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„Restorative Justice in Ukraine:
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Robert Uerpmann-Wittzack

Restorative and Transnational Justice in International Law

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Content:

I. Introduction

International institutions and international legal scholars rather refer to transitional than restorative justice. This paper seeks to explore the relationship between both concepts (II.1) and explores how public international law contributes to transformative and restorative justice (II.2). It tries to systematize elements of transformative justice which may be attributed to truth seeking, criminal justice, reparations, and guarantees of non-recurrence (III). Further sections highlight specific features of criminal justice including reparations ordered by the International Criminal Court (IV), truth commissions and other alternatives to criminal justice (V), and problems of inter-State restorative justice (VI). A short summary concludes the paper (VII).

II. Setting the Scene

1. Restorative and Transitional Justice

The idea of restorative justice originates from criminal justice and was developed as of the 1960s as an alternative to retributive justice.[1] While traditional, retributive justice looks at the perpetrator and punishment, restorative justice expands the focus to the harm caused and to the victim. Hence, restorative justice aims at reconciliation and at reintegrating the perpetrator into society.[2] It is future oriented.[3]

In international law, the concept of transitional justice prevails. The UN Secretary General defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation“.[4] Transitional justice deals with situations of fundamental societal transformation, be it after the end of an authoritarian regime or in a post-conflict situation.[5]

[1] See Pietro Sullo, Restorative Justice, paras 1 f., in: Anne Peters and Rüdiger Wolfrum (eds.), Max Planck Encyclopaedia of International Law (MPEPIL; last updated 2016), https://doi.org/10.1093/law:epil/9780199231690/e2120 (all http links last checked on 6 May 2024).
[2] Louise Mallinder, Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice, in: Jennifer J. Llewellyn and Daniel Philpott (eds.), Restorative Justice, Reconciliation, and Peacebuilding, 2014, pp. 138 (145); see also United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes, 2nd edition 2020, pp. 4 f.
[3] Sullo (note 1), para. 7.
[4] United Nations, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, S/2004/616, para 8; United Nations, Transitional Justice – A Strategic Tool for People, Prevention and Peace, Guidance Note of the Secretary-General, 2023, p. 2, https://www.ohchr.org/en/documents/tools-and-resources/guidance-note-secretary-general-transitional-justice-strategic-tool.
[5] See Anja Seibert-Fohr, Transitional Justice in Post-Conflict Situations, para. 1, in: MPEPIL (note 1; last updated 2019), https://doi.org/10.1093/law:epil/9780199231690/e419.

Anja Seibert-Fohr speaks of situations “of past large-scale human rights violations and humanitarian abuses”.[6] Like restorative justice, transitional justice is future oriented. It deals with the past in order to reconcile, to stabilize and to strengthen society. Hence, transitional justice frames what Germans call “Vergangenheitsbewältigung”, i.e. coming to terms with the past.[7] The concepts of restorative justice *stricto sensu* and transitional justice overlap where crimes committed during a civil war or under a former authoritarian regime are addressed. However, the scope of transitional justice is both more restricted and broader than the scope of restorative justice *stricto sensu*. In fact, it is limited to post-conflict situations and regime change, while it is not restricted to dealing with individual crimes. It is a future-oriented endeavour of nation-building which seeks to heal a society and to provide sustainable peace and reconciliation.[8]

In Ukraine, there is a double transformation calling for transitional justice: the passage from a communist, authoritarian regime to a liberal democracy was complemented by gaining independence from the former USSR. While USSR rule over Ukraine was not perceived as a form of colonialism during the Cold war,[9] independence from Russia could be perceived as a post-colonial situation today. However, the situation is complicated by the fact that transition is overlayed by an ongoing military conflict between Ukraine and the former de-facto colonial power which implies war crimes and other serious international crimes and threatens the very existence of the State. Hence, it might be difficult to apply concepts conceived for post-conflict situations.

In a nutshell, the concepts of restorative and transformative justice overlap, and both terms may be employed to a certain extent synonymously. Since this paper takes the perspective of international law, the term transformative justice will prevail.

