Peace through Criminal Law?

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1. Introduction – On some Flaws of the Criminal Justice Paradigm

In the 1990s, the international community established a variety of international criminal tribunals that were meant to promote peace-making and political transition in situations of gross violations of human rights and armed conflict among ethnical or religious groups. This tendency led to the establishment of two ad hoc Tribunals – for the former Yugoslavia and for Rwanda – and the International Criminal Court (ICC). There was also a proliferation of 'mixed' judicial bodies – in Cambodia, Sierra Leone, Kosovo and East Timor – composed of both national and international judges and enforcing domestic as well as international criminal law. A court that is very similar to these from a legal point of view is likely to soon be established in Iraq.

Moreover, side by side with both ad hoc international courts and mixed courts, e.g. in Sierra Leone, national governments started or promoted procedures of conflict settlement to either replace or supplement criminal trials. A well known instance of this it the *gacaca* system in Rwanda, which, to some extent, matches the model of non-judicial peace-making of the South African Truth and Reconciliation Commission. Another aspect of this trend is the enforcement of the principle of 'universal punishability' of some kinds of war crimes, provided for by the Geneva Conventions of 1949.

Most commentators look very favourably at this rapid and massive development of international criminal justice. The international legal order is quickly adapting to a more and more 'global' scenario, where state sovereignty is declining, new actors are surfacing and Grotius' principle that individuals are not subjects of international law is withering away. Moreover, international criminal justice appears to be a suitable answer to the spreading of ethnic conflicts, virulent nationalism and religious fundamentalism, leading to widespread and gross violations of human rights since the Cold War. From now on, they argue, nobody will be able to think that he or she can start conflicts or stir up nationalist campaigns, leading to genocide, without being tried by a court of justice and pursued by international police. From this standpoint, criminal prosecution may even effectively prevent new wars.

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In comparison with national courts, they argue, international criminal tribunals can prosecute war crimes and crimes against humanity much more effectively. For, domestic tribunals are not very willing to act against crimes lacking relevant national or territorial links with their state. Moreover, international courts are technically much more skilled than domestic courts in ascertaining and construing international law, are more impartial in trying crimes and more likely to apply uniform judicial standards. In addition, as international trials are much more visible in the media, they are more effective in expressing the will of the international community to punish those guilty of serious international crimes, and their sentences perform a clearer function as a public reprimand of those convicted.

These points may be accepted on the whole. However, in my view, the normative structure of international criminal justice remains quite uncertain and confused when compared to domestic law. This is especially so from the point of view of the philosophy of punishment and penitentiary treatment that inspires prosecutors and judges when carrying out their respective functions. What is the purpose of international criminal punishment? Consider the following alternatives. Should it be an exemplary penalty with a strong pedagogical impact? Should it force a criminal to pay for his guilt, and favour his redemption? Should it be meant to be a retributive sanction, as any other form of revenge? Or, rather, should it match the convict's social dangerousness? Should it redress a specific damage or perform a function of general prevention of international crimes, and, thus, ultimately, of war? Should the convict be socially isolated and stigmatized or, on the contrary, should detention be aimed at re-socializing and 're-educating' the convict?

These are by no means marginal questions, because defining the quality of punishment is crucial in determining the purport and purposes of a criminal court. Answering these questions is not made easier by the provisions of the Statutes of the courts or the reports of the UN General Secretary, since they do not adequately address these issues. The Statutes of the ad hoc Tribunals – as well as the Statute of the ICC – simply repeat a very general normative refrain: 'the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.'[1]

The poverty of theoretical reflection on the key issues of the meaning and quality of punishment risks leading to an insufficient or even inconsistent elaboration of the 'general principles' of international criminal law. This underdeveloped elaboration may, in turn, lead to uncertainty and confusion, both in construing rules and the broad trend in the judicial making of substantive and procedural law that characterizes international criminal justice today. The outcome might be inconsistent sentences that are unsuitable to the goals of criminal justice, as Ralph Henham pointed out in this journal.[2] On the basis of a thorough examination of the rationale for punishment in the context of the existing sentencing practices of the ad hoc

1 See, e.g. Art. 24 ICTYSt. and Art. 78 ICCSt.

2 See R. Henham, 'The Philosophical Foundations of International Sentencing', 1 *Journal of International Criminal Justice* (2003) 64–85.

