ARTICLE

Exploring the intertwining between human rights and restorative justice in private cross-border disputes

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Abstract

International human rights instruments operate on the assumption that states are the focal human rights duty bearers. However, private actors can harm human rights as well. Moreover, since mechanisms at a supranational level are lacking, these instruments rely primarily on states for their enforcement. Yet states' internal rules and courts are meant to address infringements that are confined within their borders, and are therefore often structurally unable to deal with violations having transnational impact. Restorative justice has proven to respond in depth to different kinds of wrongdoing and, although addressing the peculiarities of each case, restorative procedures can systemically prevent deviant behaviour as well. Additionally, as restorative justice relies on voluntary participation it need not operate in a specific territory. Having this broader picture in mind, the article explores whether restorative justice might be adequate for dealing with human rights infringements perpetrated by private actors that have cross-border impact.

Keywords: International human rights, private actors, horizontal effect, restorative justice.

1. Introduction

This article explores the question of whether restorative justice might be appropriate for dealing effectively with human rights cross-border disputes involving private actors.[1] It is not so much about understanding the extent to which restorative justice is constrained by human rights enshrined in international instruments such as 'due process' or 'right to a fair trial', which is the most common

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Acknowledgements: I am grateful for the comments on draft versions of this article from Ivo Aertsen, António Cortês, Pavel Molek, Stephan Parmentier, Gonçalo Almeida Ribeiro and the article reviewers.

1 'Private actors' and 'private parties' will be used interchangeably in this article.

approach to the relationship between restorative justice and human rights found in the literature. It is mainly to grasp the possibility of having restorative justice as a human rights enforcement mechanism, as a particular way of protecting human rights. A yes-or-no answer to this question, if ever achievable, would require thorough investigation beyond the scope of this study, whereas this article aims merely to open the question by underlining some features of both international human rights and restorative justice that suggest such a possibility.

The article will begin by contextualising the development of contemporary human rights from within classical public international law and by pointing out the shortcomings of that legal framework when dealing with the violation of human rights by private actors, particularly concerning remedies at a non-state level. Then it will turn to the emergence of restorative justice and its underlying concerns, draw a picture of the different uses for it and illustrate how it may generate systemic effects. It will conclude with a prima facie affirmative answer while stressing the need for further inquiry.

2. Human rights and private actors

We frequently see in the news stories about child labour in companies operating in different jurisdictions, or the pharmaceutical industry using orphans for medical experimentation with the assistance of international non-government organisations (NGOs), or global social network owners that use private information without consent. Media often show them as cases of human rights violations. But are these actual human rights violations? If so, what are the available mechanisms for dealing effectively with such issues?

Contemporary human rights were imagined in the aftermath of one of the darkest pages of human history. Both legal and non-legal discourses have often presented them as stemming from and tending to human dignity (Domingo, 2010: 142-144). Jurgen Habermas says that '[t]he appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity', which makes it 'the moral "source" from which all the basic rights derive their meaning' (2012: 65). There are other conceptions of human rights as moral rights: for instance, different authors point out agency, basic interests, autonomy and basic capacities as the human feature relevant to human rights (Cohen, 2008: 581). However, although controversial, human dignity is probably the most common in human rights discourse (Freeman, 2011: 69; Orend, 2002: 87). We can further notice that there is a widespread idea that contemporary human rights should seek universality (Tomuschat, 2014: 47).[2] Their point should be the protection of every human being against the offence to human dignity.[3] In this vein, human rights aspire to protect orphans from illicit drug testing, children from forced

2 This idea of universality is controversial as well (Panikkar & Sharma, 2007). Opposed to the 'universalist' view on international law, there is a 'particularist' one, which holds that states are and should remain the sole players in the global arena (von Bogdandy & Dellavalle, 2008).

3 See the Preamble and Art. 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948.

labour or any of us from undue violation of our privacy, any time, anywhere. A few decades later, in spite of the great development human rights have undergone, we are well aware of the gap between its aspirations and its accomplishments. Different circumstances contribute to this state of affairs. The mere fact that international human rights need political, diplomatic and, particularly, legal instruments to operate in our daily lives makes them vulnerable to the weaknesses inherent to these mechanisms, and fall short of their original ideal.

From a legal standpoint, one major problem lies in the fact that international human rights developed within a classical public international law framework, the principles, concepts, methodology and instruments of which do not entirely fit human rights' purposes and hinder this task. The core of the dilemma concerns the difference in frameworks – classical public international law is state-centric, whereas human rights are intrinsically anthropocentric – generating a series of difficulties (Tomuschat, 2014: 1-3).

