Victors' Justice, Double Standards, and the Civil Society Tribunals of the Late Cold War

By:

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February 19, 2025

International criminal justice is, by common consent, to at least some degree, victors' justice. Some have argued, however, that victors' justice might be giving way, over time, to a more universal justice also capable of holding victors accountable. This hopeful notion is often held up by others as a specifically liberal delusion. In my current project, however, I hope to use the examples of leftist "civil society tribunals" from the late Cold War to show that this idea - delusional or not - was once actually more popular amongst radical critics of the liberal international legal mainstream. Liberals, in this period, could thus be the "realists." I conclude that geo-political realities do not only produce victors' justice, they explain ideological responses towards it. They have changed how double standards are perceived.

What Antonio Cassese termed the "Nuremberg syndrome" is probably impossible to eradicate in international criminal law. In the (likely permanent)

absence of a world state, that is, international criminal tribunals will always depend on national governments to investigate and arrest suspects. Such cooperation is, obviously, most forthcoming when it comes to enemies of those states, particularly those captured and defeated in conflict. Such inconsistent enforcement sits awkwardly alongside the international justice regime's claims to universality. In short, victor's justice produces at least the perception of double standards.

Most disagreements centre around how to respond to this common diagnosis. On one pessimistic view victor's justice is so integral to international criminal law, and its effects so powerfully delegitimizing, that the regime would be better abandoned. On another, more optimistic view the fact that victors use international justice to pursue their interests at least allows critics to hold them to those commitments after subsequent conflicts. Victors' justice might therefore, gradually, and over time, universalize, even if it remains an ineradicable feature of international life.

In recent times, the first pessimistic view has been most associated with radical scholarship. Prior to Russia's invasion of Ukraine, it was a common feature of anti-colonial and post-colonial critiques of the ICC's apparent focus on African perpetrators. For Kamari Maxine Clarke the ICC simply "preserved" existing power relations. For Mahmood Mamdani, international criminal justice simply could not exist without "a global political system that will hold everybody accountable." If you put the "cart before the horse then you end up with a Kangaroo Court." For Adam Branch, finally, it would have been better to have no International Criminal Court than one so reliant on (African) states for cooperation that it only pursues enemy insurgents and deposed opponents.

The second, optimistic view, meanwhile, has been associated with some of the ICC's perhaps more sympathetic critics. Patryk Labuda, for example, has argued that the fact inconsistent enforcement "will never be fully overcome" cannot justify waiting endlessly for a World State able to enforce equal justice. As Darryl Robinson concluded, we can only choose "among… flawed options. The deep tensions at the heart of the [international justice] project are impossible and beautiful and frustrating and inspiring. But, as a final paradox, the impossibility of the project need not undermine its necessity." For a radical critic like Richard Falk, however, this paradox is simply a "typical liberal

quandary." It is "naïve hope" to imagine that "things will be different in the future," or that "the next group of victors will themselves accept the same legal standards of accountability are imposed upon the losers." "Liberal legalism's" belief that identifying double standards can help universalize and depoliticise justice over the long term may even serve to conceal the broader ideological functions of international criminal law (see also Katharine Millar here).

I argue, however, that we should not explain responses to victors' justice in straightforwardly ideological terms. The terms of this debate were, in fact, almost wholly reversed during the late Cold War. In this period, it was a small, dissident group of leftist and anti-colonial international lawyers who most consistently argued that the apparent double standards resulting from uneven patterns of state cooperation were a regrettable but necessary foundation for better justice in the future. And it was the liberal disciplinary mainstream who responded by claiming these lawyers were politically biased. Like some of the ICC's most radical critics today, they argued that until all or most states endorsed the international justice project it would be better not to pursue it. Perceptions of double standards were so endemic that no legal regime could retain credibility over the long term.

I make this argument on the basis of ongoing archival research into political controversies surrounding so-called civil society tribunals. The 1966 International War Crimes Tribunal - or "Russell Tribunal" - that prosecuted the war in Vietnam is fairly well-known. There is also a fairly extensive specialist literature that analyses its various successors and recent experiments with independent "peoples' tribunals." My focus, however, is on a series of (planned) inquiries from the late 1970s and early 1980s that have yet to be seriously investigated. In contrast to the Russell and "peoples" tribunals, these commissions depended to some degree on states and (former) revolutionary forces for practical cooperation and - whilst being far from mere Soviet fronts - were notably free of vocal anti-communists.

