The end of 'the end of impunity'?
The International Criminal Court and the challenge from truth commissions

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Abstract: With its express intention "to put an end to impunity", the International Criminal Court (ICC) faces a substantial challenge in the shape of conditional amnesties granted in future national truth commissions (TCs) – a challenge that invokes fundamental considerations of criminal justice ethics. In this article, I give an account of the challenge, and I consider a possible solution to it presented by Declan Roche. According to this solution the ICC-prosecutor should respect national amnesties and prosecute and punish only those perpetrators who have refused to cooperate with the TC. I argue, however, that this compromise is untenable. As a general rule, if we justify the ICC on grounds of deterrence we should not accept conditional amnesties granted in national TCs.

Keywords: International Criminal Court, deterrence, truth commissions, amnesties, restorative justice, Declan Roche

Introduction

The ink was barely dry on the Rome statute founding the ICC before the first murmur of dissent was heard in the hallways of Academia. In the ensuing years this has led to a number of writings challenging the philosophical foundations of the ICC – mainly on grounds of alleged difficulties in transplanting the traditional justifying aims of trial and punishment (retribution or prevention) from the domestic to the international arena of mass atrocity crime.[1]

Below or beside these more or less abstract philosophical discussions, however, lurks a problem that might prove an even more imminent and substantial challenge to the ICC. It is a challenge with highly tangible implications for its near-future work but with equally deep philosophical roots.

This challenge has its background in a conspicuous invention of the latter half of the twentieth century. For centuries the field of criminal justice ethics has been dominated largely by retributivism and consequentialism in various guises and combinations. These theories agree basically that punishment should be our main response to crime but they disagree on its justification. From the 1970s onwards, however, a third theory – or what presents itself as a third theory – has entered the battlefield, viz. so-called restorative justice (RJ).[2] This theory takes as the primary aim of criminal justice the restoration of values destroyed by crime and seeks to do so by letting "the parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its

[1] Cf. e.g. (Ryberg this issue, Tallgren 2002, Wippman 1999, Wringe 2006) to mention just a few.

[2] Thus, one of the leading figures in the RJ movement, Howard Zehr, has repeatedly described it as presenting a new paradigm in criminal justice ethics (cf. Zehr 2005). However, it is in fact controversial whether RJ is genuinely a third theory or rather a revision of traditional consequentialism. As I have argued elsewhere (Holtermann 2009), RJ's relationship to traditional punishment is considerably more ambivalent than indicated by the rhetoric of its proponents. I will get back to this issue below. Suffice to say here that RJ is a third theory in the sense that it diverges from the punitive apriorism of traditional theories of criminal justice.

implications for the future." (Marshall 2003: 28) RJ has gradually developed into a vital movement with both growing theoretical sophistication and widespread implementation in criminal justice programmes around the world.[3]

RJ believes generally in the superiority of informal stakeholder based processes over formal trials in achieving the overall goal of restoration. In the domestic setting this implies direct victim-offender mediation processes where each party gets to tell their story and "all parties are encouraged to decide upon a mutually agreeable form and amount of reparation – usually including an apology." (Johnstone 2002: 1) In the context of mass atrocities RJ is usually taken to imply using truth commissions (TCs) instead of tribunals as a means to deal with the past. To many commentators this idea has found its best model so far in the South African Truth and Reconciliation Commission (SATRC) (cf. e.g. Minow 2000, Roche 2005) which was established in order to deal with atrocities committed during the apartheid era.

However, the SATRC-model poses a substantial challenge to the ICC with potentially far reaching consequences. As stated in the preamble to the Rome Statute the ICC is created in order "to bring an end to impunity for the perpetrators of these crimes". A chief characteristic of the SATRC, however, is precisely its strategy of using conditional amnesties in order to force as many perpetrators as possible to testify. Perpetrators were promised amnesty *if* they made full disclosure of all crimes committed with a political objective during the apartheid era.

The crucial question, then, is how the ICC shall respond to such amnesties if, sometime in the future, a country chooses to adopt the SATRC-model for dealing with an atrocious past. Most commentators agree that legally speaking this is actually an open question as the Rome statute has no mention of TCs and there is no court practice to settle the question. Thus, we appear to be forced into a consideration of the philosophical foundations of the ICC.

Current literature is found somewhat wanting in this area. To be sure, the rise of RJ generally and TCs in particular has not gone unnoticed. Most discussions of the issue, however, are held in rather abstract terms listing pros and cons of either traditional criminal justice measures or TCs (cf. Rotberg & Thompson 2000). As a result, conclusions tend to take the shape of general endorsements of one or the other.

In itself this is surely a worthwhile academic endeavour. But its proper aim is rather one of determining whether it was ultimately the right decision to create the ICC in the first place, or if the international community would do better by promoting, say, TCs globally instead.

My aim in this paper, however, is more practical. General propositions for or against trials and TCs are not really going to offer much help to the ICC prosecutor who is confronted with the concrete question as to how to deal with conditional amnesties issued in national TCs, and who realises that the statute does not provide an answer. To solve this problem we need theories that take into account the current institutional setting surrounding the ICC prosecutor. We need to examine the basic presuppositions justifying the ICC, and we need to ask if a practice of respecting conditional amnesties SATRC-style can be brought into harmony with these presuppositions.[4]

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[3] A clear sign of this development was the adoption by the UN of a set of "Basic Principles on the use of restorative justice programmes in criminal matters" in 2002.

