Victims of ‘private’ crimes and application of human rights in interpersonal relations

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International human rights law has been challenged because of its alleged inability to safeguard the rights of the most vulnerable victims of violence. Whereas in real life they are often marginalised and effectively left without adequate protection, this is not to be attributed to the absence of an appropriate normative framework but rather to the contempt, lack of enforcement and systemic neglect of their claims. This paper proposes to find a ‘cure’ inside international human rights law, by strengthening the mechanisms that permit a horizontal application of human rights standards in private relations. The paper is divided in four sections. The first section describes the problematic at hand, focusing in particular on violence against women and children. The three subsequent sections then analyse the avenues open to victims in order to claim a ‘third-party’ application of human rights treaties against non-state actors who have violated their fundamental rights.

Keywords: private crimes, human rights, third-party application, redress.

Introduction

The paper investigates the horizontal application of international human rights norms in interpersonal relations between private actors, so as to provide protection and redress to the victims of ‘private’ crimes. It is divided in four sections. The first section describes the problematic at hand and the contemporary failure to redress the injustices experienced by vulnerable victims, focusing in particular on violence against women and children. The three subsequent sections then analyse in depth the diverse avenues open...
to victims in order to claim a ‘third-party’ application of human rights treaties against non-state actors who have violated their fundamental rights; hence, providing them with badly needed remedies against the abuses suffered. The second section examines the possibility of giving to international human rights law a direct effect in interpersonal conflicts before national courts, in line with the application of constitutional norms in private law trials. The third section builds on the contemporary case law condemning states internationally for not protecting individuals against violations of their rights by private actors, emphasising the indirect effect of international treaties on private relations. Finally, the fourth section studies the direct applicability of international human rights law to non-state actors in international or transnational forums and domestic trials based on universal jurisdiction. The following analysis mostly focuses on the dispositions adopted at the level of the Council of Europe, because of the specific position they occupy in the legal systems of its member states and the comparative strength of its control mechanisms.

Private crimes, public obstacles and scope of international norms

International human rights law has been challenged, theoretically and in practice, from a variety of contrasting perspectives. One of the most damning criticisms of international human rights norms and institutions is internal to the human rights paradigm; it targets the alleged inability of the international legal order to safeguard the rights and interests of the most vulnerable victims of violence and other abuses, in particular those of women and children, and in its most extreme variant calls for dismantling the entire human rights regime. Since human rights belong to every human being, international human rights law must adopt a conceptual framework that adequately addresses the needs of all human beings (see e.g. Engle, 1992). Regrettably, an abyss separates the high standards that theoretically protect the rights of women or children and practical reality.

This challenge is particularly important in relation to the horizontal application of human rights norms in inter-personal relations, where their most basic rights typically clash with culture, tradition, custom, religion and patriarchy. However, whereas in real life these vulnerable victims are often marginalised and effectively left without adequate protection, this is not to be attributed to the absence of an appropriate normative framework but
rather to the contempt, lack of enforcement and systemic neglect of their legitimate claims to protection and redress. The problem is largely due to states’ deference “to the basic tenets of patriarchy and the legitimacy, if not necessity, of violence as a mechanism of enforcing that system” (Copelon, 1994: 120). Hence, it is important to integrate the relevant international rules in all spheres of society, to “prioritise the rights of [the individual] over those of the traditionally defined community” and to have them sanctioned by the national legal orders (Hossain, 1994: 486-487), to make the state accountable when it enables or fails to prevent private abuses (Cook, 1994), and to entitle the victims to introduce judicial complaints before internal courts and international bodies (Knop, 1994: 159).

While fully acknowledging the urgency of remedying to shortcomings of the current system, this paper proposes to find the ‘cure’ inside rather than outside international human rights law, relying on the emerging case law of international and regional human rights bodies, by strengthening the mechanisms that permit an horizontal application of human rights standards in relations between private actors. The privileged position of human rights in the international legal order has led to their horizontal application to private actors. While this phenomenon and ensuing judicial developments do not specifically target cases of violence against women or children, they can be usefully invoked to effectively advance the claims to redress of the victims. As such, they provide a creative answer to the alleged inability of international norms to account for this particular type of abuses. Only states parties to human rights treaties have the obligation to respect the liberties and entitlements entrenched in human rights conventions. Yet, the preamble to these international agreements and several of their articles imply an absolute application of their terms to interpersonal relations. Besides, the supervisory organs of the various treaties increasingly refer to states’ positive obligations under these conventions. Then, the responsibility of member states can be invoked because of their failure to legislate or take other preventive measures against private violations and by reason of the judgements of domestic courts that legitimise the violations or refuse to compensate their victims.