My focus is on three prominent examples. The International Commission of Inquiry Into the Crimes of the Racist and Apartheid Regime in Southern Africa (1978-1981) was largely an initiative of the Soviet-affiliated Afro-Asian Peoples' Solidarity Organization, focusing on South African "destabilisation" of neighbouring the Front-Line States. The International Commission to Enquire

into Reported Violations of International Law By Israel During Its Invasion of the Lebanon (1982-3) was primarily an initiative of John Platts-Mills (who had also investigated the Crimes of the Racist and Apartheid Regime). Its final report was known as the MacBride Report: named after Commission member Seán MacBride, the 1974 Nobel Peace Prize winner who had presided over the second session of the Southern African commission. Finally, an overlapping group of lawyers - including MacBride - made a failed attempt to try American crimes against Iran during the hostage crisis of (1979-1980). For some, the main goal was ideological: to counter claims that the Iranian Revolution had produced an outlaw regime. For others, it was to provide an international legal basis for the extradition of the Shah, who could then be exchanged for the hostages.

The leftist and anti-colonial network that staffed these tribunals was widely accused of bias against, respectively, apartheid South Africa, the United States, and Israel. This critique was not only advanced by those sympathetic to those states. A disciplinary mainstream alleged that they were so dependent on Angolan, Iranian, and Palestinian cooperation that resulting double standards could only discredit international criminal justice. Jacques Robert, for example, worried they were simply "encourag[ing] all pirates needing publicity to launch into similar ventures with the aim of having a public inquiry in the reasons for their despair." In every case lawyers in this radical network responded with claims like Robinson's: that these tensions at the heart of their project were frustrating, but also productive and necessary. The Nuremberg and Tokyo Tribunals, after all, had also constituted one-sided justice. The United Nations had resolved in 1950 to make these international criminal justice institutions permanent, but the superpowers had abandoned these commitments. The international rule of law thus "became eroded and the public conscience blunted." It fell to them - in Falk's words - to "keep Nuremberg alive."

These lawyers are almost completely absent from the most prominent international relations histories of international criminal justice. In Kathryn Sikkink's Justice Cascade, for example, the Nuremberg legacy (itself a liberal creation) was only unfrozen at the domestic level in the 1970s, with the "human rights revolution" in Latin America and Southeastern Europe. Yet Cold War civil society tribunals did matter. For one thing, they absorbed left-wing political energy. The call for the now-unknown Second Russel Tribunal for

Brazilian repression, for example, was signed by Pablo Neruda, Jean-Paul Sartre, Joseph Needham, Michael Foot, Francois Mitterrand, and Noam Chomsky. Its jury included Simone de Beauvoir. Very extensive diplomatic efforts were also made to discredit these tribunals. That critics and enemies of the United States were laying claim to the Nuremberg legacy was embarrassing. It challenged what the historian Francine Hirsch calls "the Nuremberg myth." According to this myth, which emerged around 1960, the International Military Tribunal was an Anglo-American creation designed from the outset to grant Nazis the due process they had suppressed. Soviet campaigning for the Tribunal was forgotten. By the end of the Cold War conservative and liberal groups had also begun to see appeals to Nuremberg as a powerful tactic, and the international Sakharov Committee began holding hearings on human rights in Cuba and the Soviet invasion of Afghanistan.

I suspect that the significance of these tribunals has been downplayed because of assumptions in the literature that 1) sincere activism must be most influential, and 2) that these lawyers cannot possibly have been sincere (given their refusal to condemn human rights violations by Soviet and revolutionary regimes). Neither point is certain. After all the Nuremberg trials would probably never have happened at all were it not for Stalin's wish to re-rerun the show trials of the 1930s.

For all their differences Sam Moyn and Sikkink both go looking for breakthrough moments when advocacy was liberated from this kind of Cold War partisanship. Yet my reading of these lawyers' private papers suggests that - for varying reasons - they really did see themselves as building international legal order. This was true even for Joë Nordmann and John Platts-Mills who had been utterly convinced Stalinists in the 1950s. They saw even patently one-sided processes as a means of continually reminding the Soviets that Nuremberg was also their legacy (a point which has become part of Russian imperialist propaganda today), and of strengthening the hand of Soviet jurists pushing for more engagement with international law. Others in this network, such as Kader Asmal and MacBride, may have seen these tribunals as means of encouraging national liberation movements to make rhetorical commitments to broad humanitarian principles that could later be used to moderate their most violent and authoritarian excesses.

In conclusion, the idea that universal justice might emerge from victors' justice is not a specifically liberal form of idealism. The same idea was deployed by some of the liberal mainstream's most outspoken critics during a period in the late 1970s and early 1980s when the Nuremberg legacy had become a useful ideological weapon for opponents of the United States and its domestic critics. Established critiques may actually therefore underestimate the importance of geo-politics for international criminal law. Great Power politics does indeed, inevitably, shape the form of uneven enforcement we know as victors' justice, and fuels broader perceptions of double standards. But it has also shaped lawyers' responses to this problem. Cold War dynamics, rather than (liberal) ideology, explained expressions of optimism about the international justice project. The international law of the Cold War still has much to teach.

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