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International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide

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1. Introduction

Punishment and reconciliation are closely linked. As Hannah Arendt put it in 1958, "men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable".[1] International criminal justice reflects this dichotomy. Since Nuremberg and Tokyo, there is a trend to recognize that the purposes of trials reach beyond retribution and vengeance.[2] International criminal proceedings are increasingly associated with restorative features. At the same time, certain acts may be beyond forgiveness – an argument used to discard alternatives to punishment or as a shortcut to impunity.[3]

The approach towards reconciliation as argument in legal discourse depends on context. Reconciliation has become a policy prerogative to mitigate consequences of identity-based conflicts, in particular internal crises that lack a clear winner.[4] But its focus extends beyond the victim-offender relationship that forms part of the criminal trial. It involves different levels: interpersonal forgiveness and collective dimensions (such as community-based, societal or national reconciliation). It contains retrospective (such as understanding of the past, healing, undoing of wrong) and prospective elements (for example, social repair). It is both a *goal* (an ideal state to strive for),[5] and a *process* "through which a society moves from a divided past to a shared future".[6] It is typically associated with a process of "social learning" and a move beyond negative co-existence and the mere absence of conflict.[7] Justice is only one element, along others such the search for truth, forgiveness or healing.[8]

The role of international criminal justice is modest, but important. International criminal law strengthens the claim that reconciliation should not be conceived "as an *alternative* to justice".[9] It is questionable to what extent reconciliation should be framed as a goal of international criminal justice *per se*.[10] The latter can neither stop conflict nor create reconciliation. A Court can judge, but only people can built or repair social relations. A Chamber cannot order an apology by the perpetrator, nor forgiveness by victims. The liberal criminal trial may require respect of the will of those who do not want to forgive. The experiences in the Balkans, Latin America

1 Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958, p. 241.

2 See Martha Minow, *Between Vengeance and Forgiveness*, Beacon Press, Boston, 1998; First Annual Report ICTY, 29 August 1994, para. 16, UN Doc. A/49/342, S/1994/1007 ("Far from being a vehicle for revenge, it is a tool for promoting reconciliation").

3 See Mark Freeman, *Necessary Evils: Amnesties and the Search For Justice*, CUP, Cambridge, 2009.

4 Keynote address by the High Commissioner for Human Rights at the International Criminal Justice Sentencing and Post-Conflict Societies, Cape Town, 13 October 2011 (https://www.legal-tools.org/doc/df77c2/).

5 Aiken defines it as "the act of creating or rebuilding friendship and harmony between rival sides after resolution of a conflict, or transforming the relations between rival sides from hostility and resentment to friendly and harmonious relations". See Nevin T. Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies*, Routledge, London, 2014, p. 18.

6 David Bloomfield *et al.*, *Reconciliation after Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, p. 12.

7 Aiken, *supra* note 5, p. 18.

8 "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", 9 August 2012, UN doc. A/HRC/21/46, para. 37.

9 *Ibid.*, para. 37; Juan E. Mendez, "National Reconciliation, Transnational Justice, and the International Criminal Court", in *Ethics and International Affairs*, 2001, vol. 15, pp. 25, 28.

10 Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Open Society Justice Initiative, 2008, p. 58; and Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia*, Routledge, London, 2014.

and Africa have shown that healing and forgiveness are culturally-bound processes that are locally rooted, starting at the level of the individual or community-based structures.[11] Reconciliation requires the recognition of a more inclusive common identity. But the criminal trial can provide conditions that facilitate such complex processes. It may *signal a rupture with the past that contributes to a process of reconciliation*.

In existing discourse, the contribution of international criminal justice to reconciliation is typically viewed through the lens of two archetypes of justice: retributive and restorative justice.[12] This contribution challenges the assumption that restorative approaches are *per se* better suited to achieve reconciliation than retributive mechanisms. It argues that the tension between retributive and restorative approaches in international criminal proceedings provides important impulses for the nexus between international criminal justice and reconciliation.

2. Links between Reconciliation and Retributive Justice

Retributive justice mechanisms, such as international criminal jurisdictions, are often criticized for their limitations, that is, their emphasis on perpetrators, individualization of guilt and their focus on past, and their risks (their detachment from local context or emphasis on universal justice models and standards). Restorative mechanisms of justice, including victim-centred and less formal forms of accountability, have gained increased acceptance as a middle ground between retributive justice and blanket pardon. They are viewed as more conducive to reconciliation, in light of their stronger focus on victim needs, their proximity to community- or group-structures, and their flexibility in terms of process and sanction (such as restorative penalties).[13] This distinction deserves critical scrutiny and differentiation.