[6] Seibert-Fohr (note 5), para. 1.
[7] See e.g. the contributions by Axel Bormann and Martin Löhnig to the IOR workshop on Restorative Justice in Ukraine.
[8] See Ruti G. Teitel, Globalizing Transitional Justice, 2014, p. 55.
[9] See Marc Weller, Settling Self-Determination Conflicts: Recent Developments, European Journal of International Law 20 (2009), pp. 111 (112 f.).

2. The Perspective of International Law

Restorative and transitional justice is, first of all, a concern of individual States like Ukraine. Since many societies have been confronted with problems of transitional justice, it is worthwhile comparing different approaches and establishing best practices and common standards of transitional justice. This is an endeavour of comparative law. Herbert Küpper undertakes this endeavour in his Working Paper with regard to transitional justice in former socialist States.[10]

a) The Role of International Institutions

International law comes into play when international institutions start supporting transitional justice in individual States. In fact, both the United Nations and the Council of Europe are involved in processes of transitional justice. For this purpose, they have taken the lead in identifying best practices and common standards. At the universal level, the United Nations have adopted standards like the Basic Principles and Guidelines on the Right to a Remedy and Reparation[11] and the Principles to Combat Impunity[12]. Within the Council of Europe, for instance, the European Commission for Democracy through Law, the so-called Venice Commission, has regularly commented on domestic legislative transitional justice projects such as the Ukrainian Lustration Law.[13]

It must be kept in mind, however, that each regime change and each post-conflict situation is different. Solutions must be adapted to the specific cultural and historical setting in a given country and at a given time.[14] For instance, Continental European and post-communist societies are much more shaped by statutory law than traditional societies. Hence, truth and reconciliation commissions, which have successfully operated in Latin America, are not necessarily the best option for Ukraine. Rather, solutions that have successfully been implemented in Central and East European countries are more likely to fit here.

[10] Herbert Küpper, Coping Legally with the Injustice of Former Socialist Regimes: a Comparative Overview, Pilot Project: ‘Restorative Justice’ in Ukraine, Working Paper No. 1, 2024, https://nachkriegsukraine.de/wp-content/uploads/2024/04/Working-Paper-Nr-1.pdf.
[11] United Nations, General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution of 16 December 2005, A/RES/60/147.
[12] United Nations, Economic and Social Council, Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Principles to Combat Impunity), 2005, E/CN.4/2005/102/Add.1.
[13] See, e.g., Council of Europe, Venice Commission, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, CDL-AD(2015)012; see also the Opinion on the Draft Law “on the Principles of State Policy of the Transition Period”, CDL-AD(2021)038.
[14] See also Guidance Note of the Secretary-General (note 4), p. 6 f.

In the absence of appropriate domestic institutions, international bodies may be charged with providing transitional justice. This is the case of international criminal courts and tribunals. In the early 1990s, the UN Security Council was seized with the wars in former Yugoslavia with a view to "restore international peace and security" according to Article 39 UN Charter. It appeared that enduring peace and security in the Balkans could not be achieved without transitional justice.[15] Hence, the Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) under Chapter VII UN Charter with a view to putting the perpetrators of war crimes, crimes against humanity, and genocide on trial. According to the Preamble of its Resolution 827 (1993), the Security Council believed that the Tribunal would "contribute to ensuring that such violations are halted and effectively redressed". In the same vein, the Security Council established the International Criminal Tribunal for Rwanda one year later in 1994, before the international community set up the International Criminal Court (ICC) as a permanent tribunal by adopting the Rome Statute in 1998. According to its Preamble, the Rome Statute builds upon the assumption that putting "an end to impunity for the perpetrators" of most serious crimes contributes "to the prevention of such crimes".

b) Human Rights Providing a Legal Framework for Restorative and Transitional Justice

Finally, international law sets up a framework for realising restorative and transitional justice. This is particularly true for the European Convention on Human Rights.[16] Human Rights may call for and facilitate mechanisms of transitional justice, but they equally restrict a State's means to render transitional justice.

