

THE COMPLEX ARCHITECTURE OF INTERNATIONAL JUSTICE

*Naomi Roht-Arriaza**

Good morning. The International Military Tribunal at Nuremberg established some bedrock principles of international law: individual accountability for crimes against peace, crimes against humanity, including what we now call genocide, and war crimes. Nuremberg also established that there was no immunity from individual prosecution based on the official position of the defendant, whether it be as head of state or some other. It also established the idea that international crimes are crimes whether or not they're criminalized in domestic law. It established the idea that basic due process needs to be respected, even in dealing with the worst butchers. It established definitions of crimes against humanity that still largely embody the current definition. It established the potential responsibility of private actors, like corporations, that aid and abet genocide or crimes against humanity and much more. I'm not going to talk about any of that.

What I want to talk about are two aspects of the Nuremberg legacy. First, something that William Aceves already mentioned, the trials presupposed that different defendants would be dealt with by different courts and different levels of jurisdiction, and that a single jurisdiction was not adequate to deal with international crimes. It was neither necessary nor possible, and so we had the International Military Tribunal (IMT), which tried only 22 defendants, considered to be "the leaders and organizers," people whose crimes were not limited to any one country. As Justice Jackson put it, "these defendants were men of a situation and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders." This is an idea that has been carried forward from Nuremberg and one that I want to talk about both the advantages and the disadvantages of.

* Naomi Roht-Arriaza is Professor of Law at the University of California, Hastings College of the Law. She is the author of *Impunity and Human Rights in International Law and Practice* (1995), *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005) and *Transitional Justice in the Twenty-First Century: Beyond Truth vs. Justice* (2006). She is a member of the Legal Support Network of Amnesty.

We also, as William mentioned, had trials carried out under Allied Control Council 10 of the “lesser” war criminals. These were carried out in national courts under international law. There were some 1,500 defendants in German courts under Allied control, mostly the U.S. and the U.K. There were also purely national trials of Nazi war criminals in a number of occupied countries. Those trials continued for several decades. You’ll recall the Barbie trial in France, Touvier, and a number of other trials that were also carried out in a number of other European states.

So from Nuremberg, we get the idea that different types and levels of courts could act in complementary ways to enforce international law, and that leaders and organizers of a policy of war crimes and crimes against humanity might be dealt with under one type of mechanism while the lower-downs were dealt with differently. That idea has come forward to form the cornerstone of an emerging architecture of international justice in which international, national, hybrid and transnational prosecutions hopefully complement each other.

Now, in the early 1990s and through the end of the 1990s, when the International Criminal Court first came on the radar screen as an idea and then was developed into a reality, there was a little bit of a tendency to think that, “well now we’ve got a court that can deal with all these problems.” And since the Rome Statute has come into force, if not before then, we’ve seen how hard it is to do that with limited resources and limited state cooperation. I’m not going to talk about what the Court has or has not done, I’m going to leave that to my colleague, but it is clear that the Court cannot close the impunity gap by itself. It needs the complement both of national courts and of an increasing number of variants, both at the national level and at the international level, to try to look at all the different levels and all the different places where justice should be carried out.

So we now have internationalized courts, as in Kosovo or East Timor. We have hybrid courts, such as the special court for Sierra Leone, which is not a product of the Security Council but a product of the treaty between the government of Sierra Leone and the U.N. We have the court in Cambodia, which is slated to come into being under similar arrangements. We have transnational prosecutions under universal jurisdiction or passive personality jurisdiction and we also have an increasing number of efforts and variations on the national level aimed at the same thing. And so I would refer you not only to the best known of these, the truth commission idea, but also truth commissions that feed their work into the office of the prosecutor, which was one of the things that was done for instance in Peru, or special prosecutor’s offices, as in Mexico or Ethiopia. Or localized efforts at justice, such as those carried out in Rwanda for the Gacaca trials, or in East Timor through the CRPs created as part of the truth commission’s work.

So we see that as the concept of international justice has taken hold, what you start getting, as in the immortal words of Mao, “a thousand flowers are blooming here.” There are lots and lots of different variations that are coming to fruition at both the national level and the international level. And an increasing recognition that these things have got to work together, that one is not a substitute for the other; that just because you have one mechanism going on, you can’t just sort of say, “oh we’ve got one international court, now everybody can go home.” There is an increasing need to figure out how these things are all going to work together and not step on each other’s toes, but actually complement each other. The *ad hoc* tribunals (the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda), under the pressure to have to close down in the next couple of years, are increasingly finding that they must spend their time figuring out how they work with national courts, for instance. How are they going to transfer cases that they don’t have time or resources or ability to try to national courts in a way that strengthens those national court systems and does not overwhelm them? Frankly, this is long overdue. So there are some upsides to having to close them down.

