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Ubi Ius Ibi Remedium

By Hanne Sophie Greve

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1. The Rule of Law

'Core international crimes' are genocide, crimes against humanity and war crimes – the most heinous of crimes that every state is required to punish and has a positive obligation to protect its population against. Core international crimes are crimes *erga omnes*, an affront against humankind as such that may be punished under any jurisdiction regardless of the identity of the perpetrators and the victims and of where the crimes were committed.

There are normative reasons – considerations having ethical force – that call for and justify that the commission of core international crimes should be followed by justice and criminal procedures. The crimes become obligating reasons in conjunction with these normative considerations; they give rise to an obligation to seek justice.

Practical needs assign an important role to abbreviated criminal procedures in this context. So this brief addresses urgent practical issues and challenges.

Where there are human beings, there is behaviour and there will be codes of conduct, that is, *de facto* or *de jure* regulations of human behaviour. The main question is who is entitled or allowed – sometimes by default – to decide and establish the normative rules of behaviour.

The rule of law, that is crucial to prosperity, is the property of a well-organised legal system. It requires:

- a prohibition of arbitrary power, meaning that no one – not even the lawgiver – is beyond or above the law;
- laws that are general, prospective, clear and consistent and thus capable of guiding conduct; and
- tribunals that are accessible and structured to hear and determine legal claims in a fair manner.

The law is made by the state and the state by the law. 'The same binding by which it is bound together dissolves everything.' As much as a functioning state is based on law, the lack of a legal order makes a state disintegrate.

Following the Second World War, some basic principles were singled out as human rights – belonging to every human being in the very capacity of being human. As ascertained in the Preamble to the Universal Declaration of Human Rights this:

- is the foundation of freedom, justice and peace in the world; and
- is essential, if human beings are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.

Fairness – a core constituent of the rule of law – demands that equal situations are handled in an equal or similar manner regardless of the persons involved. The law is the main equaliser. Equity in contradistinction to arbitrariness is a property of a well-organised legal system.

Under the rule of law the laws are setting the standards and provide an effective normative system. Legal provisions are intended to regularise the behaviour of people. Ideally, the law suffices to have people behave according to its prescribed standards. When and where this is not the case, the power of the state can be utilised to right the wrongs and establish the rule – the supremacy – of law. 'The effect of law – or of a right – consists in the execution.' Unless the state is willing and able to uphold the law there is no legal system that benefits the population – especially so in the field of criminal law.

The state has an obligation to chasten people to observe and honour their duty not to commit crimes and a positive obligation to prevent the most heinous crimes. The latter is a situation in which 'the law cannot fail in dispensing justice'. Every crime victim is entitled to an effective remedy provided by a competent criminal tribunal. Establishing guilt and responsibility is probably more important than punishing the perpetrators. The latter should, however, at all events be deprived of all unlawful gains and divested of any and all authority and power abused. In this context, it is necessary to keep in mind that 'every exception is itself also a rule'.

2. Immediate Implications of Core International Crimes

The elements of core international crimes tell us that these crimes, generally speaking, have much more destructive consequences for both individuals and communities than less serious crimes, due to the effects of these crimes and their scale.

Core international crimes will more often than not affect the life and limb of the victims. On an individual level this

may not be entirely different from what happens in exceptionally gruesome criminal cases that do not amount to core international crimes. But, core international crimes have an added dimension of scale. They are part of an overall plan, widespread and systematic, or disproportionate and beyond military necessity. The number of victims is likely to be high. As every human being is unique and never can be replaced, a significant aspect of large-scale crimes is in the number of individual victims involved. One other dissimilarity compared to ordinary crimes is that numbers of victims affected by core international crimes are likely to be interrelated in a manner that will victimise them in more than one respect directly or indirectly or both.

Ethnic cleansing, for example, may be so organized that the adult male population is separated from the others, to be killed or otherwise broken; and the rest of the group is deported. Every woman is not only a victim of deportation, but she is likely to have lost more than one male family member. The sheer number of losses – more or less matched by the losses of the other women in the victimised community – will make it far more difficult for her as a victim, than for a victim of but one serious crime. Both the family network and the social fabric, that under regular circumstances are crucial for crime victims to stumble back to a normal life, are torn. People in old age, children and male survivors face similar difficulties.

Core international crimes are characteristically committed in armed conflicts or other large-scale social upheavals in which not just one core international crime is commonly committed, but multiple such crimes.

Core international crimes are likely to considerably weaken the social fabric in the community at large, at the state level and often transnationally – especially when core international crimes have been aimed at victimising the leadership in the affected community.

This happens in a world where threats and opportunities for all States are inter-connected. Core international crimes are a primary reason for 65.3 million forcibly displaced persons in the world today. A situation of much suffering for the people involved and that has significantly destabilizing social effects as well.

Victimisation on a collective or state level may impair large parts of the state apparatus – its political, administrative and judicial structures and the state's income-generating ability. Large-scale destruction of public and community property will further exacerbate these difficulties.

Genocide and crimes against humanity are intended to shift the social balance in favour of the perpetrators and their groups by them taking over the possessions and positions of the victims. That is, these crimes are aimed at creating a void in terms of people in which the culprits and their followers are prepared to more or less replace the victims' group.