Invoking human rights provisions against private actions addresses three different issues, which are scrutinised in the next three sections. Whilst the described avenues have a much broader scope than that of violent acts against women and children, these abuses certainly fall under their wider protective umbrella. Consequently, the rest of the paper will analyse the
methods available to apply human rights in interpersonal relations in more general terms, relying on the underlying idea that all victims of private violations can then resort to these methods in order to obtain compensation for the infringement of their rights. First, one ought to envisage the possibility of giving to international human rights law a direct effect in cases of interpersonal conflicts before domestic courts. Secondly, the judicial tendency to condemn a state internationally for having failed to protect an applicant against violations of her rights by individuals or non-public authorities raises the question of the indirect effect of the treaties on private relations at the international level. Thirdly, the direct applicability of international human rights law to non-state actors in international or trans-national forums cannot be neglected, especially after the recent expansion of international criminal law and the creation of the International Criminal Court. And domestic trials based on universal jurisdiction allow states to prosecute grave human rights breaches committed by non-nationals even outside of their territory.

**Horizontal application of human rights norms in domestic law**

The applicability of human rights conventions to interpersonal relations is primarily a concern at the national level, where they are normally raised. This practice coincides with the general approach to the question in public international law. National courts and tribunals are the primary organs entrusted with the competence and power to enforce international norms on a daily basis (see e.g. Conforti, 1993). More specifically, the sanction of international provisions embodying human rights lies first under the responsibility of national judicial powers. In this light, it has been put forward that the only secure way to guarantee the respect of human rights treaties is to delegate the control of their domestic application to municipal organs (Sciotti, 1997: 15-16). Even though this last claim appears unlikely, in view of the numerous violations of individual rights by public authorities, a first monitoring of their respect at the national level can only facilitate the elimination of private abuses and ought thus to be welcomed.

The European Convention on Human Rights, without possessing the same force as European regulations, benefits from a particular supra-contractual status in international law. This peculiarity has been confirmed by the European Court of Human Rights, in the interstate case opposing
the Republic of Ireland to the United Kingdom. Called “to clarify the nature of the engagements placed under its supervision” by an argument of the Irish government, the Court declared that, “unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states” and that it creates a set of “objective obligations which [...] benefit from a collective enforcement”. Furthermore, it touched upon the problem of its applicability to third parties, by adding that “the Convention does not merely oblige the higher authorities of the contracting states to respect for their own part the rights and freedoms it embodies” but “also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels”.\(^1\) Moreover, several articles of the European Convention on Human Rights offer a sound foundation for the direct effect of this treaty between private persons.

First, the English text of Article 1 disposes that “the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [...] this convention”. The choice of the words ‘shall secure’ rather than ‘protect’ or ‘respect’ translates an idea of absolute effect of the liberties. Secondly, Article 13 of the Convention recognises that “everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. This suggests possible breaches of these rights by other persons than public officials. In addition, the notion of effective remedy alone obliges states to provide domestic recourses to any victim of public or private infringements of her rights. Besides, the availability of remedies against breaches of human rights is not only entrenched in Article 13 but also in the core of each particular provision. Accordingly, the European Court of Human Rights judges that failure to investigate individual claims of violations of Articles 2 and 3 of the Convention or to condemn the persons guilty of these acts constitutes in itself a breach of the Convention, independent of their actual perpetration or provocation by state actors.

Article 17 pleads even more fervently for a direct application of the Convention between private persons. By stating that “nothing in this convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction

\(^1\) ECHR, Ireland v. UK, 18 Jan. 1978, § 239.
of any of the rights and freedoms set forth herein or at their limitation to a
greater extent than is provided for in the Convention”, Article 17 bans expressis
verbis all abuses of protected freedoms and entitlements by public and
private actors alike. This prohibition imposes on individuals the obligation
to refrain from liberticidal activities and obliges them, consequently, to
respect the basic rights of other people. Likewise, Articles 6 § 1, 8, 9, 10 and
11 of the Convention, Article 2 § 3 of the Fourth Protocol and Article 5 of the
Seventh Protocol admit particular limitations in order to protect the rights
of others. Subsequently, the rights to public trial, privacy and family life,
religion, expression, association and assembly, free movement and equality
of both spouses in relation to their children can solely be exercised in full
consideration of other persons’ liberties and entitlements.

