National Criminal Procedure Shoehorned into a Global Procedure Shoe When Trying Crimes Against Humanity

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Abstract

In this article the argument is made that a global court like the ICC is not suitable for gaining the trust of those it rules over and that the procedure used when trying crimes against humanity is a poor fit as it is to a large extent based on national procedural codes. It is suggested that a split of the ICC into several regional bodies with common procedural rules that are amended to suit the special needs when trying crimes against humanity would be beneficial for the court’s credibility. The point is also made that the goals of international trials and tribunals a poorly formulated and that they over promise and need to be amended to better reflect reality.

Keywords

human rights – procedural law – crimes against humanity – international tribunals

1 Introduction

The first question one must address when dealing with procedural rules is what purpose do they actually serve. In national legislations the answer is obvious; to ensure that criminals are punished and that innocents are protected. The same goes for international trials concerning crimes against humanity but with the added twist that not only are suspects of crimes against humanity
tried but effectively also the States that permitted or encouraged those crimes. This adds a meta level for which traditional procedural rules are a poor fit.

In these cases, there is little doubt that atrocities have taken place, the purpose is to establish who is responsible in each case, and herein lies the rub. Usually, in effective national jurisdictions, most perpetrators are made to pay. Criminals have reason to fear the law. In international law this clearly is a fiction, and one that at worst can undermine the whole system if not remedied.

The number of victims of crimes against humanity vastly outnumber the persons tried and convicted of those crimes in an outrageous way, going back all the way to the Nuremberg trials to the various tribunals that have been established in the post war era to the International Criminal Court (ICC) itself. The only conclusion that can be drawn from this fact is that individual justice will not be served by international courts other than in extremely rare cases.

If the purpose of international courts and tribunals is to punish the perpetrators, prevent future atrocities and uphold victims’ rights while maintaining the rule of law in the eyes of the world they have failed most of these goals that come across as being largely theoretical. But the alternative of not doing anything at all is worse. But then again, what is the objective of the international courts and how do we know if they fulfill those purposes. Are they not only appeasing the guilty consciences of those that did nothing to prevent or stop the atrocities while they occurred?

The distinction between international criminal law and international criminal justice can be mediated by meta-theoretical requirements that operate as more general defenses for law and morality integration.\(^1\) M. Cherif Bassiouni wanted to balance the two domains while defending a Justice First priority as a matter of principle.\(^2\) This meta-principle of Justice first is also the starting point of the present article that deals, among other things, with the distinction between national/regional criminal procedural law and international/global criminal procedural law as used in the various international tribunals concerning crimes against humanity in regards to how the requirements for a fair trial can be upheld with the Justice first principle in mind. Justice is usually, but not always, pursued thru a fair trial and all that that entails such as a real

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presumption of innocence and a trial before an impartial and independent tribunal. These elements are interdependent, and it is quite difficult, not to say impossible to separate one from the other and still be able to achieve justice. Within this context the notion that justice must not only be done but seen to be done is applied when discussing questions of independence and authority of the ICC et al in the eyes of the public and States alike.

Additionally, it is obvious that the Justice first principle is closely tied to reparation for victims of crimes against humanity as well as a desire that all perpetrators be punished as far as possible, at least as a theoretical starting point, and that the message is broadcasted loud and clear that such acts will not go unpunished, thus hopefully deterring from future crimes.

The Justice first principle is nearly identical to similar national principles in theory but differs in how it is applied in practice. International law lacks the possibility, in contrast to national law, to create a common understanding, a general consensus, of how the principle should be applied. There is, inter alia, no direct parliamentary influence over global criminal procedural law that would make such a consensus possible to begin with, not to mention all the different understandings what is considered to be justice in various legislations. Nevertheless, individual states do ratify the Statutes of the tribunals and some agreement is reached by representatives of each State that is assigned to participate in the drafting.

This lack of real consensus is a general weakness of international law as it means that there always will be a certain deficiency of legitimacy but can also be a strength since it necessitates that an international court creates its own legal system from what is perceived as being needed and can be accepted. This trial-and-error creation of law differs massively from the traditional way of law making through a democratically elected parliament and/or democratically selected judges.