The first difficulty relates to the fact that the international legal order, which used to be dualist and exclusively state driven during the classical period, now has individuals as international rights' holders. In theory, human rights changed the very nature of international law by subverting its main principles: international law evolved from a purely interstate law into a suprastate law responsible for the protection of infra-state interests, and the human being became the subject of both internal and international law, collapsing the wall between internal and international legal orders (Sudre, 2015: 45). In practice, as we shall see, it was not quite so.

The second difficulty pertains to the fact that states are the main duty bearers of human rights (Sudre, 2015: 109). It is for states to safeguard every human being under their jurisdiction from any violation of his or her human rights. This involves primarily the shielding of individuals against state offences and the permission to engage freely in certain activities without state interference, for states are considered the major potential aggressor.[4] However, human dignity can be, and often is, ill-treated by private actors as well. Anyone anywhere (individuals, companies, international organisations, private or public actors, within or outside the borders of a country) can seriously injure human rights. The problem is that, here too, states and non-private actors play the leading role: states often have positive obligations under international treaties to protect individuals, which they must fulfil through national regulations, rules and procedures such as liability or criminal ones (Rainey, Wicks & Ovey, 2014: 85-87; Smith, 2014: 175-176; Sudre, 2015: 241-250).[5] Once these internal rules come into force they become the legal grounds for the protection envisioned by the human right at stake, eroding the role of international human rights. When the states fail to enact such

4 This is particularly true where first generation human rights are concerned, although we also rely on states to fulfil other generations' goals.

5 Positive obligations can be found in supranational court decisions. For instance, in *MC v. Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), the court found that Arts. 3 and 8 of the Convention were infringed because there was a positive obligation to investigate and punish rape cases.

rules the protection of human rights violated by private actors is nearly impossible, with few exceptions.[6]

Surely, there is an ongoing debate on whether and how human rights may affect the relationship between private actors and, although this debate occurs mostly on what rights enshrined in national constitutions are concerned, these domestic rights can be considered 'human rights' as well. Indeed, in a broad sense, human rights encompass both international and domestic rights because both fulfil the same function of protecting individuals against states (Gardbaum, 2008: 750). Some countries, such as the United States under the 'state action' doctrine, admit only strict vertical effect with few exceptions (Gardbaum, 2003: 412-429). Yet a growing number of jurisdictions, such as Germany, accept horizontal effect (Estrada, 2000: 92-98). Still, the difficulties remain. Horizontal effect does not usually operate by simply substituting the state for other citizens because the latter hold a different position: unlike the state, citizens are also bearers of human rights, which call for balancing the interests of both private parties. Horizontal effect leads, then, to a 'right of the citizen against the civil courts that they take adequate account of the constitutional principles which support the position argued for by the citizen' (Alexy, 2002: 361).[7] This means that in the absence of a legal state provision forbidding, e.g. pharmaceutical unconsented testing, indirect horizontal effect only allows orphans to ask the court to take into consideration their human right to bodily integrity but they cannot invoke it directly against the private company or the NGO.

Even if we accept direct effect, where private actors can invoke rights immediately between themselves, the handicap persists when we move from the state to the suprastate level. In an increasingly globalised world, many disputes involve several jurisdictions. In such cases, because of the territorial limits to their jurisdiction national courts may prove to be structurally unable to address violations with transnational impact.[8] Since it is argued that international human rights have collapsed the separation between international and national law, we might think that human rights could also produce horizontal effect at a supranational level. However, a third difficulty arises: the insufficiency of suprastate remedies and enforcement agencies (Smith, 2014: 153-154).

3. The lack of instruments for the effective protection of human rights

Several regional and international human rights instruments signed by a large number of states concern international human rights. They usually include the

6 One of those few exceptions concerns the Rome Statute of the International Criminal Court. Otherwise, the difficulties relating to the prosecution of private parties can be abundantly read in the literature. See e.g. Andrew Clapham's book on human rights obligations of non-state actors (2006) or Ratner's article on corporations and human rights (2001).

7 According to Alexy, even if constructions that accept some kind of third party effect vary in their reasoning, they are outcome neutral (2002: 357).

8 Extraterritorial jurisdiction may overcome some of the difficulties. However, there is always the need for some sort of state cooperation for the enforcement of the decision.

