PROSECUTIONS AFTER ARMED CONFLICTS

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

Abstract

International peace and security ensure enjoyment of human rights and national development. The growing concern of international community regarding internal and regional conflicts among nations is not only a significant threat for humanity and international security but also causing tyrannical and brutal victimization for human society. The international community should play a responsible role to ensure and foster peace and security by making efforts to resolve such conflicts. However the mode of prosecutions may be an effective way in peacekeeping although every mechanism of peace leaves positive and negative impact for societies and transitional justice. Administration of justice through independent tribunal or court of justice and political settlement including imposition of sanctions may ensure the resolution of conflicts among nations.

Key words: international conflicts; human rights; peace and security; justice; internal tribunals.

1. Introduction

There is no doubt that the most serious events concerning human rights and international peace and security, particularly in the twentieth century, are armed conflicts. It has been estimated that internal conflicts during the twentieth century have resulted in more than 170 million deaths.[1] Since World War II, more than 250 conflicts of a non-international character, internal conflicts, and tyrannical regime victimization have occurred.[2] It is agreed that the international community's duty is to stop such conflicts and foster peace and security within those societies. However, the way that should be used to do so is still an open question. Some argue that prosecutions are the most effective way in peacekeeping in post-conflict societies, while others believe that this has a negative impact. In fact, whether prosecutions after an armed conflict play any role in fostering peace and security is one of the most controversial issues in the International Criminal Law.

On one hand, some argue that the international community should concentrate on building rights' protective state in the future rather than establishing tribunals. [3] They argue that the most important goal that should be considered in the post-conflict societies is fostering peace. If it is, in accordance to the situation, believed that establishing tribunals will result in continuing the conflict, then tribunals should be avoided. On the other hand, there is a growing international agreement, supported by international law, that gross human rights violations, genocide, war crimes and crimes against humanity must be investigated and punished.[4] Some believed that after gross violations of human rights, those who were involved should be prosecuted in international courts, or in hybrid or special courts, or in national courts.[5] They emphasized that the prosecution of individual perpetrators for committing crimes of genocide, crimes against humanity or war crimes is an essential part of transitional justice. This article will argue that although the international tribunals play a significant role in the implementation of international norms, they do not have a significant affect on fostering peace and security in post-conflict societies. This will be supported by critically examined trials and tribunals that have been established to prosecute individuals who have been involved in certain

[1] See Hassner, P, *Violence and Peace: From the Atomic Bomb to Ethnic Cleansing*, 1995, A Central European University Press and Rummel, R. J, *Death by Government*, 1994, New Brunswick, Transaction Publishers.
[2] Jongman. A. J. & Schmid, A. B, *Contemporary Conflicts: A Global Survey of High- and Lower Intensity Conflicts and Serious Disputes*, Winter 1995, 14, 7 PIOOM NEWSLETTER AND PROGRESS REPORT (Interdisciplinary Research Program on Causes of Human Rights Violations, Leiden, Netherlands), and Study, R1994, 17, 6 PIOOM NEWSLETTER.
[3] See Forsythe, P. D, *Human rights in international relations*, 2nd edition, 2006, Cambridge University Press. P: 91.
[4] 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.
[5] Roberts, A, *The role of humanitarian issues in international politics in the 1990s*, 1999, 833 International Review of the Red Cross. PP: 19-43

crimes during civil wars. The experience of tribunals for Yugoslavia (ICTY)[6] and Rwanda (ICTR)[7] will be particularly focused on, since they have been established as measures for the restoration of peace and security under Chapter VII of the UN Charter.[8]

2. Prosecutions After Armed Conflicts

Despite the fact that the idea of prosecutions after armed conflicts by international tribunals gained hold, very few of them were established. Although there was some discussion about prosecuting German leaders after World War I,[9] it was only after World War II that criminal prosecution on an international level was recognized as having well-known defects.[10] Even after such war there have been so few instances of prosecution and other accountability mechanisms. In fact, since that time there have been only two internationally established ad *hoc* investigatory commissions and two ad *hoc* tribunals (ICTY) and (ICTR). Also, there has been one international truth commission for El Salvador,[11] and two national prosecution systems established as a result of the conflicts in Ethiopia and Rwanda. Moreover, there were few national prosecutions in Argentina[12] and Chile[13] where a national inquiry commission was also set up. Furthermore, there was The Truth and Reconciliation Commission in South Africa,[14] from which some prosecutions may be generated. [15] In 1993, after the atrocities committed in the war of the former Yugoslavia, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY),[16] under Chapter VII of the UN Charter to protect international peace and security.[17]

