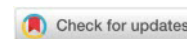


THE CONTRIBUTION OF THE INTERNATIONAL CRIMINAL COURT IN TRANSITIONAL JUSTICE OF THE POST-CONFLICT SOCIETIES

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Abstract: As a complex concept, transitional justice includes processes and mechanisms related to the efforts of post-conflict societies to face inter alia the consequences of mass abuses and violations of basic human rights. National and international non-judicial and judicial mechanisms are included in these processes. The international courts, the aim of which is to prosecute genocide, war crimes and crimes against humanity, could also be included. The international intervention through investigations could be an important contribution in achieving the goals of transitional justice. Reasonably, these processes are expected to lead to reconciliation and sustainable peace. Unfortunately, in practice, sometimes these expectations turn into disappointments.

The paper aims at providing an overview of some of the actual and potential questions of the contribution of The Court in transitional justice in post-conflict societies. The intention is to answer two key questions: 1. Whether and how the International Criminal Court can contribute in achieving the goals of transitional justice? 2. Has the Court since it was established until today made a significant contribution in achieving the goals of transitional justice in post-conflict societies?

In this order, we will review the key instruments that are available to the International Criminal Court from a formal point of view, and will consider the Court's possibilities for processing specific cases from a practical point of view. The factual challenges and criticisms that the International Criminal Court has faced since its inception, will also be discussed.

Keywords: Transitional justice, International Criminal Court, post-conflict societies, challenges, contribution.

1. INTRODUCTION

Conflict and post-conflict societies are almost always fragile and deeply fragmented. Their social reality is determined by new political leaders, former political opponents, victims and their organizations with different interests, etc. In those circumstances, reconciliation as well as the creation of conditions for lasting peace is more than needed. On the other hand, societies where the national justice system is dysfunctional or even destroyed by previous political circumstances or violence, usually could not provide objective investigations and fair trials. It is understandable that justice in those circumstances cannot be guaranteed nor expected. However, the members of society still could reasonably expect and hope that justice will come from the international community. Hence, the interaction between peace and security on the one hand, and justice on the other, was a topic of debate not only in most of the post-conflict societies, but also in cases of ongoing violence and massive human rights violations. The international community is responsible for helping post-conflict societies face the consequences of massive abuses and violations of basic human rights. The idea that individual criminal accountability for the gravest international crimes is an essential component of post-conflict recovery is now firmly embedded in both practices, to a certain extent, and rhetoric, at the international level (Lafontaine and Tachou-Sipowo, 2012, p. 1). International Criminal Court (ICC) as international judicial institution of the United Nations is founded exactly in this regard - to prosecute the perpetrators of crimes against humanity and peace, war crimes and genocide, when the national courts are unable to provide that. The international intervention through investigations for those atrocities could be an important contribution to justice in general, and particularly to achievement of the goals of the transitional justice which basically refers to how societies respond to the legacies of massive and serious human rights abuses. While every context is unique, societies and individual stakeholders the world over must find answers to the same difficult questions about whether, when, and how to embark on a path toward a peaceful, just, and inclusive future where past crimes have been acknowledged and redressed (<https://www.ictj.org/about/transitional-justice>). These processes are usually expected to lead to reconciliation and sustainable peace. However, the situations in practice sometimes could be different, and circumstances could be complicated. Hence, in some cases justice

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cannot be achieved or will come very slowly. There are various reasons and explanations for that, and they are discussed below in the article.