The International Journal of Restorative Justice 2019 vol. 2(1) pp. 73-92
doi: 10.5553/IJRJ/258908912019002001005

right to an effective remedy. These international instruments foresee an increasing number of rights leading to what has been known as the expansive force of human rights.[9] As we have seen, many argue that they stem from natural law, that they are universal and that they are at the very core of global law (Domingo, 2010: 142-144). Unfortunately, most international enforcement mechanisms still operate under the classical interstate framework, which is not suited for dealing with human rights between private parties. First, because most international bodies responsible for the application of international law do not have compulsory jurisdiction.[10] Second, because even when they produce binding decisions they still lack enforcement measures. Third, because even the European Court of Human Rights, which holds one of the most sophisticated enforcement mechanisms at a supranational level, although providing for individual applications does not allow horizontal effect to take place because the court is not competent *ratione personae*: complaints concerning human rights violations can be filed only against one of the signatory states (Harris, O'Boyle, Bates & Buckley, 2014: 6; Sudre, 2015: 250-251; van Dijk, van Hoof, van Rijn & Zwaak, 2006: 184-185).[11] Individual complaints can also be brought at a suprastate level through reports to independent bodies such as the Human Rights Commissioner. However, treaty-monitoring bodies only deal with violations coming from parties to a treaty or from members of an international organisation, which is to say, coming from states (Smith, 2014: 156-157). The lack of enforcement agencies is even more problematic considering that human rights ought to be 'specified from case to case in adjudication' (Habermas, 2012: 68).

If Ronald Dworkin is right and 'law is a matter of rights tenable in courts' (1998: 401), the fact that there are no mechanisms at a supranational level equivalent to state courts to protect human rights offences between private parties leads to the argument that international sources do not protect human dignity to the extent initially imagined (Goldsmith & Posner, 2005: 134). My claim is that it may not necessarily be so.

4. The emergence of restorative justice

We are used to thinking about court adjudication as the only effective way to protect legal rights. However, in spite of court adjudication procedural safeguards such as independence or impartiality, we are well aware of its shortcomings. Galanter's (1974) and Fuller and Winston's (1978) articles – originally published in

9 The expansive force of human rights is responsible not only for the spreading of human rights around the world but also for creating an increasing number of rights, grouped in different generations. One of the downsides to this growth is that different types of rights have different operational frameworks that often conflict between themselves. This expansive force can also be seen in the number of fields and subfields that developed under the aegis of human rights and that in turn have contributed abundantly to the development of human rights. This is the case of victimology, for instance (Dearing, 2017; Mawby & Walklate, 1994: 8; Wemmers, 2012).

10 For instance, Art. 36.1 of the ICJ Statute states that the court's jurisdiction comprises the cases referred by the par*ties* and not just by one party (Biehler, 2008: 35-36).

11 See Arts. 1, 13, 19, 33, 34 and 46 of the European Convention on Human Rights (ECHR).

the seventies – are two well-known contributions to that theme. Furthermore, in spite of the growing powers of the judiciary, courts have been facing a paradoxical legitimacy crisis. As far as the criminal justice system is concerned, the gap between what it promises and what it delivers is even wider owing not only to the greater rigidity of its rules and procedures but also to the underlying statist perspective on crime. The criminal justice system, which is meant to repress the most serious offences against people's rights, in addition to often being perceived as ineffective in dealing with the offenders, pays little attention to those it is trying to protect, which is to say the victims. Aware of these contradictions, people who deal with criminal issues in their daily lives often experience a sense of frustration and seek better ways to address the problems they face. It is against this background, and supported by critical criminology and several movements, such as the victims, feminist, minority, and informal justice ones, that restorative justice emerged and has been developing in the past decades as a complementary response to crime (Christie, 1977; Van Ness & Strong, 2015: 12-18; Walgrave, 2008: 14-16). Some important contributions for the spreading of restorative justice were the Recommendation No. R(99)19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999 regarding mediation in penal matters and the 2002 UN Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, which was followed in 2006 by the United Nations Office on Drugs and Crime *Handbook on restorative justice programmes*.[12] In Europe, the Victims' Directive has recognised the benefits of restorative justice for victims, set the conditions under which safe and competent restorative services must be provided (Article 12) and has foreseen adequate training for practitioners (Article 25).[13] The importance of the Victims' Directive to the theme resides in the fact that it is a binding instrument unlike the Council of Europe Recommendation or the UN Basic Principles. By now, most American, Australian and European states, as well as many African and Asian nations (e.g. South Africa, Rwanda, Uganda, Japan, China, Thailand and the Philippines), have introduced some form of restorative mechanism (Van Ness & Strong, 2015: 33-38). As far as Europe is concerned, although not all countries have fully introduced restorative justice into their legal systems, 'manifestations of restorative thinking can be found all over Europe' (Dünkel, Grzywa-Holten & Horsfield, 2015: 1055).

5. The restorative perspective on crime

There is no straightforward definition of restorative justice. Its bottom-up emergence more or less at the same time in different parts of the world in similar but

12 Recently, on 3 October 2018, the Council of Europe has published its Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters.

