BOOK REVIEW

VLADIMIR TOCHILOVSKY, *THE LAW AND JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS AND COURTS. PROCEDURE AND HUMAN RIGHT ASPECTS*, CAMBRIDGE-ANTWERP, INTERSENTIA, 2014, 2 ND ED., PP. 1371.

*Giacinto della Cananea**

Recent years have seen a dramatic increase – in both their number and typology – of international tribunal and courts at work across the globe. The United Nations have established special international criminal tribunals in order to prosecute those responsible for atrocities during times of (civil) war in Rwanda and Yugoslavia. Subsequently, the International Criminal Court (2003) has been established in 2003. More recently, other special tribunals have been set up in order to deal with crimes committed in Sierra Leone, Cambodia and East Timor. Students of these courts and tribunals often ponder over the following type of questions: Can these bodies be regarded as courts of law in the proper sense; that is, possessing distinct institutional characters differentiating them from other institutions, such as ombudsmen and amnesty and truth commissions? Is criminal justice – apart from the two international courts set up at the end of the second World War – no longer an exclusive prerogatives of the States? Does this mean that retributive justice is preferred to revenge or amnesia; that is, to restorative justice? Or does it imply, in case of a failure of legal institutions aiming at ensuring retributive justice, that crimes (both war crimes and crimes against humanity) are left without punishment, thus undermining the credibility of justice as such?

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Only some of these questions are considered in this book about international criminal courts and tribunals, which looks at these bodies as institutions of government which are entrusted with the task to achieve certain social goals. While the book does not deal extensively with a traditional distinctive feature of courts and tribunals, namely their independence (some cases concerning judicial impartiality are, however, analyzed in ch. 4), it focuses on the ways in which they perform their task, on the basis of pre-existing legal rules and after adversary procedures. In other words, this book focuses on procedure. For sure, human rights aspects are not neglected, but are considered from such viewpoint. Nor are theoretical issues neglected, though the main thrust of the book is descriptive. Another feature which makes this book readily distinguishable from other books in this field is its scope. Several lawyers focus their attention on the impact of courts and tribunals from the viewpoint of the effects of their action upon the litigants and those who may be in similar situations. The author's perspective is different, first and foremost, because he seeks to provide "the most comprehensive overview of the law and jurisprudence of [both] the *ad hoc* criminal tribunals and courts" and the ICC, with a view also to the relevant judgments of the European Court of Human Rights;

Tochilovsky studies a high number of recent cases that can be put in two main groups. The first concerns the proceedings that must be followed in order to achieve a decision about the culpability of the accused person(s) (chapters 1-14, roughly corresponding to two thirds of the book). The second group regards the decisions taken by international criminal courts and tribunals, the appeals against them and other issues (chapters 15-24, corresponding to another third of the book).

The first part of the book examines in detail all salient aspects of the proceedings that must be followed by international criminal courts and tribunals, beginning with the right to be informed of the nature and cause of the charge (ch. 1, with more than one-hundred pages) and including both the accused persons' access to the evidence brought against them (ch. 2) and the protection of victims and witnesses (ch. 8). In this context, specific attention is devoted throughout more than three-hundred pages to trial proceedings (ch. 11). The leading judgments taken by a variety of judicial authorities in this field are analyzed in some

detail and show what sorts of arguments are relied on by the judges in order to ensure some sort of procedural justice. Tochilovsky first of all puts the issue of the principle of equality of arms, in the light of the jurisprudence of the ECHR Court; he then examines more specific aspects, such as the role of the prosecutor, the number or witnesses who can be admitted, the accused's right to be tried in his presence (not excluding recent technological devices, such as video-links), and cross-examination. Adequate attention is also devoted to the admissibility of evidence, which is sometimes particularly controversial, for example when most, if not all, documents have been destroyed and the credibility of witnesses is contested. A closely connected aspect is that of the assessment of evidence (ch. 15), which is governed by the "beyond reasonable doubt" standard of proof.

The second group of cases deals with what happens after a decision has been taken by the relevant international criminal court or tribunal. This includes both the right to appeal (ch. 16), the referral of the case to another court (ch. 17) and other remedies (ch. 23). It includes also the actions that must be taken in order to ensure that the decision is enforced, such as arrest and detention (ch. 19), provisional release (ch. 20). Finally, other procedural issues, including *amicus curiae* briefs and public filings, are considered (ch. 24).

The author's choice to focus on rights from the viewpoint of procedure has some implications that are worth discussing. First of all, in contrast with theories of rights that emphasize their 'absolute' nature, the author argues that this is not always the case. An important example is that of the right to cross-examine witnesses. This right, he observes, can be limited, provided that other interests so require. He then goes on to say that tribunals "have a wide discretion in admitting hearsay evidence" (p. 545). This example can also shed some light on the author's broader view of the principle of equality of arms. This principle, he notes, is not simply guaranteed by Article 6 ECHR, but must be interpreted in the light of the Preamble, which declared the rule of law to be part of the common heritage of the States (p. 444). What the rule of law means and implies are obviously controversial questions. Nevertheless, in my opinion, Tochilovsky is right in referring not only to the rules agreed by the States, but also to the underlying shared values. His conceptualization of equality of

arms in the context of fair trial is also convincing, although in my opinion this does not necessarily imply that criminal proceedings must always be adversarial, at least not in the way which typical of some legal cultures. Equally important is another requirement of fair trial, that is giving reasons. Interestingly, the author does not consider only the why in which this requirement is fulfilled, but also the way in which judges actually reason in their opinions. In particular, reasons must be given for all relevant factors of the case (p. 1036), though this does not imply that a trial chamber is obliged to justify its findings in relation to every submission made during the trial. It would be interesting more in detail the kinds of legal justification that courts and tribunals provide, in order to see whether national and international criminal judges reason more or less in the same way. This is an aspect that might be developed, if a new edition is to come.

That said, there is much to be welcomed in this book. It is high time that more attention was devoted by not only by specialists, but also by students of legal globalizations to the ways in which international criminal proceedings are structured and managed.