Tribunals, Henham has highlighted the conceptual 'obfuscation and confusion' of the purposes that judges pursue in their sentencing.[3]

This lack of theoretical reflection is all the more worrying because international criminal judges work outside and above the social, cultural and economic contexts within which those being tried acted. They tend to 'de-contextualize' deviant behaviour – as Henham argues[4] – and to punish it without due consideration of both its social motivation and the social environment that should host the convict once he has served his term. In addition, international justice sets itself goals – primarily, the settlement of conflict – that are very far away from those of national criminal justice.

In spite of this, since the Nuremberg International Military Tribunal, Western legal culture has been working out and propounding a simplified conception, too easily premised on the 'domestic analogy', of the relationship between international judicial power, the protection of human rights and of peace-making. This conception has been inspired by an optimistic view of criminal law – a view based on deducing models of punitive and penitentiary justice from the national experience and their mechanical application to the international arena. By the same token, the many questions about such models raised by Western criminology and philosophy of punishment during the 20th century have been disregarded. It may not be inaccurate to speak of a criminal and penitentiary fetishism, rejecting the idea that the punishing reaction to the violation of rights and the explosion of conflicts can be meant *tout court* as 'the paradigm of social reaction'.[5]

2. The Questionable Role of the International Ad Hoc Tribunals

I will not dwell here on the 'mixed' courts referred to above, and I will not discuss the ICC, whose activity is at its very beginning and is already facing serious difficulties. I will focus instead on the two ad hoc Tribunals for the former Yugoslavia and for Rwanda (the ICTY and the ICTR, respectively), since they have a relatively established jurisprudence. As I have mentioned above, besides the task of prosecuting the most serious violations of 'humanitarian international law', they are characterized by their goal of promoting peace. The Security Council, when it established them, relied on the powers bestowed upon it by Chapter VII of the UN Charter, i.e. powers to intervene in case of a threat to the peace or a breach of peace. It is not by chance that both Tribunals were meant to respond to specific geopolitical contexts – the territories of the former Yugoslavia and the area of great African lakes – that had been upset by civil wars where conflicting parties had resorted to such ruthless practices as 'ethnic cleansing' and genocide.

3 See R. Henham, *supra* note 2, at 69 et seq.

4 See R. Henham, *supra* note 2, at 74 et seq.

5 See Y. Cartuyvels, 'Le Droit Pénal et l'Etat: Des Frontières 'Naturelles' en Question', in M. Henzelin and R. Roth (eds), *Le Droit Pénal à l'Epreuve de l'Internationalisation* (Paris: Lgdj-Georgéd.-Bruylant, 2002), at 27.

To 'do justice' in these two cases should have also – or primarily – meant to contribute, through the appropriate means of criminal justice, to the reconciliation of peoples involved in the atrocities and devastation of war. Judges and prosecutors seem to assume as a self-evident axiom that an exemplary punishment of crimes committed by one or both of the conflicting parties may decisively contribute to peace-making: 'peace through criminal law', we might say, after the title of a well known essay by Hans Kelsen. However, this is by no means clear.

The key issue is the relationship between the quality of trials and penalties, on the one hand, and the specific goals of pacifying peoples concerned with and promoting peace in general, on the other. In the following paragraphs, I will summarily highlight some points that, in my view, merit critical investigation.

A. Impunity

A frequently mentioned justification of international criminal justice is the goal of abolishing impunity.[6] The idea is that the most serious war crimes and crimes against humanity tend to remain unpunished because of the connivance, the ineptitude or the lack of concern of national courts. And punishing those guilty of criminal actions in conflict areas is thought to be a key premise of the transition towards a new political regime and, ultimately, peace. It can hardly be denied that widespread impunity is a fact and there is an important link – though not decisive or exclusive – between the political–judicial restoration of social equilibrium and the start of a process of peace-making. However, international criminal justice has not yet proven to be capable of remedying widespread impunity, except to a minor degree and with normative ambiguities.

