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The Problem with International Law as a Promoter of Individual Rights and "Justice"

International legal mechanisms remain bedeviled by a number of problems. One of the more prominent of these problems involves the work of international criminal tribunals and courts.

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Over the course of this week, we have examined the definition, history and scope of human rights. Our work has also focused upon specific aspects of current human rights regimes, to include the importance of victim participation in international criminal proceedings. But while human rights continue to be enshrined in international institutions and mechanisms, the latter remain bedeviled by a number of problems. One of the more prominent of these problems involves the work of international criminal tribunals and courts, as discussed in Belinda Cooper's *The Limits of International Justice*.

As briefly discussed in last Tuesday's ISN article, the structure of the international legal system is substantially different from domestic legal systems. International law is, to a large extent, based on treaties that require ratification by states. There remains, however, no overarching global authority that is responsible for the enforcement of these treaties. Instead, states are asked to self-regulate their adherence to the treaties they sign, thereby ensuring that international law is always subject to domestic legal interpretation. Moreover, because ratification of international treaties remains optional for states, it is often the case that international law is never truly global in terms of application.

The same problem also applies to international human rights legislation. Human rights violations, as we all know, often go unpunished if domestic mechanisms are too limited or broken to bring the perpetrators to justice. Yet, proponents of international law march bravely on, as illustrated by the creation of organizations like the International Criminal Court (ICC). The most systemic cases of human rights violations – genocide, crimes against humanity and war crimes – can now be prosecuted under international law. However, despite such progress, the ICC's jurisdiction remains limited to signatories of the Rome Statute – i.e., to states that accept the ICC's jurisdiction voluntarily – and to cases referred to the court by the United Nations Security Council (UNSC).

According to Cooper, there is another problem to consider – i.e., that the creation of formal instruments to promote and protect international human rights has done little to resolve historical dilemmas associated with the dispensation of 'victor's justice'. In the aftermath of World War II, the victorious Allied powers created the Nuremberg tribunals to prosecute war crimes committed by leaders of the Nazi regime. Yet a similar mechanism was not put in place to address possible war crimes committed by the Allied powers. Consequently, events like the bombing of Dresden and the

Soviet massacre of Polish officers at Katyn were never subjected to similar legal scrutiny as the war crimes committed by Nazi leaders. As a result, Cooper notes, "neither the German population nor the West German legal system embraced the outcome of the [Nuremberg] trials."

(A sidebar is in order here. Leaving Cooper's last arguable claim aside [the rejection of legal proceedings by a defeated nation who remained in a catastrophic state of denial about the extent of their behavior in World War II until well into the 1970s is not ipso facto proof that the proceedings were illegitimate], the problem of victor's justice is much more complicated than Cooper allows. The inference, of course, is that victor's justice is blatant hypocrisy. Unfortunately, too many people who invoke it do so retroactively. They try and impose contemporary legal and moral standards unto a past that did not practice or embrace the same standards or norms. Military necessity, for example, was the rationale invoked for the Dresden attack. Now, any student of war knows that one of its least appetizing aspects is that even if you begin a war subscribing to legal and moral prescriptions, the longer a war drags on the more it will undergo a process of barbarization. What begins as a willingness to abide by strict prohibitions and practices slowly begins to unravel – i.e., the standards that define your conduct become less rigorous, more sloppy, and more "let's just get the job done." The original rationale for an act still gets invoked, but the substance of the rationale gets seriously watered down over time. That's what happened to American bombing practices during a long air war where tens of thousands of airmen plummeted to their death over the skies of Europe. High altitude precision bombardment was the doctrine of the U.S. Army Air Forces over Europe throughout the war. Military necessity was the rationale for target selection. That these two principles were weakened as the war dragged on and the casualties mounted should be no surprise to anyone. However, that this evolutionary loosening of standards ultimately constitutes a war crime, as in the possible case of Dresden, is a more ticklish issue than Cooper allows. Finally, if the Allies had been truly democratic and applied 'true justice' as opposed to 'victor's justice', would they not have given real human beings – not the ones who exist in the abstracted landscape of the law – the opportunity to trot out self-exonerating arguments designed to blame everyone, and not just themselves? And was this danger – i.e., the invoking of moral equivalency arguments – not fresh in the minds of officials at Nuremberg who remembered the German government's and people's immediately dishonest response to what had happened in World War I. Cooper may indeed be right; victor's justice may be a problem that remains embedded in international law, but just what constitutes victor's justice may remain a very tangled web indeed.)

