

The Role of International Criminal Tribunals and Courts in the Establishment of Post War Truth and Reconciliation

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Received date: Aug 14, 2018; Accepted date: Nov 26, 2018; Published date: Dec 05, 2018

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Abstract

The end of war brings a period of chaos and confusion that, if not handled correctly, can lead to further political turmoil. After a catastrophic event like a war, there are repercussions that are complex, very personal and quintessentially human. Hence, the post war period becomes an extremely sensitive situation that needs the virtuosity of the International Organizations responsible for mitigating the disasters of war. This paper analyses this area by focusing on major events of the past and how the process of establishing truth and justice have fared. The concept of transitional justice is introduced and how a solely policy driven solution is inadequate. It concludes that there is a requirement for a process that legitimately endows justice from international bodies such as the International Criminal Courts and Tribunals, despite its many failures and drawback of the past.

Keywords: Post war; Justice; Truth; International criminal courts and tribunals

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The concept of war is a notably unbridled phenomenon on the surface. However, measures have been taken, with consent of the international community, to curb the extent of devastation anticipated. Notions of Jus ad bellum and Jus in bello are firmly and legally deployed in the case of an armed conflict. But what happens at the end of war? What steps are to be taken by the participants? And can a universal bureaucratic system be pragmatic and applicable in all cases of armed conflict? These are only some of the hurdles of post war circumstances. As Brian Orend states, 'there has never been an international treaty to regulate war's final phase, and there are sharp disagreements regarding the nature of a just peace treaty' [1]. It gets even more convoluted in cases of civil conflict as the international – national dichotomy is invariably strained.

Although still vastly underdeveloped, this is not to say that there aren't any provisions in dealing with post conflict circumstances. Missions of peace building and the system of transitional justice are the prominent mechanisms in place to address post war state of affairs (they are increasing beginning to overlap theoretically). As outline by Ruti Teitel, 'transitional justice evokes many aspirations: rule of law, legitimacy, liberalization, nation-building, reconciliation and conflict resolution' [2]. Hence, we will be focusing on transitional justice and the potential effects of the choice between retributive and restorative justice (as chosen by states following the cessation of civil armed conflict) in establishing truth and reconciliation. Pertaining to this, we are more inclined in favoring the retributive aspect of justice (endorsing criminal tribunals and courts) in achieving truth and reconciliation and will structure our arguments accordingly in this essay. In addition to this, we will be critically analyzing this system of justice whilst identifying its flaws and defects that can be improved, to

make it a more consistent system of establishing truth and reconciliation.

It is useful to start this analysis by understanding the growth and evolution of transitional justice in contemporary politics. This development has been well documented from the end of World War II to the types of conflict observed today by scholars of international law. Teitel's article, 'The law and politics of contemporary transitional justice,' succinctly outlines the progressing phases of transitional justice from the end of World War II to its present rendition in contemporary international community. She observes that 'Phase I' (period immediately after World War II) is characterized by 'interstate cooperation, war crimes trials, and sanctions. Phase II (post-cold war phase) is associated with a wave of accelerated democratization (typified by) the Soviet Union's collapse and disintegration (demonstrating the wave of) concurrent political transitions processes in diverse regimes. (And) Phase III is (epitomized by) the phenomena associated with globalization, typified by conditions of heightened political instability, fragmentation, and persistent conflict' [2]. Teitel's observations highlight the pivotal requirement for change and adaptability of international law to accommodate the concerns of a changing political climate.

Tremendous developments in various facets of international law have resulted in the formation of a permanent international tribunal to prosecute various violations such as genocide, war crimes, crimes against humanity and crimes of aggression in the form of the International Criminal Court. As such the scope of jurisdiction of international criminal law has extensively broadened, now possessing authority over not only political but various social issues as well. This is evident in what Michael Dillon terms as the 'increasing "humanization" of social and political conflict' [3]. Dillon is referring to the rapidly growing trend (observed in 1998) of adopting and expanding the purview of the International Humanitarian Law (especially after the atrocities of World War II). He states that 'international legislation codifying the rules and conventions of war has never been more comprehensive and never so extensively written in domestic codes of states' [3]. Additionally, as Dillon alludes to in his

statement, the old idea of international-national dichotomy is fast being remapped and 'a new paradigm has emerged whose dimensions refer to expanded legalism, while at the same time also predicted upon fragmentation, proliferation, and transnational-and attendant new legitimacies' [2].

With international law increasing encompassing a wider range of issues under its jurisdiction (as discussed in the previous paragraphs), there has been a clear trend toward the criminalization of international law. This conveys an authoritative message to the international community at large about the status and validity of international law, enforcing its legitimacy and charting a definitive parameter (of course, this intent has been epitomized by the formation of the I.C.C. in 2002). Theodor Meron discusses some of the initial changes transpiring in the late nineties, with regards to this trend, such as criminalizing legal persons like corporations, 'treble damages of anti-trust violations (becoming) a major feature in evaluating the movement of the law toward the imposition of punitive sanctions', 'rape (becoming) criminalized as a crime against humanity (and) recognizing the criminality of violations of common Article 3 and Additional Protocol II to the Geneva Conventions' [4]. Such developments demonstrate the growing aspect of austerity and give a distinct sense of direction toward thorough legitimacy in international law.

