



UNISCI Discussion Papers

JUSTICE FOR PEACE: REDRESSING VICTIMS AND HUMAN SECURITY

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Introduction

It is commonly asserted that, facing increased and more complex challenges, the international community needs a new paradigm of security, shifting from the security of state to the security of people. This new paradigm of security for the 21st Century centred on people is based on the concept of *human security*, with its own content: “Human security means protecting fundamental freedoms, freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people’s strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.”²

The demands of human security involve a broad range of interconnected issues grouped in two areas of action: protection and empowerment³. One of the issues which lays the groundwork for human security in both areas of action is helping countries to recover from conflict, particularly, internal conflict. An integrated human security framework for a post-conflict society would be based on, at least, five clusters closely interconnected : ensuring public safety; meeting immediate humanitarian needs; launching rehabilitation and reconstruction; emphasizing reconciliation and coexistence; promoting governance and empowerment⁴. From these five clusters, one seems particularly relevant under international law. In order to recover from violent internal conflicts where a situation of gross violations of human right has taken place, one should emphasize reconciliation and coexistence. Nevertheless, this must be done without betraying justice. This lesson is well established in

¹ *Las opiniones expresadas en estos artículos son propias de sus autores. Estos artículos no reflejan necesariamente la opinión de UNISCI.* The views expressed in these articles are those of the authors. These articles do not necessarily reflect the views of UNISCI.

² *Human Security Now*, Report of the Commission on Human Security, New York, 2003, p. 4. The idea of creating such Commission was launched at the 2000 UN Millennium Summit and is co-chaired by Mrs Sadako Ogata, Mrs Amartya Sen and others.

³ As it is observed in the Report *Human Security Now*, “protecting people’s security requires identifying and preparing for events that could have severe and widespread consequences.” (*op. cit.*, p. 10). Empowerment, that is, “people’s ability to act on their own behalf and on behalf of others is also instrumental to human security. People empowered can demand respect for their dignity when it is violated. They can create new opportunities for work and address many problems locally. And they can mobilize for the security of others” (*op. cit.*, p. 11)

⁴ *Human Security Now*, *op. cit.*, p. 61.



United Nations as its General-Secretary observes: “While United Nations efforts have been tailored so that they are palpable to the population to meet the immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left undressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future. Peace and stability can only prevail if the population perceives (issues) can be addressed in a legitimate and fair manner. Viewed this way, prevention is the first imperative of justice”.⁵

Justice and reconciliation in most transitions from conflict to peace go hand by hand, as it is observed in the Report of the Commission on Human Security: “the first (justice) relating to the events that occurred in the conflict phase, focuses on establishing the truth of what has happened, upholding justice for the victims and punishing the perpetrators. The second (reconciliation) focuses on establishing the rule of law, developing a human rights regime and strengthening judicial systems.”⁶

From a human security perspective is essential to restore trust among the people of divided communities, particularly in recent kind of internal conflicts, “inter-group conflicts” where there are not two but many sections of population confronted. In such cases mediation and implementation of peace accords mainly have failed, sometimes with disastrous consequences.⁷ Thus, is vital that former enemies are encouraged to interact, to engage and to coexist, building up increasing sense of security and respect for others⁸. As the General-Secretary of United Nations has pointed out, “our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”⁹

It is, thus, equally important to build confidence among former adversaries, to provide security to ordinary people trying to rebuild their lives and communities after conflict.¹⁰ For this aim to be successfully reached, a first priority is to recognize the legitimacy and dignity of the victims of the conflict.¹¹ In post-conflict situations and where transitional justice processes are under consideration, a particularly important constituency is the country’s victims. Consequently, “the United Nations must assess and respect the interests of victims in the design and operation of transitional justice measures.”¹² What are the consequences of such statement?

⁵ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. Report of the Secretary General, United Nations Documents, S/2004/616, 23 August 2004, paragraph 4.

⁶ *Human Security Now*, *op. cit.*, p. 61.

⁷ *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change. General Assembly Docs. A/59/565, 2 December 2004, paragraphs 85 and 86. Footnotes and annotations to this report are available online at <http://www.un.org/secureworld>.

⁸ *Human Security Now*, *op. cit.*, p. 66.