It can be convincingly argued that international trials have other functions as well such as documenting atrocities, reconciling warring parties, making peace possible in the future etc. These are all valid reasons to have a trial but

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without the justice first principle the trial is no longer what ordinarily is meant by a trial. It turns into something else. Something that might well be worthwhile but in which the concept of access to justice is secondary. This might be some kind of panel/body with legal powers, but it cannot be a fair trial without individual justice since the right to a fair trial points directly to the individual's right, not only to a fair trial but also to the realization of other right thru the trial. Without individual access to justice the trial becomes a separate kind of dispute resolution process such as, *e.g.*, the WTO dispute settlement process that normally falls outside of the scope of human rights.

2 Questions Addressed

The first question dealt with is the purpose of international criminal trials/tribunals and what they are set to achieve. The second issue is the procedural system used and whether it is an ample one. The last question is about trust and the organization of international courts.

The aims of the system govern its structure and the outcomes can be checked against the aims, thus letting us know whether it works as it is supposed to and vice versa in that the outcome reveals flaws in what has been promised if it is lacking.

When it comes to the choice of procedural systems the notion of a fair trial is a viable starting point as outlined in, *inter alia*, the Universal Declaration of Human Rights—Article 10, the International Covenant on Civil and Political Rights—Article 14, the European Convention on Human Rights—Article 6, the African Charter on Human and Peoples' Rights—Article 7, the American Convention on Human Rights—Article 8 and of course in many national legislations as well. These are all well-established and focus on the protection of individuals in concrete cases thus serving as a starting point for analysis. They are time-tried and overall effective but maybe less well suited for global use dealing with crimes against humanity.

When it comes to the trust and organization of international courts, they are a special case in several regards. Almost always they are set up by international bodies thus leaving those concerned or their states without any real influence over the setup. This is all by itself problematic since it might be difficult to recognize let alone trust an unfamiliar system. When it comes to international tribunals the issue of trust is even greater than that since these

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5 www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
tribunals function in effect, because of the lack of international parliamentary support, as normative courts that create law. Such a court might be less alien to those that come from common law systems but is quite different from those used in civil law countries.

Obviously, the three questions go together and are to be seen as a whole and part of the same system. Nevertheless, the assertion is made that they are all in need of a clearer definition to fulfill what is promised explicitly or implicitly. Clearly only examples can be given of the issues considered as discussing the full fair trial is not something that would fall within the scope of a single article.

The first issue of setting goals is clearly a political one but one that nevertheless has a substantial impact on the other two. Although the goals vary to some extent there seems to be a general consensus that perpetrators must be punished, and victims given satisfaction but not to what extent and which ones. Here, the difference is clear between national/regional systems and global ones.

3 Yet Another Level of Demarcation

When it comes to the issue of what international justice is set to achieve Bassiouni’s use of the Justice first principle means that a broad conflict-typology and broad provisions for a victim-centered approach have emerged as rule of law prescriptions that accommodate consideration of needs about whether it makes sense to claim that there are ‘key differences’ between the main branches of public international law. In response to the demarcation debate, Bassiouni makes a concession about the complexities that accompany such a dispute, and then goes on to state that: ‘Recent conflicts have substantially blurred these differences rendering prior legal categories insufficient’. The demarcation debate concerns primarily the intersection between the three main branches of public international law, namely international criminal law, international human rights law, and international humanitarian law and whether it makes to claim any major differences between them.

In this paper yet another demarcation is used, one between global criminal law and national/regional criminal law as concerns procedural aspects of

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6 Supra note 1, pp. 7–8.
criminal law and especially the right to a fair trial. The objective is to, at least to some extent, separate procedural law from criminal law in order to facilitate a discussion between nation/regional law and global law when it comes to the concept of a fair trial, which obviously is a procedural provision.

The demarcation between national/regional procedural law and global procedural law is not always an easy one to make. Nevertheless, there are a few crucial differences with far ranging consequences when it comes to providing an effective path towards “Justice first”. To highlight those, this article takes it starting point in the case-law of the European court of Human Rights (ECtHR) when upholding the fair trial adherence of its member States using the European Convention on Human Rights (ECHR).