According to the settled case law of the European Court of Human Rights (ECtHR), gross violations of human rights must be criminalized, investigated and prosecuted. The respective positive obligations follow, inter alia, from the right to life (Article 2 ECHR) and from the prohibition of torture, inhuman and degrading treatment (Article 3 ECHR).[17] The scope of this case law for situations of transitional justice is limited, however, by the Convention's non-retroactivity. In fact, the Convention does not apply to acts which have occurred before its entry into force. Ukraine joined the ECHR in 1997, i.e. after the end of the communist regime and after independence.[18] Hence, the ECHR does

[15] For the underlying peace concept see Mallinder (note 2), p. 142 ff.
[16] See generally Eva Brems, Transitional Justice in the Case Law of the European Court of Human Rights, The International Journal of Transitional Justice 5 (2011), 282 ff.; Antoine Buyse and Michael Hamilton (eds.), Transitional Jurisprudence and the ECHR, 2011, pp. 131 ff., https://doi.org/10.1017/CBO9780511758515.
[17] See Brems (note 16), pp. 286-287; Seibert-Fohr (note 5), para. 9.
[18] See the status of ratification provided by the Council of Europe Treaty Office: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005.

not oblige Ukraine to prosecute acts committed before. Nevertheless, seeking the truth about the communist past is protected by freedom of expression. As a rule, Article 10 ECHR obliges the State not to restrict access to information and a public debate over what has happened.[19]

While the ECHR does not apply to injustice committed within the former USSR, any measure of transitional justice undertaken since 1997 must comply with ECHR guarantees.[20] Criminal proceedings must be assorted with the procedural safeguards contained in Article 6 ECHR and respect the principle of *nulla poena sine lege* contained in Article 7 ECHR.[21] Restituting property seized under the communist regime must respect Article 1 of Additional Protocol No. 1 to the ECHR if the property is owned now by a private person. Vetting civil servants or other persons must comply inter alia with the protection of private life under Article 8 ECHR.[22] Hence, lustration must pursue a legitimate aim and be proportionate. Proportionality depends both on the degree a person was involved in Soviet abuses and on the position it now holds in the State system. Moreover, with the passage of time, the interest of removing someone from service for acts committed under Soviet rule diminishes.

III. Dimension of Transitional Justice

There have been efforts to systematize the different aspects of transitional justice. A Guidance Note of the UN Secretary General exposes four different dimensions of transitional justice:

- truth seeking,
- criminal justice,
- reparation, and
- guarantees of non-recurrence.[23]

Coming to terms with what has happened requires truth. Authoritative regimes tend to impose their narrative of the past. Liberal democracies also need a narrative of what happened, but this narrative must be based on facts and open to debate. Opening archives for potential victims, for scientific research or for the public at large is a first step to reveal the truth. Latin American States have opted for

[19] See Brems (note 16), pp. 287-289; Antoine Buyse, The truth, the past and the present: Article 10 ECHR and situations of transition, in: Buyse and Hamilton (note 16), pp. 131 ff., https://doi.org/10.1017/CBO9780511758515.007.
[20] See generally Brems (note 16), pp. 291 ff.
[21] For further details see below section IV.1.
[22] For the applicability of Article 8 ECHR see ECtHR, Judgment of 17 October 2019 – 58812/15 and others, paras. 203-211 – Polyakh and others vs. Ukraine; for a general framework, see ECtHR, Judgment of 24 June 2008 – 3669/03, para. 116 – Ādamsons v. Latvia.
[23] Guidance Note of the Secretary-General (note 4), p. 2; see also Seibert-Fohr (note 5), para. 1: investigation, criminal prosecution, reparation and “issues of institutional reform as a matter of long-term stability”.

truth commissions in order to establish the past. Research projects or parliamentary enquiries could be other means to establish the truth. While truth is important, it has to be recognized that any narrative, even if carefully based on facts, contains an interpretative element. Therefore, Ruti G. Teitel prefers speaking of historical justice instead of truth seeking.[24] It must be borne in mind, however, that historical justice must be based on facts. In a liberal democracy founded on freedom of expression, State authority must not impose one single view of what happened.

