\(^2\)

In the absence of strong pre-existing normative indications in this respect, the ICTY has tried in several instances to clarify the “purposes and objectives” of the sentences imposed on convicted individuals. In a misguided attempt at exhaustiveness, it has lumped together “retribution, protection of society, rehabilitation and deterrence” of the accused and other persons alike. Retribution has been -in a rather evangelical vein- renamed “just deserts”, while deterrence is sometimes mentioned under the label of “prevention”. In a competing account of its sentencing functions, the Tribunal emphasises “public reprobation and stigmatisation by the international community”; which partakes more to the classical symbolical vision of penalisation. It also recurrently brings up the fight against impunity and further claims as ultimate targets of its mandate the end of infractions to humanitarian rules, redress, “appeasement” for the victims and their relatives, reconciliation

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\(^2\) ICTY, Tadić, IT-94-1-T, Opinion and Judgement, 7 May 1997, § 1.
and contribution to the peace process in the former Yugoslavia.\textsuperscript{3} The goals enumerated vary from one judgement to the next and none refers to this list in its entirety. Far from resolving tensions with other sets of norms, the overambitious and patchy adherence to a multiplicity of largely irreconcilable aims and their lack of ranking create further clashes inside the penal paradigm itself (Damaška, 2008). Interestingly, the Tribunal appears to be aware of the mutually exclusive character of some of its self-appointed missions.\textsuperscript{4}

However, the Statute, Rules of Procedure and Evidence, and more limited case law of the ICC push the same all encompassing logic even further. In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly,\textsuperscript{5} following resolutions on the topic by the United Nations Human Rights Commission and Economic and Social Council,\textsuperscript{6} similarly promote a mixed approach between a restorative victim–oriented perspective and penal avenues. Even taking into consideration the fact that individual victims voice various expectations, resolving the ensuing conflicts requires some elucidation of the actual role of criminal justice in international law and its position in relation to the fundamental rights of all involved parties.

\textbf{Fairness to all parties to the proceedings}

Although they have not been fully exempted from charges of partiality, the two \textit{ad hoc} tribunals and the permanent court were not meant to be only concerned with the punishment of the atrocities committed during armed conflicts. Theoretically, at least, they were supposed to be equally anxious to try the defendants in conformity with international human rights rules, as


\textsuperscript{5} General Assembly, \textit{Resolution 60/147}, 21 Mar. 2006, UN Doc., A/RES/60/147.

underlined in several ICTY decisions. To this effect, they have constructed an elaborate set of procedural guarantees, aimed at protecting the rights of individual accused, witnesses and victims alike. In spite of the difficulties entailed in respecting the conflicting interests of these different categories of individuals, the underlying idea is that a just trial means fairness to all parties.

The rights of victims can be divided in two categories. The first group facilitates the victims’ participation in the proceedings and makes possible for them to receive some form of satisfaction or reparation. Before the ad hoc tribunals, they cannot claim any compensation, aside from the restitution of their property. If the accused is found guilty, they may then bring an action before national courts or other competent bodies, in order to obtain reparation for the damages, pursuant to the relevant national legislation; which encourages forum shopping. By opposition, the ICC Statute foresees that, when their personal interests are affected, the Court shall permit their views and concerns to be presented by their legal representative. It may also order the award of reparations – including restitution, compensation and rehabilitation – by a convicted offender or through the trust fund established for this purpose. The ICC has drafted a strategy in relation to victims and the question of its impact on “victims and affected communities” was part of a stock-taking exercise during the ICC Review Conference in Kampala. The second group of rights provides support to victims, through the creation of a victims and witnesses unit within the registry, and protects them against intimidation or aggravation of their traumas. The measures adopted in this

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7 ICTY, Tadić, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, §§ 4 and 46; Delalić et al., IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 Sept. 1997, § 60.
8 See, for a detailed analysis: ICTY, Haradinaj et al., IT-04-84-A, Judgement, 19 July 2010, §§ 14-50.
9 ICTY Rules of Procedure and Evidence, Nos 105-106.
10 ICC Statute, Articles 68, 75 and 79; ICC Rules of Procedure and Evidence, Nos 89-99.
13 ICTY Rules of Procedure and Evidence, No 34.

