Commitment to implementing restorative justice and its outcomes in International law

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Abstract

Along with the criminal justice system that the theories of punishment will be meaningful within them, the restorative justice system is also improving. United Nations Economic and Social Council has urged member states that make available the restorative justice programs at all stages of the criminal justice process.\(^1\) Despite the UN reception of restorative justice programs adoption as supplement of the criminal justice system and encouraging governments to apply them,\(^2\) currently domestic legal systems are primarily subordinates of the criminal justice system. Restorative justice system is used only in some legal systems and in the treatment of certain crimes. Such an approach in the international community is as the dominant approach. Dealing with the perpetrators of international crimes and justice execution means criminal justice execution for perpetrators of these crimes.

Keywords: restorative justice, international law, peace, victim participation.

\(^1\) “Basic principles on the use of restorative justice programmes in criminal matters”, op.cit, para. 6

\(^2\) Ibid, para. 20
1. Introduction

Since the beginning of the 1980s under the influence of legal victimology and anthropology studies, concepts such as repair, restoration, reconstruction, rehabilitation, restitution, compensation, mediation, conciliation, compromise, negotiation, dialogue, participation and so on enters the criminal law literature. These concepts before to be given the legislative and theoretical aspects, in some countries were implemented by the initiative of the crime parties and beneficiary families and the local community. Later, in the 1990s had attracted the attention of legislators as elements of restorative justice. Now the theoretical framework of restorative justice is taken into consideration in the universal and regional documents\(^3\). In fact, repeal-orientation theory of criminal system and triple mechanisms of diversion, decriminalization and de-retribution are as the theoretical framework of restorative justice which all are seeking to limit the scope of intervention of the criminal justice system and involving civil society in different ways for criminals. Restorative justice is a process to engage those who have a contribution in a specific offense to take an action in a collective manner to determine and pay attention to injuries and losses and commitments to heal, improve and wield right the affairs as much as possible. Under this approach, violation and aggression will be making a commitment. This means that when a person commits a wrong against another one, an obligation will be created to build what he has destroyed. Compensation from the offender is an important factor for victim satisfaction. Another fundamental feature of restorative justice is participation of victims in the justice realization. Research shows that victims need more than just punishment. When an active role are granted to victims in the process of addressing the crimes committed against them, they have more relaxed feeling, and yet the sense of revenge after commission of crime will subside. Therefore the greater participation of victim in the investigation of crime committed and confronting them with offender and getting aware of the crime commission motivations have more deterrent effects at least in relation to the retaliatory crime of victims themselves. (Will.2007:109-110)

2. Restorative Justice in international Law

A term that today is referred as Restorative justice sometimes is considered as a perfect substitute to criminal justice system for the traditional criminal justice system and sometimes is considered as a viewpoint or a reformist viewpoint with maintaining the previous forms of criminal justice. This new approach of criminal justice is not described under a single name or description. The fact is that applying a title for this movement, cannot describe the concepts, ranges and wide horizons of its believers and theorists.

The English Martin Wright defined the restorative justice as follows:
“Restorative justice is a justice that tries to create balance between the interests of the victim and society and the need for social rehabilitation of offenders, and trying to realize the restore and improving the condition of the victim as much as possible, and in this regard bring together all those who somehow have an interest in criminal incident (such as the victim, offender, their relatives, community representatives and criminal justice officials) to participate actively and constructively to create such balance (Wright, 2002: 2).”

Restorative justice system in domestic legal systems has been limited to specific crimes that often has been used in violations category or minors crimes. As a result, implementing the restorative justice system in relation to international crimes which are of utmost severity seems unlikely. Supporters of restorative justice about the relation of restorative justice with criminal justice follow two trends: some considered it an alternative to the criminal justice system and in contrast, some others recognize it as a complements to criminal justice system. (Will, 2007, 109)

The "purist" orientation defines restorative justice as a process that parties involved in a crime trying to resolve the problems and its effects together through it. Its supporters argued that restorative programs should be developed in parallel with the traditional criminal justice system and thereby the restorative justice will be gradually replaced with traditional criminal justice system. However, the "maximalist" orientation believes that restorative justice as is considered by the purist model tendency, may in one hand and in the long run only apply to the petty and less serious crimes, and sever crimes are still remain within the competence of the traditional criminal justice. While incidentally, the needs of the victims and local community in these types of crimes is more. On the other hand criminal conflicts management through voluntary settlement of dispute between the offender and the victim and the local community may not always lead to a repair response. So orientation accepts the restorative justice alongside with or in the form of traditional criminal justice with reform and instill of the principles of restorative to it, to resolve the issues arising from crim. So that if committed crime was so severe that its effects get beyond the local community level, the government intervention through the judicial officials is predicted. According to maximalists, rather than restorative justice is define in the form of process, it must be evaluated in terms of the result, because the aim of restorative justice is effort to ensure the compensation of various damages caused by the crime. From this angle, if no agreement was reached, other programs and actions such as public services punishment and public works, work for the benefit of victims’ compensate guarantee fund, pay compensation to the victim and so on in the context of restorative justice can be considered. Thus, criminal executions guarantees also have reconstructive aspect. The maximalist approach to restorative justice has been widely accepted by side policy. Lawmakers of some countries of common law and Roman-Germanic legal family, with keeping the traditional criminal justice framework, have tried to involve the philosophy and principles of restorative justice at various stages of the criminal process. It seems that in the international arena, the International Criminal Court have considered such approaches of restorative justice. Since the Court by maintaining the traditional criminal justice system, some elements of restorative justice, including compensation of victims
has entered into its internal rules. In this approach the criminal justice system accepts just some features of restorative justice within itself thus seek to achieve restorative justice results. Therefore, despite international commitments regarding the administration of criminal justice, no international obligation for governments to implement restorative justice in dealing with the perpetrators of international crimes is exist. Only in the International Criminal Court, it can refer to the restorative justice both in terms of results not restorative process.