Criminal Justice is equally concerned with establishing the truth. Its focus is narrowed, however, to individual acts. Hence, it may be difficult to establish the truth about an entire regime and systematic abuses through individual criminal proceedings.[25]

In general, reparation can take the form of restitution, compensation, or satisfaction.[26] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation of 2005 add rehabilitation as another form of reparation.[27] The UN document uses a wide concept of rehabilitation which includes providing medical, psychological and other support to victims[28] and highlights the importance of such support. Otherwise, it would be possible to qualify rehabilitation as a special form of restitution or satisfaction. Moreover, the UN Basic Principles refer to guarantees of non-repetition.[29] This implies a fundamental change of the political, constitutional and administrative regime and goes beyond traditional forms of reparation. It should rather be seen as a specific element of transitional justice as the Guidance Note of the UN Secretary-General suggests.[30]

Reparation may be linked to individual criminal or civil proceedings or administered through specific programmes.[31] It can also take a symbolic and collective form like erecting a memorial or monument.[32] “Reparatory justice”[33] recognizes past injustice and has a strong restorative element.

While truth seeking, criminal justice, and reparation all contain preventive elements, the fourth pillar of transitional justice goes beyond that. In fact, guarantees of non-recurrence can take various forms

[24] Ruti G. Teitel, Transitional Justice, 2000, pp. 69 f.
[25] But see Denisa Kostovicova, Rachel Kerr and others, The “Digital Turn” in Transitional Justice Research: Evaluating Image and Text as Data in the Western Balkans, Comparative Southeast European Studies 70 (2022), pp. 24 (29).
[26] See Articles 34-37 of the 2001 Articles on responsibility of States for internationally wrongful acts drafted by the International Law Commission, A/RES/56/83, Annex.
[27] Basic Principles and Guidelines (note 11), para. 18.
[28] See Basic Principles and Guidelines (note 11), para. 21.
[29] See Basic Principles and Guidelines (note 11), para. 18, 23.
[30] See above note 23.
[31] See Principles to Combat Impunity (note 12), Principle 32.
[32] See generally Guidance Note of the Secretary-General (note 4), p. 18.
[33] Teitel (note 24), p. 119.

and they imply strengthening civil society and structural reforms securing the rule of law, human rights and democracy.[34]

Considering the different dimensions of transitional justice, vetting and lustration may fulfil different functions. First, screening civil servants contributes to establishing the truth about what happened and who was involved. If a civil servant's past compromises their future action in civil service, lustration secures full transition to the new system and hinders recurrence of past injustice. This is the stance taken by the UN Secretary-General in his Guidance Note on Transitional Justice.[35] In the absence of a risk of continuance or recurrence, lustration may still have a retributive effect which comes close to criminal justice.[36]

IV. Criminal Law

It seems settled that States are obliged to investigate and to prosecute gross violations of international human rights law and war crimes.[37] In this context, they must respect some limitations set by international law (1). As far as international criminal courts are concerned, the ICC offers a telling example of reparatory justice (2).

1. The Limits of Transitional Criminal Justice

a) Nulla poena sine lege

Any prosecution and criminal conviction must respect the principle of *nulla poena sine lege*. Normally, this will not hinder prosecuting serious international crimes. Under Article 7(1)1 ECHR, "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". According to the ECtHR, the legal basis must be sufficiently accessible and foreseeable for the perpetrators to be able to know that their deeds entail criminal responsibility.[38] Since Article 7 (1) ECHR

[34] Guidance Note of the Secretary-General (note 4), pp. 20 f.; see also Principles to Combat Impunity (note 12), Principles 35-38.
[35] Guidance Note of the Secretary-General (note 4), pp. 2, 20; but see Teitel (note 24), pp. 165 ff. for a more nuanced approach.
[36] See also Teitel (note 24), p. 171; but see ECtHR, Judgment of 17 October 2019 – 58812/15 and others, paras. 276 f. – Polyakh and others vs. Ukraine, on ECHR limits to such an approach.
[37] See Principles to Combat Impunity (note 12), Principle 19; Basic Principles and Guidelines (note 11), para. 4; for the ECHR see supra, note 17.
[38] ECtHR (Grand Chamber), Judgment of 19 September 2008, paras. 71, 73 – Korbely v. Hungary; ECtHR, (Grand Chamber) Judgment of 17 May 2010, para. 185 – Kononov v. Latvia.

