

CHANGING HEARTS AND MINDS: THE DOMESTIC INFLUENCE OF INTERNATIONAL TRIBUNALS

*Belinda Cooper**

I have been observing events in Kosovo as someone interested not only in international tribunals, but also in German history, and especially in the way in which Germany has dealt with the legacies of World War II and the Holocaust. A significant outcome of the Kosovo war has been the spotlight suddenly trained on the International Criminal Tribunal for the former Yugoslavia [ICTY], which became virtually a household word following the indictment of Slobodan Milosevic. This event underscored the increasing tendency to look to an international court to provide justice in the aftermath of brutal conflicts. Looked at in light of the German experience, however the only example we have to date of the long-term effects of post-conflict international prosecution on a society the issue becomes more complicated. The question that particularly interests me involves the extent to which an international court can exercise an influence within the country whose case it is considering be it Germany, former Yugoslavia, Rwanda or any other. I would like to highlight what I believe are some of the limitations on the domestic impact of an international court, using Germany's experience as a basis, and why our expectations should therefore perhaps be lowered or made more realistic with regard to such tribunals. I will also suggest ways in which the modern international criminal tribunals are behaving differently from the Nuremberg tribunal, as well as ways in which they should behave in order to increase their impact. Finally, I will briefly mention what I think international criminal courts can accomplish why they remain important regardless of their domestic effect.

Perhaps because the criminal tribunals for the former Yugoslavia and Rwanda were in part responses to the failure of the world community to prevent violence in those countries, and also perhaps because human rights activists had been working so long and hard to make them a reality, the tribunals have become something of a repository for the hopes disappointed by the international political system. In speaking and writing about the tribunals, commentators have suggested they can prevent collective resentments by individualizing guilt. By revealing irrefutable facts and truths, they can prevent the development of new myths about conflicts and thus, contribute to breaking the cycle of

* Senior Fellow, World Policy Institute, New School University; J. D., Yale Law School, 1987.

violence. Additionally, they can contribute to reconciliation by ensuring justice to victims, and ultimately can help establish peace. This view of their functions does not appear to have abated with the Kosovo war. If anything, even more hopes attach to the tribunal now that its credibility seems strengthened and it commands greater respect and more resources. A further factor in this development may be the chastening realization that even when the international community does at last intervene, it cannot resolve all problems which again turns attention toward the international tribunal as a source of hope.

But I believe we ask too much of the international tribunals if we expect them to have an impact of this magnitude within the country for which they are created. While it is true that today's courts are different from the Nuremberg tribunal, some of the fundamental issues remain the same, as do the limitations on the court. This is not to suggest that tribunals serve no purpose, but that their purpose is not domestic. They do not exist to cure internal problems of transition or to rehabilitate a country, though every case is different and they may, in fortunate cases, play some such role.¹ Attempting to ascribe broad curative powers to international courts misunderstands their function and carries with it the danger that, should they fail to accomplish the lofty purposes imagined for them, they may become targets of frustration generated by renewed disappointment. Additionally, requiring too much of these judicial organs risks abdicating political responsibility.

This is not the place for a lengthy discussion of the Nuremberg tribunals, about which so much has been written.² However, a brief listing of some of its flaws is merited, in order to better understand some of the reasons it was not accepted in Germany, and to allow discussion of what the present-day international tribunals have done and can do to avoid similar pitfalls. Nuremberg was looked upon as victors' justice by many because of the composition of the bench, made up of Allied judges alone. It was considered hypocritical due to the presence of the Soviet Union among the judges, despite its own documented war crimes and crimes against humanity. Crimes like the Katyn massacre, known to have been perpetrated by the Soviets, were purposely ignored by the tribunal. Germans, in particular, also objected to what they saw as the *ex post facto* nature of the laws the tribunal applied.

In part because of these problems, the Tribunal's effect within Germany was limited. It did not, as has sometimes been asserted in its favor, force most Germans to confront the crimes committed in their name, if not by them. While

1. The attempted prosecution of Augusto Pinochet of Chile by a Spanish court has had a significant effect within Chile, triggering national soul-searching and prosecutions within the country. Although it does not involve an international tribunal, this is an example of the positive effect international prosecutions might also have, given the right context.