13 Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

The International Journal of Restorative Justice 2019 vol. 2(1) pp. 73-92
doi: 10.5553/IJRJ/258908912019002001005

not entirely coincident terms, its flexible and dynamic nature, the existence of overlapping informal justice proceedings as well as different conceptions of restorative justice combine to make it a 'deeply contested concept' (Johnstone & Van Ness, 2011: 9-18). Nevertheless, we can find some tentative definitions in international instruments, which show strong similarity. The Council of Europe Recommendation No. R (99)19 in its Appendix (I. Definition) states that its guidelines apply to:

> [A]ny process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

In the Appendix (II.3) of the 2018 Council of Europe Recommendation we can read that:

> 'Restorative justice' refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the 'facilitator').

As for the 2002 United Nations Declaration of Basic Principles, in its Annex (I.2), restorative processes are defined as follows:

> [A]ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

According to the 2012 European Union Victims' Directive, restorative justice means:

> [A]ny process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party (Article 2(1)(d)).

Besides these tentative definitions enshrined in supranational instruments, there are numerous doctrinal definitions, which emphasise different features of restorative justice. However, restorative proponents have been stressing that, more than sharing a common definition, it is important to share common restorative values and principles. Justice, solidarity and responsibility, respect for human dignity and truth were the common values identified by the European Forum for Restorative Justice practice guide on values and standards for restorative justice practices (Chapman & Törzs, 2018: 11-12).

We can also describe restorative justice by pointing out how it differs from the traditional criminal approach in its perspective on crime. Rather than concen-

trating on the fact that a law was broken and applying to the offender the legal consequence established in that specific criminal rule, its primary concern is to identify the concrete harm that has been caused and to find the best way to make things right for all involved, particularly the ones injured (Zehr, 2002: 19). This means that instead of addressing crime from a vertical state-offender perspective, restorative justice deals primarily with the horizontal victim-offender relationship, leading to a 'change of lenses' (Zehr, 2005), which resonates with international human rights' horizontal aspirations.[14] This distinct perspective on crime entails differences both in procedure and in expected procedural outcomes.[15]

6. Restorative processes

In restorative processes, all stakeholders meet in an informal, confidential and respectful environment and, through dialogue guided by a facilitator, have a say in how to deal with the aftermath of crime. Victims are able to tell their stories and the harms they have suffered and ask all the questions they wish to; offenders are also able to express their feelings and to understand the impact of their actions; other stakeholders such as family members, community members, social workers or government representatives may sometimes be present as well to show their support and contribute to the agreement between the participants.

For the purposes of this article, I would like to stress four features of restorative processes: they are flexible, they are non-antagonistic, they tend to be voluntary, and although they are inclusive, they do not require the intervention of government representatives. These features reveal a horizontal and flexible procedural design that might be able to overcome the shortcomings of court adjudication in the protection of human rights.

6.1 Flexible proceedings

Restorative justice is context sensitive. Procedural designs need flexibility to adapt both to the social and legal local backgrounds and to the objectives of each programme. Early practices developed in different cultural and legal contexts, giving rise to three different prototypical models (victim-offender mediation, conferences and circles), which share restorative principles and values but diverge in some of their features.

Victim-offender mediation (VOM) or victim-offender reconciliation programme (VORP) is most common in the United States and in Europe. In VOM, victim and offender meet with a trained facilitator to deal with the aftermath of

14 The community can play an important role in restorative justice as well. Van Ness and Strong argue that it 'can build peace through strong inclusive, constructive, and just relationships' (2015: 58). However, as Paul McCold (2010: 155), George Pavlich (2001: 56; 2005: 84) and Fernanda Fonseca Rosenblatt (2015: 41) point out, defining 'community' and understanding its role is a major challenge for restorative justice.

15 Of course, no restorative process or outcome is fully restorative. We can find different degrees of 'restorativeness' both in restorative processes and in adjudication (Van Ness & Strong, 2015: 160).

crime. This encounter between the two often takes place after the facilitator has met separately with each several times to prepare them for the meeting. In some particular cases, victim and offender never meet face-to-face but communicate through the facilitator. In the United States, the programmes are sometimes community based, and the facilitator is often a volunteer. In Europe, they are mostly state driven and the mediators are professionals. The outcome is usually a signed agreement on how to repair the harms caused to the victim.[16]

Conferencing – also known as Family Group Conferences (FGC) – is restorative justice 'New Zealand style'. It has influenced other programmes like the Australian, Belgian and Northern-Ireland ones and some in England and North America. It was first intended for young offenders and was inspired by Maori processes of dispute resolution. Family members, other supporters and government representatives are included and are expected to help the offender take active responsibility. It is social security and not criminal justice based. The social services along with the families design the meeting and decide who will attend. Police officers, who sometimes follow a script, can facilitate the encounter. The outcome, reached by consensus, includes reparation but also a plan that the offender must follow seeking prevention or even punishment.[17]