This function of the ECtHR, using an international instrument to control national ones, illustrates the difficulties with doing a demarcation between national and regional law as the two ideally should be the same but in the details are not and considering that the ECHR encompasses systems that use both Common Law systems and Civil Law systems the differences of what is to be considered a fair trial go beyond the details of the trial. Furthermore, both national and global systems anchor themselves ideologically in the protection for the individual accused of a crime from a potentially malign State. The ECtHR case-law clearly upholds this notion, as it should, since one of the basic assumptions behind the ECHR was and is to guard against leaders such as Hitler and Stalin and their ilk. The abuse of trials was aptly demonstrated in Nazi-Germany and in the Soviet Union and the right to a fair trial is an obstacle to such abuses. Hence the term national/regional procedural law in this case, to exemplify, refers to national and regional European institutions and laws.

However, if we take it one step further, from the national, over the regional, unto the global, things become more complicated. The major difference between the national/regional versus the international/global is the starting

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8 In certain jurisdictions criminal law and procedural law are two separate entities, albeit with obvious and many connections between the two. In international law they tend to be lumped together creating confusion. It seems that when most authors speak about criminal law in a global context, they seem to mean both criminal and procedural law.

9 See, e.g., S. Greer: The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, Council of Europe Publishing (Council of Europe Publishing, Strasbourg, 2000). The margin of appreciation refers to the room for maneuver the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights.

10 See, e.g., H. Ortner, Hitler’s Executioner: Roland Freisler, President of the Nazi People’s Court (Frontline Books, Barnsley, 2018).

point for what criminal procedure is to accomplish. An important distinction here is the one between international procedural rules and international law in general as a set of broad international laws and aims. The more overarching question of the functionality of international law have been discussed many times but the stricter procedural issues have not been discussed at same length. One can, arguably, claim that the main objects of a national/regional fair trial is to ensure that the perpetrator is punished, and that individuals are protected from miscarriage of justice by the States, being wrongly accused and sentenced. Although this is also valid for international/global criminal procedural law the main difference is that the international court’s primary objective is to sentence those guilty of atrocities such as crimes against humanity. It is not to protect from State abuse of power since, in principle, there is no State prosecuting in the case of international tribunals, and therefore no abuse of power from a malign State to fear. There is only an international body that is assumed to be benevolent or one that in theory lacks incentive for wrongful convictions. Hence the term international/global, in the following text described as global (procedural) law.

The above has held true in most cases and few today would claim that that the Nuremberg or Tokyo trials rested on trumped up charges and, likewise, few would say that about, e.g., the Cambodian tribunal or the Rwandan one. But can we assume that this will be the case in the future as well, that history will “legitimize” some of the current and future tribunals? What are the problems using national/regional criminal procedural law as a template for global criminal procedural law and what are the alternatives? These and adjacent questions about the aims, the legitimacy, and the efficiency of global procedural law as compared to national/regional are discussed in this article. The purpose of the article is to take the demarcation debate one step further and to discuss in principle and by concrete examples whether the time tried, legitimate and efficient concept of a fair trial as it has been developed in national/regional settings is suitable for a global setting or whether something else is required to uphold these aims that we might have only seen the beginning of.

13 For a comprehensive documentation on the Nuremberg trials, see, e.g., https://nuremberg.law.harvard.edu.
14 For more sources on the Tokyo trials see e.g., https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0182.xml.
When analyzing global procedural law it becomes obvious that some of the basic premises of a fair trial go out of the window immediately. One of the absolute requirements of a fair trial is access to justice, meaning in this context to a fair trial and the real, not symbolic, remedies it brings. Even a perfect trial is useless if it cannot be accessed. For the trial to be meaningful all victims of atrocities should at least have a reasonable chance of having their case tried in a court of law that is able to properly punish the perpetrator and provide some sort of restitution.

In practice this is perhaps one of the cruelest illusions since almost none of the victims have received justice thru the various tribunals, starting from the Nuremberg trials until today’s special chamber of Cambodia. This means that the concept of protecting individuals is a non-starter in practice, yet the international courts are set up as if everybody could have their day in court, at least in theory. The illusion very quickly falls apart when one looks at the resources allotted to the international courts. There simply is no practical way of delivering justice for all under those circumstances. This also means that the liberal idea of justice first for the individual victims of crimes is lost. What is then left and what is the alternative?