From a legal point of view, the reliance on Chapter VII was important in establishing such a tribunal. As the tribunal's orders are compulsory on UN members, they have an obligation to *"cooperate fully with the International Tribunal*."[18] One year later, as a result of the 1994 genocide in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) was also established by the Security Council.[19] Both the ICTY and ICTR were established to try individuals suspected of committing war crimes; they have the same structure and they share the same appellate court. The establishment of the ICTY and ICTR tribunals had been shown as a marker in the history of the law of armed conflict,[20] since Nuremberg and Tokyo were not followed by other international tribunals for almost fifty years.[21] Moreover, unlike the Nuremberg and Tokyo tribunals which were established in response to a moral imperative of *"never again*," the ICTY and ICTR were established first and foremost as part of a peacekeeping strategy.
The establishment of such tribunals represented significant improvement in the interpretation and implementation of international law. Their practices ultimately became the foundation for the idea of the need to have a permanent international criminal institution. Thus, the International Criminal Court (ICC) was established in July of 2002.[22]
Furthermore, special courts were established in the aftermath of atrocities in Sierra Leone, East Timor, Kosovo, and Cambodia. A new court was created by the interim government of Iraq after the US invasion and occupation of 2003 to try Saddam Hussein and his lieutenants. [23] The questions that should be considered are whether these trials had significantly improved peace and security within post-conflict societies, whether they are practical ways of peacekeeping in those societies or whether they are just political tools that give certain states the ability to achieve their political goals.

---

[6] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY). On the establishment of the ICTY see, generally, Bergsmo, M, *the Establishment of the International Tribunal on War Crimes*, 1993, 373, 14 Human Rights Law Review.
[7] The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994 (ICTR).
[8] For the ICTY, see SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), reprinted in 32 ILM 1203 (1993); for the ICTR, see SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994).
[9] Forsythe, Supra note 3. P: 90.
[10] For more details see Willis, F. J, *prologue to Nuremberg: the Politics and Diplomacy of Punishing War Criminals of the First World War* , 1989, Westport: Greenwood Press.
[11] See From *Madness to Hope: The 12-Year War in El Salvador*, Report of the United Nations Commotion the Truth of El Salvador, U.N. DOCS. /25500 (1993).
[12] See NUNCA MAS,INFORME DE LA COMISIOSNO BRE LA DESAPARICIODNE PERSONAS (1985).
[13] See Report of The Chilean National Commotion Truth and Reconciliation. Snyder, C. E, *The Dirty Legal War Human Rights and the Rule of Law in Chile*, 2 TULSAJ . COMP.& INT'L L. 253,279 (1995).
[14] Motala, Z, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 1995, 28 COMP.& INT. L. J. S. AFRICA. P: 338.
[15] 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, pp. 9-28. P: 11.
[16] Security Council Resolution 955, 8 November 1994.
[17] S.C. Res. 808, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993).
[18] S.C. S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993).
[19] In terms of Article 42 of the Charter.
[20] Roberts, Supra note 5.
[21] Forsythe, Supra note 3. P: 92.
[22] 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, pp: 349 – 368. P: 349.
[23] Forsythe, Supra note 3. P: 89.

2.1. A Challenge to Foster Peace and Security

First of all, despite the fact that the duty to prosecute or extradite is covered by the Genocide Convention,[24] the Geneva Conventions of 1949,[25] and Protocol I of 1977,[26] it does not exist in conventional law with respect to crimes against humanity since there is no specialized convention for such crimes.[27] However, it can be argued that such obligations are covered implicitly. In fact, there is a significant weakness in the practice of states in the duty to prosecute or extradite and to cooperate with each other in the investigation, prosecution, and adjudication of those charged with such crimes and the punishment of those who are convicted of such crimes. Nevertheless, in 1971 the UN General Assembly adopted the Resolution on War Criminals[28] confirming that a State's refusal *"to cooperate in the arrest, extradition, trial, and punishment*" of persons accused or convicted of war crimes and crimes against humanity is contrary to the United Nations Charter and to generally recognized norms of international law.

In considering whether prosecutions after an armed conflict are essential, some important points should be known. Firstly, from a legal point of view, even though in the situations where prosecutions and trials have been established, they often do not provide the necessary guarantees for a due process of justice. In such prosecution, if they are decided to be established "*Justice must not only be fair, but must also be seen to be fair*."[29] One of the significant concerns about tribunals' procedures is that the trial proceedings take a very long time, as a result of taking into account the accused's right to a fair trial. This, as in the ICTY, causes the number of completed trials and convictions secured per year to be very low. Thus, the tribunals have been ineffective, since the high-level accused remain free and continue to exercise their power, which means the possibilities to foster peace will be limited.