[4] In this sense, the assignment undertaken here resembles a *hard case* in the Dworkinian sense, that is, a dilemma facing a judge (or prosecutor) when the law proper: "… does not discriminate between two or more interpretations of some statute or line of cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political

Declan Roche who has written extensively on RJ, is one of the few theorists who has attempted to solve the problem on these premises. Thus, in (2005) he argues that it is possible and indeed desirable for the ICC prosecutor to respect amnesties issued by TCs. This, he claims, is the best way to make sense of our current institutional setup.

Roche's suggestion has the merit of being, for lack of better words, immediately likeable. On the face of it, it dissolves the appearance of irresolvable conflict in strict either/or logic and suggests a way to reconcile restoratively justified TCs with the presuppositions traditionally invoked in order to justify penal institutions like the ICC.

Whether a solution to that effect is ultimately tenable is the question that I undertake to answer here. As will appear, my answer is mainly in the negative. However, I believe that Roche's failure to establish his conclusion is instructive because it allows us to articulate why these amnesties should not, or should only in highly exceptional circumstances be accepted by the ICC prosecutor. For these more general reasons Roche's paper provides the focal point for the following discussion.

Admittedly, my conclusion has a limited reach. Whether TC-amnesties are ultimately compatible with the ICC depends, obviously, on the concrete principles invoked in order to justify the ICC. And an exhaustive answer would require, ideally, considering the compatibility of TC-amnesties with all major theories of criminal justice ethics available to justify the ICC. This, however, is beyond the scope of one article. Instead, I focus only on the compatibility of respecting TC-amnesties with justifying the ICC mainly on grounds of crime prevention, and more specifically on grounds of deterrence.

Thus narrowing the scope is justified, first, because RJ is usually presented and argued in a broadly consequentialist framework. And, as we shall see, this is also the case in the context of mass crimes. We should therefore expect better prospects of reconciling TCs with an ICC justified on grounds of prevention, than if we tried to justify it through some version of retributivism. Second, prevention is explicitly mentioned in the preamble to the Rome Statute and deterrence has repeatedly been invoked by politicians and human rights organisations in defence of the ICC.[5] Finally, focusing mainly on deterrence is justified because the other factors traditionally invoked in prevention-based theories of punishment (rehabilitation, incapacitation) seem less relevant in the context of mass atrocity. Repeat-offending is hardly the most pertinent problem with regard to the crimes falling under the jurisdiction of the ICC. Perpetrators of genocide are usually not put on trial unless they have lost for good the power which made their misdeeds possible in the first place.

In part I, I recapitulate the challenge as it looks from a strictly juristic point of view, and I present an outline of Roche's suggested solution. In part II, I describe more carefully Roche's suggestion in terms of positions in criminal justice ethics and argue that the appearance of a compromise between RJ and deterrence theory is misleading. In part III, I consider two possible hybrid theories that, if viable, could save Roche's suggestion, and I show why they run into problems. In the conclusion I sum up the results of my findings and indicate briefly two areas where the ICC could nevertheless reasonably be expected to deviate from its general obligation to prosecute and punish.

Part I. Outlining a problem – and sketching a solution

morality." (Dworkin 1986: 255f)

[5] E.g., in 2000 then president Bill Clinton endorsed the ICC in this way: "I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide" (Clinton 2000)

As a matter of statute interpretation it is an open question what the ICC prosecutor should do when perpetrators have been granted conditional amnesties in national TCs. The Rome Statute is silent on amnesties, and it is known that the issue was sidestepped at the Rome Conference (Dugard 2002: 700). Though several passages in the preamble generally emphasise the importance and necessity of prosecuting and punishing perpetrators, a few articles could be interpreted so as to leave open the possibility of respecting amnesties.

Article 53 provides the best stepping stone for an argument to that effect.[6] Unlike blanket amnesties conditional amnesties granted in TCs are not simply attempts to abort the criminal justice process. On the contrary, they are themselves essential elements in an attempt to realise a concept of criminal justice, viz. that of RJ. And this is important because Article 53 allows the prosecutor to refrain from investigating a case if "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation *would not serve the interests of justice*" (Article 53(1)(c), emphasis added). The interests of justice would traditionally be interpreted in terms of either retribution or prevention but, as Roche remarks, Article 53 does not define the term, and this, arguably, leaves room for RJ:

> "A state could argue that 'the interests of justice' should be interpreted in a broad sense to include the restorative conception of justice pursued by a truth commission." (2005: 568)

On this conception, justice is a matter of restoring the values broken by crime. And Roche argues that in this respect TCs outperform tribunals on at least three important parameters: i) revealing the truth; ii) repairing victims' harm; and iii) promoting reconciliation (Roche 2005: 569). However, in order for TCs to reach these goals it is crucial that their amnesties are respected. If perpetrators will be punished by the ICC anyway, they have no reason to expose themselves to the painful process of witnessing. On the contrary, "perpetrators would have an extra incentive not to apply for an amnesty, knowing that any admission they made in the process could become the basis of an ICC prosecution" (Roche 2005: 574). And, as Roche further notes:

> "… without the participation of offenders, commissions are limited in the truth they can uncover, and, in turn, the extent to which they can repair victims' harm and promote reconciliation." (2005: 574)

In other words, if the ICC disregards these amnesties it will go against the interests of at least *restorative* justice.