2. TRANSITIONAL JUSTICE

Although this notion is relatively new, we can find its elements throughout the decades whenever radical changes took place in terms of establishing a new system of government and dealing with the consequences of the previous regime. Although its contemporary meaning is related to achieving justice through the trials particularly after the world wars, however, has been use much later by involving other different mechanisms. The notion includes processes and mechanisms directed to achieving reconciliation in order to ensure accountability and to serve justice. It is a conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes (Teitel, 2003, p. 69). Transitional justice is but one of several objectives-such as economic development, political moderation, ethnic equality and reconciliation, public access to accurate information, and the international community's support and attention-that must be pursued in order to realize a holistic, effective genocide prevention strategy (Kaufman, 2014, p. 378). However, the notion should not limit and afford primacy to judicial responses (Kaufman and Clark, 2013, p. 3). In summary, transitional justice as a term today in general is used to indicate the choice made of measures and the implementation of the various mechanisms and the quality of justice delivered during political transitions in order to deal with the conflict past, authoritarian regimes or armed conflicts, while different comparative experiences, both good and bad practice, are used. The aim of judicial mechanisms of course are investigation, prosecution, and fair trial of individuals for atrocities if there were such crimes in conflict time. In her book "Transitional Justice", Vankovska refers to the use of the term by the Argentine sociologist Juan Corradi in a book dedicated to state terror in Latin America, understanding it as a specific and intense type of political justice: the arbitrary trial of the previous regime (See: Vankovska, 2021, p. 54-55). His understanding of transitional justice as both more and less than ordinary justice, is interesting and realistic at the same time. Namely, transitional justice is more than ordinary justice because its aim goes beyond the simple regulation of human relations: it seeks to achieve moral and political regeneration. It is less than ordinary justice, because it is subject to serious irregularities as a political formula for the formal elimination of sacrificial lambs, burdened with problematic decisions and judgments made by the current holders of power. Anyway, justice is the opportunity and ability for the international community to punish criminals for committing atrocities. While some states considered that these mechanisms threatening their national legal system, for some other countries the existing of such mechanisms are reasonable (Lundström, 2017). Because of those characteristics, this complex term is sometimes described as both "backward-looking" and "forward-looking". In this sense, combating impunity certainly is a transitional justice objective with retrospective and prospective components (Kaufman, p. 376). The same as international criminal justice is simultaneously focused on the crime itself (deontological) and forward looking (teleological) (See: Cryer, Friman, Robinson and Wilmschurst, 2014).

3. INTERNATIONAL CRIMINAL COURT: BETWEEN OPPORTUNITY AND REALITY

As stated above, the criminal prosecution and trial before national or international judicial institutions of those responsible for the crimes is only one in a series of developed approaches to the realization of the goals of transitional justice. It is certainly a very important mechanism that could make a significant contribution in achieving the goals of transitional justice. The ICC's supporters estimate that this Court deters would-be war criminals while the others have the opposite view. In this part of the work, we have tried to explain some of the reasons for this contradiction.

3.1. Limited jurisdiction

The first limitation to ICC jurisdiction is that it can proceed only with crimes that occurred after its Rome Statute took effect in 2002. The second limitation is in the possibilities for ICC to prosecute investigations only in the four above-mentioned categories of crimes. The next limitation is the ways in which, and the persons against whom, the Court can open an investigation. Bearing in mind that the national courts primarily have a duty to administer justice, ICJ is powerless to act even when it has strong grounds to do so. Thus, this is in line with the basic principle of sovereignty according to which states should not interfere in the internal or external affairs of other states. This means that if the national justice system, even if it is a post-conflict state, is still ready and capable of objectively prosecuting cases for the

most serious crimes committed during the conflict, then the ICC should not have jurisdiction. However, the probability of such a case is very low, because the societies emerging from conflict as well as societies in transition may lack the political will to prosecute these crimes, and legal systems may even be in disarray. Considering this reality in post-conflict states, some aspects of a potential judicial process are called into question. The main questions are actually whether the state is ready to provide an objective and independent trial, as well as whether the system is able to provide conditions for a fair trial in the processed cases. In this regard, it is worth to underline that unlike the obligation to cooperate with the former tribunals for Yugoslavia and Rwanda imposed by the UN Security Council, in the ICC case it is an obligation arising from a concluded agreement. This means that the obligation to cooperate is in some way limited by the will of each member state of the Rome Statute and cannot be implemented by virtue of the UN Charter or at the request of the Security Council. In other words, the court's weakness lies in the fact that it has no means of coercion and depends, ultimately, on the political will of the states concerned (Vankovska, 2021, p. 124).