Every serious crime affecting life or limb and personal integrity of a person will by necessity enfeeble the victim, and it thereby reduces that person's ability to protect self, kith and kin, possessions and other interests.

Extensive knowledge of the weaknesses of others that many perpetrators are likely to have after the commission of core international crimes, gives them an upper hand if the victims and perpetrators are to live in the same society in the future.

The victims have a right to know the truth about the wounds inflicted on them and a right to know the identity of the perpetrators at the different levels. Lack of such information makes the victims susceptible to future abuses as well.

A legacy of brutality will frequently have a close to crippling effect on the sufferers. For example, the Khmer Rouge legacy long made it unnecessary for the group's former assassins to demonstrate any residual power to have things their way. No one should be left to benefit, immediately or in a longer perspective, from his or her own wrong – in particular not of core international crimes. A balance shifted in favour of perpetrators has to be neutralized.

As the main provisions of criminal codes in well-functioning legal systems are in harmony with the community's basic understanding of what is right and good and what is wrong and sub-standard, crimes as such have implications for the community's perception of values and morals. This is particularly so if the most serious of crimes do not have consequences for the perpetrators – not to say if such crimes prove beneficial to the perpetrators even after the perpetrators' identities have become known to the state.

Core international crimes do somehow shatter the moral universe in a community. When the basic standards of what is right and what is wrong are ignored and broken, the very moral structure in society will be questioned. Standards not abided by, give way to new standards. If a state is unwilling or unable to set the rules on its territory, the standards are set by those who impose their standards by the use of force. The rule of the strongest is a negation of the rule of law, but it implies regulations that the inhabitants will have to follow.

The question is who is entitled to set the rules in the affected community after the era of core international crimes have ended. The rule of law, human rights and democracy all presuppose that it is the state that adopts the laws of the land – laws meeting with the minimum requirements of human rights, and promoting some kind of a fair social balance. It is not possible to draw a line and start afresh. Every moment and every event in history is an end, a beginning and a continuation.

Justice and fairness – as significant concepts contributing to social order – are easily undermined if a community thinks that it can bypass a shattered moral universe by pretending that it never existed. This is even more so when there is also an ensuing shift of balance in favour of perpetrators. Distinguishing right from wrong and telling the truth are significant to reconstructing the moral universe.

3. Options Following the Commission of Core International Crimes

As Aristotle said, "Not even God can undo what has been done". Crimes committed are facts – they may be ignored, but cannot be deleted.

With impunity the perpetrator is left at large without any

punishment for the crimes that have been committed. The perpetrator may shield behind the right that everyone charged with a penal offence has to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. At the same time no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation.

The lack of criminal justice may imply that perpetrators of the most heinous crimes remain in positions of power. This is so also when they have enhanced their actual power base and potential for being able to abuse that base by financial gains and a reputation for brutality in combination with a special insight into the weaknesses of other people and society at large – all of which are acquired by the crimes. If this is allowed, heinous crimes are *de facto* encouraged. Impunity is a negation of the rule of law.

Impunity for core international crimes establishes a thriving environment for organised crime – transnational and international as well – as the perpetrators possess insider knowledge that can be abused for their lucrative benefit.

The right to know is part of the human rights of the individual victim. It is also basic for the proper development of a society that it has the fullest possible understanding of its own history and in particular the exact nature of the severe difficulties encountered in the past. There is, moreover, a need for the society to reconcile itself with its past, meaning to be familiar with it, to acknowledge it and to move on into the future on the basis of this knowledge. Reconciliation is not an alternative to justice, is not a managed process and it cannot be unconditional. On their own, truth and reconciliation mechanisms fall short of securing the rule of law.

In the European legal system, the law has traditionally penalised the conduct of the wrongdoer as well as ensured that the victim is adequately compensated. On its own compensation goes some way in assisting the victims in overcoming some of the effects of the crimes. But bare compensation does not ensure the rule of law, and it does not give the victims their due in terms of basic human rights.

In a modern European democracy with the rule of law and respect for human rights, the one general response to the commission of crimes is criminal procedures. There is no reason why this should be different after core international crimes. Only through criminal procedures can the law be made to work for everyone. Criminal justice is crucial in securing social cohesion and to prevent fragmentation and a lasting breakdown in social relations.

The main challenges for a fair justice system, is to seek a balance between the interests of the victims, the perpetrators and society at large. It is, however, a prerogative for the state to enact the codes of conduct in the society and never to leave this prerogative – not even *de facto* – to any unrepresentative group of citizens and in particular not to criminal groups. A fundamental reason for every state-organised or international justice system is to break the vicious circles of revenge, and to prevent private 'justice'. A public criminal justice system clearly works to the advantage of perpetrators, in particular the less protected among them, as well.

Criminal procedures will, furthermore, stand in stark contrast to the negation of the rule of law in the time of the conflict when people were not provided with the protection of the law.

A state that has severe domestic problems almost always becomes a target of meddling, interference and exploitation by other states and outside forces.