Returning from the above aside, let's acknowledge, as we must, that the problem of international tribunals and courts not being widely accepted by sections of society has echoed throughout modern history. United Nations tribunals addressing human rights violations in the former Yugoslavia (ICTY) and Rwanda (ICTR) suffered from similar deficits as the Nuremberg trials, or so Cooper argues. She quotes, for example, the former ICTY Chief Prosecutor Carla Del Ponte's concerns that "90 per cent of all accused currently on trial or awaiting their trial are in The Hague as a direct result of EU conditionality." Well, does such conditionality represent an imposition of alien values on local norms, or are the locals merely retrograde and recalcitrant in the norms they embrace? If we look at Ratko Mladic,the former Bosnian Serb military leader has now been indicted for war crimes some 16 years after the International Criminal Tribunal for the former Yugoslavia (ICTY) first issued his arrest warrant, the answer depends on where you stand. As we know, Belgrade's decision to extradite Mladic to The Hague was by no means universally popular with the Serbian population. This in turn reflects the findings of an opinion poll conducted in 2009 showing that a majority of the Serbian population opposed Mladic's extradition and continued to see him as a "hero."

So while the victims of human rights violations committed by Bosnian Serb forces would naturally approve of Mladic's extradition to The Hague, the opinion poll also suggests another uncomfortable truth – instruments of international law may bring about 'justice,' but they remain largely impotent in

trying to heel broader forces at play in the international system. They don't necessarily reconcile former enemies to each other and they don't necessarily dampen historical, ethno-religious animosities. Instead, Cooper argues, peaceful coexistence within the Former Yugoslav Republic continues to be enforced by international actors, making prospects for reconciliation between enemies as distant as ever. Cooper also argues that a similar state of affairs exists in Rwanda, adding substance to her argument that both societies have proven less receptive to international legal efforts than many of its proponents had anticipated.

The case of Ratko Mladic is closely related to a final problem associated with the current application of international justice. It is often the case that organizations like the ICC target high-profile individuals as the main perpetrators of criminal acts. Genocide and other gross human rights violations, however, are almost always large-scale societal phenomena. Significant sections of societies either actively participate in the crimes or tacitly accept them. While planning is usually coordinated by a handful of senior figures, they nevertheless require the support of society in order to put those plans into practice. So Cooper further argues that while 'individualizing' justice may place primary responsibility where it belongs, it often overlooks the complicity of vast swathes of the population. Not only does this mean that many odious people 'get a free pass' when it comes to their crimes, it also might explain the widespread local skepticism that often exists regarding international criminal courts. The perception held by many is that such trials are "persecution by distant, foreign entities unfamiliar with the domestic situation and the long histories of real or perceived injustices."

Supporters of an international criminal justice system expect a lot from the instruments already put in place: justice, reconciliation, post-conflict peacebuilding and more. Yet because human rights violations are often large-scale events, it should come as no surprise that the wounds they inflict within societies take generations to heal. As Cooper points out, justice is merely one part of the equation confronting societies emerging from conflict and societal upheaval. Other factors such as the reformulation of credible historical narratives, widespread education, and forms of reconciliation beyond those provided by formal legal justice also play an important role in creating viable and peaceful societies. And because international legal mechanisms are not ideally designed to play an integral part in processes of reconciliation, Cooper urges a reaffirmation of historically core objectives: "In dealing with past conflicts, international justice has performed most effectively when it has focused on traditional legal tasks – ensuring that crimes, particularly those of leaders, result in individual accountability, establishing which acts are beyond the pale, [and] interpreting and developing the law."

Recommended Reading

Cooper, B. "The Limits of International Justice", in the *World Policy Journal* , 2009.

Lekha Sriram, Chandra. "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice", in *Global Society*, 2007.

Freeman, M. *Necessary Evils: Amnesties and the Search for Justice*. Cambridge, UK: Cambridge University Press, 2009.

Sarkin, J. "The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Cacaca Court in Dealing with the Genocide," in the *Journal of African Law*, 2001.

Gearty, Conor. *Can Human Rights Survive?* Cambridge, UK: Cambridge University Press, 2006.

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Editor's note:

For the rest of our content on ""Laying the Groundwork: The Definition, Scope and Roles of Human Rights," check out our dossier on the topic.

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