THE ROLE OF INTERNATIONAL CRIMINAL TRIBUNALS IN PROMOTING HUMAN RIGHTS

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Abstract

An important debate in contemporary international law is the extent to which the international trials could contribute to development of human rights. This article presents the place of this type of trials among the means of transitional justice and asserts their benefits for human rights by approaching three main issues related to international criminal tribunals: their activity based on the rule of law, their influence in societies emerging from human rights abuses and their role to deter future human rights violations. It also challenges the main critiques of international criminal justice, in order to cover all the relevant aspects of the topic.

Keywords: public law; human rights; international criminal tribunals; transitional justice

Over the last two decades the importance of international trials, their role in dealing with mass violations of human rights but also their limits, have fostered lively debate among international law scholars and practitioners but also among politicians and other actors on the international stage. The main topic of this debate has been whether international trials, with their focus on individual responsibility, are really necessary for protecting the human rights or, on the contrary, they could rather ban the peace process. Some authors 1) have argued for the idea of an essential role of international tribunals in promoting human rights while others 2) have considered these institutions as having only a limited significance in this domain, even constituting sometimes an obstacle to the peace process in the countries affected by large scale abuses. The entire debate has revealed the tension between justice and peace, or in the words of Akhavan, the

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judicial romanticism versus political realism\(^3\)). This essay will assert that the benefits of international tribunals in protecting and promoting human rights are multiple, especially for establishing individual responsibility which should be considered as essential for the protection of human rights. Nevertheless, in order to cover all the relevant aspects of the topic, it will also go on to challenge the main critics of international trials. After a short presentation of the birth and development of international tribunals as means of transitional justice, the essay will approach three main issues related to this type of tribunals: their activity based on the rule of law, their influence in societies emerging from human rights abuses and their role to deter future human rights violations. Each time it will also discuss the main critics related to these issues.

As mentioned in the title of this article, international trials are considered to be one of the principal means of transitional justice. The latter notion is used by legal scholarship to design the ways by which international community or the new democratic regimes approach the mass crimes perpetrated by the authoritarian regimes. «The term transitional justice, which is commonly used to describe multiple mechanisms during democratization, is more than descriptive. It conveys a normative understanding about what these processes are meant to achieve, namely, some measure of justice for victims of state crimes»\(^4\). These institutional reactions to massive human rights violations may have different forms: truths commissions, domestic trials for individual criminals, conducted by national courts or hybrid tribunals, or international trials of principal perpetrators, conducted by permanent tribunals such as International Criminal Court or ad hoc tribunals, such as International Tribunal for the Former Yugoslavia or International Tribunal for Rwanda. The sphere of this article will include only the international trials for mass violation of human rights, whereas other means of transitional justice, such as hybrid tribunals or truth commissions will be excluded. Thus, only the trials before international jurisdictions will be the focus of this paper.

The international tribunals appeared in the aftermath of the Second World War with the tribunals from Nuremberg and Tokyo. After 1980, these institutions have become an important mean of transitional justice together with hybrid tribunals, national courts and truth commissions. As a result of development of international humanitarian law and international human rights law in the past


decades, when a society faced serious crimes such as genocide or war crime, the principle of justice should prevail over the possibility of amnesty laws\(^5\). From this perspective, amnesties can be used only in exceptional situations to end a conflict or to assure peaceful transition to a democratic society. In this new framework, where the transitional justice is used to deal with the mass abuses, the international trials should be considered of paramount importance for the effectiveness of universal protection of human rights.

Firstly, one of the main arguments in favor of international tribunals is that these institutions strengthen the rule of law both at international and national level. The universal principles of justice, such as independence and legitimacy of the judges, fairness of the trial, individual responsibility, cross examination, presumption of innocence, judgment on the base of general, preexisting norms, right to legal assistance, will contribute to the defense of human rights and to the fair balance between the opposite interests involved in each particular case. At a larger scale, the rule of law, applied after mass violation of human rights in a certain country, could help to arbitrate between vengeance and forgiveness\(^6\) and to rebuild the confidence in fair justice\(^7\). From this perspective the international tribunals seem to be more fitted to deliver objective judgments than national or even hybrid tribunals which function on place and could be subjected to various pressures.

Of course, international trials have their own limits. Only the principal perpetrators are held accountable and only for the worst violations of human rights such as genocide, war crimes and crimes against humanity. But these limits could not be considered a powerful argument against the important role of international tribunals. Other persons who contributed to abuses and other types of violations could be approached by national courts that can join in this way the activity of international institutions.

The main critique of the activity of international tribunals has emerged from their focus on the deeds of individual persons without taking into consideration the political context. Or one of the most important defenses of the accused in international trials is based on the context of the facts especially when they were perpetrated during war conditions\(^8\). Of course, all the circumstances, such as the national, political or ethnic situation, should be analyzed by the international courts, but this will serve only to find the truth about the indictments in the

\(^6\) M. Minow, ibid., p. 1244.
\(^7\) J. Stromseth, ibid., p. 89.
specific case, and not to avoid the individual responsibility. The focus on punishment of individual violators, which characterize the activity of international tribunals, is determinant for a real protection of human rights. It could also have an important role in deterring future violations as it will be asserted later.