Now each of these different areas has its own limitations and its own strengths. Nuremberg, for example, didn’t try Hitler, but it did try Admiral Karl Doenitz, who had assumed the head of state role after Hitler’s suicide. Now in terms of trying heads of state, where we seem to be is that, for current heads of state, only the International Criminal Court or the national courts of their own state seem to be able to investigate and try sitting heads of state or foreign ministers. At this point, and we may disagree with this as advocates, but there does seem to be at this point a fairly broad consensus that for current as opposed to former heads of state, the proper forum is an international court. This is the position that was taken for instance by the International Court of Justice in the *Arrest Warrant* case. Similarly, the ICC prosecutor has said that while he doesn’t rule out the possibility of looking at mid-level officials, his idea is that he’s supposed to focus on leaders and organizers; he’s supposed to focus on the top. The *ad hoc* tribunals have made similar declarations, that given that they have to roll it up, their completion strategy involves going after the top, going after the leaders and organizers. Sierra Leone’s Special Court, similarly, has a focus on “those most responsible.” The Cambodian International Court is limited to leaders of the Khmer Rouge.

So what we’re seeing is international and internationalized courts are focusing on leaders and organizers. Now this has a lot of advantages. As a question of morality, we probably think that the people that set up these systems and got everybody else ensnared in them are probably more morally culpable and probably also should bare the brunt of legal culpability. Also, if you focus on the leaders and organizers, that means you

don't have to prosecute everyone and you avoid some of the problems of multiple prosecutions. You can be more flexible in terms of dealing with those who are lower ranked. But let me point out that there are also some disadvantages to this. Most importantly from my perspective, from the perspective of the victims, it's very hard for them because you want *your* perpetrator to be brought to justice. It's nice that some guy up there who seems to have been pulling the strings is being brought to justice, but there's something visceral about wanting to see the person who did it in your village, in your area, also brought to justice. And that's no longer necessarily going to happen under this international "trying the most responsible" kind of theory. It's harder to see justice at the local level if you have the court in the capital trying just the top. There's also a problem of what happens to the mid-level guys when you cut off the head; they move up [and] they then become the top-level guys. And some of these folks may have rather unsavory records of their own. So, that for me says that it's more, even more important, if we're going to have a strategy that says "focus on the top," to have a complementary strategy that says, "alright, for everybody else there are other ways to go," whether this be through national courts or whether it be through transnational prosecutions.

Now let me talk very briefly about transnational prosecutions. Nuremberg also raised the issue of what is the nexus that allows an international court to try things that happened outside the country? And, in Nuremberg, they said the nexus is given by the war; it was the fact that this was in connection with the war that you could try crimes against humanity. Well, subsequent to Nuremberg, after considerable debate, we have understood that nexus requirement as a jurisdictional requirement, not a substantive one. In other words, it has to do with a specific court but it doesn't have to do with what a crime against humanity is. A crime against humanity by definition is a crime against all of us; we are humanity. If that's the case, then there doesn't need to be any additional nexus, whether it be through the territory of the state, whether it be through the nationality of the perpetrators or the nationality of the victims. It's enough that the crimes themselves are such that they are crimes not just against the law of one state, but against the law of all states and international law.

On the other hand, there is an argument that national sovereignty requires some connection to a state in order to prosecute because otherwise one state could just waltz into another state, presumably a stronger state could waltz into a weaker state, and simply decide that they wanted to impose their own law. There has been a continuing contention between these two notions, this notion of territorial limits on criminal jurisdiction because of sovereign equality and a notion that well, yes, but certain crimes are so heinous that everyone has an interest and therefore a right to see them prosecuted. And we have, since at least the *Pinochet* case, seesawed back

and forth between these two notions, and you have at this point internationally, two clear trends: one which requires a clear nexus with the state and/or the unavailability of an alternative forum to initiate prosecution, and one grounded on the idea that the only required nexus is the nature of the obligation, the nature of the crime. In other words, these are the kind of crimes that are both really hard to prosecute in any one country because it tends to be powerful people that carry them out and also they are so heinous that everyone has an interest in their prosecution.

Two examples, and then I'll stop. On the restrictive side, the amendments to the Belgian Universal Jurisdiction Law in 2003, which now require a nexus either in the form of the perpetrator being in Belgium or the victims having Belgian nationality or long-time Belgian residency. The Swiss Military Code was similarly amended. Germany on the face of it has a very broad law, but it's restricted in its criminal procedure code. However, on the other side, there is also a counter trend and this is exemplified, I think, by Spain. Last year, the Spanish constitutional court decided that no nexus of any kind was needed to bring transnational prosecutions for certain particularly heinous crimes, including genocide. They said that because of the nature of the crimes, that's good enough, so it didn't matter what the nationality of either of the parties involved was, and it didn't matter whether Spain had any kind of national interest involved. It didn't matter if the perpetrator was to be found in Spain at the time that an investigation was initiated, although by the time you got to trial, you did have to have the defendant in Spain, because there's no trial in absentia. But basically that it was the nature of the crime that controlled. So we have these two trends. There's still no resolution; there are things going on in both directions. This is an on-going dialogue among national courts and one that it would be important, and I know Amnesty has weighed in on this, but for Amnesty to continue weighing in on.

In conclusion, the roots of this whole enormously and increasingly complex architecture are to be found in Nuremberg, a lot of the details are still being worked out. The courts are doing so and are stepping up to the challenge on a lot of different levels within this ever-more complex architecture of international justice.

Thank you.