

MAY THE PRINCIPLES OF RESTORATIVE JUSTICE BE APPLIED TO INTERNATIONAL CRIMINAL LAW?

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Abstract

The concept of restorative justice is generally adopted to indicate a specific approach to criminal justice which does not merely punish the offender but aims at restore the equilibrium broken by the criminal offence. This main aim is pursued through a specific path involving both the victim and the offender. It can be considered as a substantial form of *restitutio in integrum* which has the equilibrium and the well-being of the people involved as main objectives. It differs from the classical concept of *restitutio in integrum* as it does not merely try to re-form the objective *status quo*, but the focus is actually on the people involved in the crime at hand, in the belief that the commission of a crime breaks a social equilibrium. This approach aims at restoring the pivotal equilibrium in order to preserve peace and security within the society. Could this method be applied to international criminal law?

International criminal law is characterised by the inhumanity of humans against humans. This inhumanity is not merely the cause of the crimes committed but also the origin of future feuds within the society. The institution of International Criminal Tribunals can provide for verdicts on the breaches of criminal law, but it has not been a sufficient response to ethnic and cultural issues so far. Logically, trials deal with the rule of law, not with social matters, thus tribunals seems to be inadequate in order to really solve the inner problems of situations which end with international crimes such as genocides. An example of the deficiency of the system adopted so far is the Rwandan genocide. Developed between April and July 1994 as the latest clash of cultural syncretism between the Hutu and the Tutsi with approximately 800000 estimated victims, it has been only superficially solved by the decisions of the International Criminal Tribunal for Rwanda (ICTR) instituted by the United Nations with the Security Council resolution S/RES/955. The truth is the ethnic issues on the basis of the genocide never ended and it had an impact on the stability of the whole Great Lakes region.

This evidence shows how it would be important to establish a new method in crisis resolutions able to reveal untold social issues, deal with them involving all the parties concerned and re-create a lasting social equilibrium. The “nightmare” of the *homo homini lupus* which becomes real in case of crimes against humanity cannot be faced looking only at short term solutions. To really defeat the threat of these horrible crimes the international community has to deal with their inner reasons.

Restorative justice, with its attention to individualities and a deep social approach, may be the right method to fulfil this purpose. The following is an analysis of its possible application to international criminal law.

Keywords: Restorative justice, Criminal offence, International criminal law, International community.

1. DEFYING RESTORATIVE JUSTICE

Restorative justice is a model of response to crimes which takes into consideration not merely the criminal offence but also the injury caused through its realisation. Establishing a system in which the main objective is to understand the inner reasons of the breach of law, restorative justice addresses criminal behaviours dealing with the offence *ex se* better than with the offender. However, the offender seems to have a pivotal role in the model being one of the parties involved in the breach of law and its consequences, i.e. the offender and the victim. Umbreit defined restorative justice as a form of justice which “emphasizes the importance of elevating the role of crime victims and community members through more active involvement in the justice process, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation, and problem solving, whenever possible, which can lead to a greater sense of community safety, social harmony,

and peace for all involved”.

Restorative practices have been used as a responsive tool to criminal offences in several judicial systems although in many experiences it has been only partially used focusing on few specific aspects of this process. However, if considered as a whole and specifically removing the aspects collapsing with human rights as the *lex talionis*, restorative justice includes several tools applicable to criminal cases in a fact oriented perspective. The main example of restorative practices is the victim-offender mediation: a meeting between the victim and the offender moderated by a third party, usually a community representative, aimed at conducting an exegetical discussion on the alleged or committed criminal offence. This aspect led several authors to see restorative justice as a humanisation of the judicatory process as it aims at repairing the harm caused and not the breach of law. This should have a positive impact on the perception of justice within the society as it takes the needs of the victims into consideration making the set of criminal sanctions closer to individuals. It may be also seen as a bottom-up approach to criminal justice in opposition to the traditional top-down approach expressed by a well-structured judicial system subject to the rule of law.

This said, restorative justice does not appear as an effective practice for national judicial systems as it may interfere with the rule of law and eliminate the objectivity of criminal law. This is mainly because of three interconnected reasons:

- i) the involvement of the victim and the consideration of his/her needs related to the criminal offence as well as the presence of community representatives acting as mediators may transform restorative justice in a legalised pattern of unlawful revenge;
- ii) the judgment of the criminal behaviour at hand seems to be predominantly moral and it could not be different as the mediators do not necessarily have any legal knowledge, thus it is only apparently a model of criminal justice but it has no characteristic in common with an established judicial system of response to criminal offences;
- iii) as moral values may change from individual to individual and the needs of the victims are most likely to differ in case by case, restorative justice is not able to guarantee the respect of the principle of equality.

However, underlining its social approach and the inclination to combine different interests, it could be interesting to associate restorative justice to international criminal law.

