

ROLE OF INTERNATIONAL TRIBUNALS IN RESOLUTION OF ARMED CONFLICTS

Saif Al-Rawahi,
Assistant Professor, College of Law,
Sultan Qaboos University, Muscat, Oman.
Email: rawahi82@squ.edu.om

ABSTRACT

The experience lessons of the ICTY and ICTR and the arguments that have been discussed in this article, it has become clear that there is an agreement that tribunals that are established after armed conflicts are important. They can play a significant role in the implementation of international norms. However, their effectiveness in fostering peace and security in post-conflict societies is controversial. There is clear evidence that the ICTY and ICTR have been ineffective in both stopping the fighting and in developing domestic criminal justice systems in both regions.

Keywords: International Criminal Tribunal; war crime; peace and security; crime in Rwanda and Yugoslavia

1. Introduction

There is no doubt that whether the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have success in maintaining peace and security and in providing justice to victims is the issue that is very difficult to judge, since what would be the current peace-building and justice efforts in both Yugoslavia and Rwanda without the establishment of the tribunals is a question that has no answer.

2. Tribunal for Rwanda and Yugoslavia

The maintaining peace and security after an armed conflict should mean that groups which are involved in the conflict should live together again in a normal life. This, nevertheless, has not appeared to be provided by prosecutions after armed conflicts in both the former Yugoslavia and Rwanda. Roberts (1998) criticized that neither tribunal has been successful at maintaining peace.¹ He argues that in the case of the ICTR, for example, the “*continuing bitter conflicts in the African Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect.*”² Moreover, although there had been a clear decline of violence in the region after the ICTR compared with 1994, ethnic killing continued. Tutsi and Hutu continued to fight in the Democratic Republic of the Congo and Burundi, as well as in Rwanda. This has shown the fact that the ICTR has had a limited impact on the region to stop violence.³

Furthermore, in the case of the ICTY, which was established during the conflict as an element of the international community’s peace-building schemes,⁴ the conflict within Bosnia was continued until the end of 1995, (the ICTY began operations in November 1993). Moreover, the atrocities continued to be reported in Kosovo until 1999, which made it clear that the ICTY has not had a significant impact on the alleged new crimes.⁵ It has been argued that if peace means the absence of war, then it is true to say that the ICTY’s goal to maintain peace was not achieved.⁶ It has been witnessed that after the conflict in the former Yugoslavia, almost 2 million people returned to their homes. Whereas about 1.3 million people are still displaced, including 230,000 ethnic Serbs, Roma and other minorities that fled Kosovo.⁷ There are about 390,000 refugees in the Federal Republic of Yugoslavia and about 250,000 Croatian Serbs remain in exile mostly in the Federal Republic of Yugoslavia and in Bosnia.⁸ Therefore, such a tribunal did not appear to encourage an end to the fighting and or assistance in helping the Bosnian Serbs, Croats and Muslims to live together peacefully.⁹ Moreover, even though the Kosovo conflict has been included into the ICTY when it was expanded in 1999, it appears that the Serbs were not afraid about the possibility of a change in the mandate of the

¹ Roberts, A, *The role of humanitarian issues in international politics in the 1990s*, 1999, 833 International Review of the Red Cross. PP: 19-43

² Ibid.

³ Forsythe, P. D, *Human rights in international relations*, 2nd edition, 2006, Cambridge University Press. P: 105.

⁴ Certainly, the ICTY Statute states that its work is aimed to “bring justice” to the perpetrators and “contribute to the restoration and maintenance of peace”. ICTY Statute, Preamble. Available at <http://www.un.org/icty/legaldoc/index.htm>. Retrieved April 26, 2015.

⁵ Tolbert, D, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, Summer/FALL 2002, Vol. 26: 2 the Fletcher Forum of World Affairs. P: 9.

⁶ Barria, A. L, and Roper, D. S, *How effective are international criminal tribunals? An analysis of the ICTY and the ICTR*, September 2005, Vol. 9, 3 The International Journal of Human Rights. P: 358.

⁷ Ibid. P: 362.

⁸ United Nations High Commission for Refugees, “The Balkans,” <http://www.unhcr.ch/cgi-bin/texis/vtx/Balkans>. Retrieved April 26, 2015.

⁹ A notable example is the massacre in Srebrenica in July 1995, almost two years after the creation of the ICTY.