Prosecution aimed at punishment is not necessarily an obstacle to reconciliation. In some contexts, retribution may have a greater effect on reconciliation than restorative forms of justice that prioritize forgiveness or forgetting.[14] Forgiveness often requires more than a mere apology or generic acknowledgment of responsibility. Victims might be more willing to forgive, or at least temper their feelings of revenge, if they know that the perpetrator will be punished. A recent example is the reconciliatory gesture by Auschwitz survivor Eva Moses Kor who noted in the trial against camp guard Oskar Gröning that she could forgive because "forgiveness does not absolve the perpetrator from taking responsibility for his actions" nor diminish the "need to know what happened there".[15]

Available social science research indicates that reconciliation is linked to cognitive and affective change, grounded in social interaction (such as positive experience with the 'other') and a relationship of recognition and trust.[16] Reconciliation "shows itself in the degree to which people actually can act as distinct individuals with mutual regard in the real world".[17] Criminal justice has an important function in this regard. It offers a space to re-humanize the perpetrator, and to break some of the inequalities and hierarchies inherent in system criminality. As argued by Pablo de Greiff, the criminal trial provides a forum to discard any "implicit claim of superiority made by the criminal's behaviour".[18] In specific contexts, the victim and perpetrator (re-)encounter each other as mutual holders of rights, or as members of a common polity. These structural features may lay important foundations for longer-term processes of social repair or reconciliation. They may break up 'us v. them' divides.

One of the inherent features of a criminal trial is that it may produce different narratives, or even multiple truths, through assigned roles in the legal process, competing testimonies or conflicting decisions. The road of international criminal justice is paved with such examples.[19] It has produced many frustrating experiences for victims of crime. But this is not necessarily an impediment to healing or forgiveness. Reconciliation is not linked to the acceptance of a 'single truth' or narrative, but grounded in the acceptance or toleration of conflicting points of view. It lives from the ability to respect the 'other' and tolerate difference, despite conflicting views

11 Harvey M. Weinstein and Eric Stover, *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, CUP, New York, 2004.

12 Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, Willan Publishing, Devon and Portland, 2005.

13 Bloomfield *et al.*, *supra* note 6, pp. 97, 112; and Claire Garbett, "The truth and the trial: victim participation, restorative justice, and the International Criminal Court", in *Contemporary Justice Review*, 2013, vol. 16, pp. 193–213.

14 Rodrigo Uprimny and Maria Saffon, "Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case" (https://www.legal-tools.org/doc/e5caf8/).

15 The Guardian, 27 April 2015 (https://www.legal-tools.org/doc/46c16c/).

16 See Aiken, *supra* note 5, p. 20.

17 See Jodi Halpern and Harvey M. Weinstein, "Rehumanizing the Other: Empathy and Reconciliation", in *HRQ*, 2004, vol. 26, pp. 661, 575.

18 "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", *supra* note 8, para. 30.

19 On SCSL, see Nancy A. Comb, *Fact-Finding Without Facts*, Cambridge University Press, Cambridge, 2013. On the Katanga trial, see Carsten Stahn, "Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment", in *JICJ*, 2014, vol. 12, pp. 809−834.

of facts.[20] The strength of the criminal process lies in the way it offers a forum where contradictions and contestations may legitimately co-exist, based on the constraints of the law.

3. International Criminal Justice and Reconciliation: Improving Connections

Existing studies remain doubtful to what extent this practice has created a shared understanding that is indicative of a 'thicker' conception of individual, inter-group or inter-societal reconciliation.[21] But international trials have limited the space for denial of atrocities and created a public space and reference point to confront history, which is one pre-requisite for societal transformation. Existing connections can be improved in different ways.

3.1. Judicial Management

One of the most basic lessons is the need to reduce practices that undermine the reconciliatory potential of retributive justice. In past years, international courts have sought to address their limitations through greater investment in restorative features (such as victim participation or compensatory justice), complementarity strategies, and education and outreach. Improvements might start with a closer look at retributive practices and procedures.

One of the cardinal lessons is that international criminal jurisdictions need to complete trials and produce a judicial outcome, in order to have a transformative effect. In existing practice, criticism has focused on the divisive nature of acquittals or dissents.[22] Such judgments may confirm existing societal tensions; but they are not necessarily detrimental to longer-term processes of reconciliation. They represent a legitimate outcome and contribute to the process of finding truth. More critical are flaws in the *justice process* as such, in particular unfinished or derailed proceedings. International justice has witnessed a number of critical examples over the past decade, including *Milosević*, *Lubanga*, or most recently *Kenyatta*. They undermine the demonstration effect of international justice, and the faith in law and institutions that is necessary for meaningful engagement with the 'other'.

The prospect of the trial to contribute to reconciliation depends on its acceptance and perception as a common forum. Each trial necessarily involves a certain degree of drama – which may be conducive to catharsis. International tribunals are easily discarded as show trials,[23] and struggle to confront ideologies. These challenges need to be addressed. Judicial proceedings should provide space to challenge pre-determined biases or the heroization of agents, in order to maintain their perception as shared forum. This requires active, and sometimes better judicial management of proceedings, deeper engagement with conflicting visions of history and causes of criminality, and space to highlight and challenge contradictions in ideology-tainted discourse.