For this reason, Roche suggests that the ICC prosecutor should pursue a strategy of cooperation instead. Whenever a genuine TC appears[7], the ICC prosecutor should respect conditional amnesties granted in the process and select, instead, "…cases to prosecute

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[6] Thus, I side with Dugard (2002) against Roche in considering the so-called *complementarity principle* in Article 17 an ill-suited starting point. In contrast to the international tribunals for the former Yugoslavia and Rwanda, the ICC does not have primacy over national courts. It is supposed, instead, to *complement* them in the sense that the Court shall determine that a case is inadmissible where: "[t]he case has been investigated by a State which has jurisdiction over it and has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." (Article 17(1)(b))

However, as Dugard notices (2002: 702), in the cases under consideration here states' decision not to prosecute is indeed the result of an unwillingness to prosecute: they have deliberately granted amnesty instead.

from the group of individuals who have failed to apply for amnesty, or those whose amnesty applications have been rejected" (Roche 2005: 74).

Roche remarks that this solution has the added feature of being able to help resolve a classical predicament of traditional theories of criminal justice that seems especially pertinent in the context of punishing mass atrocities. As Roche rightly observes, the ICC generally faces a difficult dilemma as to which perpetrators it should ultimately choose to prosecute: "[P]rosecutions will inevitably be selective; there are too many atrocities and too few prosecutorial resources for it to be otherwise." (Roche 2005: 574) In light of this difficulty, Roche praises his own solution for its ability to provide the ICC prosecutor with suitable transparent criteria for the allocation of resources.

Thus, in addition to being fully in accordance with RJ, Roche's solution appear to serve, or at least cohere well with the interests of justice as they are more traditionally conceived in relation to prosecutorial work in a criminal court. It appears, in other words, that Roche has made a convincing case for respecting TC-amnesties on the basis of Article 53 in the Rome Statute.

Part II. Spelling it out: an all-out restorative solution

Roche's suggestion has the appearance of a reasonable equitable compromise that would respect the national, perhaps even democratic solution of establishing a TC on the one hand while upholding some measure of global accountability for mass atrocity on the other. Thus, the solution seems to allow for RJ's peaceful coexistence with traditional criminal justice: Whenever a national TC appears the ICC would get to "do its punitive thing" with regard to the uncooperative offenders while the commission would get to "do its restorative thing" with regard to those who cooperate.

In spite of appearances, however, I will argue in this section that Roche's solution to the issue of TCs really has nothing to offer those who propose ICC on grounds of deterrence. In fact, when properly spelled out, Roche's suggestion amounts to handing over to RJ *all cases* affected by TCs, that is, cases regarding *both* cooperative *and* uncooperative offenders. As it stands deterrence theorists should find nothing of interest. The entire enterprise is through and through an exercise in RJ.[8]

In order to establish this claim, we need an exact description in terms of positions in criminal justice ethics of the suggestion at hand. This is the task undertaken in this section.

Through restorative lenses: The crucial thing to notice about Roche's suggestion is that it does not in fact constitute a compromise as between two institutions, an ICC and

[7] Roche suggests five elements that distinguishes legitimate TCs from sham commissions created in order to shield perpetrators from prosecution: "that victims support its establishment; that amnesties are granted conditionally; that widespread participation is encouraged, that efforts are made to assist victims; and that the truth commission contributes to a wider process of reconstruction." (Roche 2005: 575)

[8] Perhaps Roche would agree to this particular claim. As a matter of fact he is quite silent on the wider theoretical implications of his suggestion. To be sure, he does, as already mentioned, hint at the "ecumenical" character of his solution. And he does sketch how respecting the amnesties would be in general accordance with a restorative conception of justice. But strictly speaking, apart from this, Roche merely suggests a set of actions to be undertaken by the ICC and national TCs in conjunction in specific cases of mass atrocities. Which theories of criminal justice would *ultimately* support which, if any, of these actions is a question that is left mostly in the dark. And, in particular, Roche does not discuss whether this suggested course of action is ultimately reconcilable with the ICC being an institution that has generally made it its goal to prosecute and punish perpetrators.

a national TC, each pursuing their fundamentally different concept of criminal justice, viz. a punitive and a restorative respectively.

As already mentioned, a superficial reading could otherwise leave the opposite impression. But this reading conflates criminal justice theory with concrete measures taken in criminal practice to implement these theories. And it conflates, in particular, RJ as a vision of criminal justice with RJ as a specific process (mediation, truth telling, etc.).

This is to some extent an understandable confusion as some advocates indeed do identify RJ thus narrowly with stakeholder based voluntary deliberative processes (cf. Marshall 2003, McCold 2000). However, most modern proponents have abandoned this narrow definition because as Lode Walgrave remarks: "restricting restorative justice to voluntary deliberations would limit its scope – possibly drastically, and condemn it to the margins of the system" (2002: 193).