What is left is largely a symbolic gesture that the international community is reacting to some of the worst atrocities committed and not overlooking them totally. It can be argued that this is better than nothing but it is also quite easy to make an argument that this symbolism is contra productive in that everybody knows that the chance of actually prosecuting a perpetrator is close to nil, thus creating the image that not only does the international community not care, it tries to cover up atrocities by pretending to be dealing with them.

The importance of having a fair and independent tribunal in these cases cannot be overstated. The *ratione materiae* jurisdiction of the ICC in Article 5 of the Rome Statue states that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. Therefore, the court has jurisdiction when it comes to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Without the possibility of trying these cases by an independent and impartial tribunal it can be argued that there is no international law at all but only real politics.

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17 All the previously mentioned charters assume such a possibility and are modeled after this prerequisite in mind. If it were to be taken away, you would need to construct a totally different system, since you would then remove one of the cornerstones of what is meant by a fair trial, risking removing the whole concept in the process.
masquerading as law in a desperate attempt to legitimize that that only has basis in power and not justice.

5 The Concept of a Fair Trial—One Size Does Not Fit All

To illustrate some of the differences, there are many more, between national/regional and global procedural law, article 6 of the ECHR is used to compare global procedural law with national/regional procedural law. The main reasons for using the ECHR are that it is the oldest binding regional instrument still in use on the right to a fair trial and that the ECtHR has produced an extensive case-law further developing the concept of a fair trial. It is also, arguably, currently the most efficient of the regional systems when it comes to States abiding by its decisions. One crucial aspect to keep in mind when making an analysis is that the right to a fair trial is a human right and therefore, under regular circumstances, difficult to derogate from.\(^{18}\)

The right to a fair trial is a time-tried and globally accepted right. It is based on common rule of law principles such as the presumption of innocence, the adversarial principle, impartial and independent tribunals, right to counsel etc. In these regards it does not matter whether the procedural systems used are based on Common Law or Civil Law. The basics are the same in that the procedure must be able to provide an efficient rule of law tool that can be used in most circumstances.

There is however a marked difference between what works nationally and what works globally. It might be argued that global procedural law is a relatively new and to some extent a different, separate, procedural system that has yet to find its proper form. It is very similar, for obvious reasons, to national procedural law but nevertheless different, making some of the aspects of a national fair trial difficult to implement globally on one hand. On the other hand, so is taking them out and maintaining a fair trial based on the rule of law.

It is difficult to provide better global alternatives since almost all legal solutions have been nationally developed, time tried and then globally applied. Few legal tools have been developed solely for international use except for those that deal directly with various global or regional organizations such as the United Nations, the African Union, the European Union, or the Organization

\(^{18}\) Having said that the right to a fair trial is not one of the non-derogable rights enshrined in article 15 of the ECHR. Article 6 of the ECHR contains provisions that might allow derogation from some if its main components under certain circumstances such as, e.g., the right to be shown the evidence brought forward by the State in cases of national security.
of American States. The fair trial has for the most part remained and will remain a national procedure. The underlying assumption is that international law needs to, to some extent, develop its own procedural solutions and cannot rely solely on national solutions since the problems addressed are, on the surface of things, similar but in practice quite different.

To be able to show and discuss the differences between national criminal procedural law and global criminal procedural law a starting point is needed, i.e., a baseline to which compare what is required of a functioning legal system. One such baseline is the justice first principle that requires that victims redress and punishment of perpetrators be paramount for justice to be done. This is shared by both national and global systems but in practice their realization differs. In the following the national/regional concept of a fair trial is used as a starting point to discuss how much of a national/regional instrument can be used as a template for a global one and areas that do not fit.

5.1 The Right to a Fair Trial—A National/Regional Tool in a Global Setting

Article 6 of the ECHR is used to analyze which components of a regional fair trial are suitable for global use and which are not. Any of the other corresponding articles in other conventions that have enshrined the right to a fair trial could most likely have been used as a starting point as well, but the ECHR is the oldest and, arguably, the most developed in terms of the amount of case law available hence the most suitable.