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view are most likely to impose restrictions on traditional fair trial guarantees and it has even been remarked that they necessarily impinge upon the rights of the accused, thereby constraining judges to balance the conflicting claims (Rigaux, 2003: 779-781).

In drafting its rules of procedure and evidence, which are applicable before both *ad hoc* tribunals, the ICTY has balanced two sets of objectives: the protection of victims and witnesses, in order to enable them to testify and facilitate the trial, and the respect of the rights of the defence.\(^{15}\) International criminal tribunals encounter serious difficulties in securing the attendance of witnesses, because of their inability to control any given territory and the risks involved for the personal safety of those willing to testify. Such dangers are increased by the highly political context of most crimes judged before these courts and their close relation to somewhat unresolved ethnic tensions. Accordingly, the power to examine prosecution witnesses and the publicity of the trial are limited, when they conflict with the safety or the rights of victims and witnesses. Five types of measures protect victims and witnesses from abuses: measures preventing their identification by the public and the medias; avoiding the aggravation of their actual traumas by further confrontations with the accused; not disclosing their identity prior to the trial; ensuring their anonymity *vis-à-vis* both the accused and the defence; and, lastly, guaranteeing their physical protection when in or around the tribunal’s premises (Mackarel, 1999: 190). Specific additional provisions are aimed at averting worsening the sufferings experienced by victims of sexual assaults and take into account the particular vulnerability of these victims when confronted with their aggressor or the memory of the attack (Chinkin, 1997: 78-79; Kress, 2001: 355; Kutnjak Ivković, 2001: 286-287).

Article 14 of the ICTR Statute refers to the rules set by the ICTY and allows the judges to amend them “as they deem necessary”. Both tribunals regularly modify the existing rules to face the challenges that progressively arise, even though it violates the principle of legal certainty to the prejudice of the rights and interests of accused and victims alike. The rules applicable in front of the ICTY have been amended no less that forty-six times, while those in force before the ICTR have been revised nineteen times. The ICC Statute and Rules of Procedure and Evidence largely borrow from the norms applicable before the *ad hoc* tribunals but are more protective of the rights of the accused.

\(^{15}\) ICTY Statute, Articles 15 and 21-22.
Following Article 64 § 2 of the Statute, “the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. Accordingly, in case of conflicting obligations, the rights of the defence should trump the interests of victims and witnesses. Although the ICC has still not pronounced itself at length on the articulation of the rights of the different categories of individuals, the practice and case law of all three tribunals have unfortunately failed to protect the rights of any of them effectively.

**Shortcomings, challenges and squaring circles**

*Respect and protection of the fundamental rights of all parties*

On one hand, the inscription of the rights to life and integrity of the victims and witnesses within the rules of due process has led to serious encroachments upon the defendants’ rights. It did not only affect the publicity of trials and the cross-examination of witnesses. It also motivated the endorsement of judgements taken on the basis of a single uncorroborated testimony,\(^{16}\) the admission of written summaries of witness statements drafted by prosecution investigators and adjudicated facts from previous trials,\(^{17}\) extended periods of detention on remand and stricter conditions on provisional release, even in case of appeal upon acquittal,\(^{18}\) and the possibility of balancing human conditions of detention against the imperatives of security and order.\(^{19}\) Such a stance is regrettable and was not inevitable. Indeed, the protection of the rights of all parties could be adequately guaranteed inside the human rights paradigm, by recognising that the scope of the rights of the accused is circumscribed by the ban on their abuse; here, by the interdiction of victims or witnesses intimidation and other violations of their rights.