As for circles, also known as peacemaking circles, First Nations Canadians traditions were a source of inspiration. Judge Barry Stuart is known to be the first to promote one of these proceedings in his courtroom. Circles are large meetings. They usually include victims, offenders, families, other supporters, government representatives as well as community members. Participants talk one at a time using a 'talking stick' that is passed from one participant to the next sitting in the circle. One or two 'circle keepers' lead the encounter. The procedures are called sentencing circles, community circles or healing circles, depending on their aim.[18]

Procedural designs also require flexibility in order to take into account the stakeholders' needs, their age or gender, the kind of wrongdoing at stake, the degree of community participation, and any other features deemed relevant. In order to meet these aims many restorative programmes are being designed through the combination of different elements of the three prototypical models and the adding of innovations. Therefore, the types and number of stakeholders, the degree of facilitator intervention, preparation meetings, follow-up procedures, number and duration of sessions and the like may vary a great deal (Roberts, 2010: 244).

The flexible character of restorative proceedings allows a fast incorporation of best practices and empirical research findings.

16 For further reading on VOM, see Amstutz (2009), Umbreit & Armour (2011: 111-142). For an account of the importance of VOM in Europe, see Dünkel, Grzywa-Holten & Horsfield (2015: 1038-1043).

17 For further reading on conferencing (MacRae & Zehr, 2004; Umbreit & Armour, 2011: 143-178). For an account of conferencing in Europe, see Dünkel, Grzywa-Holten & Horsfield (2015: 1043-1049); Zinsstag & Vanfraechem (2012).

18 For further reading on circles, see Pranis (2005); Umbreit & Armour (2011: 179-210). For an account of the use of circles in Europe, see Dünkel, Grzywa-Holten & Horsfield (2015: 1050-1051); Weitekamp (2013).

6.2 Non-antagonistic proceedings

Restorative encounters are a type of informal justice proceeding, which is non-antagonistic. Rather than being built on legal argumentation driven by experts and leading to third party decision-making that may please neither the offender nor the victim, they are storytelling and dialogue based and, hopefully, result in a consensus on how to address the wrongdoing. Unlike court adjudication, designed for dichotomous legal/illegal decisions reflecting the opposing views of plaintiff and defendant, restorative processes can encompass as many views as the ones held by each stakeholder.

Often victims feel vindicated simply by being able to tell in their own words the impact that the wrongdoing has had on their lives. They also value that the offenders listen to them, understand their point of view and collaborate in finding the best available way to redress the harm they have caused. For this reason, facilitators tend to stay in the background, merely assisting stakeholders in reaching an agreement on how to deal with the aftermath of the offence.

6.3 Voluntary proceedings

Owing to their non-antagonistic character, participation in restorative proceedings tends to be voluntary. Pressuring victims to participate is not admissible for it may lead to secondary victimisation. Preparation meetings and complete information on the programme and on alternatives to it are paramount (Biffi, 2016: 9; Van Ness & Strong, 2015: 90). As for the offender, restorative proponents believe that voluntary participation increases the degree of compliance and note that highly successful restorative meetings involve remorse and changed behaviour, which if 'forced out of offenders has no restorative power' (Biffi, 2016: 6; Braithwaite, 2002c: 571). However, they also recognise that as far as offenders are concerned, a 'shadow of coercion' is inevitable (Braithwaite, 2002a: 34-36). Because it tends to be voluntary, restorative justice cannot replace the judiciary altogether. The two systems coexist. Some cases will be fit for one of the systems and not for the other, and some may go through both systems in different stages of the process (Van Ness & Strong, 2015: 153-155).[19] However, whereas state courts rely on coercion and are tied to a jurisdiction, restorative justice's voluntary character might free its proceedings from territorial constraints.

6.4 Inclusive proceedings

Finally, restorative processes are designed to involve all those who can solve the deeper issues raised by crime. The victim alongside the offender is then a primary stakeholder. Other participants, such as victim or offender supporters as well as other community members, may sometimes also be present and intervene. Many programmes are community driven. Even when they are state driven, government representatives do not usually participate in the meetings. Their interven-

19 The coexistence between restorative justice and the traditional criminal system is not always a peaceful one. In fact, there is often a tension between the two. However, this tension has brought to light several handicaps of both systems and given way to many relevant improvements.

The International Journal of Restorative Justice 2019 vol. 2(1) pp. 73-92
doi: 10.5553/IJRJ/258908912019002001005

tion, if any, tends to be restricted to controlling the legality of the agreement after the participants have signed it (Van Ness & Strong, 2015: 77-78).

7. Restorative outcomes

The desired outcome of restorative justice is the restoration of all stakeholders to the extent possible. As Howard Zehr (2002: 19) puts it:

- Crime is a violation of people and of interpersonal relationships.
- Violations create obligations.
- The central obligation is to put right the wrongs.