2. COMBINING RESTORATIVE JUSTICE TO INTERNATIONAL CRIMINAL LAW

The problem of the possible response to international crimes has been raised since the interest for human rights developed with the related obligation to protect them. Specifically, international criminal law has been introduced as a response to the crimes committed during the World War II. International criminal law grew as the response to the crimes offending the common conscience of human beings beyond the boundaries of cultures and the borders of States. Yet international criminal law, despite its noble objective and great intentions, raised also several legal problems, i.e. legitimacy, violation of sovereignty and disrespect of the *nullum crimen, nulla poena sine lege* principle, just to name some. The institution of the International Criminal Court (ICC) with the conclusion of the Rome Statute in 1998 only partially solved the aforementioned criticisms. The main problem of international criminal law is that the international community tried to design sanctions punishing criminal offences for human facts which cannot be considered as crimes from a legal perspective, even though there is no doubt they are unbearable for the society as a whole.

The strong interference of society and moral principles in the definition of international crimes leads to the idea of the de-penalisation of international criminal law and a greater involvement of the international community. Analysing international criminal law in deep and excluding any personal and moral beliefs, it does not seem appropriate to judge international crimes through trials. It would be probably better to institutionalise intercultural mediation as a tool for crisis resolution and consider in that *forum* all the aspects that cannot be evaluated in courts.

As a direct consequence of this assertion, one of the possible alternatives to international criminal law could be restorative justice. If on one hand its negative aspects - as the breach of the rule of law and the principle of equality - confer to restorative justice no realistic use within a national judicial system, its positive aspects - as a deeper interest in the needs of society and the attention to fears and beliefs of communities - make of this tool the perfect instrument to uncover the reasons of large scale criminal behaviours. It is clear that international crimes as those typified in the Rome Statute, i.e. crimes against humanity, genocides, war crimes and crimes of aggression, are not merely caused by the so called criminal intent, but imply more intense underlying reasons. In order to maintain peace and security the international community should address those

reasons at their root better than criminalise the acts caused by them.

In this context, the application of restorative justice to international criminal law would perform the functions of establishing a more suitable system of response to international criminal offences avoiding the paradox of judges who cannot be considered as third parties – this is especially related to crimes against humanity as judges are naturally humans, thus they must be considered as judges and victims at the same time in breach of the principle providing for impartial judges in every trial – and adopting lasting solutions dealing with the causes of ethnic and cultural syncretism at the basis of the crimes and not merely with the actions committed.

3. A POSSIBLE FRAMEWORK FOR FUTURE APPLICATIONS

It is difficult to define an international system of crisis resolution based on restorative justice with no empirical data derived from a concrete application of these principles to an existent case, however, it is possible to make some deduction on the basis of a pilot program arranged in the post-genocide Rwanda between 2005 and 2007. The program, named *gacaca* after the lawn where dispute resolution traditionally took place, provided for open-air hearings conducted by traditional judges. It changed in 2007 when retributive justice took the place of restorative one. Its structure provoked a harsh view of restorative justice as it mainly developed as an organised system to impose collective guilt on Hutu exponents.

The structure of the *gacaca* may be summarised in three main features: i) the presence of traditional judges; ii) the conduction of open-air hearings; iii) a final judgment establishing sanctions for the offenders.

These three aspects may be also seen as the causes that led to the failure of the program. Indeed, it seems a mixture of traditional and institutionalised justice and its characteristic are too undefined in one sense or another. The first fail consists in the appointment of traditional judges: as part of the community they interacted with the parties taking also their personal feelings and beliefs to the discussions exacerbating the discussion better than moderating it. Looking at this first aspect, it would be better to appoint external mediators not designed as judges but as cross-cultural interpreter in order to combine the ethnic and cultural issues at hand. They should have no relation with the matter nor the geographic region where the crimes took place and they should always act as *super partes*.

The second fail consists in the conduction of open-air hearings: this element seems to be very similar to an institutionalised trial, but it also involves the whole community making the risk of institutionalised revenge and community shame more evident. If applied to international crimes, restorative justice should be a long process carried on step by step and it should definitely take individualities into consideration. It should start with discussions between the main exponents of the groups involved and then proceed to every citizen involved. It should always be intimate and never public because this is the only way to uncover the real reasons and feeling behind the crisis and go beyond the etiquettes of victim and offender realistically allowing the re-constitution of an equilibrium.

The third fail consists in the judgment *ex se*: indeed, if the final deliverable of restorative justice would be a judgement there is no need of a judicial method different than the institutionalised one. Restorative justice should be an alternative method of response to criminal behaviour, thus if it merely reproduce a trial there is no need for its establishment.

Although it is still difficult to imagine a restorative justice system in international crimes, this framework could be useful to start a debate on what can be done in the future. The main objective of crisis resolution dealing with international crimes should be to really solve the situation, not criminalise the offenders and take no responsibility for the underlying causes.

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