Secondly, only certain individuals often prosecuted after an armed conflict if tribunals are established. For instance, Tokyo was limited in trying to prosecute war criminals representing the enemy powers for crimes committed by them during the conflict. Such a tribunal had no power to prosecute war crimes committed by any member of the related armed forces. Thus, it was criticized as representing more than "victor's justice." [30] Moreover, at Nuremberg, when the losing leaders were tried, only twenty two German leaders were prosecuted in the first round of trials, nineteen of them were convicted and twelve executed. However, Soviet military personnel committed perhaps 100,000 rapes in Berlin after the defeat of the Nazis. Raping was a systematic practice, yet no commanding officers, much less lower ranking soldiers, were ever held accountable.[31]
Thirdly, in such trials, it is common that politics plays a significant role. For example, in Tokyo, the US protected certain officials, especially scientists, from criminal prosecution and brought them to the US. [32] Also, it shielded the Emperor from prosecution, arguing him useful in democratic state building after the war.[33] So, even though tribunals are established, justice is not guaranteed.
It can be argued that what might happen in international tribunals may not happen in national prosecutions. However, prosecution on the national level has been considered more unjust than that of the international level, since such prosecution may reflect newly established power structures dominated by warlords or vigilante groups. Procedures and penalties are often incompatible with human rights standards.[34] The fresh example is the Iraqi Special Tribunal which was established to try nationals and residents of Iraq suspected of genocide, crimes against humanity and war crimes.[35] Such a tribunal was described as an inherent drama in accordance to the court's power and its independency, suspects' rights, criminal procedures and

[24] See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1U.N. GAOR Res. 96 (Dec. 11,1946) 78 U.N.T.S. 277; see also Statute of the International Tribunal for
Rwanda, adopted at New York, Nov. 8, 1994, S.C.Res. 955, U.N.SCOR, 49th Sess., 3453d mtg., U.N.
Doc. SIRES1955 (1994), reprinted in 33 I.L.M. 1598; Statute of the International Tribunal for the Former
Yugoslavia, adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th
mtg., at 1-2, U.N. Doc. SIRES1827 (1993), reprinted in 32 I.L.M. 1159.
[25] See the Four Geneva Conventions of Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I),
Aug. 12, 1949, 6 U.S.T. 3114, 7.5 U.N.T.S. 31; Convention for the Amelioration of the Condition of
Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 8.5.
[26] Protocol I Additional to the Geneva Conventions of Aug. 12,1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Art. 4, 1125
U.N.T.S. 3, reprinted in 16 I.L.M. 1391 [hereinafter Protocol I]. See especially arts. 11,85,86.
[27] See Bassiouni, C. M, Crimes against Humanity: The Need for a Specialized Convention, 1994,Vol. 457, 31 COLUM. J. TRANSNAT'LL.
[28] G.A. Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).
[29] The Role of International Criminal Prosecutions in Reconstructing Divided Communities, Public Lecture by Carla Del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, given at the London School of Economics, on 20 October 2003, Discussion Paper 24. P: 3. Available from: http://www.lse.ac.uk/Depts/global/Publications/DiscussionPapers. Retrieved April 24, 2015.
[30] Forsythe, Supra note 3. P: 91.
[31] Ibid.
[32] Ibid. P: 92.
[33] Akande, D, *International law immunities and the international criminal court*, July 2004, 3: 98 American Journal of International Law. P: 417.
[34] Theissen, Supra note 4. P: 3.
[35] The Iraqi Special Tribunal established on 10 December 2003 the Iraqi Governing Council adopted the Tribunal Statute.

punishments.[36] In fact, prosecuting the leaders who are involved in the conflict may result in the resumption of the fight, since these leaders have their values, expectations, personal ambitions, positioning for power, and the public support.[37] In the case of Iraq, no one can argue that prosecuting Saddam Hussein for his crimes is injustice, but if it is believed that by convicting him thousands of lives will be at risk, then justice for a peaceful approach is more acceptable. By prosecuting him, many doors that may lead to peace will be closed.

3. Conclusion

The international tribunals play a significant role in the implementation of international norms that may ensure peace and security for humanity and international community. The examples of critically examined trials and tribunals that have been established to prosecute individuals who have been involved in certain crimes during civil wars, for instance, tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) that restored peace and security under Chapter VII of the UN Charter. Although what might happen in international tribunals may not happen in national prosecutions. However, prosecution on the national level has been considered more unjust than that of the international level, since such prosecution may reflect newly established power structures dominated by warlords or vigilante groups. Procedures and penalties are often incompatible with human rights standards.

[36] Amnesty International, Iraqi Special Tribunal-Fair trials not guaranteed, May 13, 2005. from: http://www.globalpolicy.org. Retrieved May 4, 2015.
[37] Bassiouni, Supra note 15. P: 29.