\(^{18}\) The relevant decisions have been criticised for violating the rights of the accused and creating “a presumption of pre-trial custody” (Arajärvi and Jacobs, 2008: 148-149; Sluiter and Zahar, 2008: 286-289, 303 and 340-341).

On the other hand, the measures adopted did not protect victims and witnesses from reprisals. Numerous witnesses have been killed before reaching the *ad hoc* tribunals or the permanent court, to prevent them from giving their testimony, or after they had testified, to take revenge on them (Morris, Scharf, 1998: 407 and 535-536; Mrkalj, 2000: 134; Štrbac, 2000: 60). In addition, the media sometimes exercise pressure to dissuade witnesses from testifying against “what the prevailing state of mind considers proper”: Stipe Mesić, a witness in the Blaškić Case, was virtually lynched by Croatian newspapers that had ‘mysteriously’ managed to get a transcript of his testimony (Prodanović, 2000: 63) and a file for contempt of court against the guilty journalists and responsible state officials was overlooked by the Tribunal.\(^{20}\) Similarly, the ICTY has responded extremely mildly to the misuse of Rule 96 – on the burden of proof in rape cases – by defence counsels, inquiring about victims’ previous abortions and their use of contraceptives (Nikolić-Ristanović, 2000: 58-59). These abuses have led to amendments of the relevant rules and contempt proceedings have been initiated in later cases where the accused publicly disclosed the identity of anonymous witnesses.\(^{21}\)

Still, potential witnesses are easily prevented from testifying out of fear of public attacks and harassment or threats to their own security and the life of their relatives back home. Furthermore, similar terrorisation has not been reported during international proceedings in state-liability cases or in front of civil courts. In any event, one solution to this dramatic problem would be to grant political asylum to endangered persons and their family. For rape victims, this solution is also in accordance with the recognition of asylum based on gender persecution under the United Nations Refugee Convention (Fitzpatrick, 1994: 550-551; Macklyn, 1995). However, relocation and settlement in a third country is solely done in rare instances and witnesses may still refuse such a protection (Pejić, 2000: 69; Štrbac, 2000: 61).

Moreover, the ICTY and the office of the prosecutor have actively contributed on several occasions to a serious aggravation of the already dire situation of insecurity facing many victims and witnesses. The trial of leaders of the so-called Kosovo Liberation Army, where the climate of intimidation and terrorisation was so pervasive that the Appeals Chamber judged it “far


\(^{21}\) ICTY, *Šešelj*, IT-03-67-R77.2; IT-03-67-R77.3; IT-03-67-R77.4.
from normal” and ordered a retrial,\textsuperscript{22} provides an emblematic illustration of the dangers raised by the prevailing unawareness of the international actors involved towards the very actual risks faced by people willing to testify. Instead of adequately tackling this problem, the Trial Chamber disclosed sensitive confidential information to the general public, in breach of protective measures previously adopted; thereby, wilfully endangering the lives of protected witnesses.\textsuperscript{23} Besides, it initiated contempt proceedings against a crucial witness for the prosecution who had repeatedly refused to answer questions out of fear.\textsuperscript{24}

In addition to their apparent lack of concern for the risks to which they expose witnesses, international judges regularly discard the legitimate claims, motivations, allegiances and dramatic or traumatic experiences of victims, when supervising their examination or cross-examination by the parties to the trial. Aside from the serious mishandling, harsh questioning and further victimisation of vulnerable persons, during what has been described (even if with some caveats) as “silencing hearings” (Dembour, Haslam, 2004), they tend to treat abjectly people unwilling to testify under certain conditions, be it because of threats or out of personal loyalty and patriotism.\textsuperscript{25} Finally, several witnesses in the Šešelj Case have claimed to have been pressured or intimidated by investigators for the prosecution and complained about irregularities during their preliminary interviews, although the veracity of these claims has not been established.\textsuperscript{26}


\textsuperscript{24} ICTY, \textit{Haradinaj et al.}, IT-04-84-R77.1, \textit{Order on Contempt concerning Shefqet Kabashi}, 5 June 2007.