⁹ *The Rule of Law...*, *op. cit.*, paragraph 2.

¹⁰ *A more secure world: our shared responsibility*, *op. cit.*, paragraph 221.

¹¹ *Human Security Now*, *op. cit.*, p. 66.

¹² *The Rule of Law...*, *op. cit.*, paragraph 18.



1. Transitional justice and victims

In the language of United Nations, justice is a multidimensional concept. With a procedural connotation, it firstly refers to the rights of the accused in the context of international penal tribunals. Secondly, justice implies regard for the interests of victims (restorative justice). Finally, justice would imply taking into account the well being of society at large (repressive-preventive justice of crimes and violence). Normally, there is a fair balance among these three dimensions of justice. Nevertheless, such *status quo* is broken when it is the case of “transitional justice”, that is, “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹³

In the recent Report of the Special Reporter on the independence of judges and lawyers, Leonardo Despouy, *Civil and Political Rights, including the question of independence of judiciary, administration of justice, impunity*, regarding justice in period of transition – paragraphs 43 to 57 of the Report- redress for victims is not considered. Furthermore, section D “Re-establishing truth and ensuring justice, reparation and compensation for victims” – paragraphs 49 to 53- there is not even a single mention of victims nor their rights to reparation and compensation is done. The Special Reporter focuses on the procedural¹⁴ and preventive¹⁵ dimension of justice in the case of transitional justice, omitting any reference to restorative justice, whereas indeed, “strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.”¹⁶ Yet, General Secretary of United Nations has denounced that the international community has rushed to prescribe a particular formula for transitional justice, emphasizing either criminal prosecutions or truth-telling, without first affording victims and national constituencies the opportunity to consider and decide on the proper balance. In his opinion, nevertheless, transitional justice must be seen in a way that extends well beyond courts and tribunals.¹⁷

What it is at stake, according to the General-Secretary, is to accept rendering justice to victims independently of prosecuting the perpetrators of gross violations of human right. Furthermore, the key is recognising the need to redress victims, compensation from state included, autonomously of the eventual conviction of perpetrators. It is a fact that, in post-conflict countries, most of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically.¹⁸ Thus, in post-conflict countries, other transitional justice mechanisms “may need to be put in place in order

¹³ *Ibid.*, paragraph 8.

¹⁴ “A State going through or emerging from a crisis must not only ensure that particular violations are punished under the law, but also examine the whole of the judicial system and its operation to ensure that it is compatible with international human rights law [...] In a transition context, proper administration of justice may also be hampered by factors such as ...i) the absence of mechanism for protecting witnesses, ii) the absence of a legal framework for protecting lawyers defending persons accused of violations [...]”. *Civil and Political Rights, including the Question of Independence of Judiciary, Administration of Justice, Impunity*, 20 January 2005, E/CN.4/2005/69, paragraphs 50 and 51, in <http://www.ochr.org/english/issues/judiciary>.

¹⁵ “The State must entrust responsibility for trying the main perpetrators of serious and massive human rights violations to the ordinary courts [...] It may set up a para-judicial instance such as a truth and reconciliation commission... These two measures may be taken simultaneously or consecutively”. *Ibid.*, paragraph 49.

¹⁶ *The Rule of Law...*, *op. cit.*, paragraph 26.

¹⁷ “The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.” *Ibid.*, paragraph 25.

¹⁸ *Ibid.*, paragraph 46.



to overcome the inherent limitations of criminal justice processes... in particular to help satisfy the natural need of victims' relatives to trace their loved ones and clarify their fate; to ensure that victims and their relatives are able to obtain redress for the harm they have suffered."¹⁹

2. Rendering justice to victims: greater focus on reparation needed

Rendering justice to victims not only morally necessary but also a pragmatic choice since, as Theo van Boven has observed, justice is a prerequisite for restoring and enduring peace and welfare at national and international level.²⁰ Thus, rendering justice to victims is seen in connexion with other general interests at stake such as peace and national reconciliation. In this sense, witness the experience of the ad hoc International Penal Tribunal for Rwanda. In Security Council Resolution 955 (1994) justice is in paragraphs 6 and 8 must be read in connexion with national reconciliation in paragraph 7. Hence, it is possible to distinguish within the concept of transitional justice two complementary dimensions: on the one hand, repressive-preventive justice of those who have committed serious crimes under international law as a way to assure peace and national reconciliation. On the other hand, restorative justice, that is, rendering justice specifically to the victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide). What is implied in the idea of rendering justice to victims is like a two-side coin: firstly, granting them access to justice; secondly, granting them reparation and compensation²¹.