ICTY to include this conflict.¹⁰ Even until recently, Muslim refugees and displaced people had difficulty returning to their homes in Serb portions of Bosnia. It is evidential that the stress continues to be high in Kosovo between the Serbs and Albanians.¹¹

It has become clear that the ICTY and ICTR should not have been created in the former Yugoslavia and Rwanda.¹² What can be provided by tribunals after an armed conflict for victims is only the acknowledgment and recognition of what happened. Some argue that the ICTY and ICTR have not been successful because of the problematic cases that they have been dealing with.¹³ The nature of the crimes committed during civil war conflict is problematic for international humanitarian law. Thus, some argue that it is impractical to assume that the ICTY could have immediately discouraged crimes in the midst of a particularly cruel interethnic conflict in the former Yugoslavia.¹⁴ So, the question raised is, why they should have been established?¹⁵

In addition, one of the most important reasons that most writers and reporters believe that the ICTY and ICTR are useless, is the fact that their long-term impact on the systems of justice in the area of conflict has been minimal.¹⁶ The justice system in almost all countries of the former Yugoslavia are not prepared to provide fair and independent trials for all ethnic groups, particularly in dealing with war crimes.¹⁷ Such failure has many aspects; Tolbert (2002) states that one important features of that failure is that the ICTY has provided little to support the local prosecutors and courts in preparing to hold investigations and trials concerning war crimes. He emphasized that while the tribunal was established as a mechanism to foster peace and security in the region, it was not given any specific role in creating or improving the local justice systems or supporting in domestic crimes prosecutions.¹⁸ Thus, some argue that the money used for prosecutions should be used instead for redevelopment of the state that has experienced civil conflict,¹⁹ it is better to support the domestic criminal justice system. For instance, the ICTR has received international funding which was double of what the national criminal justice system in Rwanda has been given. However, only thirty cases have been heard by the ICTR in the first five years of its establishment, while around 120,000 suspects of genocide during the same period were prosecuted by the local courts. This fact indicates that the success of international criminal courts is limited, as they are not playing a significant role in building the local institutions.²⁰

2.1. Is prosecutions only way to achieve justice?

Some argue that international and national prosecutions are not the only way to achieve accountability, particularly in post-conflict situations.²¹ It has been argued that both peace and justice are necessary in fostering peace and security but the issue is when justice should be pursued.²² As developed by David Keen, the transition from war to peace isn't clear cut, and very much influences the very sustainability of the given peace settlement or agreement. In fact, "*It may be difficult to account for mass violence or civil war without examining the violence embodied in peace.*"²³ As a concrete example, the establishment of the ICTY in 1993 was in a follow of the conclusion of the Dayton agreement in 1995. Such an agreement showed that both peace and criminal justice only together can end most of the fighting and reduce much of the multifaceted victimization of individuals and promising justice for those who had involved in war crimes, crimes against humanity, and genocide.²⁴ In the case of Milosevic, Western states did not make a serious effort to go after him until later, when the Dayton agreement was more secured.²⁵ Therefore, it can be argued that, in the case of the ICTY, the tension was resolved only with the negotiated Dayton peace agreement for Bosnia as well as NATO intervention concerning Kosovo. Only after these diplomatic events was there a serious pursuit of a number of Serbian leaders consecutively to hold them personally accountable for certain crimes.²⁶

¹⁰ Barria and Roper, Supra note 6. P: 358.

¹¹ Forsythe, Supra note 3. P: 102.

¹² Ibid. P: 364.

¹³ Ibid.

¹⁴ Akhavan, P, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 2001, Vol. 95, American Journal of International Law. P: 9.

¹⁵ Roberts argues that "the atrocities of the 1980s and 1990s have been in conflicts with at least some element of civil war. Such wars are often more bitter than international wars . . . [the] rules applicable to internal conflicts . . . are more limited than those for international armed conflicts." Ibid.

¹⁶ Tolbert, Supra note 5. P: 8.

¹⁷ For an overview of the state of judicial system in Bosnia, see Judicial Reform Index for Bosnia and Herzegovina (ABA-CEELI, October 2001). The judicial system receives only four positive marks out of 30 assessed categories.

¹⁸ Tolbert, Supra note 5. P: 10.

¹⁹ Oosterveld, V, *Prosecution of Genocide, Crimes against Humanity and War Crimes in War to Peace Transitions*, Foreign Affairs Canada. From: <http://www.humansecurity.info/sites/cchs/files/pdfs/Consultation%20Papers/8th/oosterveld.doc>. Retrieved May 5, 2015.

²⁰ Theissen, G, *Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past*. From: <http://www.berghof-handbook.net>. P: 2. Retrieved April 26, 2015. P: 3.

²¹ Bassiouni, C. M, *Searching for Peace and Achieving Justice: The Need for Accountability, Law and Contemporary Problems*, 1996, Vol. 59, 4 Peace and Justice Journal, P: 19.

²² Oosterveld, Supra note 19.