2. See, e.g., Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992); Robert E. Conot, *JUSTICE AT NUREMBERG* (1983), . . . , among many other accounts.

the Tribunal did serve to establish irrefutable truths as a legacy for later generations, these truths were frequently rejected by average Germans after the war; or if accepted, they were not considered to possess personal significance. There was little internalization of remorse. The first trial at Nuremberg, the International Military Tribunal, did bring a measure of justice, at least in regard to a small number of top perpetrators. However, the political choice of the defendants somewhat tarnished this record, as did some of the sentencing decisions. Furthermore, most of the defendants convicted at the twelve American follow-up trials were released by the mid-1950s, largely for political reasons, as the United States courted West Germany as a Cold War ally. Germany's leaders in fact insisted on their release as a condition for alliance.³ Scholars have shown that German courts expressly refused to acknowledge the validity of any of the Nuremberg convictions.⁴

While new concepts of law began to enter German jurisprudence following the war, in part as a result of Nuremberg, it would take time for them to make significant inroads. In the meantime, though trials were held in Germany in the immediate post-war period, they did not often result in true justice. The judicial system was staffed mainly by holdovers from the old regime, essentially judging themselves; and their unwillingness to condemn their own backgrounds, along with their concept of positive law, led to much judicial reinterpretation and manipulation of both laws and facts to prevent criminals from suffering severe penalties.⁵ The attitude was summed up in the words of one post-war German politician who, defending his actions as a judge under the Nazis, argued, "What was legal then cannot be illegal now."

Thus the impact of Nuremberg on the post-war German legal system, though not non-existent, was limited and this despite Germany's unique situation, subject to occupation by the Allies and their attempts to reeducate in the early post-war years. It was not until much later, in the course of Germany's development over the years, that German law would embrace the Nuremberg approach to law and justice as, for example, in its methods of dealing legally with members of the East German leadership and border guards responsible for the killings at the East German border.⁶

3. See Peter Maguire, *Nuremberg: A Cold War Conflict of Interest*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 67-86 (Belinda Cooper, ed., 1999).

4. See Jörg Friedrich, *Nuremberg and the Germans*, in *WAR CRIMES: THE LEGACY OF NUREMBERG*, 102-105 (Belinda Cooper, ed., 1999).

5. For detailed discussions of a number of such cases, see, e.g., JÖRG FRIEDRICH, *DIE KALTE AMNESTIE: NS-TÄTER IN DER BUNDESREPUBLIK* (1994).

6. In a number of cases, border guards and higher officials of the East German government have been convicted of human rights violations despite the fact that their actions did not technically violate East German law at the time; the courts have used arguments that incorporate international humanitarian law.

In addition to these legal obstacles, Germany in the 1950s and 1960s also faced social obstacles to a full reckoning with the Nazi past. Postwar Allied attempts at denazification essentially came to an end with the onset of the Cold War, and many former Nazis retained their positions in government and at all levels of society. There was thus little incentive for them to confront their complicity with the Nazi regime; the legal and medical professions, for example, took years to begin this process. Though Germany has paid millions of dollars in reparations to many victims, there was (and in fact continues to be) a great deal of resistance to these payments. They were originally instituted at the insistence of the Western allies, whose ranks Germany hoped to join.⁷

The Tribunal did not reconcile Germans with their victims or their victims with them, though Germany differed from some of the more modern conflicts for which reconciliation is often discussed: most of the victims were either dead or had left the country. (In this way, it perhaps most closely resembled "ethnically cleansed" regions such as parts of the former Yugoslavia). The few Jews who remained were physically protected, but because of the general failure of postwar German society to acknowledge guilt or responsibility, there could be little in the way of psychological or social reconciliation. Other victims of Nazism (Gypsies, homosexuals, Communists) were marginalized or not acknowledged at all.

Germany today is admittedly a very different place than it was in the first Cold War decades. It has become one of the most introspective of nations, undergoing an almost obsessive process of self-examination that is exemplary and probably unique. But this change happened for reasons largely independent of the international prosecutions. Domestic legal proceedings against concentration camp guards in the late 1950s had some effect; but a society-wide process of questioning began in earnest only with the student upheavals of the late 1960s, during which young people confronted their parents' silence about the past. This process was largely a function of changes in social and political institutions, education, and most importantly, the change in generations that permitted greater distance, and thus a greater ability to deal honestly with the past.

It must also be remembered that we are speaking here only of the perpetrators (and their descendants), and the attempts they have made to come to terms with their own past. Over fifty years after the events, the feelings of the victims and their descendants, within and outside of Germany, remain complicated, and their relationship with the perpetrator society is far from resolved.⁸

7. [sources on reparations].

8. For a skeptical view of the usefulness of international tribunals for victims, see Julie Mertus, *Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors*, in WAR

This history leads me to believe that we must be more realistic about the probable effects of today's tribunals. These tribunals are simply not created, at least in the short run, for the sake of the societies whose crimes they are dealing with. They may well provide victims with a degree of vindication and empowerment; but they are unlikely to have much effect on the immediate situation the relationship between victims and victimizers, or the way the victimizers deal with their complicity. Convicting those responsible for atrocities in Kosovo will not make Yugoslans more willing to face unpleasant truths.