First of all, as John Braithwaite puts it a certain amount of coercion is necessary:

> "Very few criminal offenders who participate in a restorative justice process would be sitting in the room absent a certain amount of coercion. Without their detection and/ or arrest, without the specter of the alternative of a criminal trial, they simply would not cooperate with a process that puts their behavior under public scrutiny." (Braithwaite 2002: 34)

For this reason, RJ processes narrowly understood must take place "in the shadow of the axe" (Braithwaite 2002: 36).

Furthermore, not all cases lend themselves to stakeholder deliberation even under the shadow of the axe, for instance when one or both parties refuse to participate or when the offender is considered dangerous to society. In these cases, many RJ advocates agree that punishing the offender after legal proceedings can become necessary (see, e.g. Braithwaite 2002, Dignan 2003, Van Ness 2002, Walgrave 2002).[9] It will be justified because it can be seen to further the overall aim of justice: the restoration of values.

These considerations apply equally to garden variety criminals in domestic jurisdictions and to perpetrators of mass atrocities falling under the jurisdiction of the ICC. Thus, as we saw above, Roche himself considers the threat of punishment a necessary ingredient in order to render a TC possible at all.[10]

On the most plausible interpretation, then, punitive measures are undoubtedly necessary in a restorative criminal justice system.[11] Thus, from this point of view there is in fact no compromise with regard to those cases that the ICC prosecutor should deal with on Roche's suggestion. On the contrary, the ICC only does what the national legal system would otherwise have had to do itself in order for there to be a TC at all. Other than that, the only compromise lies *outside* the model, that is, in not applying this strategy across the board to each and every case of mass atrocity but only to those where states have decided to pursue justice through a TC.[12]

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[9] Though some prefer to avoid entirely the word "punishment" and speak, instead, of e.g. "restorative sanction" (Walgrave 2002: 194). However, the responses they recommend in these latter cases include for instance incarceration and thus resemble traditional punishment for all practical purposes. For a critical discussion of the general problems confronting RJ theories on the issue of punishment, see my (Holtermann 2009).

[10] Even archbishop Desmond Tutu who, as chair of the SATRC, vigorously defended a reconciliatory approach to perpetrators, has expressed regret that South Africa never honoured its promises and prosecuted those perpetrators who did not cooperate with the commission (Tutu 2005).

[11] And this is also the one on which Roche must rely.

[12] Whether that compromise is ultimately feasible is a question that I will deal with in part III below.

Through the lenses of deterrence theory: From the point of view of deterrence, on the other hand, it is hard to see how someone who would justify punishment on these grounds could find anything of value in the procedure suggested by Roche. Even if uncooperative perpetrators would ultimately get the same punishment as "ordinary" perpetrators would have gotten had there been no TC in the first place, the aggregate deterrent effect of these particular punishments would be so small as to be virtually nonexistent. In particular, it would not in any way compare with the corresponding effect of a criminal justice system that would punish the same absolute number of perpetrators but instead choose who to punish, i.e., through some randomised mechanism or on the basis of prosecutorial discretion.

This is so because even if it is widely acknowledged among all parties that it is impossible to punish all perpetrators equally hard, it is nevertheless possible for the authorities to create a significant deterrent effect if, for example, they succeed in creating sufficient uncertainty among potential perpetrators as to the future consequences of their actions.

This logic was famously utilized in the "Federal Day" project initiated by Rudolph Giuliani when he was U.S. Attorney in Manhattan. In the light of scarce resources:

> "[Giuliani] would pick a day of the week at random and on that day, every drug case brought was prosecuted in federal court. On the other six days, those cases all went to state courts." (Hughes 1997: 161)

As a result, many potential perpetrators, being ignorant of which day had been chosen for federal day, would choose to act on a cautionary principle. They would refrain from offending in order to avoid the risk of suffering the comparatively severe punishment ensuing arrest on federal day, thus fulfilling Giuliani's goal: "to create a Russian-roulette effect" (Hughes 1997: 161, n77)

In contrast, the system suggested by Roche does not motivate any considerations of caution on behalf of potential perpetrators. Rather it resembles, in effect, a system that announces *in advance* which day is federal day. Whenever TCs are decided upon, perpetrators have absolutely no reason to feel uncertain about the consequences of their actions. On the contrary, if the ICC should decide to follow Roche's suggestion and this was to become common knowledge, potential perpetrators would know beforehand exactly which of the two mechanisms they would ultimately end up in, viz., the one they would personally prefer! Thus, perpetrators who prefer witnessing over punishment (presumably the vast majority) would remain completely undeterred by the threat of punishment, simply because they would know that that option would never become relevant to them. It would be relevant only to those perpetrators who are so untroubled by the prospect of punishment that they prefer it over witnessing. And it seems safe to say that these perpetrators are not the ones most likely to have been deterred by the threat of punishment in the first place.[13]

I should, perhaps, add that of course not all ICC-punishments would be, thus, void of deterrent effect if Roche gets his way. If I understand him correctly he assumes that the

[13] This discussion perhaps oversimplifies matters somewhat. Presumably it is anything but pleasant for a perpetrator to confess to her sins in front of victims or relatives of victims. The crucial point, however, is that there is a marked difference between the unpleasantness of witnessing and of being punished, and that the unpleasantness of witnessing is too small for it to work as a deterrent, while the other can. Incidentally, this goes for the two options in the "federal day" example as well. And RJ proponents must themselves consider punishment more unpleasant than testimony if they are to defend that the threat of punishment will work as an incentive.

