THINK AGAIN

By Helena Cobban

INTERNATIONAL COURTS

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"International Courts Help Achieve Peace"

No. The 1993 and 1994 U.N. Security Council resolutions that established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and its sister court for Rwanda (ICTR) both said the courts would contribute to the process of national reconciliation and to "the restoration and maintenance of peace." Sadly, that has not happened.

In The Hague, the ICTY's most famous indictee, Slobodan Milosevic, has successfully used drawn-out courtroom appearances to perpetuate the feelings of hatred still harbored by many Serbs. Few Serbs, Croats, or Bosnians think that the ICTY has helped achieve reconciliation. The fragile peace in that region is the product of international troops and diplomacy, not judges and lawyers. In Rwanda, fewer than 36 percent of people polled in a 2002 survey said that the ICTR has promoted reconciliation in their country. And the International Criminal Court's (ICC) announcement that it would investigate atrocities in Sudan has not ended violence there.

What's worse, modern tribunals have been prolonged and expensive. As of November 2005, the ICTR had handed down judgments for only 25 individuals. More than $1 billion has been spent on the tribunal so far, or about $40 million per judgment. By contrast, South Africa's truth commission processed 7,116 amnesty applications for less than $4,300 per case. In postconflict Mozambique, programs to demobilize and reintegrate thousands of former combatants cost about $1,000 per case. Rwandan community leaders aren't shy about saying that the more than $1 billion the United Nations has so far poured into the ICTR could have been better spent.

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Most wanted: Four years and $1 billion later, Slobodan Milosevic is still on trial.

PAUL VREEKER/AFP/GETTY IMAGES

"Today's International Courts Are the Legacy of Nuremberg"

Not really. Supporters of today's international criminal tribunals say that their work builds on the post-World War II tribunals in Nuremberg and, to a lesser degree, Tokyo. As a matter of legal doctrine, that is true. The category of "crimes against humanity," for example, was developed at Nuremberg and is now a central element in many prosecutions. But there is a critical difference between now and then.

The courts in Nuremberg and Tokyo were part of a broader political project that aimed to rehabilitate the occupied countries socially and economically, not simply to try guilt or innocence or hand out harsh punishments. The Allies tried punitive reparations against Germany a quarter-century earlier, with disastrous results. The U.S.-dominated courts established after World War II were streamlined and efficient—perhaps to a fault. At Nuremberg, defendants were given no meaningful right of appeal, and the prosecution was able to introduce documentary evidence into the record that defendants could not challenge. But the fact that many due-process concerns were swept aside meant the court completed its work in less than 11 months; 10 of the 22 defendants were hanged on Oct. 16, 1946. These were military courts that operated with military efficiency, and the Allies could then focus fully on rebuilding the broken nations.

By contrast, the international courts for the former Yugoslavia, Rwanda, and the new ICC in The Hague operate under civilian law and provide generous protections to defendants. The result is a ballooning of the courts' timelines and costs. It took the ICTR 10 years to complete the same number of trials that Nuremberg conducted in less than a year. The trial of Slobodan Milosevic is now in its fourth year. Nor have these societies been able to make a clean break with their past. The protracted and always polarizing exercises that are today's war crimes trials cannot serve the decisive political and social function that Nuremberg did.

"War Crimes Tribunals and Truth Commissions Advance Human Rights"

Not always. War crimes tribunals and truth commissions are well-meaning responses to ghastly atrocities. But the assumption that they advance human rights rests on a deep failure to recognize that nearly all of today's atrocities are committed in the anarchic, violent atmosphere of war zones. Any strategy for limiting atrocities must focus on providing a stable, sustainable end to armed conflicts.