These developments in international law provide a stable foundation in bringing about justice and are an infallible aspect of this process. However, with regards to the aim of encouraging reconciliation, the legal components of international law need to be employed in conjunction with other civic operations to ensure that the impact of transitional justice is adequately observed. Although a highly debated issue with regards to when it should be conducted, with the 'gradualists' opining that 'it should be the last step after a political settlement has been reached' and the 'synergists (suggesting) that it should be considered complementary to and supportive of other approaches such as preventive diplomacy before a conflict flare up' [5], components of peace building are nonetheless integral to achieving reconciliation. Charles Philippe David explains (the components) that 'the success of reconciliation and reconstruction relies on three objectives: 1. Security transition: this involves disarming and demobilizing combatants, re-integrating them into civilian life, reforming armed forces and the police force, facilitating safe return of refugees, demining affected areas and recovering light weapons. 2. Democratic transition: implementation of the basic human rights and conduction of fair elections. And reorganization of the justice and penal systems. 3. Socio-economic transition: which includes rebuilding society, the financial system and restricting an incapable government' [5]. However, as was alluded to earlier, these civic components of change need to be assisted by a strong and stringent legal structure to be truly effective. The laws have been passed to that effect, and hence it's the responsibility of the courts and tribunals to see its implementation.

As mentioned earlier in the essay, there are broadly two courses of transitional justice available for states to pursue after the cessation of an armed conflict scenario namely, retributive or restorative justice. Pursuing either entails following distinctly divergent approaches in terms of philosophy as well as the system of justice practiced. The pursuit for restorative justice involves employing political responses such as assigning truth commissions and amnesties to administrate the post conflict situation. As Charles Villa Vicencio states, the primary responsibility of TRCs 'is the initiation of a process that seeks to draw all parties that have been involved in a conflict, from grassroots to

leadership levels, into a national conversation motivated by a desire to maximize truth seeking, truth telling and acknowledgement' [6]. Theoretically sound with lofty ideals, it has to be noted that 'central to this process is that perpetrators of heinous crimes could be granted amnesty in return for this acknowledgment and full disclosure of the crimes they had committed' [6]. As such, this system puts greater emphasis on the element of reconciliation and is willing to compromise on the aspect of justice to achieve this. The report of the truth commission of South Africa (established to oversee the transition ensuing the fall of the apartheid regime), which confirmed that 'the subjective truth was encouraged and accepted, by the commission as part of an inclusive process of truth recovery' [6] testifies to the agendas of this system. However, this is not to declare that this mode of transitional justice is wholly ineffective and, a reasonable case can be made to assert the contrary. There have been cases such as the signing of the Mozambican General Peace Agreement in 1992 (to end the civil war) that evidently affirms the doctrines and agendas of granting amnesties and pardons to perpetrators in realizing peace and reconciliation between conflicting parties. As Ramesh Thakur has argued, 'criminal law, however effective, cannot replace public or foreign policy. Determining the fate of defeated leaders is primarily a political question, not a judicial one' [7].

Moreover, this system of pardoning to achieve peace and reconciliation has gained prominence in contemporary international community through the case of South Africa resolutely adopting and endorsing it. Archbishop Tutu has even remarked that 'retributive justice is largely western. The African understanding is far more restorative' [6]. And there have not been major signs of disintegration in South African society yet. However, having examined and charted the development of the legal aspect of transitional justice through the years (in the earlier paragraphs), it is evident that this course of development has impelled the criminal courts and tribunals to play a more central role in contemporary transitional justice. The establishment of the I.C.C. and the passing of various new laws have bolstered the case for prosecution over pardon in the progressive course of transitional justice. And despite its successes, the system of granting pardon and amnesty is a relatively recent phenomenon, originating in the 1980s as a 'middle ground between political exemptions from prosecutions and courtroom trials' [7]. As such, analysis of its effectiveness and repercussions are theoretically immature and unsophisticated as compared to trials and prosecutions. Moreover, examples such as 'the spate of lawsuits in the United Kingdom, Spain and Chile in the late 1990s that sought to bring former Chilean President Augusto Pinochet to justice for the human rights violations that his government had committed decades earlier' [7] and 'the dirty war' in Argentina (ending in the mid 1980s), whose perpetrators were subsequently investigated and arrested by president Nestor Kirchner highlights the persistence of what Moghalu terms as 'the banished ghost of the victims' thirst for justice' [7].