For instance, as was the case in Nuremberg and Tokyo, criminal prosecution only affects a limited number of individuals, singled out by their bearing a major political responsibility or by their being more directly involved in criminal activities. No selective legal criteria have ever been clearly stated and prosecutors seem to rely on very discretional and intuitive evaluations that, among other things, take such extra-judicial elements into account as organizational weaknesses, insufficient investigative and policing apparatus, and limited financial resources.

In the first six years of its activity, the ICTY prosecuted around 90 people, of whom about 20 have been arrested and roughly as many tried in court. The case of the ICTR is even more significant: by 1999, six years after its establishment, Rwandan state prisons hosted more than 120,000 detainees, whereas the International Tribunal only arrested 38 people, charged with genocide, and only tried five defendants. The number of those responsible for a tragedy where everybody, or nearly everybody, had killed (causing the death of approximately 500,000 people) is likely to be in the thousands. Clearly, under such circumstances, the violation in Rwanda of some basic principles of modern law – habeas corpus, legal equality, the certainty of criminal law – is conspicuous, whereas impunity remains substantially untouched.

6 See, e.g. the Preamble to the Statute of the International Criminal Court: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'

Secondly, the punishing role played by the ad hoc International Criminal Tribunals is peculiarly anomalous. The scope of their jurisdiction has been strictly limited to international offences against *jus in bello*, excluding crimes against *jus ad bellum*, i.e. crimes against peace. In other words, their jurisdiction does not include the crime of aggression – that fell instead within the jurisdiction of the Nuremberg and Tokyo tribunals. Thus, those responsible for one of the most serious violations of international law – the breach of the prohibition of the use of force, the pillar of the UN Charter – are immune from the jurisdiction of these courts or of any other. Absolute impunity still applies to them. Thus, for instance, in 1999 the 'special' nature of the ICTY allowed it to judicially disregard the illegal use of force by NATO on the very territory covered by the Tribunal's jurisdiction. Criminal trials, with their accurate procedural rituals, coexisted with NATO bombings and their 'collateral damages'. Not only did the Tribunal ignore that NATO's political and military authorities were manifestly responsible for a 'crime against peace', but also it could systematically avail itself of NATO armed forces as its own police.[7] This kind of impunity can – and, in the case of Kosovo, did – go against the goal of peace-making attributed to international criminal justice.

B. The Exemplary Nature of Punishment

The exemplary character of sentences has been hailed as an important feature of an international criminal justice system that does not hesitate to prosecute high-level politicians, e.g. state presidents such as Slobodan Milošević. The exemplary character of sentences is seen as showing the superior impartiality and moral authority of the judicial body. Moreover, the exemplary character is thought to be the premise of the pedagogical effectiveness of sentences.[8] Indeed, the ICTY has issued exemplary sentences for their severity (there have been sentences for terms approaching 50 years), for the solemn formality of rites and for the relevance and spectacular character of media communication.

Exemplariness is a typical feature of pre-modern penal systems. Then, the paternalistic–pedagogical standard of the (public) execution of sentences as the political authorities' ritual of self-glorification, and as a means of reinforcing popular feelings of hierarchical dependency, took the place of the ideal of equality before the law.[9] The more 'exemplary' a trial, the more it was degrading and stigmatizing, and the more it led to popular condemnation of an individual who broke collective values and was therefore deserving of a severe and solemn punishment.[10]

The 'exemplary' character of criminal penalties retains elements of that ancestral irrationality which confers a victimizing and sacrificial function on punishment. We might recall the view of René Girard about the 'scapegoat' function played by the