In order to do so, it is necessary to identify the relevant harms and needs (material, emotional, environmental, public safety or other), decide the best way to address them (in either material or symbolic terms) and have the wrongdoers take active responsibility and voluntarily complying with what has been agreed by the participants, including themselves. In Susan Sharpe's words, 'here the strategy is to decrease the suffering for the victim rather than increase the suffering for the offender' (2011: 26). Some outcomes such as the restoration of human dignity of all stakeholders, of property loss, of health, of the environment or emotional restoration should be maximised. As for outcomes like remorse, apology or forgiveness, practitioners must not actively pursue them but only hope for their emergence during the process (Braithwaite, 2002c: 569-571).

Considering this comprehensive approach to wrongdoing, particularly the willingness to maximise the restoration of all involved, we can say that restorative justice's expected procedural outcomes are in line with human rights' moral foundation in human dignity, their optimisation requirements and their call for balancing the interest of every private party.

8. The current uses of restorative justice

Domestic legislations and decision makers often see restorative practices as minor procedures best suited for diverting from courts young offenders and less serious transgressions (Dünkel et al., 2015: 1067). However, restorative justice has proven to be flexible and effective enough to address in depth other kinds of wrongdoing. A growing number of programmes led by experienced practitioners are being designed to focus on severe violent crimes, including murder and assault. Victims of violent crime are often the ones who take the initiative to participate in these programmes, and empirical evidence shows that restorative justice is more effective in reducing recidivism in violent crimes than in less serious ones (Sherman & Strang, 2007: 68; Umbreit & Armour, 2011: 213; Van Ness & Strong, 2015: 53). Restorative justice seams suited for addressing corporate violence as well (Aertsen, 2018). Restorative justice has also been used to deal with the transition from repressive to democratic governments in countries where severe mass violations of human rights took place. The Truth and Reconciliation

Commission in South Africa, although not a restorative process in itself, nevertheless presents some features of a restorative response in such a case. In spite of the many critiques it has received, it is hard to imagine a better realistic alternative to deal with such severe injuries as those caused by the apartheid regime. The same can be said about the *Gacaca* courts and the Tutsi genocide in Rwanda (Dzur, 2018: 322-326; Llewellyn, 2011: 351-366). Furthermore, we see restorative practices increasingly being applied in non-criminal settings such as schools, workplaces or families. Its horizontal focus on dialogue and relationships makes it particularly suited for dealing not only with crime but also with different kinds of conflict in everyday life (Braithwaite, Ahmed, Morrison & Reinhart, 2003: 169; Morrison, 2011: 325-350; Wachtel & McCold, 2001: 114-129).[20]

Considering the expansive character of restorative justice, we may wonder whether it might also be fit for dealing effectively with private violations of human rights that have cross-border impacts such as the ones caused by multinational corporations.

9. Systemic restorative outcomes

One recurrent critique of restorative justice is that it generates disparate outcomes in different proceedings when the same type of crime is at stake, which does not allow for the emergence of a restorative precedent (Ashworth, 2002: 590-592; Delgado, 1999-2000; Skelton & Franc, 2010: 206). At first sight, this inconsistency would be an obstacle to dealing with transnational violations of human rights through restorative justice. However, the argument does not take into consideration some important aspects. First, restorative justice and the traditional criminal justice system have different levels of approach to crime. As we have seen, restorative proponents address it as being primarily an offence to people and to interpersonal relationships and not as the breaking of a rule. This is why the stakeholders themselves define the relevant harms and decide the outcome autonomously in a non-antagonistic fashion. At this very concrete level, the argument can be reversed to say that making stakeholders treat different harms the same would be inconsistent (Braithwaite, 2002b: 159). Second, by claiming that restorative justice's outcomes are inconsistent the critique suggests that they are unfair. Yet, despite this normative claim, empirical evidence shows that participants in restorative proceedings perceive its outcomes to be fairer than those who have had their cases brought to court (Poulson, 2003: 201; Walgrave, 2011: 107; Wemmers & Cyr, 2006: 123). Third, restorative justice operates within legal boundaries. There is a consistent practice in restorative justice never to allow the agreed outcome to disrespect human rights or to exceed the upper limits enforced by courts for the crime at stake (Braithwaite, 2002b: 150-151). Finally, the sharing of experiences and good practices along with empirical studies on what works and what does not provide consistency to restorative outcomes as well.