\textsuperscript{26} ICTY, \textit{Šešelj}, IT-03-67-T, \textit{Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj’s Motion for Contempt against Carla Del Ponte, Hildegard Uertzretzlaff and Daniel Saxon,
Individual accountability for collective crimes

The problems encountered in securing the rights of all parties before international criminal tribunals are largely due to the hybrid nature of international criminal justice. The punitive character of penal law and its focus on prosecution sidestep the claims and concerns of victims. In front of the two ad hoc tribunals, their participation to the proceedings is purely ancillary to the interests of the prosecution. The situation in front of the ICC is better in this regard. However, because of the length of the on-going trials, relevant practice and case law have still to determine how effectively the relevant provisions vindicate the rights of victims. In particular, whereas the Court has recently pronounced its first conviction, it has not yet had the opportunity to rule on the victims’ right to reparation; which will be adjudicated upon during the sentencing phase of the trial.

More fundamentally, from a liberal right-based perspective, the main rationale and claim to legitimacy of a criminal regime is to be found in deontological or ‘desert’-based considerations (Hart, 1958: 448-455). This conception of the object of penal justice, entrenched in the general principle of personal culpability, is widely recognised by domestic legal orders. In this view, criminal responsibility requires an element of mens rea; that is, the criminal intention to commit the imputed infraction. The vast majority of national systems have adopted the concept under one form or another, often as a presumption, with the result that it most likely falls under the scope of Article 38 of the Statute of the International Court of Justice, in its quality of general principle of law (Schabas, 2003b: 1015). In consequence, the question of the responsibility of individual perpetrators poses itself for the prosecution and punishment of international crimes. And there lies the rub.

Typically, international “crimes are manifestations of collective violence and are described by lawyers as structural or system criminality” (Drumbl, 2007; Smeulers, 2008: 971-980). In addition, they mostly purport to obtain or keep political power. Accordingly, the penalisation of specific individual actors for this archetypical form of ‘group’ offence constitutes a paradox. Besides, states’ apparatus usually sanctions, if it does not encourage, the perpetration.
of international crimes; which casts the particular offenders in the part of simple law-abiding executioners of professed ‘crimes of obedience’ (Drumbl, 2007; Smeulers, 2008: 971-980). This leads to the wider philosophical question of how to ascribe individual accountability in totalitarian settings or even in ordinary democracies, where national residents did not choose nor necessarily agree with the actions and policies adopted by the government supposed to represent them.

Most legal orders traditionally reject the idea of collective criminal responsibility, and rightly so, as a breach of the principle of personal culpability. Yet, because of the banality of the evils committed under extreme circumstances (Arendt, 1963; Smeulers, Werner, 2010) and the collective dimension of international crimes, the attribution of full responsibility for these offences to ordinary citizens is not easily brought together with the retributive and symbolical or expressive purposes traditionally associated with criminal justice. However, the challenge is not adequately met by any criminal alternative either. Obviously, just picking a few scapegoats to bear responsibility for the actions of an entire regime similarly contradicts its ethical underpinnings. It is too selective to fulfil an effective deterrence policy or end impunity and the arbitrariness (and randomness) of such an indictment process vitiates the most basic conditions of fairness; ultimately, giving rise to justified charges of partiality and, thus, undermining any claim to legitimacy of the following trials. In fact, “the need to select challenges the very concept of fair justice and retribution” (Smeulers, 2008: 982). This criticism applies even if the pool of prosecuted individuals is broadened, as in front of hybrid or national courts compared to international ones. In particular, most of the physical perpetrators who actually pulled the triggers might not possess the required mens rea to be held personally culpable, while commanders and individuals who occupy higher social positions do not necessarily get involved in the design and preparation of the offences. Furthermore, responsibility is never to be assumed or presumed in penal matters, which nullifies attempts at making people ‘strictly’ liable or accountable for international crimes on a purely functional, vicarious or other ‘objective’ basis.27