ICC should continue to punish perpetrators of mass atrocities in all cases where TCs have not been decided upon. And as perpetrators would not generally know beforehand if the mass atrocities they participate in will be dealt with in one way or the other, these punishments would still produce some deterrent effect in a manner analogue to the Federal day-example, even if only a fraction of all perpetrators would ultimately be punished.[14]

However, my business in this section has been to determine how to classify in terms of deterrence the use of punishment suggested by Roche *specifically against those perpetrators who refuse to cooperate with TCs*. And it appears that these punishments do not contribute at all to any previously existing deterrent effect, and, thus, the additional harm they do inflict remain unjustified on grounds of deterrence.

In sum, it appears that in spite of Roche's promising remarks on his suggestion providing a suitable criterion for dealing with scarce prosecutorial resources, it turns out to be of no use to proponents of deterrence. In terms of resources the punishments Roche recommends for uncooperative offenders will be money out the window. And in terms of ethics they will be plain wrong. The only way these punishments can be justified is on account of a restorative concept of criminal justice.[15][16]

This is why the appearance of a compromise is deceiving. In Roche's model deterrence rationales have in fact been dispelled entirely from cases where TCs have been suggested by the states involved. The only compromise lies *outside* the model. From the point of view of deterrence, then, the suggestion comprises of an ICC, that has made it its business by default to punish perpetrators of mass atrocities on grounds of deterrence, but which switches from this default option to a combination of amnesties and punishments justified on grounds of RJ whenever TCs are presented.

Part III. Two possibilities considered

So far I have only spelled out the implications of Roche's suggestion in terms of criminal justice. My more critical claim presented in this section, however, is that an ICC following this suggestion simply would not make sense. To be sure, it could of course be *practically* possible for it to act according to these guidelines. But it is hard to see how it could be defended in theory. On the one hand, accepting TC-amnesties actively works counter to the aim of deterrence. On the other, we cannot claim that Roche's solution presents a

[14] How much exactly and whether it would ultimately outweigh the costs of producing it is a question that I do not discuss here.

[15] Actually, it could reasonably be questioned if these exact punishments can even be justified on restorative grounds. At least if the punitive level resembles that of traditional tribunals. Strictly speaking, the procedure Roche suggests justifies punishment only as a means to provide an incentive for perpetrators to testify before a TC. Thus, on this account the punishment only needs to be sufficiently hard as to actually serve this purpose. And this could easily imply much milder punishments than those traditionally handed out by mass atrocity tribunals. After all, who would not testify in order to avoid, say, ½ a year in prison? Thus, by hypothesis, punishment superseding this level would be unjustified even on grounds of RJ. This, however, is a problem I mention only to put aside here.

[16] Of course, this does not in itself tell us whether proponents of deterrence should continue to feel embarrassed about the lack of resources vis-à-vis an overabundance of perpetrators. This, however, is a different question the answer to which depends, essentially, on considerations of equality under law, and which has a bearing, rather, on the general discussion for and against the ICC. But the argument so far has shown that even if we *did not* have to choose but could punish *all* perpetrators, it would still be wrong, on either of the classical positions, to punish these specific perpetrators in accordance with Roche's guidelines.

through and through RJ model because it includes a lot of punishments (when the ICC is doing "business as usual") that are obviously unjustified on these grounds.

In order to save Roche's suggestion, then, it seems we need a hybrid model. Regrettably, Roche himself does not attempt to construct such a model. In the remaining part of the article I will therefore consider two possible hybrid theories, one that allows for exemptions from the general punitive imperative on grounds of national deliberation, and one that does so if it can be shown in particular cases to lead to better consequences.

Deviating from punitive justice on grounds of national deliberation: One immediate possibility is that the ICC should respect TCs because they are the result of national deliberation. Thus, Roche repeatedly refers to the importance for the ICC of respecting national sovereignty (cf. 2005: 568). In addition, he suggests, as a general criterion for discriminating "true" TCs from "false" ones that they be supported widely in the countries in question (Roche 2005: 575).

In a wider perspective, honouring national decisions on TCs also strikes a chord with the general anti-paternalistic, stakeholder oriented spirit of RJ. Since Nils Christie's seminal article "Conflicts as property" (1977) it has been a central tenet of RJ that conflicts should be given back to the people. In the aftermath of crime we should always look to the stakeholders themselves. They are the true experts. And in the context of mass atrocity this could be interpreted in the direction of putting national interests over the comparatively abstract interests of the international community.[17]

At the same time this thought could be claimed to find support in the earlier mentioned complementarity principle that testifies to the will of the ICC to grant some reverence for national interests. However, this reading rests on a misinterpretation of the principle. While national decision making might generally be considered a good thing, especially when democratic, it is not necessarily so in the context of mass atrocity. On the contrary, the ICC is created precisely because punishing perpetrators of mass atrocity might not always be in the best national interest. Ever too often, as in the case of Rwanda, victims of mass atrocities might be minorities while perpetrators belong to the majority. In addition, it is generally highly possible that national interests will not be in harmony with those of the international community, i.e. in cases of ongoing armed conflict. Perpetrators of mass atrocities often belong to warring factions and the prospect of being punished severely for mass atrocities after the cessation of hostilities has repeatedly been accused of prolonging armed conflict.[18] This is often referred to as the "peace vs. justice"-dilemma in the literature on mass atrocities and transitional justice.