4. Abbreviated Criminal Procedures

There are many situations where there are too many criminal cases to bring them all to full trial due to a lack of adequate human or financial resources or both. In particular, after armed conflicts or other major upheavals the regular courts may be unable – if the courts are utilising full criminal procedures – to deal with an extreme caseload.

In civil law systems there is a duty to prosecute all cases that come to the attention of the prosecution. The law provides for no discretion in this respect. Prosecution is mandatory.

It is highly unfortunate when many core international crime case files have been opened within a criminal justice system that is unable to process the cases within a reasonable time. It is equally unfortunate when many core international crimes have been committed but hardly any case files opened. Backlogs of criminal cases – sometimes huge – are not exclusively a phenomenon after significant debacles.

For a number of reasons abbreviated criminal procedures have come to represent a main criminal law agenda in most European countries today. There are many national legal systems that have different kinds of abbreviated criminal procedures in other areas than the one represented by core international crimes. Abbreviated criminal procedures are considered one legal tool among several. The idea of utilising abbreviated criminal procedures for core international crimes is new. Despite the existence of a new overall concept, core international crimes are primarily compound, utterly complex and multifaceted serious crimes, and full criminal procedures represent the main or regular norm. Also abbreviated criminal procedures are regular in the sense that they are not irregular.

Proper criminal procedures shall, according to the Universal Declaration of Human Rights, secure that:

- no one is subjected to arbitrary arrest, detention or exile;
- a defendant is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of the criminal charge;
- a defendant is presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence; and
- no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.

Other minimum requirements are that prosecutors and judges administer the cases, that there are provisions guaranteeing *ne bis in idem*, and the right to appeal. There is nevertheless quite some leverage for states to organise their

criminal systems according to their traditions and preferences. Most national criminal justice systems will have room for the possibility of elaborating and enacting abbreviated criminal procedures – entirely within the due process of law requirements – significantly more time- and cost-efficient than regular full criminal procedures.

Abbreviated criminal procedures must be so construed as to secure the interests of the victims. Detailed and reasoned judicial decisions that are needed for the society to obtain accurate historical records form no obstacle to the adoption of abbreviated criminal procedures. The utilization of abbreviated criminal procedures does not impact on the prioritization that will have to be made when huge numbers of cases are waiting to be processed.

The use of abbreviated criminal procedures should reflect the different levels of gravity of the core international crimes. For example, property offences and minor unlawful detention prior to large-scale transfers of whole population groups are offences committed on an immense scale in many armed conflicts. These offences do not as such violate the interests of life or personal integrity significantly and may thus suitably be addressed in abbreviated criminal procedures.

The abbreviated criminal procedures have to be prescribed by law and made an integral part of the state's criminal justice system. The legality principle may not exclude some kinds of conditional discretion. Extrajudicial mechanisms are not regarded as abbreviated criminal procedures. Abbreviated criminal procedures are intended to provide the minimum needed and to represent accelerated procedures. Thereby the abbreviated criminal procedures are likely to significantly shorten the time and reduce the resources spent to process case files.

Abbreviated criminal procedures can thus have a most significant role to play by helping states to maintain the rule of law and protect fundamental human rights by being able to prosecute large numbers of core international crimes within their national criminal justice system and with full respect for fair trial principles. The core of the matter is to simplify without compromising due process.

5. Concluding Remarks

There are normative reasons – considerations having ethical force – to support the implementation of justice and criminal procedures following the commission of core international crimes. The crimes are obligating reasons in conjunction with these normative considerations, compelling the state to seek justice. Abbreviated criminal procedures are one tool of extraordinary significance for the state in this respect in the aftermath of core international crimes.

The interests at stake when criminal justice is foregone are highly significant and should never be left unattended to in search for 'perfect' criminal procedures. What matters is to concentrate on what is good. Only criminal justice can restore the rule of law fully. It is a false perception that it is only by having a less than perfect criminal justice system that the state can make a serious mistake and then only *vis-à-vis* the perpetrators. Not administering justice is more harmful, primarily with regard to victims and the society at large but also in relation to perpetrators. In law, as in medicine, there ought to be a basic *primum non nocere* norm (first, do no harm) based on which societies constantly seek a fair balance between the interests of all those involved in criminal justice cases and without ever sacrificing the human rights of either side.

Victims of core international crimes find no solace in international and national law as long as it remains but unimplemented words. Without progress towards government under the rule of law the victims despair. A change towards this end is what they need. Legislation without implementation makes no sense.

The international community should embrace the 'responsibility to protect' as a basis for collective action against genocide, ethnic cleansing and crimes against humanity. In this, it is of international concern to assist primarily national but also international efforts to re-establish the rule of law in conflict and post-conflict societies. There is no way to reach this goal without taking advantage of abbreviated criminal procedures for core international crimes.

Hanne Sophie Greve *is a Judge in the Gulating Court of Appeal, Norway. She was formerly a Judge at the European Court of Human Rights and a member of the United Nations Security Council Commission of Experts for the former Yugoslavia. The text is based on a speech given in Courtroom 600 of the Palace of Justice in Nuremberg on the occasion of the launch of the anthology 'Abbreviated Criminal Procedures for Core International Crimes'.*

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