Secondly, the international trials, as means of transitional justice, have a significant influence upon the societies were human rights violations were perpetrated. The main debate from this perspective concerns the role of these trials in national reconciliation. In the past when international trials were organized in occupied countries, such as Nuremberg or Tokyo trials, the problem of their role for preserving the peace was not very relevant. But in present days, when international institutions try to end atrocities by negotiations rather than by military occupation, this problem becomes more and more actual. Some authors argued that indictments of the leaders of authoritarian regimes while they are still in power could lead to further perpetration of atrocities instead of ending them by peace settlements. Nevertheless this hypothesis is not proven by relevant facts. On the contrary, in some cases, such as Côte d’Ivoire, Uganda and Sudan, the decision to prosecute and the arrest warrant contributed to prevent the continuation of violations.

Another important issue from this perspective is the role of international tribunals in promoting respect for human rights in countries with a repressive past. They should deliberately build public trust in justice in post conflict societies by understanding the local culture, constructive outreach or help in improving the domestic justice systems. From the last perspective, the case-law of international human rights courts could influence the protection of these rights at national level. One relevant example is the decision from 2001 of Inter-American Court of Human Rights in Barrios Altos case which contributed to limitation of amnesty laws in Latin America and to criminal prosecution for the violation of human rights in these countries. Another regional court that influences even deeper the protection of human rights at national level is the European Court on Human Rights. Some of its case-law can be viewed as transitional justice since it deals with mass human rights violations in repressive past. For example, by the judgment from 8 December 2009, issued in the case Sandru and others v. Romania, the Court retained the violation of article 2 of the European

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9) P. Akhavan, ibid., p. 626.
11) P. Akhavan, ibid., p. 625.
12) J. Stromseth, ibid., p. 91.
13) L. J. Laplante, ibid., p. 971.
14) Sandru and others v Romania App no 22465/03 (ECHR, 8 December 2009).
Convention on Human Rights because the state did not respect its obligation to investigate the violent repressive actions of the former communist regime against peaceful protesters in the town of Timisoara in December 1989. The Court held that national proceedings against the perpetrators of mass killing actions were not in accordance with the exigencies of the Convention concerning the right to life, especially because of their very long duration. This judgment had significant impact in Romanian society due to the large number of people involved and to the importance of these events for the recent past of the country, enforcing the public confidence at national level in the European Court. Moreover, other case-law of this court could be viewed as belonging to transitional justice since it deals in a certain way with the reparations for human rights violation during communist period in Romania. From this perspective, the richest jurisprudence of European Court was produced in the field of property rights, the Romanian state being condemned for taking inadequate domestic measures in order to cover the damages produced by large scale communist nationalizations15).

Finally, the last part of the debate about the significance of international trials concerns their presumed role in deterring future violations of human rights. These trials, which deal with the facts of main perpetrators, should be an example for other leaders that transgression of fundamental rights is punished. As Sikkink and Booth Walling have mentioned, the strategic impact of trials on the next generations of military leaders is relevant: “they may decide that trials have made repression and coups too costly for use in the future”16). From this perspective the activity of ad-hoc international tribunals, such as International Criminal Tribunals for Former Yugoslavia and Rwanda, have had a deterring effect. One could presume that a permanent International Criminal Court will have even more importance from this perspective. But some authors argue that this effect of international trials is doubtful17). The mass violation of human rights belongs to the normality of a totalitarian society or they take place in war times, which represent exceptional situations. Thus it is unlikely that for perpetrators the risk of a future trial will be deterring. In addition, in many cases, criminals intend to do

15) This case-law started with Vasilescu v Romania App no 27053/95 (ECHR, 22 May 1998), continued with tens of judgments in favor of individual victims and culminated with Maria Atanasiu and others, App. 30767/05 and 33800/06 (ECHR, 12 October 2010) where the Court used a “pilot-judgment procedure”, by which Romanian state was demanded to take general measures amending national legislation and administrative practice in order to protect the property rights of all people in similar situations. Thus, the Court extended by itself its competence to check even the political and general measures adopted at national level, in order to protect the fundamental rights of a large number of people.


17) J. Snyder, L. Vinjamury, ibid., p. 1334.
good things in the name of an ideology\(^{18}\). These two positions presented above are the result of suppositions and they are not based on factual realities. Nevertheless, most studies based on empirical data have proven that international trial, as means of transitional justice, have rather positive effects\(^{19}\). In any case, it is relevant the example of the Nuremberg trial which influenced the future generations of Germans in becoming “champions of human rights\(^{20}\)”.

In conclusion, this article has discussed the extent to which the international trials represent the main solution for mass violation of human rights. Furthermore, it has asserted that punishment of individual violators by international prosecution is a necessity for successful promotion of human rights. In the future, in order to be more effective, the international criminal law should be more unitary, on the case-law of the International Criminal Court. In addition, one should be aware that, a real confidence in justice can be assured only if the international tribunals, which deal with a small number of perpetrators, are joined by the activity of national courts in this important field. The domestic impact of the activity of international criminal justice, the “justice on the ground\(^{21}\)”, should be analyzed by future interdisciplinary studies in order to improve the confidence of post conflict societies in the rule of law.

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\(^{18}\) M. Koskenniemi, ibid., p. 1246.


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