20 For an overview of the expansive character of restorative justice, see Johnstone (2011).

Still, the systemic outcomes generated by restorative justice that I want to stress here (systemic changes of behaviour) are of a different kind. They may have a deeper and broader impact than we would expect at first sight. They are not a major concern in all restorative justice proceedings, and they do not occur every time, but they do happen sometimes, and restorative programmes can be designed to pursue them further.[21] On a deeper level, there is the recent trend to expand restorative justice beyond the criminal territory, known as the transformative conception, which seeks to address not only the harms directly caused by crime, not only the deeper harms revealed by it, but that purports to address the roots of any broken relationship, transforming any kind of violent behaviour into dialogue (Van Ness & Strong, 2015: 44). Here, restorative justice steps into any sort of conflict and goes further than the pure criminal setting as clearly defined by criminal provisions enacted by states through detailed legislative proceedings. In schools, for example, bullying is not merely the object of a meeting between the offender and the victim in the aftermath of an offence: it involves an all-encompassing approach that brings together the entire school community, including other students, teachers, other workers and families. Schools' internal rules may begin incorporating restorative principles and other practices that allow detecting early signs of bullying and stopping it before it happens (Morrison, 2011: 329-346). The awareness of these signs is often the result of having participated in proceedings where people are invited to speak truthfully and listen deeply to others. In this sense, restorative justice can prove to be a pedagogical tool that generates systemic outcomes because it addresses the deeper issues that are preventing voluntary law abiding. The fact that recidivism is lower among violent offenders that participated in restorative justice than among those who went through criminal courts may be justified by the length and the depth of these proceedings when compared with court trials or lighter restorative processes addressing less serious offences (Van Ness & Strong, 2015: 53). These features point to a functional advantage of restorative justice vis-à-vis the traditional criminal justice system when addressing the systemic causes of a conflict that is deeply rooted.

Systemic outcomes may also be present through a different and broader restorative mechanism. As we have seen, participants in restorative justice are invited to be creative in finding the best way to address the harms they suffered or inflicted. Many victims say that their most important need is to guarantee that what happened will never happen again to them or to any other person. In restorative proceedings concerning discrimination by large companies, whenever such a need has to be addressed, experienced mediators suggest that the signed agreement should foresee, in addition to compensation and other adequate measures, that the company changes its internal rules, incorporating mechanisms that pre-

21 For an account of the systemic potential of restorative justice, see *e.g.* the 2018 special issue of *The International Journal of Restorative Justice* (issue 3), notably its editorial (Llewellyn & Morrison, 2018).

vent new offences by other workers or company representatives.[22] This outcome is similar to the one obtained whenever a company is convicted by a court and ordered to pay compensation. In such a case, the company knows that the court decision will become a precedent (either formally or informally, depending on the jurisdiction at stake) and that if it wishes to avoid paying further compensation it must change its behaviour. However, if the company operates in different countries, in the case of a court conviction it only has to change its practice within that particular jurisdiction. Differently, the restorative agreement may foresee that the internal rules be changed in all countries relevant to that company because restorative agreements may but need not relate exclusively to a specific jurisdiction.

Considering this deep and broad systemic potential, we may wonder whether restorative justice can provide an effective remedy against transnational human rights violations involving private actors.

10. Conclusion: restorative protection of human rights in cross-border private disputes

This article explores the possibility of protecting transnational human rights violations perpetrated by private actors through restorative justice mechanisms.

International human rights aspire to protect human dignity against any form of offence by both state and non-state actors. However, the legal instruments available for the protection of international human rights fall short of this ideal mainly because of international law's state-centric framework, which was not envisioned for having private actors as rights holders or duty bearers or for horizontal effect to take place. Moreover, enforcement mechanisms of international human rights rely mostly on states as well, although states are structurally tied to their own jurisdiction, hindering the task of addressing human rights violations having cross-border impact. This lack of enforcement mechanisms could lead to the conclusion that international human rights do not protect offences between private parties having transnational impact. This article claims that it is not necessarily so and points to restorative justice as a potential enforcement mechanism particularly suited for dealing with human rights, which are not rules but principles, optimisation requirements, that call for balancing the interests of the different parties.

The most successful restorative experiences have shown the ability to deal in depth with crime, the kind of behaviour that strikes human rights at their very core.[23] Restorative programmes are increasingly being designed to dig into the roots of conflict rather than merely sticking to the tip of the iceberg that is brought to light in the course of the breach of a criminal provision. In its

22 Marilyn Webster shared this practice during her presentation of The Equalities Mediation Service – mediation within a restorative justice framework at the II International Congress on Mediation – Restorative Justice, Lisbon 20-22 October 2011.

23 This is particularly true as far as first generation human rights are concerned, although it may also apply to human rights of any kind.