3. Restorative justice outcomes

Restorative justice pursues several goals, but the main targets to be included in those cases that in following it will be addressed.

-peace and Compromise

Compromise is distinguishes the criminal justice system and restorative justice. The restorative justice, as its name implies, seeks to repair relations scarred by the past. While in the criminal justice, the committed acts as a crime against the state and society are seen, and the restoration of relations is not the main goal. So the main mechanisms of compromise realization are the same mechanisms of restorative justice not criminal justice.

In international crimes that often the states own are the cause of crimes, the criminal justice system cannot fulfill the compromise. Since the criminal justice sees crime as an action against the government; while in most cases international crimes occur by the government themselves. Even in the definition of some international crimes such as torture, the government intervention is included as one of the elements of the crime. While, restorative justice system with balanced look to the victim and the offender and the community is trying to repair and compensate and realize the justice. In international crimes due to the spread and severity of crimes, not just victims of crime who are directly affected, but the whole community is affected in this regard. When not only the victim, but also the entire community are affected for the acts committed, should seek mechanisms that consider compensation not only for the relationship between the victim and the offender, but also in relation with society. Therefore the compromise aim here is not just a mutual reconciliation between the victim and the community. So along with personal compromise, a kind of collective and national compromise should occur. (Mc CartyIII,2011-2012: 990)

-Compensation:

There is a general principle in international law that any violation of obligations to the commitment to compensation hence obligation to compensation in case of violation of states’
human rights obligations in relation to human beings is exists as well. (Boven,1995:505-506) Although the right of compensation for victims of all human rights violations exist, but if these violations occur organized and heavily, the necessity of realizing the human right to be felt. Therefore, necessity in many human rights treaties and documents is stipulated as the right to compensation. In many international documents, the right to compensation is regarded.

In some human rights documents, this right is limited to a particular type of compensation is a form of indemnification. In contrast, some human rights documents have had a broader view to the right to compensation. As in Article 6 of the Elimination Convention on all forms of racial discrimination stipulated to the right of adequate compensation or attracting the satisfaction of victims for all discrimination losses. Also, in accordance with Article 39 of the Child Right Convention (CRC), States Parties must adopt all actions necessary for the physical and psychological rehabilitation and reintegrating of child victims in society.

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5 Gross and Systematic Violations of Human Rights

6 Article. 10: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.", American Convention on Human Rights, 1969. Available at: http://www.hrcr.org/docs/American_Convention/oashr.html

Article. 21: "...2.In case of Spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation...", African Charter on Human and Peoples Rights, 1981. Available at: http://www.african-court.org/en/index.php/documents-legal-instruments/basic-documents

Article. 5: "...5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.", The European Convention on Human Rights, 1950. Available at: http://www.hri.org/docs/ECHR50.html

Article. 14: "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.", Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly, A/RES/39/46, 1984. Available at: http://www.un.org/documents/ga/res/39/a39r046.htm

7 Article. 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.", International Convention on the Elimination of All Forms of Racial Discrimination, 1965. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

In addition to the human rights treaties, in the international humanitarian treaties the right to compensate the victims is referred too.\(^9\)

In fact, the right to compensate the victims of human rights violations is from a human right angle that was in the documents and procedures of documents and procedure of some international courts. But from another angle, particularly is in terms of civil rights enforcement that in all institutions of civil liability in the domestic arena is recognized. So despite the human rights aspect of this right, its realization in the internal systems and based on the pillars of civil liability will occur. It is worth noting that the original source of almost all of the international law rules about compensation, were the general principles of developed law in the judicial trend of different countries. At the same time compensate the victims of massive and organized human rights and humanitarian violations in transitional societies, has a double role. In other words, along with the common goals of a civil liability system, the transitional society because of their particular circumstances can also use compensation to achieve the top transitional goals.