But as several commentators have emphasized these considerations have already been taken into account when creating the ICC in the first place:

> "[W]here the crimes offend not only national law but international law, the international community also has an interest in the process and it has decided that

[17] We should be aware, however, of a certain irony attached to this use of the anti-paternalism argument. In the context of domestic crime the thrust of the anti-paternalism of RJ is usually directed against the state. It is the state that steals the conflicts from the people. If the argument is to carry any weight in the context of mass atrocities, however, the state suddenly becomes the bereaved party while the international community becomes the villain. I shall leave aside the intricate question of whether this transfer of the anti-paternalism is entirely unproblematic for proponents of RJ.

[18] For instance, the ICC-prosecutor's steps to issue an arrest warrant for Sudan's president has been accused by the African Union of jeopardising the difficult peace process in the region, http://news.bbc.co.uk/2/hi/africa/7517393.stm (accessed on November 26, 2008).

> justice, in the form of prosecution, must take priority over peace and national reconciliation. The establishment of the ICC testifies to this judgement on the part of the international community." (Dugard 2002: 702-3)

For these reasons, the ICC is founded on the idea that when it comes to pursuing justice in the aftermath of atrocity crime we should not honour national decisions simply for being national – not even if democratic. Thus, the complementarity principle does not express the will of the international community to transfer powers with regard to deciding *what* to do, basically, with the perpetrators of mass atrocity; only with regard to *who* should perform the actions the type of which, i.e. trial and punishment, we have decided basically to deal with elsewhere. And this transmission takes place out of recognition that there might be some beneficial effects in justice being meted out not somewhere far away in the Hague but locally where the wounds are felt.[19]

Roche's suggestion, on the other hand, leaves the "what to do"-question to the nations concerned, not just the "who"-question. And this, it seems, should not be respected simply on grounds of state sovereignty – at least not if we basically condone the judgement behind the establishment of the ICC.

Deviating from punitive justice if it leads to better consequences: A different possibility would be to claim that by default the ICC should pursue trial and punishment (primarily) on grounds of deterrence – *unless* a TC could reasonably be expected to have better consequences in a specific case of mass atrocities.[20]

In (2005) Larry May argues in favour of an ICC-prosecutor policy that could be interpreted along the same lines – though he is not as specific as Roche with regard to the exact division of labour between the ICC and TCs. May concedes that we should generally choose punishment in accordance with the rule of law. At the same time, however, he draws attention to the classical problem of equity which he claims to be especially important in the context of mass atrocity. As is well known, the principle of legality claims that the law be formulated in general terms and *ex ante* its application on any individual situation. The problem arises when particular cases come up which the lawmakers did not anticipate and where a verbatim application of the law would yield abhorrent results.[21] In such cases, the classical answer going back to Aristotle is to let

[19] An additional problem is that in the long run, this policy could undermine entirely attempts to deter crime because it could further a dramatic increase in the number of TCs at the expence of ICC trials and punishments. If the ICC should respect TCs on grounds of national decisions it would create an extra incentive (besides truth, reconciliation and reparation) for national interests to further TCs: the prospects of moving citizens beyond the reach of the ICC. That this mechanism is not entirely ficticious was illustrated recently in Uganda. Here, the ICC-arrest warrant for top leaders of the Lord's Resistance Army led to hastily organized "TCs" in order to make the ICC back down: http://www.time.com/time/world/article/0,8599,1682747,00.html (accessed on November 26, 2008)

[20] This interpretation would accord well with the arguments put forward by Roche that refer to the superior ability of TCs to produce truth, restore victims, and promote reconciliation – while offering no counter arguments against the possibility of producing a deterrent effect through punishment. This could be taken to imply that deterrence is basically acceptable and should be our main target and that we should pursue TCs only in those cases where it would actually have better consequences to do that.

[21] Thomas Aquinas famously considers one such case: "Suppose a siege, then a decree that the city gates are to be kept closed is a useful general measure for the public safety. Yet say some citizens among the defenders are being pursued by the enemy, the cost would be heavy were the gates not to be opened to them. So opened they are to be, against the letter of the decree, in order to defend

the letter of the law yield to the spirit of the law. And this is done in the name of equity. In Aristotle's famous wording: "And this is the nature of the equitable, a correction of law where it is defective owing to its universality." (Aristotle 1987: 1137b26-27)

Transferring these considerations to the context of mass atrocities, May argues that on grounds of equity we should leave to the prosecutor discretional powers to decide occasionally not to proceed: "[A]ppeals to equity will justify the kind of appeal to mercy and broader social good that is involved when amnesties are granted instead of holding criminal trials …" (May 2005: 243) And these remarks could be interpreted to imply that the prosecutor should stand ready to acknowledge amnesties issued by national TCs whenever these can be seen to lead to better consequences in individual cases.

I believe, however, that this will not do either, basically because the exception clause is so strong that an ICC following this maxim would never get around to punishing anybody and, thus, neither to deter potential perpetrators.