After an internal conflict, any society is divided between the need to shed light up the recent past and the exigency of searching for national reconciliation. In such a context, the role of victims is crucial since those having suffered serious crimes may feel betrayed in their search for justice and, probably, they will take revenge provoking a new spectrum of generalised horror and death. Thus, a fair balance must be redressed between the need of justice, by way of convicting the perpetrators and redressing for victims with the final aim of reconciliation. In the words of Ilaria Bottigliero, we face "the necessity to rehabilitate victims, with a final aim of reconciliation, reparation, forgiveness, apology and restoration of the social environment injured by the atrocities committed."²² Accordingly, more important than the quantity of perpetrators judged and convicted for serious human rights abuses would be the fact that population victimized see the sun set of the "culture of impunity" in the light of the new dawn of "culture of accountability".

In the Report of the Secretary-General entitled *In larger freedom: towards development, security and human rights for all*, 21 March 2005, the idea of accountability is stressed: "We therefore need new mechanisms to ensure accountability –the accountability of States to their citizens, of States to each other, of international institutions to their members and of the present generation to future generations. Where there is accountability we will progress."²³ The reason is advanced in previous paragraph 17 of the same Report: "We will not enjoy

¹⁹ *Ibid.*, paragraph 47.

²⁰ Van Boven, T. (1999): "Rendering Justice to Victims: a Case for Reparations", in *Realism and Moralism in International Relations. Essays in Honour of Franz A.M. Alting von Geusau*. The Hague, Kluwer Law International, p. 197.

²¹ See, *inter alia*, Resolution 40/34 of 29 November 1985, adopting the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Recently, *Basic Principles and Guidelines on the Right to a Remedy and to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, annexed to the United Nations Human Rights Commission's Document E/CN.4/2005/59, of 22nd April 2005.

²² Bottigliero, I. (2004): *Redress for Victims of Crimes under International Law*. Leiden, Martinus Nijhoff, p. 37.

²³ "In Larger Freedom: Towards Development, Security and Human Rights for All", Report of the Secretary-General, 21 March 2005, A/59/2005, paragraph 22.



development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed.”²⁴

As a consequence, the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, has observed in its Report of 25 January 2005 that restorative justice (rendering justice to victims) must be at the same level than repressive-preventive justice (justice on behalf of peace). It would not be acceptable that, in the case of conflict between both dimensions of transitional justice, the former should be delayed in favour of the latter. That would be contrary to the aim of human security in those societies after internal conflicts, as the General-Secretary has pointed out in its Report of 21 March 2005. In fact the very title of this Report *In larger freedom*, “encapsulates the idea that development, security and human rights go hand in hand.”²⁵ Thus, the International Commission of Inquiry on Darfur observes in its Report regarding Truth and Reconciliation Commissions:

“A Truth and Reconciliation Commission could play an important role in ensuring justice and accountability. Criminal courts, by themselves, may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only on proof beyond a reasonable doubt. In situation of mass crime, such as have taken place in Darfur, a relatively limited number of prosecutions, no matter how successful, may not completely satisfy victims’ expectations of acknowledgement of their suffering. What is important, in Sudan, is a full disclosure of the whole range of criminality. (Nevertheless)... Truth and Reconciliation Commissions established for the purpose of substituting justice or producing a distorted truth should be avoided.”²⁶

3. International practice confronting the challenges of human security.

Locating tribunals inside the countries concerned is publicly recognized as essential under a human security approach. The main reason is because of its closer proximity to the evidence and witnesses and it being more accessible to victims. Such accessibility allows victims and their families to witness the processes in which their former tormentors are brought to account.²⁷ That would fulfil the first dimension of rendering justice to victims –granting them access to justice-. It would leave, nevertheless, the second dimension: granting them reparation and compensation.