- **Reconciliation**

The meaning of Reconciliation among the goals of compensation is that by compensation between the parties of compensation, the reconciliation and compromise will be achieved. As most of Uganda's civil war victims have remembered from compensation, as the prerequisite for achieving peace.\(^{10}\) When compromise is remembered as the target of compensation, the restorative justice theory will come to the mind. Since restorative justice put its main objective in the realization of reconciliation between the offender and the victim, so one of the ways of realizing this goal in restorative justice is compensate the victim and offender’s attempt to satisfy him/her.

The damage caused by a wrongful act may be material losses that is compensated through indemnification, but in human rights violations beside material losses, the psychological injuries also are important because compensate them is not possible easily. However, if these violations occur in heavy and organized dimensions, their adverse effects will be multiplied. So when it comes to compensation purposes in human rights violation, it cannot be bounded by the purposes of civil liability, because human rights violations are different from ordinary violations. Human rights violations often committed by governments. In this category of violations, the loss factor is

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government, that compared with common persons have more facilities. In massive and organized human rights violations in addition to individual victims, the society also is injured because of expanded dimensions of these violations. In these violations the society is also considered as victim and it is required to seek mechanisms for compensate the society. So the meaning of compromise here is not compromise only between the offender and the victim, but also the compromise must establish between different groups involved in the violations as injured or injurer on the one hand and between the injured community and injurer government to compromise on the other hand. Therefore, although the compensation is a victim-centered mechanism, but in committing massive and organized human rights violations and that affect wider dimensions of human society, to realize the goal of compromise, the others who were not direct victims of these violations and even the injurer must be considered too. (Lykes, 2006:609)

When the community is remembered as the injured and when the compensation aim is realizing the compromise in society, different victims and distinct objectives will affect the common forms of compensation. When the injured is society, the compensation is shifted out of individual form and inclined to collective form; a compensation that has placed society as its main audience and is looking for satisfying victims’ groups and ultimately achieve a collective compromise. Establishment of fact-finding commissions, providing health and training services specific to victims groups, holding memorial ceremonies, and . . . , all are expressions of collective forms of compensation that put the compromise as their main goal. (Shelton, 2006:15-16) A compromise that will be realize collectively in contrast with the goals of restorative justice.

-Discovery of Truth

In human rights documents and treaties, the right of victims and their families to know the truth has been mentioned. On September 24, 2012 the Human Rights Council adopted a resolution on this issue and urged all States to take action in order to facilitate the efforts of the victims and their families to discover the truth about heavy human rights violations.  

This international document is on the right of people to know the truth about human rights violations. In this document, the Council in addition to recalling the UN Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949 and Additional Protocols of 1977 and other human rights documents, reminds being universal and unity of these rights and then refers to those human rights documents which explicitly referred to the right to the truth. Article 32 of the Additional Protocols of 1997 stipulates to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, and the right of the victims’ families to know the fate of relatives.

Guaranteeing the right to truth, will lead to end the impunity and promote the respect for human rights. Thus, the right to truth must be recognized completely as possible including the identification of perpetrators of human rights and humanitarian violations, and the causes and circumstances of such violations.

The need to uncover is a solution that often in commitment of heavy and organized human rights offenses; the cases that the government by adopting a policy is trying to hide angles of committed violations. Therefore the transitional governments for the realization of transitional justice should use some mechanisms to realize this solution before anything. The necessity of realizing this mechanism is due to the goals that realizing them can bring and at the same time because of the need of victims and their families of organized human rights violations to know the truth. Therefore, in addition to assess the purposes of truth discovery and the help that can have to realize the transitional justice, evaluating the nature of this right is inevitable.

-Victim Participation

One of the basic characteristics of restorative justice is the participation of victims in realizing the justice. Researches show that victims need more than just punishment. When victims are granted an active role in the process of addressing the crimes committed against them, they have more relaxed feeling, and also the sense of revenge after the crime subside in them. Therefore, the greater participation of victims in the investigation of the committed crime and confronting with the offender and being aware of the motivations of committing the crime, will have more deterrent effects at least in relation to the retaliatory crimes of the victims themselves. (Will, 2007,109-110)

The aim of restorative justice is "correcting imbalances and repairing the fractured relationship". As attempted to answer this question that what should be done for the victims. The answer can be stated that the offenders are people like us who should be considered as part of the community, but must be controlled in order to not committed a new crime and be aware of the injuries that have bring to the victims. (Cayley,1998:32)

One of the most important programs of restorative justice to achieve these goals is facilitating the face to face communication between offenders and victims as well as victims’ family members that in such meetings, offenders will be accountable for their behavior and the victims will encourage explain the impact that crime has had on them. (Johnstone, 2002:2)

4. Conclusion

During the dynamic process of restorative justice, victims, society and offenders come together in a creative and efficient role in a way that cause to strengthen the status of victims by the active role in the criminal justice process and paying attention the needs and concerns of the victim, including material and spiritual and social needs, and restore and compensate the damages and
losses brought to him/her as much as possible.

In addition, the offenders during restorative justice process will be aware of real humanistic and social effects of their action on victims and their relatives, as well as the society and actively and consciously accept the responsibilities arising from their criminal act and therefore create peace between them.
References


