Book Reviews


As the International Criminal Tribunal for the Former Yugoslavia (ICTY) is approaching the end of its mandate, any scholarly commentary reflecting on the law and practice of the Tribunal constitutes a welcomed addition to the existing literature as well as a useful tool for the future, and notably for the International Criminal Court.

In the – admittedly controversially entitled – ICTY: Towards a Fair Trial?, Kruessmann brings together the analyses of several experts – all with different professional and national backgrounds – so as to offer ‘a flashback to all the debates around the proper role of international criminal justice and a contribution to the developing academic discipline of “transitional justice”.’

By focusing on the issue of fairness within the international criminal justice arena, this volume addresses a fundamental question, one which international criminal justice has faced since its very conception and one that – if not prudently cared for – could potentially harm the credibility of the whole system and ultimately put its very existence into jeopardy.

It is indeed to be recalled that one of the most severe criticisms raised against the Nuremberg Charter and trial, and which led to fierce and fervent debates, was precisely the alleged unfairness of the proceedings, which were asserted to be based on judge-made law to the detriment of the legality principle and to impose victor’s justice to the detriment of the rights of the Accused. And even if such criticism may now be easily dismissed, the fact remains that such accusations of unfairness have somehow stained international criminal justice and brought the role of the international criminal judge into a critical limelight. In this context, it may seem an understatement to assert that fairness is international criminal justice’s biggest challenge.

In the words of Lord Reid, ‘[t]here was a time when it was a thought almost indecent to suggest that judges make law’. It is to be admitted that, even a defused

approach to the Nuremberg Charter and trial quickly reveals that, from its very conception, international criminal law relied on a relatively small number of brief norms and, without going as far as to suggest that it was voluntarily drafted as a basis for judicial interpretation, the fact remains that the Nuremberg judges had hardly no other choice than to engage with active construction, making of international criminal law a jurisprudential creature. Considering the fact that all the post-Nuremberg legal developments in international criminal law drew from the Nuremberg Charter and elaborated upon the Nuremberg findings so as to incorporate them, it seems safe to assert that the ICTY Statute – being no exception in this respect – was directly inspired by Nuremberg judicial rulings. It is in this context understandable that the ICTY judges followed into their predecessors’ footsteps, engaging – where appropriate – with active judicial construction. Put differently, contemporary international criminal law stayed within the Nuremberg spirit and remains, by its very essence, a judicial invention. As rightly explained by Mettraux,

because international criminal law is still a body of law in need of legal precision, international criminal tribunals from Nuremberg to The Hague and Arusha, have had to give it substance and precision and have eased may meta-legal standards into proper legal prohibitions. Without judicial input, such legal standards, in and of themselves, would rarely have attained the degree of precision and certainty required from a legal norm to warrant more than a vain hope of compliance. In the history of international criminal law, international tribunals have done more than merely give jural imprimatur to norms in waiting [...] so that international criminal law may owe more to judges than any other part of international law. 3

Kruessman’s volume interestingly – and fundamentally – concentrates on the role of the ICTY in shaping international criminal law and justice and does shed the light on the quasi-legislative endeavour of the ICTY judges, emphasising where and how they have proven proactive, and even creative, in their appreciation and interpretation of the law and where they have refrained from judicial intrusion. So as to fully address the issue and adequately explore the value – and fairness – of judicial proceedings before the ICTY, Kruessman’s volume contemplates truth-finding, questions the interrelationship between substantive and procedural law, compares human rights law with civil and common law traditions and considers the issue of victim protection, including witness protection and as pointed out by the editor himself:

The wealth of materials and critical thought provided by the contributions outlined above invariably leads back to the starting point of this scholarly enterprise: did the ICTY, as a matter of fact, advance the fair trial principle in international criminal procedure? 4