The Statute of the Special Tribunal for Sierra Leone²⁸ includes some articles providing rights for victims granting them access to justice but omitting any reference to reparations²⁹. Similarly, the Agreement reached on March 2003 between the United Nations and the Government of Cambodia for prosecution of perpetrators of crimes under international law during the period of the Democratic Kampuchea³⁰, also includes some provisions relating to procedural rights of victims but there are no dispositions referring to reparation.

²⁴ *Ibid.*, paragraph 17.

²⁵ *Ibid.*, paragraph 14.

²⁶ “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General”, paragraphs 617 and 621.

²⁷ *The Rule of Law...*, *op. cit.*, paragraph 44.

²⁸ See “Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone”, 16 January 2002, Appendix II, UN Doc. S/2002/246.

²⁹ See articles 15.2, 16.4 and 17.2.

³⁰ Annexed to General Assembly Resolution A/RES 57/228 B, of 13 May 2003.



The concept of Justice in the Preamble of the Rome Statute –in paragraphs 4 and 11³¹- does not imply rendering justice to victims but repressive-preventive justice, punishing the perpetrators of serious crimes under international law as a way of ensuring respect for an international public order. Furthermore, justice and peace are clearly linked in paragraphs 3³² and 7³³ of the Preamble. Reading these paragraphs, justice means some kind of obligations under international law whose respect must be assured by the international community by judging and convicting the individual perpetrators of such violations which, by themselves, are tantamount to major attacks to an international public order³⁴.

The Rome Statute would have lost, in my opinion, a good chance of asserting this dimension of human security in post-internal- conflict societies. The relevance of this omission is evident, since the experience of hybrid courts, particularly the Special Tribunal of Sierra Leona and its trouble in financing by voluntary contributions, may suggest the convenience of addressing the International Criminal Court instead of a new specific mixed penal tribunal for a case of grave abuses of human rights and violations of humanitarian law, in the context of an internal conflict, as a way of restoring peace and reconciliation in the zone. See, recently, the example of Darfur in Sudan. The International Commission's recommendations in its Report of 25 January 2005 were not only that the Security Council referred the situation in Darfur to the International Criminal Court, pursuant to Article 13 (b) of the Statute of the Court³⁵, but also that: "the Security Council should, however, act not only against the perpetrators but also on behalf of victims. In this respect, the Commission also proposes the establishment of an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body."³⁶ Nevertheless, up to date no Security Council resolution has established an International Compensation Commission³⁷.

The legal grounds for this approach are found in the same Charter of United Nations and in the development of international law of human right. As far as the former is concerned, "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community".³⁸ Regarding the latter, "The universal recognition and acceptance of the right to an effective remedy (a basic human right) cannot but have a bearing on the interpretation of the international provisions on State responsibility

³¹ "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." And "Resolved to guarantee lasting respect for the enforcement of international justice", respectively.

³² "Recognizing that such grave crimes threaten the peace, security and well-being of the world".

³³ "Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations,"

³⁴ Carrillo Salcedo, J. A.: "La Cour Pénale Internationale: l'Humanité trouve une place dans le Droit International", *Revue Générale de Droit International Public* (1999), p. 23.

³⁵ What the Security Council did on 31 March 2005 by way of Resolution 1593, adopted under Chapter VII of the United Nations Charter.

³⁶ "Report of the International Commission of Inquiry on Darfur...", *op. cit.*, paragraph 649.

³⁷ Specifically for victims of terrorism, Security Council 1566 of 8 October 2004 recommended the study of the establishment of an International Fund for compensating these victims. The study is not yet finished.

³⁸ *A more secure world: our shared responsibility*, *op. cit.*, paragraph 29.



for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.”³⁹

In this way, “States have the obligation to act not only against perpetrators, but also on behalf of victims –including through the provision of reparations.”⁴⁰ In other words, “Serious violation of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility requires that the State (or the state-like entity) pay compensation to the victim.”⁴¹

The establishment of the Trust Fund for Victims for the International Criminal Court, although reflecting a growing international consensus that reparations play an important role in achieving justice for victims⁴², would seem an insufficient approach for three reasons. Firstly, no subsidiary responsibility of States, assuming the duty of compensating victims’ suffering is foreseen in the Statute of Rome (see particularly article 75) and its subsequent instruments⁴³. Secondly, any right to reparation for victims under the International Criminal Court is under the basis of previous conviction of perpetrators. That is, it means a civil liability *ex delicto*, which would imply many victims not obtaining reparation for the same crimes. Thirdly, the Trust Fund for victims is envisaged to be operative exclusively by way of voluntary contributions, whereas the recent experience of Special Tribunal for Sierra Leone – also sustained on voluntary basis- would appeal for a different solution.