This thirst for justice reveals a deeper need for legitimacy, validity and accountability that is inexorably etched within every victim. The rulings passed by international criminal tribunals and courts have the aspect of legitimacy and represent the condemnation of the international community for the crimes committed. As rightly observed by Payam Akhavan, 'stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence' [8]. Moreover, the desire and possibility of vengeance from fringe victim groups is considerably repressed and, despite any initial polemic, leads to more satisfaction with the establishment-portending a more peaceful civic society. Prominent cases such as the Nuremberg

and Tokyo trials corroborate this statement. Drawing on more contemporary events the I.C.T.Y and the I.C.T.R., despite its various drawbacks (will be discussed later), have 'helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide (and have unquestionably transformed) criminal justice into an important element of contemporary international agenda' [8]. The I.C.T.Y.s endeavors in Bosnia-Herzegovina have drastically diffused the hostility caused by sectarian politics seen during the Bosnian war and 'permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process' [8]. Furthermore, the I.C.T.Y. was a major factor in helping to 'delegitimize Milosevic's leadership as well as the later calls for his prosecution by the Serb and Montenegrin public' [8]. The impact of a legitimate ruling from an internationally approved body is distinctly evident on a domestic level of conflict-ridden areas. Additionally, these rulings establish the norm for the other members of the international community at large, which deters the recurrence of impunity from potential perpetrators. From our research and readings, we are inclined to affirm the realist viewpoint that 'any attempt to completely isolate legal justice from political context is shortsighted. Legal justice is what political community is prepared to enforce' [7].

In terms of where the future lies in effectively regulating the end of a war (involving the issues of truth and reconciliation) and the various technicalities involved, a solely political and policy driven solution is inadequate and rather precarious. The hype of the truth commission's apparent success in South Africa is predominantly centered on distinction between truth and justice and its capacity to elicit the restorative abilities of the former. This, as is observed by many scholars, is a misleading distinction. As Moghalu observes, numerous cases prosecuted by the I.C.T.R. have produced 'confessions just as remarkable as any in a truth commission and shed light on the Rwandan genocide' [7]. Moreover, there seems to be uncharted association between truth and reconciliation identified with truth commissions, which is an incredibly abstract and simplified manner of considering the notion of reconciliation. Significant factors such as material remuneration, legal accountability and lawful closure are subordinated in favor of healing through acknowledgement. On the flipside, the continually expanding jurisdiction of international criminal law provides encouraging explications to improving the regulating mechanisms of concluding war, with an enhanced focus on reconciliation through justice. Additionally, technical nuances, central to attaining social harmony and reconciliation, such as 'appropriate compensation and remuneration, demilitarization of armed groups and political rehabilitation' [1] require the legal consent of courts and tribunals to be accepted and effectively implemented.

The relevance of International criminal courts and tribunals are perhaps best emphasized whilst contemplating the notion of war itself. As stated earlier, the ideas of *Jus ad bellum* and *jus in bello* are pivotal pillars in the issue of armed conflict globally. Hence, the discretion to prosecute perpetrators in 'war crimes trials represent a powerful instantiation of the principle of just war theory, formally calling leaders into account for their violations of those tenets at the heart of *jus ad bellum* and *jus in bello*'. Criminal courts and tribunals are essential in bringing and maintaining justice and order, not only domestically but also internationally. Certain rules and regulations need to be maintained and can only be done through the approval of a legitimate legal body. Consequently, criminal courts and tribunals can be seen as the custodians of appropriate conduct at the start, during and after warfare. The United Nations has further vouched for the importance of these courts and tribunals by declaring that amnesty grants to those

accused of war crimes is a violation of international law. With the theme of truth and reconciliation central to the aims of these courts and tribunals, Vuk Jeremic in a discussion on the role of international criminal justice system in reconciliation, stated that reconciliation will only come about when 'atrocities are neither denied nor bizarrely celebrated as national triumphs' (internet page, 10 April 2013).

Even with the merits of choosing prosecution over pardon, it would be misleading to ignore the shortcomings of international criminal justice. Starting with the I.C.T.Y. and such ad hoc tribunals in general, Michael S Moore observes that 'lacking statutory or judicially created guidance, these tribunals struggled to establish criteria for determining appropriate sentences' [9]. A notable example would be the trial of Erdemovic where he plead guilty to crimes against humanity but was sentenced to just 10 years imprisonment. Although the establishment of the I.C.C. has to an extent, rectified such issues, its primary drawback remains the scope of its jurisdiction. 'The ICC may (only) exercise jurisdiction where national systems are unable or unwilling to genuinely investigate or prosecute offenders. According to Article 17(1) of the Rome Statute, the Court cannot hear cases when: (1) the case is being investigated or prosecuted by a state that has jurisdiction over it; (2) the state has decided not to prosecute the person in question; (3) the person has already been tried by another court; or (4) the case is of "insufficient gravity" to be considered as one of the crimes under the Court's jurisdiction' [9].

Despite its drawbacks, we still believe that the mode of prosecution is better suited in achieving truth and more importantly reconciliation in conflict-ridden areas. Apart from the reason stated over the course of this essay, criminal courts and tribunals provide the victims with an indispensable component in overcoming their demons and moving on – that is closure. Without retribution (justice), the entire concept of modern democratic society is intrinsically dismantled. Moreover, the prominent drawback of jurisdiction for the I.C.C. can seem discouraging on paper but, with third world countries desperately struggling on many fronts, the services of the I.C.C. are generally requested. Although theoretically appealing, amnesties, truth commission and the like are pragmatically highly risky. South Africa is a relatively recent development and only time will tell about the extent of its success. Nonetheless, the fundamental principles of prosecution hold more water and are politically and legally less of a gamble.

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