Short of abandoning altogether the idea of individual criminal responsibility for grave violations of international norms, this leaves the

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27 In this respect, the commission of a crime in a state of voluntary intoxication does not qualify as a case of strict liability, since the intoxication itself results from a voluntary act of the individual.
original quandary without any fully satisfying solution and international lawyers with the task of squaring the accountability circle in relation to individual offences that essentially constitute acts of states or other similar large scale organisations. Instead, due to the collective or societal character of most of the atrocities committed during armed conflicts and upheavals, international prosecutors and criminal courts have relied heavily on alternative and sometimes unorthodox doctrines to attribute personal responsibility for these offences to other actors than their direct perpetrators. These new modes of liability have for main purpose to lower the \textit{mens rea} threshold required as an evidence of the criminal intent. At the limits, they allow to impute the responsibility for the crimes on trial to people who neither committed nor intended them, on grounds of mere negligence or even solely on account of the foreseeable character of the infractions (Guellali, 2008: 407-408), by an expansive interpretation of the notions of command responsibility and ‘co-perpetratorship’.

In this frame, the concept of ‘joint criminal enterprise’, developed by the Appeals Chamber in the Tadić Case \textsuperscript{28} and tellingly nicknamed ‘just convict everyone’ (Badar, 2006; Schabas, 2006: 429), provides a most extreme example of collective responsibility and guilt by association. Conjuring up the specificity and collective character of international crimes, the ICTY simply created the doctrine, by means of a purposive interpretation of several dispositions of its statute. It has led to discard the \textit{dolus specialis} required for the commission of genocide, in several instances,\textsuperscript{29} and knows of no geographical, structural or temporal limitations.\textsuperscript{30} Accordingly, any member of an army or civilian institution could conceivably be held accountable for the whole range of offences perpetrated by this organisation nation-wide (Danner, Martinez, 2005: 137; Robinson, 2008: 939-943; Robinson, 2010: 119-124 and 139-140). This confronts international lawyers with the necessity to choose between, on one


hand, a judicial system based on the rule of law and compliance with general criminal law principles or, on the other hand, forsaking any such claim, the police ruled “administrative elimination of wrongdoers by command of those in power”. Finally, the doctrine proves equally wrong from a teleological perspective: it necessarily results in “discounted convictions” (Schabas, 2003b: 1033-1036), which trivialise the guilt of the accused and do not vindicate the claims of the victims, and it risks generating further violence in the region.

**Conclusion: State liability and restorative justice as a way forward**

Addressing the various concerns mentioned above might involve abandoning the criminal approach or, at least, developing parallel adjudication strategies. Two promising alternative approaches that victims of international crimes have recently followed in front of domestic courts are worth investigating. First, states’ liability can now be invoked for internationally wrongful acts, even if through other avenues than penal justice, while states’ criminal responsibility and their subjection to the ICC’s jurisdiction have been defended, *de lege lata* and *de lege ferenda* (Quirico, 2005). In two cases brought up by relatives of people killed in Srebrenica, a national court judged the Netherlands liable for the fate of several individuals whom Dutchbat soldiers had evicted from their compound after the fall of the enclave.

Secondly, more individuated compensatory and restorative mechanisms, grounded in tort law, contract and restitution, have been advocated as an alternative means of solving the current conundrum (Drumbl, 2007: 195-196).

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31 SCSL, Norman et al., SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction - Child Recruitment, 31 May 2004, Dissenting Opinion of Judge Robertson, § 14.


See also, on the link with further violence: ICTY, First Annual Report, 28 July 1994, UN Doc., A/49/342, § 16.