Finally, the wording of the articles that consecrate individual rights
decisively argues in favour of an interpersonal application of the Convention;
by specifying either that “everyone has the right” or “shall be entitled
to” something, or that “no one shall be” the object of a certain abuse. This
choice of formulation accentuates, instead of states’ obligations, the idea of
subjective rights opposable to everyone. The 2011 Istanbul Convention, which
has not yet entered into force, goes even further and provides for changes in
the perceptions and prejudices of private actors.

A similar application of human rights norms in interpersonal relations
can also be deduced from the text of the conventions adopted by the
United Nations and the Organisation of American States, as well as from the
positions expressed by the organs in charge of monitoring their respect. The
International Convention on the Elimination of All Forms of Discrimination
Against Women constitutes the most activist international text regarding the
horizontal application of human rights norms in interpersonal relations The
Preamble of the Convention pleads for a transformation of the existing society
and the traditional gender roles. This progressive program is confirmed by
different provisions of the Convention.

Article 2 observes that “states parties condemn discrimination against
women in all its forms” and “agree to pursue by all appropriate means and
without delay a policy of eliminating discrimination against women”; an
obligation reinforced by Articles 3 and 24. States are bound to use all available
means at their disposition to suppress discrimination by private actors.
They are responsible for breaches of the Convention by individuals, groups
or organisations and they are supposed to penalise them. In practice, states
are thus liable to compensate the victims of discrimination and adopt civil or criminal penalties against the offenders. In addition, Article 5 requires eliminating prejudices and stereotypes, even if they are culturally or religiously rooted. In consequence, reliance on established customs and practices cannot be accepted any longer as an excuse for failing to defend human rights and non-interference with the ‘personal affairs’ of a given community violates the Convention. However, this last requirement would benefit from being qualified, taking into account the actual experiences, views and perceptions of the women living in the targeted communities. Finally, the United Nations Committee responsible for the protection of women’s rights adopted a general recommendation on violence against women, banning all such acts, whether public or private.²

**Indirect effect between private persons at the international level**

Third party application of international norms is not restricted solely to domestic courts and tribunals. On the contrary, it is much discussed at the level of the Council of Europe. Whereas individuals may not be cited in Strasbourg for violation of other persons’ rights, their breaches of international human rights law receive an indirect sanction by summoning the state involved. A double question arises at this level: the obligation of individuals to respect human rights, and the corollary issue of states’ international liability for infringements committed by their citizens or other people residing on their national territory. This second part of the question would then allow, indirectly, horizontal application of the Convention, by putting pressure on states and forcing them to adopt legislation or take judgements protecting private persons from each other. The extent of states’ accountability for the deeds of non-public authorities needs to be assessed carefully, though, since the actions of some private actors, like terrorist organisations, may prove extremely difficult to control, deter or influence.

First and foremost, in general public international law, states’ responsibility may be engaged not only for actions but also for omissions,

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as recognised by several decisions of the International Court of Justice. In consequence, a state may be found guilty for not having taken all appropriate measures to prevent or repress international offences, including breaches of human rights norms, and for failing to provide adequate remedy to the victims of these crimes. Indeed, as soon as their liability is confirmed, states themselves are presumed to have violated the infringed rights. Secondly, aside from the classical recognition of states’ international responsibility for omissions, the doctrinal theory of ‘state complicity’ establishes that states are accomplices and, thus, accountable whenever their domestic courts and tribunals tolerate the execution of a contract that includes discriminatory clauses (Lauterpacht, 1950: 154-160 and 340-341). Third, due to the wording of Article 13 of the European Convention, states cannot escape liability by claiming that it was a private person that perpetrated the infraction. Fourth, in relation to the most fundamental rights to live and not to be tortured, Articles 2 § 1 and 3 of the European Convention foresee the prosecution of any infringement of these provisions (see infra). Consequently, it appears that states may be judged responsible for individuals’ actions violating human rights, though the extent of their liability remains uncertain.