Only a misguided deterrence theorist would claim that if any one case is viewed in isolation does the deterrent effect of applying trial and punishment always or even for the most part outweigh the beneficial consequences of pursuing some alternative course of action, i.e. mediation processes or even blanket amnesties. And more importantly, she would not even have to make this claim in order to justify punishment mainly on grounds of deterrence. On the contrary, she could readily agree that it might even be highly possible that punishment in any one case considered in isolation would lead to worse effects than any of the mentioned alternatives.

First of all, it is indeed possible that TCs do outperform trial and punishment on the parameters Roche mentioned: revealing the truth; repairing victims' harm; and promoting reconciliation.[22]

Furthermore, as any criminology textbook will readily confirm, the direct consequences of carrying out any single case of trial and punishment are most likely to be overwhelmingly negative. The punishment itself, of course, inflicts a certain amount of pain on the offender – as it is meant to do. Furthermore, it is empirically well established that punishment has a propensity to produce a range of negative side effects like defiance, social stigmatization, marginalization, etc (cf. e.g. Braithwaite 1989). On top of this, we have the direct costs to society at large. A trial in itself is a costly affair, and the enormous price of running a penal system is a constant reminder that we need very good reasons for choosing this way of dealing with crime.[23]

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that very common safety the ruling authority had in view." (Thomas 1964: , 1a2æ. 96, 6)

[22] Though, this presumption should by no means be considered a matter of course as advocates of RJ tend to do. Several critics, notably Acorn (2004) and Brudholm (2008), have argued convincingly that TCs can actually intensify victims' harms rather than repair them. Thus, the agenda of forgiveness and reconciliation habitually (and perhaps even inherently?) associated with TCs has a tendency to render illegitimate and guilt-ridden victims' natural and morally legitimate feelings of resentment.

In addition, when comparing trials and TCs there is a tendency to describe the former in implausibly restrictive terms while the latter is described in broad inclusive terms. Thus, e.g. Roche emphasises that genuine TCs should not simply settle for emotional reparation of victims' harms that might become available through perpetrator testimony. They should also perform symbolic acts of reparation and provide financial reparation to victims (2005: 578). However, these measures are surely equally available whenever trial and punishment has been chosen as the appropriate way of dealing with the past. In fact, in accordance with the Rome Statute's Article 79 a Trust Fund for Victims was founded in 2006.

[23] The 2008 budget appropriations for the ICC alone amounted to €90,382,100 (International Criminal Court 2008: 18).

And if we move the perspective back in time to a point before the perpetrator was even arrested, the immediate consequences of insisting on trial and punishment seem even worse. If the perpetrator is still at large after having perpetrated, the prospect of prosecution and punishment obviously gives her a strong incentive to resist arrest, if necessary through continued perpetrating. A fact which in the context of mass atrocity crime actually amounts to the earlier mentioned "peace vs. justice"-dilemma.

At the same time, deterrence, on any reasonable interpretation of it, is an effect that, if real, it takes more than one case of punishment to establish. In and of itself, an act of punishment does not bring about substantial changes in potential perpetrators' calculations as to the possible effects of their actions. If threats on behalf of the judicial authorities are widely trusted the punishment itself is superfluous as a means to bring about the change. If they are not so trusted[24] more than one successful case of trial and punishment is needed. One swallow does not make a summer, and, by the same token, in distrustful contexts, individual instances do not establish a deterrent effect in and of themselves.[25] They do so, only conditional upon them being parts of a larger set of similar actions on behalf of the judicial authorities in response to relevantly similar kinds of criminal behaviour.

Remembering the immediate negative consequences of punishment we thus have good reason to believe that the consequences of applying trial and punishment to any single criminal case will be considerably worse than if we apply some version of RJ or even blanket amnesty. And this is true of traditional domestic as well as of international criminal justice.

For these reasons any argument in favour of punishment on grounds of deterrence cannot be sustained if it is made purely on a case by case basis. If we restrict our view to an assessment of the immediate consequences of the singular application of punishment, it might very well be the case that we should never punish in any particular instance, but find some other alternative (possibly a version of RJ). In the hybrid rationale under consideration here, the exempting clause would simply always be satisfied. Thus, in effect, an ICC following this maxim would be incapable of establishing any significant deterrent effect at all.

Incidentally, this also explains why May's comments on equity are misleading. As described above, equity, in the Aristotelian tradition to which May refers, is only invoked when cases come up which the lawmakers did not anticipate and where a verbatim application of the law would yield abhorrent results. However, there is nothing *unanticipated* about the possible costs of punishment over TCs in any single case. It is, of course, always a tragedy when mass atrocities do take place, but however cynical it may sound these particular losses are in a sense calculated costs of upholding a credible threat of punishment toward all potential perpetrators. As earlier mentioned, these costs can be found in any criminology textbook. Thus, if a deterrence-based defence of punishment is to make any sense at all, it must be because these losses are believed to be outweighed in the long run by the possible gains in terms of reduced future perpetration.[26]

I should underline that nothing of what I have said here amounts to the claim that it is in fact possible to establish any significant deterrent effect through the use of

[24] As in the case of the ICC whose capacity to actually prosecute and punish even a small fragment of perpetrators of mass atrocities is often questioned by its critics (cf. e.g. Tallgren 2002).