As an alternative to this insufficient situation, it has been suggested that the Security Council, acting under Chapter VII of the United Nations Charter, could establish a Compensation Commission, not as an alternative, but rather as a measure complementary to the referral to the ICC, because: “States have the obligation to act not only against perpetrators but also on behalf of victims. While a Compensation Commission does not constitute a mechanism for ensuring that those responsible are held accountable, its establishment would be vital to redressing the rights of the victims of serious violations committed in Darfur.”⁴⁴ Nevertheless, this proposal has not received favourable support.

Alternatively, it has also been recommended that the Security Council, acting under Article 29 of the Charter of the United Nations and after consultation with the Economic and Social Council, should establish a Peace building Commission.”⁴⁵ The reason for this Peace building Commission must be seen in the fact that there is no place in the United Nations

³⁹ “Report of the International Commission of Inquiry on Darfur...”, *op. cit.*, paragraph 597.

⁴⁰ *The Rule of Law...*, *op. cit.*, paragraph 54.

⁴¹ “Report of the International Commission of Inquiry on Darfur...”, *op. cit.*, paragraph 593.

⁴² Wierda, M. and De Greiff, P.: “Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims”, paper published by the *International Centre for Transitional Justice* in 2004, in <http://www.ictj.org>.

⁴³ Rules of Procedure and Evidence, adopted by the Assembly of States Parties in 2002 (ICC-ASP/1/3), in particular, rules 94 and ff. Regulations of the Court, adopted by the judges of the Court on 26 May 2004, ICC-BD/01-01-04. Both available online at <http://www.icc-cpi.int>.

⁴⁴ “Report of the International Commission of Inquiry on Darfur...”, *op. cit.*, paragraph 590.

⁴⁵ *A more secure world: our shared responsibility*, *op. cit.*, paragraph 263.



System explicitly designed to avoid State collapse and the outbreak of war, or to assist countries in their transition from war to peace.⁴⁶ The core functions of the Peace building Commission should be to identify countries which are under stress and risk sliding towards State collapse; to organize, in partnership with the national Government, proactive assistance in preventing that process from developing further; to assist in the planning for transitions between conflict and post-conflict peace building; and in particular to marshal and sustain the efforts of the international community in post-conflict peace building over whatever period may be necessary.⁴⁷ Under this description of its functions, it seems to me that the Peace building Commission could and, indeed should, deal with redress for victims, especially in dealing with reparations at least until an International Compensation Commission is established.

Be as it may, one issue remains: whatever mode of transitional justice is adopted and however reparation programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims.⁴⁸ The Millennium Declaration reaffirmed the commitment of all nations to the rule of law as the all-important framework for advancing human security and prosperity. Justice is a vital component of the rule of law. No security agenda will be successful unless they are based on the sure foundation of respect for human dignity of victims.⁴⁹ No drive for development will be effective without the punishment of the perpetrators of gross violations of human rights and upholding justice for the victims.

Concluding remark

The objective of the present paper has been to focus greater attention to rendering justice to victims in post-conflict societies from a human security approach. This implies adopting a holistic perspective of Justice, particularly, from the “repressive-preventive justice” on behalf of peace, towards a restorative justice in benefit of victims. Such approach is already timidly adopted by United Nations, namely when contributing to the instauration and operation of the so called “hybrid tribunals”. Nevertheless it should be further developed as the Statute of the International Criminal Court and subsequent instruments prove. This is an urgent task for international community, not to be postponed; if one takes into account the recent Security Council 1593 and latter decision of the International Criminal Court Prosecutor concerning the crimes allegedly committed.

⁴⁶ *Ibid.*, paragraph 261.

⁴⁷ *Ibid.*, paragraph 264.

⁴⁸ *The Rule of Law...*, *op. cit.*, paragraph 55.

⁴⁹ *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, 21 March 2005, A/59/2005, paragraphs 133, 138 and 128.