In this frame, a French tribunal found Radovan Karadžić and Biljana Plavšić guilty of wartime abuses against a Bosnian family, who had fled to France after a 1992 attack of their home in Foča, and awarded some monetary compensation to the plaintiffs.\textsuperscript{35} Furthermore, the United States Alien Torts Claims Act permits trials, before American civil courts, for compensatory and punitive damages, as well as redress for genocide, war crimes and gross human rights violations. It was, first, successfully brought into play against a Paraguayan policeman responsible for the death under torture of the son of a political opponent to the regime.\textsuperscript{36} More recently, it has also been used against Radovan Karadžić, on the basis of claims relative to genocide, war crimes, summary executions and other wrongful killings, torture and inhuman and degrading treatments, rapes, enforced prostitution, forced pregnancy and childbirth, and various forms of assaults and battery.\textsuperscript{37}

While the recognition of state’s responsibility constitutes a better answer to the dilemma raised by the impossibility to totally reconcile the imperatives of the fight against impunity with the requirement of an actual individual responsibility, in the sense that it does re-places the liability at the collective level where it has originated, it risks creating at the same time a collective guilt complex at the national level, of the type experienced by Germany after the Second World War. Moreover, international criminal law is premised on the contrary assumption that only individuals can commit crimes, and not abstract entities. In consequence, the best available option becomes a switch of emphasis from purely penal to compensatory solutions, inherited from civil liability adjudication.

Whilst erasing the strictly criminal aspect of the ensuing proceedings, this alternative presents the significant advantage of perfectly fitting in the human rights paradigm and further adopting its logical implications at the inter-subjective level, repositioning the victims at the centre of the proceedings. Indeed, from a strict human rights viewpoint, the avenue of civil liability and corrective justice followed, for instance, by the United States Alien Torts Claims Act is to be preferred to criminal proceedings. On one hand, it allows bypassing the already mentioned insurmountable challenges raised by

\textsuperscript{36} United States Second Circuit, Filartiga v. Pena-Irala, 30 June 1980.
the ascription of personal responsibility for structural crimes and, on the other hand, it permits to compensate adequately the victims of the abuses. It gives them a more important place in the process and the possibility to voice their concerns and grieves in a more appropriate forum than a penal trial. In this respect, the General Assembly’s Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law list, under the broader heading of ‘reparation for harm suffered’, provides for five restorative techniques: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.38 To conclude, although the proposed solutions erase the strictly criminal aspect of the proceedings, they manage to square the circle of international justice by reconciling the imperatives of accountability and redress.

Bibliography


38 General Assembly, Resolution 60/147, 21 Mar. 2006, UN Doc., A/RES/60/147, Articles 15-23.


Prava žrtava, krivična dela protiv međunarodnog prava i restorativna pravda: kako povećati nivo odgovornosti i obeštećenja za međunarodne zločine?

Međunarodno pravo se u sve većoj meri fokusira na krivične pristupe u bavljenju prošlim kršenjima ljudskih prava. U ovom smislu, uloga žrtave se često marginalizuje, čak i potpuno zanemaruje, dok se žrtve ponekad i dalje viktimiziraju. U radu se predlaže da problem u velikoj meri leži u kaznenom karakteru krivičnog zakona i njegovom fokusu na krivično gonjenje. Rad se bavi nedostacima ovog pristupa i sugeriše moguća rešenja. Dve alternative koje obećavaju vredne su razmatranja. Prvo, država može biti pozvana na odgovornost za međunarodne zločine kroz druga sredstva osim kaznenih mera. Drugo, više individualni kompenzatorni i restorativni mehanizmi, bazirani na građanskim procedurama, ugovorima i restituciji, pomeraju u stranu pomenute tenzije. Oslanjanje na mere tradicionalnog horizontalnog privatnog prava predstavlja značajnu prednost savršenog uklapanja u paradigmu ljudskih prava i ponovnog dovođenja žrtve u centar postupka.

Ključne reči: međunarodni zločini, ljudska prava, restorativna pravda, odgovornost, naknada.