[25] Otherwise, we would be home free by now considering those already punished in ICTY and ICTR. And we obviously are not.

[26] See also, (Dugard 2002: 702-3) quoted above.

punishment.[27] I only observe that *if* we generally propose the ICC in the belief that it can help prevent mass atrocity through deterrence, fulfilling this ambition is inconsistent with choosing RJ whenever it will lead to better consequences in particular cases. If, on the other hand, one does not find the thought of such an effect at all plausible one should feel equally dissatisfied with a solution that suggests leaving cases where TCs *have not* been proposed to traditional trial and punishment. In that case one should simply oppose the entire creation of the ICC. Alternatively, one could argue that the ICC should be turned into an institution that simply promotes reconciliation and RJ in the aftermath of mass atrocity through the global imposition of TCs. But in that case it would seem appropriate to strike the word prevention from the preamble and settle for words like restoration and reconciliation.[28]

Conclusion

I have discussed a possible future challenge facing the ICC in the shape of conditional amnesties granted in national TCs. Focal point of the article has been Declan Roche's claim (presented in part I) that the ICC can enter a path of cooperation and acceptance of amnesties without jeopardizing its fundamentals – that indeed a compromise is both possible and desirable on the Rome Statute. I have found, however, that Roche downplays the controversiality of his suggestion, and that, when properly spelled out, it does not constitute a viable road for the ICC.

First, I have shown (in part II) that on Roche's suggestion deterrence-based theories of criminal justice have in fact been dispelled entirely from cases of mass atrocities dealt with by TCs. The suggested course of action is instead RJ through and through. Thus, from the point of view of deterrence, what Roche in fact suggests is that the ICC should generally punish on grounds of deterrence, except when TCs have been suggested in which case the court should switch to a restoratively justified combined strategy of amnesties and punishment.

Secondly, I have considered (in part III) two hybrid theories that, if plausible, could justify this blend of strategies and criminal justice rationales. However, neither of these could ultimately be sustained. For that reason I conclude that Roche's suggestion of accepting conditional amnesties is unsound. He has not managed to provide a convincing reason to deviate thus systematically from the general punitive imperative associated with the ICC.

But perhaps one question remains: are there absolutely no situations in which the ICC should refrain from prosecution and punishment and e.g. accept TC amnesties if they are available? Two scenarios come to mind.

First, Roche mentions, in passing, that under a variation of the cooperative approach suggested by him:

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[27] As a matter of fact I do believe it possible in the long run for the ICC to create a general deterrent effect strong enough to justify the costs of trial and punishment. Regrettably, this effect will never be so strong as to satisfy the post-Holocaust promise "Never again!" but less will definitely do. Defending this claim, however, is the topic of a different article on which I am currently working. In the meantime, I believe Anthony Ellis (in 2001: and in this issue) has done a very convincing job at laying out the foundations for such an argument.

[28] In Dworkinian terms we would then have given up on the *hard case* at hand. We have abandoned entirely the attempt to provide an interpretation that "shows the community's structure of institutions and decisions in a better light from the standpoint of political morality." (Dworkin 1986: 255f) Instead we have proposed a whole new institutional setup. Again, from the point of view of general philosophy this is surely a legitimate undertaking. But it is useless as a piece of advice to the ICC prosecutor *qua* ICC prosecutor.

> "the ICC prosecutor may agree to abide by a general policy of respecting truth commission amnesties, but insist on the right to prosecute a small number of the most serious cases." (2005: 575)

Now Roche does not define "a small number of the most serious cases" but on at least one interpretation this could be a reasonable suggestion. On this interpretation, however, it is no longer merely a variation but an entirely different and in fact uncontroversial suggestion.

The ICC is necessarily a "big fish court". First of all, as earlier mentioned resources are limited in comparison with the number of perpetrators of atrocities. Furthermore, the concepts of individual guilt and responsibility, notoriously controversial in the context of mass atrocities but simultaneously necessary preconditions of criminal trials, arguably make most sense when applied to perpetrators in the ruling elite.[29] For these reasons, Roche's modified suggestion actually only repeats the obvious: that ICC trials cannot and should not tell the whole story. In the aftermath of mass atrocities, international prosecutions have to be supplemented by national initiatives. And using TCs against "small fish" could be one of those initiatives.

Secondly, there is obviously one last sense in which the ICC prosecutor should be allowed to refrain from prosecution, viz. if we have reason to believe that prosecution and punishment will lead to disastrous consequences. Kantianism aside, ethical imperatives are surely best understood in an *other things being equal*-fashion. It is not only a sign of the arrogance of power but equally of moral perversion to subscribe to the motto of Roman emperor Ferdinand I: "Fiat iustitia, et pereat mundus" (Let there be justice, though the world perish).

If by justice we mean strict application of black letter law, then the only maxim that makes sense is this: "Fiat justitia si mundus non periet" (Let there be justice unless it will make the world perish). In the context of mass atrocity this is the true sense of equity. And this, in fact, is just a formula of justice in a deeper sense. The sense that should rightly be applied when reading Article 53 of the Rome Statute.

References

[29] Some even question that these concepts make sense *at all* in the context of mass atrocities (Tallgren 2002: 573). This claim, however, takes us back to a general discussion of the ICC altogether, and this is not the issue here.