7 See D. Zolo, *Invoking Humanity: War, Law and Global Order* (London–New York: Continuum International, 2002) 120–122.

8 See C. Bassiouni, 'Etude Historique: 1919–1998', *Nouvelles Etudes Pénales* (1999) 2.

9 See M. Foucault, *Surveiller et Punir. Naissance de la Prison* (Paris: Gallimard, 1975) at 36–72.

10 See H. Garfinkel, *Studies in Ethnomethodology* (Englewood Cliffs, NJ: Prentice-Hall, 1967) *passim*; J. Heritage, *Garfinkel and Ethnomethodology* (Cambridge: Polity Press, 1984) *passim*.

sacrifice of a political chief (or an 'internal stranger') in 'primitive' cultures.[11] In situations of social conflict and instability, the punishing rite symbolically embodies the group's sense of guilt and unloads it on the victim, whose sacrifice serves to bring back peace and to regain gods' favours. The aforementioned elements of ancestral irrationality should not enter processes of social reconciliation based on collective deconstruction of the historical unfolding of conflict, on political compromise and constitutional engineering as dialogical and rational 'pacification rituals' aimed at rebuilding the cultural and political identity of a whole country.

As to the pedagogical-deterrent impact of an 'exemplary' international criminal sentence, suffice it to maintain as a significant precedent that Japanese public opinion perceived the Tokyo trial as a judicial parody that satisfied the United States' wish for revenge after the Pearl Harbour attack. Few remember that since 1978, in the temple of Yasukum, the seven Japanese executed by the Tokyo Tribunal are being paid the honours reserved to the martyrs of the Japanese fatherland. Something similar seems to have happened in Serbia, where the television broadcasting of the long trial of Slobodan Milošević apparently had an opposite effect to the one intended. The recent general elections in the Federation of Serbia and Montenegro saw a remarkable success of Milošević's party, and this does not seem to make for peace making in the Balkans.

More generally, it is questionable that the 'exemplary' sentencing of a very limited number of individuals can perform an effective deterrent function against civil conflict and war. It has been argued that international criminal trials after the Second World War have exhibited little or no deterrent power. In the second half of the 20th century, deportations, atrocities, war crimes, crimes against humanity and genocides did not decrease. Several aggressive wars waged by the states who initiated the trials of Nuremberg and Tokyo caused hundreds of thousands of victims. The repressive activity against the atrocities committed in Bosnia from 1991 to 1995, performed by the Hague Tribunal, seems to have had no deterrent effect, for comparable atrocities were committed by all parties to the 1999 Kosovo war. In fact, there is no evidence that the 'exemplary' judicial sentencing of particular individuals – by isolating their responsibilities within highly complex contexts – may have had any impact on the macro-structural dimension of war, by affecting the deep causes of conflicts and armed violence.

C. Retribution

In the essay that I mentioned above, Herbert Henham concludes his critical investigation by arguing that, in fact, though in an implicit and confused way, the sentences issued thus far by the ad hoc international Tribunals were inspired by the paradigm of the *retributive* and *stigmatizing* function of punishment.[12] If this is so, then this situation, probably due to the poor statutory drafting mentioned above, has

11 See R. Girard, *Le Bouc Emissaire* (Paris: Editions Grasset & Fasquelle, 1982) *passim*.

12 R. Henham, *supra* note 2, at 66–69.

another aspect that today makes the practice of international criminal justice ill suited to its goals of social peace making.

The retributive view of punishment is very ancient. It can be traced back to the Bible and was given its most typical form in Catholic medieval theology. This kind of afflictive punitive justice sees deviant behaviour as a breach of an objective order – a violation of the universal harmony of the cosmos. To punish, and to pay for, is to restore the ontological equilibrium undermined by illegal or immoral behaviour. Thus, the deviant individual's suffering has both a 'penitentiary' function – with its effects of subjective purification and redemption – and a 'compensatory' function. From this notion, the 'retributive' idea follows that human justice should impose on the convict a pain matching the 'seriousness' of his guilt. This is – it is claimed – an 'objective' seriousness, measured by absolute standards, ethical and theological in character.