3.2. Limited support

There is no doubt that the idea behind the foundation of the ICC was to end impunity, through mechanisms of international criminal justice that seek accountability for committed crimes. It was expected that ICC with its work would act preemptively as well. The jurisdiction of the ICC is not global in the true sense of the word, but refers only to the signatory states and their willingness to cooperate especially when it comes to suspects/accused who are on their territory but are not their nationals (Vankovska, 2021, p. 122). Some authors consider that the great powers have very few incentives to join the ICC because, according to them, the high degree of supranational powers of the ICC make their ratifications less likely. However, although the possibility of the ICC becoming a universal institution is remote, it is likely to produce jurisprudence that will have universal influence (Christensen, 2018, p. 169). Hence, one of the most criticized facts regarding ICC is that several the most influential countries, including US and Russia, have subsequently withdrawn their signatures from the Roma Statute. It is probably unexpected, but ICC has been unable to gain the support of major powers, who say it undermines national sovereignty. This is quite incomprehensible and unjustified in general, if we have in mind the right of states to withdraw from the Rome Statute which means, in some way, a possibility for regaining the sovereign rights that have been ceded to the ICC. The European Union is also a staunch supporter of the Court. Since 2006, the EU and the ICC have signed an agreement on cooperation and assistance. With Council Decision 2011/168/CFSP, the EU expressed commitment by taking measures at national level and by enhancing international cooperation to ensure their effective prosecution (Council Decision 2011/168/CFSP). Moreover, the EU is convinced that universal accession to the Rome Statute is essential for the full effectiveness of the ICC and has committed to contribute to the objective of the widest possible participation in the Rome Statute. The ICC's relations with the United States, on the other hand, varied through the years depending on the attitude of the current U.S. president. These relations sometimes had episodes of escalations. The relations of Russia with ICC are also followed by controversies. The lack of support from these countries, including China as well, is considered as one of the biggest challenges regarding the idea of justice in general, and especially for the purposes of transitional justice. The fact that they are permanent members of the UN Security Council is considered one of the biggest controversies related to the ICC, having in mind that one of the possible options for processing a case before the ICC is to refer the case through the UN Security Council. Hence, the work of the ICC has been significantly reduced in advance and that is one of the reasons why the Court is criticized for being selective in dispensing justice. Unfortunately, the international community as a whole cannot transcend the limitations imposed by state sovereignty as a fundamental principle in international system although the fundamentals of that system have not changed with the Rome Statute. We agree that the Court is the most important example so far of diplomatic brinkmanship under the present international system (Christensen, 2018, p. 170).

3.3. The questions of credibility as the biggest criticism

Regarding ICC's credibility, criticism generally comes from the two group of authoer. Namely, those who argue that the ICC is obviously inefficient, while other who considered that the ICC has such prosecutorial power that threatening state sovereignty (Klobucista, 2022). Anyway, since its foundation, the ICC has indicted more than forty individuals, most of which from African countries, while more than two dozen cases have dealt with alleged crimes in African states. The reason for serious concern is certainly the accusations of disproportion in targeting the states from the African continent. As e consequences, in 2016 two countries, Burundi and Gambia, have withdrawn from the Court. Unfortunately, these withdrawals show the lack of trust in the Court. (Buckley-Zistel, Mieth, and Papa, 2017, p. 4). If we look

back in retrospect, the second question regarding ICC's credibility is related to its selective approach. Although we cannot realistically expect from the international criminal justice mechanisms to judge all those responsible for international crimes because in certain situations mechanisms will not be able to deal with the massive numbers of alleged perpetrator (Lafontaine and Tachou-Sipowo, 2012, p. 12), still some authors stand out the cases with Rwanda, Uganda and Cote d'Ivoire as cases where the justice mechanisms has worked selective (Buckley-Zistel, Mieth, and Papa, 2017, p. 4).