²³ Keen, D, *War and peace: what is the difference?* in *Managing Armed Conflicts in the XXI Century*, Ed. Adekeye Adebajo and Chandra Lekha Sriram, International Peace Academy, New York, Franck Cass 2001. P: 8.

²⁴ See Holbrooke, R, *To End a war*, 1998, New York: Random House.

²⁵ Forsythe, Supra note 3. P: 99.

²⁶ Ibid. P: 101.

In spite of the fact that there are strong arguments and factual evidence to support that prosecutions after armed conflicts have not seen justice or have had a significant impact in fostering peace and security, there is always a different side for everything; there are a number of supporters of such prosecutions. They have widely argued that peace and security cannot exist without justice; they cannot be improved upon while individuals who were involved in conflicts are still in positions of power.²⁷

3. Peace Without Justice

A number of writers and reporters strongly argue that under any circumstances, there can be no impunity for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture.²⁸ It is very important for such crimes to be prosecuted, since they are the most serious international crimes that can be committed by an individual. They argue that such trials are significant in placing accountability in the realm of the individual and not on an entire nation.²⁹ By looking back via criminal prosecution, the future of the society that experienced an armed conflict will be secured. Benjamin B. Ferencz, a prosecutor involved in the work of the Nuremberg Tribunal stated that it is important for States to realize that peace and security in the world is better achieved through the pursuance of the force of law rather than the force of war. He added that wars of aggression, genocide and crimes against humanity shall not be tolerated and must be deterred by the rule of law. Although the world is full of difficulties and hurdles, there are always people who are committed to making the world a better place to live and whose efforts have greatly contributed to the achievement of that end.³⁰

In addition, some strongly argue that truth is important in order to foster peace and security, the public in the society that experienced a conflict should know what happened, how, why and importantly who was involved.³¹ All these questions cannot be known without prosecutions. After the prosecutions and the truth is established, it should be up to those who have been victimized whether to forgive involved individuals. As an important factor for future peace, victims should know the criminal perpetrators or at least their leaders and to see them prosecuted. Furthermore, Theissen (2001) argues that criminal trials after an armed conflict may play a significant role in breaking the culture of impunity and increasing the awareness of human rights and humanitarian law, which ultimately prevent future human rights violence.³² Thus tribunals may provide victims with a certain satisfaction and prevent them from “*taking the law into their own hands.*” Theissen, however, pointed out that prosecution after an armed conflict may provoke violent fighting from former combatants or the potential accused and their supporters. This may contribute to increased support for presumed martyrs ‘*who claim to be subjected to ,victors justice.*’³³ In deed, it is widely argued that prosecutions after an armed conflict are often applied upon selective suspects, which may send a wrong message that certain people remain above the law.³⁴

Furthermore, Akhavan (2001) in his argument for the role of the ICTR in fostering peace and security in Rwanda, states that although the conflict continues in the region, without the ICTR, the scope of killing would be greater in the absence of such a tribunal.³⁵ He also, emphasized that the ICTY and the ICTR have considerably contributed to the fostering of peace and security in post-conflict societies, as well as to developing criminal accountability into the culture of international relations.³⁶ The position has improved with both the ICTY and ICTR, a number of accused in custody, including several high-level accused. More than a few convictions have also been made.³⁷ Moreover, in the case of the ICTY, some argue that such a tribunal has achieved a level of credibility when Slobodan Milosevic and his subsequent transfer for trial to The Hague was made by the Serbian authorities.³⁸ He had been transferred from the leading role in the former Yugoslavia to the accused, facing the most serious criminal charges under international law.³⁹ This, as Akhavan (2001) claims can play a significant role in undermining war leaders’ influence on the region.⁴⁰ Having such tribunals will send a direct message to other states that “*the cost of ethnic*

²⁷ Tolbert, Supra note 5. P: 8.

²⁸ Bassiouni, Supra note 21. P: 19.

²⁹ Oosterveld, Supra note 19.

³⁰ Bassiouni, Supra note 21. P: 19.

³¹ Ibid. P: 24.

³² Theissen, Supra note 20. P: 3.

³³ Ibid.

³⁴ Ibid.

³⁵ Akhavan states ‘Notwithstanding the various conflicts between the ICTR and the Rwandese government . . . this policy of accountability, aimed at discrediting the Hutu extremists, has also restrained the extent of anti-Hutu vengeance killings . . . the shadow of the ICTR proceedings . . . have exercised a moderating influence in the postconflict peace-building process.’ Akhavan, Supra note 14. P: 23.

³⁶ Ibid. P: 9.