Since the late 17th century, the modern philosophy of punishment has increasingly departed – at least in principle – from this 'afflictive' and 'penitentiary' archetype, and has embraced a secularized view of criminal punishment. There evolved the utilitarian paradigm of social defence and the re-socialization of convicts. Criminal punishment is now meant to neutralize dangerous deviant individuals and to bring them back into the group after 're-educating' them to social discipline and making them harmless. The misery visited on the person convicted is no longer conceived of as expiation, purification or redemption. Today, it seems that any suffering should only consist of the deprivation of freedom during prison and that this suffering should perform a correctional and deterrent function. The memory of past pain should advise the convict against reiterating his criminal behaviour, whereas the social spectacle of the misery imposed upon deviant individuals should lead most citizens to respect those collective rules that the group freely adopted.[13] Thus, the basic rationale behind penalties is not 'retribution': a penalty should match the 'social dangerousness' of a convict and should take into account the evolution of his personality, providing for a number of 'alternative measures' to imprisonment that make the application of penalties flexible.

On the contrary, the *retributive* character of punishment rules out the goal of re-education, is at odds with the concept of alternative measures to imprisonment, rejects the very notion of a flexible application of penalties and does not allow for any form of re-socialization of convicts. It makes prison absolute as a place of custody and affliction and a non-contextual device for excluding and isolating convicts, for stigmatizing them in an exemplary, irreversible fashion. Prison becomes a place of sheer misery – sometimes, of actual physical and mental torture – and violation of a citizen's most elementary rights.

13 In extreme cases, an individual is 'exiled' forever, i.e. kept permanently segregated by the social group, as irreversibly dangerous and unable to be 're-educated'. This is the case of the (*de facto*) permanent internment in a criminal asylum, of life sentencing and death penalty. The latter penalties are (wrongly) thought to be exceedingly effective in deterring all citizens.

It is quite clear, in my view, that the retributive conception of criminal punishment can hardly be reconciled with any project of social peace making.

3. Conclusion

Rebus sic stantibus, international criminal justice does not seem to perform that function of 'transitional justice' for which it has been formally established. This function lies in contributing to settle serious social conflicts through judicial measures. If this function were to be taken seriously, then, in my view, the conception of punishment and of the means for its execution that have so far characterized the action of the ad hoc international Tribunals should be deeply re-thought and revised to account for modern punitive theory.

Sometimes – as in Yugoslavia and Rwanda – the punitive justice of ad hoc international Tribunals may even have contrary effects to those hoped for. This kind of punishment can symbolically reinforce feelings of hostility, and fuel the wish for revenge and exclusion rather than eradicating crime. Indeed, it does not encourage rival parties to agree upon or achieve forms of settlement and mediation aimed at rebuilding the social texture and civil solidarity. This is not to say that international Tribunals, even ad hoc, are never appropriate, provided of course that they operate with an acceptable degree of autonomy and political impartiality. The practice of criminal justice at the end of a civil war, Otto Kirchheimer argued, may be important in limiting political power (or making it limit itself), as an alternative both to general amnesty – which may be often impracticable – and to summary justice, the physical suppression of enemies, generalized revenge and the restart of conflict.[14] This is not to extol and render absolute rites of extra-judicial peace making, or to make a moralistic and rhetoric argument for the virtue of forgiveness. In my view, there are actually *no instruments* that are always good and should always be resorted to whenever possible.

However, the developments of the last decade seem to suggest that any mediating intervention in a situation of post-war transition should be multi-dimensioned and very *articulated*, having the 'requisite variety' to meet the complexity of historical and social dynamics. Both domestic criminal courts and international courts (endowed with complementary jurisdiction) and the rituals of non-judicial or quasi-judicial pacification, rooted in native traditions, should contribute to the process of peace making. In this vein, the very agencies of international criminal justice should achieve the highest possible degree of contextualization. They should endeavour to become part and parcel, at the cultural and legal levels, of the transition process. This they should do, instead of passing judgment from high above, from the heights of a superior instance of morality and legality – inevitably located in Northern Europe or North America – and issuing their indisputable verdicts upon ordinary mortals from there.

14 See O. Kirchheimer, *Politische Justiz* (Frankfurt AM: Europäische Verlaganstalt, 1981), at 607–608.