explicitly refers to international law, war crimes and other international crimes may be prosecuted even if the domestic law approved of them at the time when they were committed. In Kononov v. Latvia, the Grand Chamber of the ECtHR did not object against prosecuting a former partisan for summary execution of villagers in 1944 under the heading of war crimes.[39] Analysing the law of non-international armed conflict, however, the ECtHR found no sufficient legal basis for prosecuting the killing of the leader of an armed group of opponents who had not clearly surrendered in Korbely v. Hungary.[40]

Article 7(2) ECHR permits prosecuting acts and omission which, at the time when they were committed, were “criminal according to the general principles of law recognised by civilised nations”. Hence, reunited Germany was allowed to prosecute organs of the former German Democratic Republic for killings at the inner-German border that blatantly disregarded the right to life as enshrined in international human rights law.[41]

b) Statutory Limitations

There is a consensus now that international core crimes, i.e. war crimes, crimes against humanity and genocide, shall be prosecuted without any limitation in time. The gravity of these crimes outweighs the interest in drawing a line under it and of forgetting. This has been laid down in Article I of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[42] Both Ukraine and Russia are parties to the Convention.[43]

For other criminal acts, statutory time limits will normally apply. As statutory limitations are a matter of procedural law, prolonging time limits after an act was committed is not contrary to *nulla poena sine lege*; once prosecution is time-barred, however, the time limit for prosecution must not be opened

[39] ECtHR, (Grand Chamber) Judgment of 17 May 2010, paras. 188 ff. – Kononov v. Latvia.
[40] ECtHR (Grand Chamber), Judgment of 19 September 2008, paras. 86-94 – Korbely v. Hungary; but see Friedrich-Christian Schroeder and Herbert Küpper, Der EGMR und die Bestrafung stalinistischer Verbrechen, Jahrbuch für Ostrecht 50 (2009), pp. 213 (219-221).
[41] See ECtHR (Grand Chamber), Judgment of 22 March 2001, paras. 85 ff. – Streletz, Kessler and Krenz v. Germany, with a reasoning based exclusively on Article 7(1) ECHR; see also Kadelbach, in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds.), EMRK/GG Konkordanzkommentar, Chap. 15 para. 40.
[42] A/RES/2391(XXIII), Annex; confirmed by Principles to Combat Impunity (note 12), Principle 23(2); Basic Principles and Guidelines (note 11), para. 6.
[43] See the ratification status available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4.

again.[44] There is an exception for international core crimes, where international law may justify discarding domestic statutory limitations according to Article 7(2) ECHR.[45]

c) Amnesties

Like statutory limitations, amnesties are ambivalent. Both mechanisms try to strike a balance between holding a person responsible for what has happened and forgetting the past. The UN is not willing to accept amnesties for international core crimes.[46] Amnesties for minor crimes, however, may help overcoming the past if they correlate with other measures such as testimonies and apologies given in a truth and reconciliation commission.[47] Hence, amnesties should not be granted generally but only in the context of other measures of transitional justice.

2. Reparations to Victims

The shift from pure retribution to a victim-oriented approach inspired by restorative justice is particularly strong in the procedure of the International Criminal Court.[48] The Rome Statute of the International Criminal Court does not only provide for the participation of victims in the proceedings but also for compensation. Under Article 75 Rome Statute, the ICC may decide on reparation to or in respect of victims which may take the form, inter alia, of restitution, compensation, and rehabilitation. In order to grant compensation even where the convicted person is not able to pay for the damages caused, Article 79 Rome Statute provides for a Trust Fund to be established by the Assembly of States Parties to the Rome Statute. The Trust Fund administers both funds received from convicted persons and voluntary contributions from Governments, international organizations, individuals and private corporations.[49] Hence, individual criminal responsibility may lead to public reparations financed by

