HUMAN RIGHTS BEFORE INTERNATIONAL CRIMINAL COURTS

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1. Introduction

The primary purpose of international criminal law is to address the most serious violations of fundamental human rights, those which ‘shock the conscience of mankind’. It is therefore of great importance that this evolving branch of international law respects the very principles it is meant to serve. Criminal justice and human rights are closely related: it could be said that the modern notion of human rights can find its origins in the first mechanisms protecting the rights of the accused in criminal proceedings, such as habeas corpus, due process, and the prohibition of torture. As criminal justice by definition implies the use of the coercive powers of the State and the repression of individual freedom, most constitutions and international human rights instruments contain a detailed rendition of rights guaranteed in criminal proceedings. For instance, Articles 5–7 of the European Convention on Human Rights (ECHR) and Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), stipulate the rights to liberty and security, fair trial, humane treatment and the principle of no punishment without law. It should be said that such provisions have always purported to shelter the individual from the overwhelming might of the State.

The emergence of criminal justice at the international level presents new challenges to the classical concept of the rights of the accused in a liberal democracy; these challenges are due to some intrinsic features of international criminal law. Namely, international courts and tribunals do not possess a repressive apparatus of their own: they are dependent on the cooperation of states and occasionally on the limited coercive powers of the international community. This has consequences both on the conduct of investigations and the collection of evidence, and on the apprehension of suspects.1 Secondly, the immensely complex

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1 One the one hand, the limited enforcement powers of international criminal courts and tribunals usually have an unfavourable impact on the successful prosecution and arrest of suspects, but, on the other hand, they can also severely impede the efforts of the accused and their defence counsel to obtain evidence from unwilling States, as in the Blaškić case before the ICTY, or to challenge the lawfulness of their arrest, as in the Todorović case before the same court. For more, see J. Katz Cogan, ‘International Criminal Courts and Fair Trials: Difficulties and Prospects’, 27 Yale J. Int’l L. (2002) p. 111.
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factual and legal issues raised at international trials necessitate that the latter last considerably longer, and make the use of some traditional institutes of criminal law, such as trial by jury, quite impractical. Finally, international courts deal only with the most serious crimes, which affect the interests of the international community as a whole and which by their gravity warrant prosecution at the international level.

International criminal courts deal primarily with high-ranking suspects whom the municipal legal systems are either unable or unwilling to prosecute, and not with immediate perpetrators of atrocities. As a rule, the former possess great power and influence. They usually have an organization supporting them, both in the commission of crimes and in their attempts to escape responsibility, and are more than able to cover up their tracks, obstruct investigations and intimidate witnesses. This has justified the use of some unorthodox mechanisms of substantive criminal law, such as command responsibility and joint criminal enterprise, as well as procedural instruments similar to those used in domestic trials for organized crime, as they both require special rules on the collection and admissibility of evidence, witness protection etc. Finally, international criminal trials frequently occur in post-conflict or ongoing conflict situations and can considerably impact international peace and security. The purpose of these trials is then much wider than mere deterrence, and allows them to become a major way of re-establishing the fundamental principles of justice and furthering the process of reconciliation.

These distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal justice. However, this does not mean that human rights of suspects in such proceedings can be flaunted on the pretext of pursuing some higher aim. International courts and tribunals must respect the fundamental human rights of those who appear before them: this is the only way in which they can maintain their legitimacy.

Concern for human rights of the accused has been reflected in rules governing the work of two active ad hoc international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the International Criminal Court (ICC), a permanent institution. This paper will attempt to analyze the human rights provisions and safeguards in what can be regarded as contemporary conventional international criminal law, i.e. the statutes and the rules of procedure and evidence of the ICTY,