When using the ECHR and the ECtHR case-law is it imperative to keep in mind why the convention was written. Its main purpose was to create an obstacle for the abuse of power as evidenced by dictators such as Hitler and Stalin. Criminal procedural law is supposed, in this context, to guard against tyranny and the use of show trials, protecting individuals from abuse. This indicates that the right to a fair trial focuses on the rights of individuals, to make sure that they are protected from false accusations and baseless convictions. In this the connection to democracy becomes clear as well as witnessed by the preamble to the ECHR which states that:

“...fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”.

The starting point for this analysis is article 6 of the ECHR which enshrines the right to a fair trial. Some of the major parts of the article are analyzed below to
exemplify the differences between national/regional and global application of the right to a fair trial. Focus is on some of the key issues of the right to a fair trial that are particularly problematic when “translated” into global law.

Article 6 of the ECHR contains, among other things, the right to a fair trial by an independent and impartial tribunal established by law. Furthermore, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. In addition, article 13 of the ECHR needs to be mentioned as well. Keeping in mind the justice first principle, reparations for victims of abuses are paramount to make justice. Article 13 contains the right to an effective remedy in that everyone shall have an effective remedy before a national authority. The article does not contain any exceptions and it is assumed that “everyone” shall be provided with an effective remedy. In global law there are not any explicit exceptions either.

In the following three examples of why national/regional procedural law is a poor fit for global law are given. They are listed in no particular order and more examples could have been used. However, they are sufficient to start a discussion whether national/regional systems are well suited for global application or not.

5.2 First Example of a Poor Fit—Independent and Impartial Tribunals

One of the main problems for regional and global tribunals is to live up to the requirement of not only being impartial and independent but also to be seen as impartial and independent even if they in practice fulfill these criteria. In the language of the ECtHR a court must be able to fulfill the so-called objective criteria. The right to a fair trial in Article 6 § 1 requires that a case be heard by an “independent and impartial tribunal” established by law. There is a close link between the concepts of independence and objective impartiality. For this reason, the Court commonly considers the two requirements together.¹⁹

Tribunals are supposed to be independent from the executive but in international law the executive is difficult or impossible to pinpoint and political interests may be less obvious than they are nationally and more difficult to influence, thereby limiting the democratic influence. Who is the executive in global cases and if the answer is, e.g., the UN, there is very little influence on such an organization that can be wielded by most individual States in any meaningful way. There is obviously a deficit when it comes to the requirement for democracy.²⁰

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¹⁹ See, inter alia, para. 73 in the case Findlay v. The United Kingdom, 110/1995/616/706, 25 February.

²⁰ See, e.g., the preamble to the ECHR and articles 21 and 29 of the UDHR.
Being *impartial* is an easier criterion to satisfy in practice but difficult to demonstrate. If criticism about the ICC for instance being biased against Africa is to be taken seriously,21 one must ask how the courts composition should look like in order to address the critique. In all fairness this is a difficult discussion nationally as well but takes on another dimension in international law since the focus shifts from being biased against certain individuals to whole countries or even continents. The critique against the ICC that they are biased against Africa must be addressed no matter if the critique is correct or not. An international court cannot be perceived to be biased since it by its very nature creates law thereby risking enshrining its bias. If the foundations of the ICC in this regard can be put into question the whole system collapses.

The further removed a court is from its subjects the more difficult it gets to gain the trust of those it presides over. The rules of the ICC are elaborate and thought through a rather complex system for electing judges that set a high standard, but they are also quite vague. The judges are to be, among other things, chosen from persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. These standards do not say much about the specific knowledge needed or, indeed anything about possible bias, political views, etc. This in turn means that it is almost impossible to actually show that the judges are independent and impartial to those that are not lawyers and even then, it is quite easy to cast suspicion over the judges even if there is no factual basis to do so. In a court that is closer to its subjects this becomes much more difficult to do and more easily cast aside.

In a national system these issues can usually be dealt with within the political system with transparent appointments of judges and prosecutors that can be controlled by a national parliament. The same goes for laws that can be relatively easily amended. In global courts there is no such safeguard. It means that there is a large disconnect between those that judge and those that are being judged. It goes without saying that you cannot always expect to be judged by your peers in an international court but then again, the distance between the two cannot be too big for the verdict to be legitimate.

