

Victor's Justice: Selecting the Targets of International Tribunals

By André Dao



The Nuremberg and Tokyo tribunals at the end of World War II have been roundly criticised as examples of victor's justice. In contrast, the International Criminal Court's model of an independent prosecutor has been seen as a positive step towards international justice. However, Professor William Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland, Galway, has argued that far from solving the problem of victor's justice, the ICC has only obscured it.

Speaking at a Castan Centre event sponsored by Holding Redlich, Professor Schabas traced the history of the phrase "victor's justice" back to its emergence in the wake of the post-World War II military tribunals. The phrase referred to the one-sidedness of the trials, in which only the crimes of the European Axis powers and Japan were prosecuted. This was partly a jurisdictional limitation, as the Nuremberg Trials were expressly limited to the "punishment of the major war criminals of the European Axis countries". It was also a political limitation, evidenced by the fact that the American deputy prosecutor was William Donovan of the OSS, a forerunner of the modern CIA. Part of Donovan's role was to ensure that leading Nazis who had made deals with the US to bring the war to a quicker conclusion were not prosecuted.

Following a period of hibernation, largely due to the Cold War, international criminal tribunals returned to favour in the 1990s, with the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. These tribunals were heralded as a solution to the problem of victor's justice as they were no longer politically controlled. In particular, the prosecutor was free to prosecute all parties involved in the conflicts in question. And yet, as Professor Schabas pointed out, both tribunals were established by the Security Council and thus dominated by the interests of the Permanent Members – the same powers (with the addition of China) who set up the Nuremberg and Tokyo tribunals.

In its original form, the ICC was envisioned as a permanent version of the ICTY and the ICTR, effectively on stand-by until the Security Council directed it to investigate a particular case. However, with the end of the Cold War the middle powers, including Australia,

saw an opportunity to exert more influence and so a key feature of the ICC as we know it today is an independent prosecutor who decides for himself what he will investigate. The Security Council, and nations who are members of the Court, may only *request* that the prosecutor investigate a particular matter.

Ostensibly at least, the ICC therefore replaced the political criteria of who to prosecute with judicial ones. But as Professor Schabas argued, the criteria which are supposed to guide the prosecutor's decisions are so broad as to be practically useless, at least as legal norms. In deciding to prosecute a particular crime, the prosecutor is supposed to consider the gravity of the crime and whether or not prosecution would be contrary to the interests of justice.

Professor Schabas used the examples of the Lord's Resistance Army in Uganda and British soldiers in Iraq to show that the ICC's independent prosecutor lacks a satisfactory methodology for justifying his decisions to prosecute and not to prosecute. In deciding to prosecute the LRA, who are the rebel party, and not the government, Luis Moreno-Ocampo claimed that the Ugandan government's atrocities were not sufficiently grave. In short, there were not enough bodies. Yet, as Professor Schabas asked, shouldn't we be even more worried when a government kills innocent civilians?

In the same way, Moreno-Ocampo chose not to investigate claims that some British soldiers had murdered and tortured around a dozen civilians in Iraq, saying that the low number of deaths made it insufficiently grave. But when rebels in Darfur killed almost exactly the same number of peacekeepers, Moreno-Ocampo chose to prosecute on the grounds that the killing of peacekeepers constituted a grave offence. The death of innocent civilians, it seems, is a matter of less importance.

However, Professor Schabas was not entirely critical of the prosecutor's decisions. As he acknowledged, the prosecutor's potential jurisdiction is enormous – the territories of the 115 member states as well as the actions of citizens of member states anywhere in the world. With very limited resources, the ICC and the independent prosecutor have to make hard decisions about where the energy of international justice will be directed. The problem, according to Professor Schabas, is that the nature of that decision has been made less transparent. The independent prosecutor has been modelled on a national prosecutor, whose role it is to prosecute all crimes that occur within a nation.

It is a model that doesn't fit with the realities of the international community. Though Professor Schabas didn't endorse returning the decision-making power to the Security Council, he did suggest that it should rest with an accountable and credible political body.

At the very least, the decision to prosecute in the Nuremberg and Tokyo trials was a transparently political one. The trials also provided a clear narrative of history that might have been muddled if Allied commanders were prosecuted alongside Nazi war criminals. As Professor Schabas provocatively suggested, that may be why victor's justice is not necessarily a bad thing after all.

Professor Schabas visited Australia as a Holding Redlich Distinguished Visiting Fellow.