In some instances, threats of prosecution can actually impede peacemaking, prolong conflict, and multiply the atrocities associated with them. Consider Uganda. In July 2004, the ICC's chief prosecutor—responding to a request from the Ugandan government—launched a judicial investigation into the situation in the north of the country, where the Lord's Resistance Army (LRA) has sustained a barbaric insurgency for some 18 years. In April 2005, two dozen community leaders from northern Uganda went to The Hague to urge the prosecutor to hold off. One delegation member was David Onen Acana II, the chief of the dominant tribe in the war zone. He and his colleagues argued that their communities' traditional approaches would be far more effective than international prosecutions in ending the violence. In October, the Ugandan government, which had escalated its campaign against the LRA, announced that the ICC had issued arrest warrants against five top LRA leaders. LRA fighters responded by stepping up attacks against civilians and aid workers—just as Acana had warned.

Many successful, rights-respecting peace accords—including those in Spain and Mozambique—were built on tacit agreements not to look back. Is modern Spain weaker and less law-abiding because it did not engage in wrenching and divisive prosecutions of those who committed abuses during its decades of civil war and repression? The logic of prosecution-obsessed activists would say yes; common sense says no.

"Victims of War Crimes Demand Prosecutions"

Only sometimes. When people in rich, secure countries advocate the prosecution of war criminals, they often claim to be acting in the interests of victims. But the actual preferences articulated by survivors of atrocities are varied, and often differ from what many activists suppose.

Because most atrocities these days are committed during violent intergroup conflict, most survivors seek first and foremost an end to the fighting and to regain basic economic and social stability. That is no small matter. Nations have found various ways to deal with perpetrators of violent acts, and throughout history many of these methods have given priority to the reintegration of wrongdoers into normal, nonviolent existence. In Mozambique, the 1992 peace accord that ended 15 years of civil war mandated a blanket amnesty for all those who committed war crimes. It also provided for the demobilization of fighters from both sides and their reintegration into civilian life. In 2003, I talked with a high-level perpetrator who, after the war, participated prominently in the political reintegration of his country. When I spoke with him, he was about to finish his law degree. Nearly all the Mozambicans I talked to between 2001 and 2003 expressed great satisfaction with the 1992 amnesty. Most said they could not imagine prosecuting people who had committed wartime atrocities. "If we did, the whole nation would be on trial," one man said. Satisfaction with amnesties can be found elsewhere. In South Africa, researchers found in 2001 that more than 75 percent of black citizens were

satisfied with the work of the truth commission—which offered complete amnesties to former perpetrators who met its conditions.

Is the cumbersome machinery of an expensive international court operating in The Hague what the people of war zones need most? Of course, there are some victims who demand prosecutions, and activists from rich countries often echo their demands to anyone who will listen. But those who want to help the survivors of atrocities should first ask broad sections of society in an open-ended way how they define their own needs and how they define justice. The international community should be guided by the answers to those questions rather than by the simple assumption that prosecutions are essential.

"Giving Amnesty to War Criminals Encourages Impunity"

Where's the proof? Post-genocide Rwanda has been dedicated in its pursuit of war crimes prosecutions. But it has borne that country little fruit. At one point when Rwanda was still trying to prosecute all those accused of participating in the 1994 genocide, more than 130,000 of its 8 million citizens were detained. Yet President Paul Kagame has also kept all major elements of society, including the judiciary, the government, and the media completely under his thumb. That undermines the rule of law in Rwanda, no matter how dedicated the regime is to seeking justice. In 1994, Freedom House gave Rwanda a "Not Free" rating for its political rights and civil liberties—basic components of the rule of law anywhere. In 2004, Rwanda received the same rating.

By contrast, when Mozambique and South Africa ended their internal conflicts in the early 1990s, they enacted widescale amnesties—and in both countries, the rule of law quickly improved. In each of them, political leaders opted to move past the violence and injustices of the past and to focus on the tasks of social and political reconstruction. As part of that reconstruction, each country became a multiparty democracy in which the accountability of leaders and other key norms of the rule of law could finally take root. The restoration of public security, meanwhile, allowed the provision of basic services. And though their criminal-justice systems remained woefully underfunded, both were finally able to start providing citizens basic protections, such as an assurance of "habeas corpus." South Africa's Freedom House score made impressive improvements between 1994 and 2004. In poorer Mozambique, the improvement was smaller but still marked.