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doi: 10.5553/IJRJ/258908912019002001005

approach to wrongdoing, restorative justice is concerned more with the offence to human dignity than with the breaking of an enforceable rule. Its non-antagonistic-stakeholder-involvement-dialogue-driven character also provides the setting for balancing the interests of parties. Since rights are typically principles – in the sense that they are optimisation requirements –, the stakeholders participating in restorative proceedings are probably in a better position to find the most creative way to reach their realisation 'to the greatest extent possible given the legal and factual possibilities' (Alexy, 2002: 47). An independent third party such as a judge in a classical legal process will likely find greater difficulty in reaching an outcome similar to that of a successful restorative agreement. Indeed, in a courtroom, the particularities of the case tend to get lost in (legal) translation and there is less space for creativity. Also, we can expect the offender to be less prone to complying with a third party decision in a weak enforcement setting. In addition, we should bear in mind that there are already some restorative responses to gross violations of human rights (Aertsen, Arsovska, Rohne, Valiñas & Vanspauwen, 2008; Clamp, 2014; Cunneen, 2001: 83-88). Actually, in the transitional justice field, human rights protection takes place through individual and state prosecutions combined with more informal mechanisms that resonate with restorative justice approaches. Apparently, then, restorative justice has the potential to overcome some of the functional limitations of court decision-making.

Moreover, because of its in-depth approach, restorative justice may bring to light the cross-border character of a wrongdoing that on the surface appears to be merely of national concern. Considering the example provided earlier, we can look at the crime committed against one or more children by one staff member of an NGO in a particular jurisdiction as the breach of internal criminal rules and prosecute her as if it were a purely isolated internal affair. Yet we may also understand the transnational dimension of the problem by appreciating the importance of the role that the international character of the organisation plays and try to find the best available mechanism to address the issue to the fullest extent possible, namely by changing the organisation's culture and procedures wherever it operates. As we have seen, national courts present structural limitations in dealing with transnational cases, and supranational enforcement agencies are lacking, whereas restorative justice proceedings do not require a specific territory to operate and have shown some ability to generate cross-border effects. This means that we could bring together in a restorative proceeding the orphans, the pharmaceutical company, the NGO and any other stakeholder irrespective of their national origin or whereabouts and have them sign an agreement that has the territorial reach that matches the geographical range of action of the stakeholders involved. An agreement between these stakeholders could, for instance, include the duty to adopt a specific code of conduct on child safeguarding in every country where the pharmaceutical company or the NGO operate. Literature has already pointed out a few creative examples of restorative responses to corporate crime that could be useful in cross-border conflicts (Aertsen, 2018: 251-253).

Given its in-depth approach to conflict and its ability to work beyond national jurisdictions, under the right circumstances, the restorative justice framework might be both functionally and structurally fitter than court proceed-

ings in addressing human rights offences between private actors with transnational impact such as child labour, medical experiment without consent, organ trafficking, unconsented use of private information and the like.

However, we may readily imagine a number of difficulties while implementing such an idea. For instance, considering its voluntary nature, because we would be in a non-state scenario we may be concerned about the absence of the 'shadow of coercion' provided by the state whenever restorative proceedings are attached to a jurisdiction. Yet we may wonder whether other forms of persuasion such as peer pressure or international public opinion might provide the right incentives for offender participation and compliance, enabling successful outcomes. Considering the examples given previously, what could be the role of consumer organisations, or victim organisations, or competitors, or shareholders or funders in pressuring international corporations or NGOs to participate in restorative programmes that would address the harms caused by child labour or unconsented testing of drugs? To what extent could media help raise public awareness towards these problems? What are the available formal or informal regulation mechanisms for our increasingly digital world, where privacy is losing its place?

Issues such as the legitimacy of the entity setting the programme, the identification of stakeholders, the type of facilitation and other features of the design may raise difficulties as well. Would the World Health Organization (WHO) or the International Labour Organization (ILO) or the United Nations International Children's Emergency Fund (UNICEF) or the Red Cross or Doctors Without Borders be able to play an important role, or would restorative organisations such as the European Forum for Restorative Justice or the Asia Pacific Forum for Restorative Justice be in a better position to take the lead in a restorative programme? In spite of their functional and structural limitations, to what extent would it be useful to count on states to implement these restorative programmes? Should the programmes be set on a case-by-case basis by a third party chosen by the stakeholders, as often happens in arbitration? Should the programmes use one of the prototypical models or, given the complexity of the conflict at stake, should they be tailor-made? In complex situations where systemic injustices, extreme power imbalances and high victim vulnerability occur, there is usually a plurality of stakeholders. How could all the child workers, their families and the company's representatives be brought together? In such cases the common models of VOM, conferencing and circles may prove insufficient and call for more creative restorative mechanisms grounded in restorative values and principles (Aertsen, 2018: 245, 250).

These questions should not undermine the potential of restorative justice as an enforcement mechanism particularly suited for dealing with human rights cross-border private disputes. They merely call for further inquiry.

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doi: 10.5553/IJRJ/258908912019002001005