In the early ICTY practice, guilty pleas have been used as a means of reconciling punishment with acknowledgment of wrong or apology. Experience has shown that such admissions of guilt cannot be taken at face value. For instance, Mrs. Plavšić's guilty plea in 2003 was initially heralded as a significant move towards the advancement of reconciliation.[24] After sentencing, she retracted her guilty plea and expression of remorse. This experience highlights the fragility of negotiated justice. If an apology is offered in return for sentence leniency, it might not necessarily benefit reconciliation.[25] Similar concerns have been raised at the ICC in the context of the apology of Katanga. Katanga's remorse was offered after the sentencing judgment, and before the decision on appeal. It caused resentment among victims, since it was perceived as a trade-off for the discontinuance of the appeal.[26]

3.2. Justice Approaches

International criminal justice may contribute to breaking divides, if it makes use of the constructive tension between retributive and restorative approaches.

A fundamental element is the approach towards constituency. International proceedings are not merely abstract processes, geared at the interests of the parties or communities; they are increasingly connected to context, and the interests of affected communities and victims. It is this inclusiveness which connects international criminal justice to processes of reconciliation.

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20 See David A. Crocker, "Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation", in *Buffalo Criminal Law Review*, 2002, vol. 5, pp. 509−549.

21 See Sanja Kutnak Ivković and John Hagan, *Reclaiming Justice*, OUP, 2011, pp. 153−170; Janine Natalya Clark, "The Impact Question: The ICTY and the Restoration and Maintenance of Peace", in Bert Swart *et al.*, *The Legacy of the International Criminal Tribunal For the Former Yugoslavia*, OUP, 2011, pp. 55, 80.

22 Ivković and Hagan, *supra* note 21, p. 158.

23 See Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, p. 1.

24 See Dan Saxon, "Exporting Justice: Perceptions of the ICTY Among the Serbian, Croation, and Muslim Communities in the Former Yugoslavia", in *Journal of Human Rights*, 2005, vol. 4, pp. 559−572.

25 Jessica Kelder, "Rehabilitating War Criminals: What Happens To Those Convicted By the ICTY and ICTR Post-Conviction?" (https://www.legal-tools.org/doc/50e5d7/).

26 See Stahn, *supra* note 19.

Many trials suffer from the reproduction of binaries, and are perceived as obstacle to reconciliation, if they remain entrenched in 'friend/enemy' clusters, or associate crime or victimhood across pre-configured collective identities. International criminal justice may reduce these frictions, if it pays attention to rights and wrongs of all sides of the conflict, as mandated by the principle of objectivity.[27] A positive contribution to reconciliation also requires better engagement with dilemmas of selectivity, and justification of choices (selection of situations, cases and defendants). It is, in particular, important to communicate that inaction does not entail an endorsement of violations.

International criminal courts have experimented with different types of procedures. Experience suggests that inquisitorial features may be more closely aligned with rationales of reconciliation. Accusatorial models tend to treat parties to proceedings as adversaries. This structure consolidates binaries, produces clear winners and losers, fuels hostility, and stands in tension to a more exploratory mode of inquiry. As noted by Albin Eser, this contradiction could be mitigated if procedures were construed as 'contradictorial' rather than 'adversarial' (focused on "elucidating the truth by way of contradiction, including confrontation" and "(controversial) dialogue" in "a spirit of cooperation", rather than hostile contest).[28] Steps like these would facilitate empathy and potential re-humanization of perpetrators.

3.3. Treatments of Actors

Prospects of reconciliation are closely linked to the experiences of participants in the justice process. Individuals share and digest experiences through narratives.[29] Criminal proceedings may contribute to this process, if participants have the impression that they are listened to.

Some of the most direct transformative effects may occur through the experience of testimony (the contact and exposure of witnesses or victims to a professional justice environment). Existing practice might be improved through greater care for witnesses after testimony, and better management of victim participation in proceedings. Greater caution is required in the use and labelling of victims. Judicial proceedings tend to produce imageries (such as vulnerability) and abstract categorizations of victimhood that may have disempowering effects on victims.[30]

One truly innovative approach at the international level is the ICC's approach towards reparation.[31] It combines retributive and restorative features, establishing a direct form of accountability of the convicted person towards victims, which differs from classical models of victim-offender mediation. Accountability is grounded in the obligation to repair harm, but linked to the punitive dimensions of ICC justice. Jurisprudence has made it clear that establishment of accountability towards victims through reparation proceedings is an asset *per se* that can provide a greater sense of justice to victims, even in cases where the defendant is indigent.[32]

Examples like these illustrate some of the strengths and new possibilities of international criminal justice. The contribution of international criminal justice to reconciliation cannot be measured exclusively through the lens of restorative justice. Some helpful impulses result from the positive tension between retributive and restorative forms of justice.

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27 Article 54, ICC Statute.

28 Albin Eser, "Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY", in Swart *et al.*, *supra* note 21, pp. 108, 145.

29 John Braithwaite, "Narrative and Compulsory Compassion", in *Law & Social Inquiry*, 2006, vol. 31, pp. 425, 427.

30 See Kamari Clarke, *Fictions of Justice*, CUP, Cambridge, 2009, p. 107.

31 ICC, *Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Appeals Chamber, 3 March 2015.

32 *Ibid.*

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