[44] ECtHR, Judgment of 22 June 2000 – 32492/96 and others, paras. 148 f. – Coëme and others vs. Belgium; Kadelbach (note 41), para. 36.
[45] See also Kadelbach (note 41), para. 36.
[46] See Principles to Combat Impunity (note 12), Principle 24(a); according to Principle 28(1) confessing one’s crime can only justify a reduction of sentence, not impunity; see also Anja Seibert Fohr, Amnesties, paras. 9 ff., in: MPEPIL note 1; last updated 2018), https://doi.org/10.1093/law:epil/9780199231690/e750.
[47] For a positive view of amnesty laws in a context of restorative justice see Mallinder (note 2), pp. 150 ff.; see also Teitel (note 8), p. 58, and Andreas Gordon O’Shea, Truth and Reconciliation Commissions, paras. 22 f., in: MPEPIL (note 1; last updated 2008), https://doi.org/10.1093/law:epil/9780199231690/e882.
[48] See Carsten Stahn, Daedalus or Icarus? Footprints of International Criminal Justice Over a Quarter of a Century, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 77 (2017), 371 (397-400), who also warns of negative consequences.
[49] See ICC, Assembly of State Parties, Resolution ICC-ASP/1/Res.6 of 9 September 2002 on the Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Annex, para. 8.

the international community. Here, redistributive justice definitely yields to the idea of restorative justice.

This is illustrated by the Al Mahdi case. Mr. Al Mahdi was convicted in 2016 for having destroyed invaluable religious and historic buildings in Timbuktu, Mali, in 2012.[50] In 2017, the Trial Chamber issued a reparation order.[51] Mr. Al Mahdi hat already apologized for his acts during the trial. The Trial Chamber did not consider a further apology to be necessary, but it ordered the video of Mr. Al Mahdi's apology to be posted on the Court's website in order to ensure that all victims have access to it.[52] With regard to financial losses, the Trial Chamber awarded individual reparations to the citizens of Timbuktu "whose livelihoods exclusively depended upon the Protected Buildings", and it provided for "collective reparations for the community of Timbuktu as a whole" which might include "community-based educational and awareness rising programmes" as well as a financial programmes to help the population to generate revenue.[53] Finally, the Court ordered "individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack" and collective reparations for mental suffering of the community of Timbuktu as a whole. According to the Trial Chamber, collective reparations could include symbolic measures like a memorial or ceremony which would publicly recognize the moral harm suffered by the citizens of Timbuktu.[54] The Chamber even awarded one symbolic Euro to the Malian State and another Euro to the international community represented by UNESCO.[55] For the total of reparations, the Chamber fixed Mr. Al Mahdi's liability at 2.7 million Euros and encouraged the Trust Fund to complement this sum since Mr. Al Mahdi did not dispose of the necessary assets. It was left to the Trust Fund to implement the reparations award.[56] In 2018, the Appeals Chamber found that the Trial Chamber had to review how the Trust Fund executed the reparations award.[57] Otherwise, the orders of the Trial Chamber were essentially confirmed. By the end of 2021, the Trust Fund had collected half of the amount set by the Court; Norway and Germany, among others, had contributed funds.[58]

[50] ICC, Trial Chamber, Judgment of 27 September 2016 – ICC-01/12-01/15-171, The Prosecutor v. Ahmad Al Faqi Al Mahdi.
[51] ICC, Trial Chamber, Reparations Order of 17 August 2017 – ICC-01/12-01/15-236, The Prosecutor v. Ahmad Al Faqi Al Mahdi.
[52] Reparations Order (note 51), para. 71; the youtube file of the English version is available at: https://youtu.be/Regsy114ovI; it is linked on the Court's website at: https://www.icc-cpi.int/mali/al-mahdi.
[53] Reparations Order (note 51), para. 83.
[54] Reparations Order (note 51), para. 90.
[55] Reparations Order (note 51), paras. 106-107.
[56] For the action taken see ICC, The Trust Fund for Victims, Annual Report 2021, pp. 35-37.
[57] ICC, Appeals Chamber, Judgment of 8 March 2018, ICC-01/12-01/15-259, The Prosecutor v. Ahmad Al Faqi Al Mahdi, para. 98.
[58] Trust Fund, Annual Report 2021 (note 56), p. 35.

The Al Mahdi case shows how criminal prosecution can serve the objectives of restorative justice and the wide range of different forms that reparations can take.