4. THE CONTRIBUTION OF THE ICC IN TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES

In general, international criminal justice contributes to the development of the international legal order and in recovery of post-conflict societies. Criminal justice could be expected to influence ongoing conflicts situations as well. Hence, some authors notice that the discussion is more oriented toward identifying and critically assessing some of the actual and potential contribution of criminal accountability measures rather than putting into question whether they are justified at all (Lafontaine and Tachou-Sipowo, 2012, p. 2). However, the concrete question of ICC's contribution to transitional justice in post-conflict societies is complex and could not be answered by simple yes, or no. If we assume that the intentions of the creators of the idea for the establishing of ICC and the creators of the Rome Statute are sincere, then there is no doubt about the truthfulness of the mission of this court. With regard to the first question of whether and how the International Criminal Court can contribute to achieving the goals of transitional justice, we may conclude that ICC potentially has a unique opportunity to make a huge contribution to achieving the ideal of transitional justice in many post-conflict states. Investigations of powerful persons could help in deterring future atrocities. Those processes will certainly send a signal that the chain of impunity can be broken. However, that is one side of the coin. It is actually, in some way, an idealized version of ICC and justice in general. It is, in fact, looking at this court in isolation from the context of the overall circumstances in which the international community operates, not only at this current moment in time, but almost always. Although the international community has created clear principles of the international law, nevertheless, on the global international stage there are always actors with main roles, as opposed to those with secondary ones. Unfortunately, this arrangement somehow came to the fore precisely with the acceptance/non-acceptance of the Rome Statute by the actors who play the major or main roles on the world stage. This and everything elaborated above, gives the answer to our second question: Has ICC since its establishing until today achieving the expectations in post-conflict societies? The answer is that ICC has failed to establish itself as an international judicial institution with global influence. Some of the challenges mentioned above that ICC faces are obviously related to political and state interests. On the other hand, in some cases, the court worked or still works so slowly that it is inevitable to mention the maxim that "slow justice is actually injustice". If we expect from the Court a contribution to transitional justice so that society clears up some dilemmas in order to heal some wounds and continue to function, then would it be not more expedient for that healing to be effective? The answer is yes, because social acceptance of ICC's jurisdiction might change if a tribunal operates slowly. As a consequence, despite the initial high hopes, their perception led to frustration between ordinary people. An example of this situation is noticed regarding the ad hoc tribunal for war crimes in Former Yugoslavia, which were conducted for almost twenty-five years as well as the ad hoc tribunal for Ruanda which also working too slowly. Even charges so far most of the post-conflict African states have not led to significant changes in terms of stabilization and lasting peace. The accusations in most of the post-conflict African states did not lead to a significant stabilization and calming of the situation. Have Libya and Sudan for example, become stable democratic states, abiding by the rule of law? Theorists and practitioners criticize that ICC has so far failed to do either justice or peace (see: Vankovska, 2021, p. 125; see also: Gegout, 2013 p. 809). Probably the most controversial is the case with the accusation of Hashim Thaçi, the Kosovo Liberation Army commander. Namely, in 2020 he was accused of war crimes that happened almost quarter of a century ago. Meanwhile, after the armed conflict, this man became the most prominent politician in Kosovo, president and prime minister. However, the relevant question now is: Why did ICC need almost twenty-five years for this accusation?

5. CONCLUSION

Any judicial institution, national or international, including ICC, has to deliver justice without bias and without control by other state authority beyond judicial power. The states as members of the United Nations have been obliged to enact legislation to punish grave crimes. Each judicial institution should be focused on all individuals and parties responsible for atrocities committed during a conflict. This means that an emphasis needs to be laid on strengthening national courts and other institutions that provide local justice. This is only one, but very important component of achieving the goals of transitional justice. However, when justice cannot be achieved in national courts, ICC is the judicial body that should make it possible. The contribution of ICC to transitional justice depends, first of all, on its own impartial work based on its autonomy, although states parties' support and any other support is also very important. Identifying responsibility and calling to responsibility could be a very sensitive issue especially when in a concrete situation some different political and states' interest or even geopolitical interests are intertwined. That is why, not infrequently, justice is not served, and the rules of liability are not fully applied as they are created. The ICC could significantly contribute to transitional justice and thus not only to lasting peace, but also to the prevention of crimes, since the very existence of the Court is certainly a real threat to those who order or carry out atrocities. As a judicial mechanism, ICC could help in transformation of culture of impunity and of promotion of a culture of accountability, not only in conflict and post-conflict societies, but throughout the world. Sometimes national institutions are believed to be lacking capacity, professionalism and independence in the post-conflict environment. Sometimes national institutions are believed to be lacking capacity, professionalism and independence in the post-conflict environment. This is particularly reasonable if justice should be provided by the same state regime which itself was involved in massive injuries of basic human rights. As was mentioned at the very beginning, the contribution of the international intervention through investigations is expected to lead to reconciliation and sustainable peace. However, as we tried to explain in separate parts of this work, the situation in practice, until now, has not been satisfactory and far from the expectations. Hence, although ICC is undeniably a big step forward towards the realization of international justice, its results so far are in every respect modest and far from expectations. Limited jurisdiction, particularly limited support, as well as debatable credibility, gives limited contribution to transitional justice in post-conflict societies.

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