One possible solution might be that a body such as the ICC is split up into several regional bodies, using the same procedural rules but better anchored in the communities it is supposed to serve. Such a decentralized court would

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go a long way of addressing issues of bias based upon ethnicity if nothing else. Global/regional bodies would afford greater ownership to those it presides over thus increasing legitimacy, much like the regional bodies we have today.

5.3 Second Example of a Poor Fit—Presumption of Innocence

In national criminal procedure the presumption of innocence is paramount and taken for granted for obvious reasons. At its core it provides protection against false charges by the State and ideally ensures that only crimes committed are tried and that only those responsible for those crimes are convicted.\(^{22}\)

In international courts however the focus shifts. Crimes against humanity are crimes on a scale not dealt with nationally and to presume a dictator or commander innocent in these cases is even more counterintuitive than presuming a known criminal innocent at the start of a trial nationally since it is blatantly obvious that they are responsible, just not exactly to what extent in each single case. The presumption of innocence requires that the charges against the prosecuted must be specified when it comes to the place and time for the crime, leaving very little room for “general ideological responsibility” for lack of a better wording.

The above creates a totally different starting point for the presumption of innocence in international tribunals when dealing with the highest levels of responsibility than in national courts when such issues usually are non-existent. On one hand it would be ludicrous to argue that Hitler or Pol Pot were innocent but on the other hand they cannot singlehandedly be held responsible for all that occurred during the Nazi or Khmer Rouge reigns, thereby exempting everybody else from the crimes committed. This creates different de facto levels of the presumption of innocence. There will be one level for those at the very top of the command chain and one for those that might only have been members not directly responsible for the crimes committed of the NSDAP (Nationalsozialistische Deutsche Arbeiterpartei) or of the CPK (Communist Party of Kampuchea) more commonly known as the Khmer Rouge. These two extremes create a sliding slope between which the presumption of innocence is applied as witnessed by the only handful of people at the top that actually have been sentenced for those crimes against humanity and raises the question of who is to benefit from the presumption of innocence and to what extent.

\(^{22}\) For a detailed look at the Presumption of innocence, see, e.g., K. Nowak, Oskyldighetspresumptionen (Norsteds Juridik, Stockholm, 2003).
Third Example of a Poor Fit—Restitutions for Victims

Maybe the most striking example of how poorly a national/regional procedure fits a global setting is the (lack of) reparations for victims of crimes against humanity. According to article 13 of ECHR everyone has a right to an effective remedy. Ideally it would mean that all the actual perpetrators are sentenced in a meaningful way and that real compensation is provided to all the victims. In efficient national systems this usually is somewhat achievable but in global cases it is impossible to accomplish if nothing else for purely practical reasons. To ferret out every single criminal that committed a crime against humanity would be an impossible task as the numbers of perpetrators is staggering and in practice impossible to pursue.

But what to do instead? Obviously, the answer to do nothing is not acceptable neither legally, nor morally. To prosecute a few token criminals is not satisfactorily either, although better than not prosecuting at all. There are alternatives such as truth commissions23 or native systems of justice24 and although they are better than nothing, they are not really trials that can provide proper justice.

In a perfect world, criminals are punished, and all potential criminals would understand that if they commit a crime, they will be punished too. This is to some extent a fiction in both national and global law but with the important distinction that in national law the chance of it happening is a real one whereas in global trials the chance is close to zero, thereby, realistically, not deterring from committing such atrocities in the future. The procedural rules must be amended to recognize this fact and research conducted on how to amend the rules for the global trial to be as efficient as possible and to prevent future crimes from occurring. If the trial is de facto mostly symbolic that needs to be highlighted in its rules as well. To pretend otherwise is making it difficult to discuss and improve the system and insulting to the victims of the worst crimes known to man and definitively not in line with the justice first principle.

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6 Summing Up

Access to individual justice and the justice first principle are not realized in practice. Reparation for almost all victims of crimes against humanity is nonexistent and almost all perpetrators go unpunished. In practice there is a *de facto* impunity for the vast majority of perpetrators.