V. Alternatives to Criminal Justice

In the 1980s and 1990s, Latin-American States and then South Africa established truth and reconciliation commissions in order to deal with past regimes.[59] This permitted them to take a broader approach, to create a dialogue between victims and perpetrators, to find a narrative of what had happened and to establish responsibility beyond the individual focus of criminal justice. This was an appropriate means to deal, inter alia, with the practice of disappearances that had been common in Latin America. In a post-communist country, such an approach risks replacing the official history told by the communist regime by a new official history, which would be incompatible with a liberal democracy. Instead, other means like access to archives enable victims and researchers to draw their own picture of what happened.[60] Moreover, it seems to be settled that truth commissions can at best complement, but not replace criminal justice.[61] It is true that the Western focus on criminal justice has been criticized for disregarding traditions of informal justice which are prevalent in many countries of the world.[62] However, Central and Eastern Europe seems to share the legalistic tradition of the West which leaves little room for replacing criminal justice by informal mechanisms.

Even if truth and reconciliation commissions are not a model for Ukraine, extra-legal means of transitional justice should be kept in mind. This could include enquiry commissions set up by Parliament or other authorities as well as programmes of historic research, pertinent exhibitions or even artistic projects.[63]

VI. State Immunity and the Problems of Inter-State Restorative Justice

The IOR Restorative Justice Project deals with crimes and human rights violations that were committed in the former USSR and under Soviet rule. Some of these crimes and violations might be attributable to the Russian Federation. Hence, questions of State immunity arise. With the breakup of the USSR, former Soviet acts acquired a transnational dimension. This distinguishes Ukraine from other

[59] Gordon O'Shea (note 47), para. 5.
[60] See generally Teitel (note 8), p. 56 f., 59.
[61] See above note 46 f.
[62] Mallinder (note 2), p. 139.
[63] For the latter see Rachel Kerr, Art, Aesthetics, Justice, and Reconciliation: What can art do?, AJIL Unbound 114 (2020), pp. 123 ff., https://doi.org/10.1017/aju.2020.24.

cases of transitional justice. Ukraine, which became independent in 1991, is a new State distinct from the USSR. As far as acts committed under Soviet rule and concerning Ukraine are now attributable to the Russian Federation, they could entail Russia's responsibility towards Ukraine or Ukrainian citizens. Hence, State immunity applies. Under the rules of State immunity, Ukrainian courts have no jurisdiction over Russian *acta iure imperii*, i.e. over acts relating to the exercise of sovereign power.[64] Claims relating to acts of a private or commercial nature, so-called *acta iure gestionis*, can be heard in foreign courts. State immunity for *acta iure imperii* applies, however, even if these acts constitute international core crimes, as the International Court of Justice confirmed in its 2012 Judgment in *Jurisdictional Immunities*.[65] Hence, disputes concerning reparation for such acts must be settled on the international level. Ukrainian authorities are not allowed to adjudicate such claims against Russia.

Questions of immunity only arise with regard to claims against a foreign State like the Russian Federation. In principle, claims against individuals for acts committed under Soviet rule can be adjudicated by Ukrainian courts even if the defendants are Russian citizens.

VII. Summary

Summing up, international law deals with regime change and post-conflict situations under the perspective of transitional justice rather than restorative justice. It envisages a broad range of mechanisms which relate to (1.) truth-seeking, (2.) criminal justice, (3.) reparations, and (4.) guarantees of non-recurrence.

International institutions have codified important standards for transitional justice. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation and the UN Principles to Combat Impunity are examples of this. Some institutions like the International Criminal Court are directly involved in providing transitional justice. The Al-Mahdi case illustrates how an international institution can further develop international standards pertaining to transitional justice and to reparation in particular.

Finally, international human rights law provides a framework for dealing with transitional justice. This is particularly true for the European Convention on Human Rights with the specific standards

[64] See ICJ, Judgment of 3 February 2012, Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), ICJ Reports 2012, p. 99, para. 60.
[65] ICJ, Jurisdictional Immunities of the State (note 64), paras. 80 ff.

developed by the European Court of Human Rights. In essence, any project of transitional or restorative justice must respect the international rule of law.

Author information:

Prof. Dr. Robert Uerpmann-Wittzack, Maîtrise en droit (Université de droit, d’économie et des sciences d’Aix-Marseille)

Chair of Public and International Law
University of Regensburg
https://www.uni-regensburg.de/law/public-law/uerpmann-wittzack

robert.uerpmann-wittzack@ur.de