The organs of the Council of Europe have repetitively affirmed that states are not merely supposed to abstain from violating fundamental freedoms and entitlements but are also required to take positive measures for them to be protected effectively, some of which relates to the conduct of private persons (see e.g. Warbrick, 1983: 95). The European Court of Human Rights has decided that Articles 2 and 3 of the Convention protect rights so important that the respect of these provisions imply an effective domestic investigation of any claim of their breach. As a result, it is more willing to find a breach of the Convention when the domestic investigation of the complaints was either inadequate or purely inexistent. In addition, it affirmed that the duty to provide an adequate remedy under Article 13 of the Convention requires the institution of criminal proceedings in such grave cases and cannot be fulfilled either by mere civil action against the state or by simply indemnifying the victims or their families. So, the importance of inalienable rights, including those enounced in Articles 2 and 3, justifies increased duties under Article 13. And this duty of investigation benefits from the same absolute character as states’

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negative obligations under Articles 2 and 3 of the Convention.\(^4\) In particular, the European Court of Human Rights condemned the United Kingdom under Article 3 for having left unpunished the private mistreatment of children.\(^5\)

This new interpretation of states’ obligations under the Convention, derived from the notion of positive duties, has been praised for its creativity and for the importance it attaches to an effective protection of fundamental rights \textit{in concreto}. The assertion that “some human rights violations should properly be the subject of criminal proceedings against the individuals involved, as opposed to simply civil action against the state which they represent” (Livingstone, 1999: 74), coupled with the imposition on public authorities of the duty to investigate and punish abuses committed by private individuals, implies that basic rights ought to be fully horizontalised and respected by public and private persons alike. In addition, aside from state responsibility for private attacks in case of public complicity or official complaisance, charges imposed on a government under Article 2 “may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”. However, the European Court of Human Rights interprets this requisite “in a way which does not impose an impossible or disproportionate burden on the authorities”.\(^6\) In this context, the Court has traditionally shown reluctance to condemn states on the basis of their positive duties under Article 2.

**Direct effect between private persons at the international level**

In contrast to the now well-established indirect application of human rights treaties to private relations, their direct effect between individuals and other non-state actors in the international sphere remains largely inexistent. Human rights treaties, and in particular the European Convention on Human Rights, have been applied directly between private persons in front of domestic courts and indirectly through the invocation of state responsibility before


international supervisory organs. In contrast, it is usually assumed that they may not receive any direct horizontal application at the international level. The text of the relevant agreements impose on states international responsibilities or legal obligations and only put them under the scrutiny of monitoring bodies, for the respect of their duties under the treaties they have signed. However, this affirmation needs to be seriously qualified and elaborated upon, in view of the current developments in international criminal law. The recent explosion of supranational criminal enforcement mechanisms, including the extensive case law of the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda and the creation of the International Criminal Court, has changed the situation at this level as well. Another question to be considered in this view is the universal jurisdiction of municipal courts and tribunals over international crimes, including grave human rights violations that qualify as crimes against humanity. As a result of these parallel developments, the prospects for a direct application of human rights norms in interpersonal or other private interactions have significantly improved.

The Inter-American Court of Human Rights addressed this question in its advisory opinion concerning states’ international responsibility for laws that violate the Convention. First, the Court recognised that “international law may grant rights to individuals and, conversely, may also determine that certain acts or omissions on their part could make them criminally liable under that law”. Then, it added that “at the present time individual responsibility may only be invoked for violations that are defined in international instruments as crimes under international law, such as crimes against peace, war crimes, and crimes against humanity or genocide, which, of course, also affect specific human rights”; and that, what regards those crimes, “it is of no consequence that they are committed by enforcing a law of the state to which the agent or official belongs”, since “the fact that the action complies with domestic law is no justification from the point of view of international law”. Thus, “as far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of states and not to that of individuals”. Nevertheless, “if these violations were also to constitute international crimes, they would, in addition, give rise to individual responsibility”.