So, what is the answer, return to how it used to be, making the prosecution of criminals a national affair, abandoning the whole international system, of course not. But we need to acknowledge that the systems we have been using, based on national and regional systems, are not equipped to handle the challenges posted by large scale crimes against humanity in which the perpetrators are/were protected by their own and other governments.

What is needed is a reformed system, based mainly on the old, time tried system, but in which some of the goals and rules are amended to at the same time reflect the need for prosecuting those guilty of the worst crimes known to humanity on one hand, but also, on the other hand, to reflect the realities of the output of the system today. If our procedural systems are over promising or creating fictions of justice being done when clearly it is not, they will lose all credibility. This is already happening to some extent as evidenced by the States that have chosen to remain outside of the ICC and of the accusations of bias among other issues. Changes need to be made before it is too late to salvage the achievements already made.

One example of national/regional procedural rules that is a bad fit in a global context is the presumption of innocence. Clearly it must be preserved for the system to be fair but the requirements that follows from the presumption nationally/regionally are a poor fit globally when for instance requiring that every single crime be specified in time and space. Precise charges are almost impossible to achieve in most crimes against humanity. This was clearly demonstrated by the reasoning in the Demjanjuk case in which evidence of Demjanjuks specific act could not be provided but the court nevertheless convicted him. It was assumed that a guard in a camp like Sobibor was automatically a murder aide. “The defendant was part of this extermination machine,” presiding judge Ralph Alt said in the sentencing. Every Trawniki knew “that he was part of a well-rehearsed apparatus. All Trawniki men knew what was

25 See J. Baldwin, *Trawniki Guards: Foot Soldiers of the Holocaust* (Schiffer Publishing, Atglen, PA, 2020). Trawniki were among the non-German rank-and-file men, the foot soldiers, who helped carry out the “Final Solution”. The Trawniki concentration camp in Poland was used by the SS to train more than 5000 men in the execution of mass murder.
happening.”26 The reasoning of the German court is indeed a sound one and it highlights some of the difficulties when such cases are tried.

The issues in the Demjanjuk case are closely connected to issues of criminal liability and if we were to reason as the German court did, and I argue that we should, the question arises where do you draw the line? Should e.g., all 8 million members of the Nazi party have been prosecuted after the second world war or only Hitler and what about the compromise that was eventually reached, prosecuting mainly the most prominent war criminals, what was the basis for that and what is the basis for today’s prosecutions? Clearly some rethinking is needed when it comes to matters of responsibility and how the presumption can be adjusted for a global application.

Another example is the right to be heard by an independent and impartial tribunal. It is inevitable that politics play an outsize part in deciding who is prosecuted and who is not in a global context. This is an unfortunate fact and one not easily remedied. A compelling argument can be made that law and politics cannot be entirely separated and nor should they be in a democratic society. Laws should reflect the general will and protect the core values of humanity thru human rights, that may themselves be a limit to democracy. Nationally this is mostly achievable, in a global context it is almost impossible to achieve seeing as many States are dictatorships thereby not mirroring the will of the people in any meaningful way. Adding to that, values differ globally no matter the ruling model although there is a core that can be seen as universal.

The critique that has been levied against the ICC, e.g., for being biased is not easily dismissed. It does not matter that the court is independent and impartial, it also must be perceived as such. If it is not recognized as independent and impartial it will have severe difficulties to be seen as legitimate. One possible solution to this problem might be that a body such as the ICC is split up into several regionally approved bodies, bound by the same procedural rules but better anchored in the regional communities it is supposed to serve. Such a decentralized court would go a long way to address issues of bias based upon ethnicity if nothing else.

The justice first principle is one that must be the starting point for reasons of legitimacy. There is no other valid starting point, but it must be made clear that it is a principle, a point of departure to in the future achieve a goal that cannot be reached today. In acknowledging this one also acknowledges the limitations of the system, molding it to the amended purposes that today might be of largely symbolic value or any other goals that reflect reality but not creating promises that inevitably will be broken dragging the whole system into disrepute.

26 Case LG München 11, 12.05.2011—1 Ks 115 Js 12496/08.