"War Crimes Prosecutions Deter Future Atrocities"

The evidence is weak. Proving deterrence is, admittedly, a tough task. Not many leaders document their intent to commit atrocities, let alone the fact that they decided against them for fear of prosecution. But there is important evidence against the proposition that war crimes prosecutions deter atrocities. Consider Milosevic. He was warned explicitly on several occasions about the threat of prosecution. He had witnessed the ICTY indict the leader and top general of the Bosnian Serbs, and he'd seen NATO troops arrest war criminals in Bosnia. Still, he decided to proceed with abuses in the restive province of Kosovo and, ultimately, the ethnic cleansing of most of its Kosovar Albanian inhabitants in 1998. In the face of such examples, the blithe claims of activists that war crimes prosecutions deter atrocities should be treated skeptically, at best.

"The World Needs the International Criminal Court"

No. We can predict that the ICC will be no more effective than the international courts for the former Yugoslavia and Rwanda in improving the lives of war-zone residents who are its primary stakeholders. That is, not very effective at all.

In a criminal trial, two sets of facts—those of the prosecution and those of the defense—do public battle with each other. Those competing facts are probed and examined in detail and a winner and loser are ultimately decided. When such a trial concerns events that took place in recent memory, in a society that's still highly divided and deeply traumatized, the trial itself too often exacerbates existing political rifts.

That was the case with the ICTY and ICTR, and it risks being true of the ICC, too. The ICC shares with the two ad hoc courts the attribute that—unlike the Nuremberg and Tokyo tribunals—it exercises jurisdiction without being part of any broader administrative body that is responsible under international law for the welfare of the people within its domain. The prosecutor and judges of the ICTY and ICTR answer to the U.N. Security Council, and their counterparts at the ICC answer to the assembly of states that ratified the 1998 Rome Treaty. That gives these courts an indirect line of accountability, if any, to the communities they aim to serve.

Meanwhile, these war-shattered communities continue to live under the day-to-day control of their national governments. In the case of the former Yugoslavia, this fact has made it hard (and, in the case of wanted war criminals Radovan Karadzic and Ratko Mladic, impossible) for the ICTY to arrest some of its highest-ranking indictees. In the case of the ICTR, the Rwandan government's control over most of the witnesses and physical evidence involved in the court's cases has given the government a huge bargaining chip. It has used this power to force the ICTR to halt its investigations into well-founded accusations that Kagame's supporters also committed atrocities. In the ICC's work thus far on Uganda, the Ugandan government has similarly been able to deter the prosecutor from pursuing cases against pro-government forces.

The idealists who supported the ICC's creation hoped that it would help check the power of governments and improve the well-being of much-abused people. There is little to suggest it will do either. FP

Want to Know More?

Martha Minow discusses different approaches to dealing with the perpetrators of atrocities in ***Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*** (Boston: Beacon Press, 1998). In ***Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*** (Princeton: Princeton University Press, 2000), Gary Jonathan Bass provides a history of war crimes tribunals. A look at past truth commissions can be found in Priscilla B. Hayner's ***Unspeakable Truths: Facing the Challenge of Truth Commissions*** (New York: Routledge, 2002).

For an examination of the trials in the former Yugoslavia, read Michael P. Scharf's ***Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*** (Durham: Carolina Academic Press, 1997). The case of Rwanda is discussed in Dina Temple-Raston's ***Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption*** (New York: Free Press, 2005).

Assessments of the proceedings at Nuremberg include Robert E. Conot's ***Justice at Nuremberg*** (New York: Harper & Row, 1983) and Joseph E. Persico's ***Nuremberg: Infamy on Trial*** (New York: Viking, 1994).

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