³⁷ As of June 2000, the ICTY had indicted (officially charged) 67 people, including Slobodan Milosevic, the president of the Federal Republic of Yugoslavia — the main instigator of the wars in the former Yugoslavia — Radovan Karadic, the leader of the Republika Srpska, and Radko Mladic, the leader of the Bosnian Serb Army. Several high-level Bosnian Croat military commanders/political leaders have also been indicted. Out of the 67 indicted, 37 are in the Tribunal’s custody. So far, 15 accused have been convicted.

³⁸ In fact, the transfer of Milosevic to The Hague was a result of the fact that the US financial pressure, a newly elected Serbian government detained Milosevic in spring of 2001 and transferred him to The Hague for trial in the ICTY. Thus in 1995 the USA negotiated with Milosevic at Dayton, but by 2001 the USA was demanding his arrest and trial. Forsythe, Supra note 3. P: 101.

³⁹ Tolbert, Supra note 5. P: 7.

⁴⁰ Akhavan, Supra note 14. p. 7.

hatred and violence as an instrument of power outweighs its benefits."⁴¹ Another example is the case of Krajišnik,⁴² when he was convicted for war crimes, crimes against humanity, and genocide by the ICTY. His case has had a significant impact on the region political stage until now.⁴³

It has been considered that besides the impact on the region, the transfer of Milosevic to The Hague has laid the groundwork for the International Criminal Court (ICC). For example, judges in the ICTY have developed an important body of international law and criminal procedure that will provide as critical guideposts for the ICC as well as other prosecutions of international criminal law.⁴⁴ In fact, it can be argued that the ICTY and ICTR have provided a unique empirical basis for evaluating the impact of International Criminal justice on post conflict peace building.⁴⁵

In addition, the threat of punishment has been considered as a very important tool in persuading possible perpetrators to change their behavior.⁴⁶ Furthermore, tribunals after an armed conflict may help dispel the notion of collective responsibility for war crimes and acts of genocide. For example, Karl Jaspers in considering the importance of the Nuremberg Trials stated that "*For us Germans this trial has the advantage that it distinguishes between the particular crimes of the leaders and that it does not condemn the Germans collectively.*"⁴⁷ The case of Anfal may be relevant here. One hundred forty eight Kurds were killed by Iraqi Army when Iraq was controlled by Saddam's administration. It can be argued that the conviction of Saddam Hussein and his lieutenants by a national court for genocide crimes against the Kurds may play a role in reducing the hatred between the two Iraqi nations (Arab and Kurds), thus preventing future conflict between them.

4. Conclusion

From the experience lessons of the ICTY and ICTR and the arguments that have been discussed in this article, it has become clear that there is an agreement that tribunals that are established after armed conflicts are important. They can play a significant role in the implementation of international norms. However, their effectiveness in fostering peace and security in post-conflict societies is controversial. There is clear evidence that the ICTY and ICTR have been ineffective in both stopping the fighting and in developing domestic criminal justice systems in both regions. While the leaders are away receiving "*international justice*" which is apparent as lenient, the followers are at a post-conflict region getting "*bargains*" in the national justice system. Accordingly, no one is punished "*fully and severely, relative to national standards,*" for the serious crimes that were committed.⁴⁸ The arguments for prosecutions after armed conflicts, in fact, only concentrate on the idea of *accountability* that war criminals must be prosecuted and they must not avoid accountability. This is, without doubt, very important; nevertheless, prosecutions that have been carried out have not achieved their goals. There are many concerns about their role in developing domestic legal systems, their procedures and importantly, they have not stopped conflicts. Prosecutions after armed conflicts as they are nowadays should be considered as the tool that politicians use to achieve what the diplomatic methods have not.

⁴¹ Ibid.

⁴² Mom'lilo Krajišnik was the president of the Bosnian Serb Assembly during the 1992–1995 war, the Bosnian Serb signatory of the 1996 Dayton Peace Agreement, and the Serb member of the Bosnia-Herzegovina collective presidency during the post-Dayton period in 1996–1998.

⁴³ Akhavan, *Supra* note 14. P: 7.

⁴⁴ Tolbert, *Supra* note 5. P: 8.

⁴⁵ Akhavan, *Supra* note 14. P: 7.

⁴⁶ Akhavan (2001) states that 'this cost-benefit calculation has implications for preventing conflicts, and also for preventing their resumption. In pre-conflict scenarios, it may discourage decisions to foment ethnic hatred and violence, since power thus accrued would be undermined by international isolation and accountability.' Akhavan, *Supra* note 14. P: 12.

⁴⁷ Roberts, *Supra* note 5.

⁴⁸ Morris, H. M, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 1997, Vol.7, Duke Journal of Comparative & International Law. PP: 349–74. P: 365.