Most human rights conventions do not foresee actively any punishment for private actors who violate the rights of other individuals. Yet, supervisory organs have dismissed these people’s claims to protection by declaring their applications inadmissible, under Article 35 § 3 of the European Convention, Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights and Article 47 of the Inter-American Convention, on grounds of incompatibility with the provisions of these treaties or of abuse of the right to petition. They have also rejected them as abusive under Article 17 of the European Convention, Article 5 § 1 of the Covenant and Article 29 (a) of the Inter-American Convention. In addition, they interpret the scope of protected freedoms and entitlements in a manner compatible with the respect of other people’s rights. Accordingly, the European Court of Human Rights considered that the only ‘philosophical convictions’ that qualify as such are those that are worthy of protection in a democratic society and, hence, respectful of human dignity.

A perfect and complete direct horizontal application, at the international level, would require a modification of the texts of most human rights treaties or the adoption of new additional protocols. In any event, the necessity of such a development remains questionable in the light of the actual jamming of the Strasbourg process by the high number of vertical applications. Besides, the combination of existing control mechanisms already allows international judges to press domestic authorities to apply international human rights norms in inter-individual disputes, by condemning states whose judiciary does not recognise them such direct effect. Of course, this does not guarantee that states will obey the international case law or that violators will be punished. Concerning this last point, it should be reminded, though, that the primary purpose of human rights treaties is the protection of fundamental freedoms and entitlements ex ante, rather than the punishment ex post of the persons or authorities guilty for their violation. Lastly, some international conventions already have a direct horizontal effect and allow bringing individuals on trial.


either before international bodies or before domestic courts and tribunals, by relying on universal jurisdiction clauses. These solutions could be extended to cover human rights violations by private actors, including ‘private’ crimes.

Conclusion

Private violations of individual rights present a challenge for the international legal order and its traditional focus on state actions. Yet, the main function of international human rights law is to effectively guarantee individual freedoms and entitlements against abuses, whether they are committed by public agents or private persons. In this perspective, human rights conventions are general instruments of protection of the norms that delineate the limits of interpersonal relations and not simply the rules that regulate the behaviour of state actors. Accordingly, international human rights law ought to be considered by national courts and tribunals when they judge interpersonal disputes, as well as by other public authorities that adjudicate conflicting claims. In the absence of domestic control over the respect of fundamental freedoms and entitlements, states may be held internationally responsible for the private abuses that the lack of enforcement of their positive obligations under international law has facilitated. On top of this, all international organs condemn the failure to properly investigate claims related to grave human rights abuses and to provide adequate remedies to their victims as distinct violations of these provisions.

Most of the gravest violations of individual liberties are directly sanctioned at the supra-national level by international bodies and are included in the material scope of universal jurisdiction. To begin with, human rights supervisory organs consider that international treaties only protect basic rights as long as they are not exercised in a detrimental fashion and reject other claims as if they were out of their scope or declare them inadmissible. In addition, universal jurisdiction clauses have been introduced in several relevant international agreements. These legal developments provide evidence of the direct application of human rights as side constraints on all actions, independent of the public or private character of the agent. Whereas few cases dealing with specific breaches of women and children rights by private persons have been judged following such lines, a more systematic use of these avenues would greatly improve their ability to obtain redress.
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Žrtve „privatnih“ zločina i primena ljudskih prava u međuljudskim odnosima

Međunarodno pravo ljudskih prava je osporeno zbog navodne nesposobnosti da zaštiti prava najranjivijih žrtava nasilja. Iako su u stvarnom životu oni često marginalizovani i zapravo ostavljeni bez adekvatne zaštite, to se ne sme pripisati odsustvu odgovarajućeg normativnog okvira već nepoštovanju, nedostatku sprovođenja i sistemičnom zanemarivanju njihovih prava. U radu se predlaže da se pronađe „lek“ unutar međunarodnog prava ljudskih prava, jačanjem mehanizama koji dozvoljavaju horizontalnu primenu standarda ljudskih prava u privatnim odnosima. Ovaj rad je podeljen na četiri dela. Prvi deo opisuje trenutnu problematiku, fokusirajući se naročito na nasilje nad ženama i decom. Tri odeljka, koja potom slede, analiziraju opcije koje stoje na raspolaganju žrtvama kako bi mogle da kao „treća strana“ podnesu tužbu za kršenje ljudskih prava protiv ne-državnih subjekata koji su prekršili njihova osnovna prava.

**Ključne reči:** privatni zločini, ljudska prava, primena treće stranke, obeštećenje.