Of course, there are differences between the Nuremberg tribunal and the current tribunals, and the context, too, is different. The fact that the current tribunals are truly international, and not composed solely of representatives of victorious or stronger powers, gives them greater hope of legitimacy in the eyes of those at whom they are directed. Also, at least in the Yugoslavia case, the fact that indictees have come from all sides in the conflict increases the tribunal's chances of acceptance. The tribunal's willingness to at least look at NATO's activities during the Kosovo war, even though this is unlikely to lead to any indictments, also tends to make it more credible. The Rwanda tribunal, which has indicted only Hutu thus far, lags in this respect.

Less resistance exists today to the law being implemented by the tribunals. It was relatively easy for Germans, with their positivist legal tradition, to deny the legitimacy of the apparently retroactive laws under which they were being prosecuted. But developments over the past fifty years, including the large number of concrete international instruments, have made it difficult to deny the reality of international humanitarian law; most countries are party to one or another treaty or convention.

Nuremberg might have had a greater immediate impact in Germany at least to the extent of keeping former Nazis out of public office had the political situation of the day been different. However, exigencies of the Cold War required that Germany be wooed as an ally against the Soviet Union, preventing a consistent policy against members of the old regime and those complicit in its policies. But the problem of politics persists today. The political community did avoid repeating the post-Nuremberg situation by excluding indicted war criminals at Dayton, but the lack of will to arrest current indictees is a new political hurdle. Also, the indictment of Milosevic could not help leaving an impression of political manipulation, however unjustified, coming as it did at the height of the NATO campaign against him. The failure to indict Croatian leader, Franjo Tudjman, for his role in the wars in the former Yugoslavia may have left a similar impression. Lack of consistency that can be interpreted as political makes it even less likely that a tribunal will have an impact in the

country upon which its investigations are focused. Here tribunals could utilize public relations and educational tools to increase the chance of influencing, or at least being heard by, the populations of these countries.

There is an additional point, though, that is more difficult to remedy and which should be mentioned in connection with both Nuremberg and the current tribunals. This is the issue of individualizing guilt, which is the main point of a criminal tribunal concerned with accountability and an end to impunity. A tribunal fixes guilt on individuals, particularly those at the top; but crimes such as those committed in Germany, Rwanda, and to some extent the former Yugoslavia are often mass crimes, abetted and/or condoned by a majority in the country. Pinning guilt on individual leaders may have two effects. It may allow transference of guilt by those who were complicit: it wasn't me, they can say, it was those at the top, and now that they've been dealt with, I have no need to worry about the past or consider its connection to me. Or, it can lead to denial and to identification with those on trial, a sense of wrongful persecution. Germans responded to Nuremberg and its successor trials in both these ways. Obviously, neither response is constructive to the kind of domestic processes truth-finding, ensuring justice, or beginning reconciliation that are generally considered desirable after a period of conflict. Mass crimes thus cannot be dealt with exclusively through individualized legal proceedings. By concentrating on individual top perpetrators, such proceedings can even be counterproductive to a goal within the country of confronting and dealing with the past, by giving the majority a way to keep from facing its own complicity. Here, once again, tribunals cannot be looked upon as a major part of the domestic healing process.

None of this makes international tribunals any less important. Tribunals sanction the behavior of leaders, establish their accountability for their actions, and make it clear that internationally recognized crimes cannot be committed with impunity. Assuming that enforcement can be ensured, it is to be hoped they will act as a deterrent against future crimes. And they serve to develop a system of internationally agreed upon values and legal norms, with all the social, psychological, and political impact these can have. All of these are highly desirable goals that need not be developed at length here. My point is that we should not imagine a court to be more than a court. It may, but will not necessarily, contribute to healing damaged societies. But it cannot provide national psychotherapy and it may not even be widely accepted. A country's "rehabilitation," in the sense of internalized comprehension of and remorse for wrongs committed, is less likely to come about as a result of the external pressure of court decisions than to develop gradually from within. As in Germany, I believe, outcomes within a country that will permit it to move forward true confrontation with the past, admission of complicity, and some form of reconciliation, whatever that may mean or require demand quite

different approaches from those of a tribunal. In the wake of Kosovo, as the international tribunal takes a greater hand in post-conflict developments, we should simply remain aware that at least as history has so far shown a tribunal can only do so much, and should only be expected to do so much.