Claiming international law for the people: the persistence and role of civil society tribunals in the modern world

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It is a great pleasure to be here and I would particularly like to express my thanks to Professor Christine Kaufmann and the Faculty of Law of the University of Zurich for the opportunity to visit the University and to make this presentation tonight. My visit is another step in the efforts to build on the existing relationship between the University of Zurich and my own university, the University of New South Wales, which is based in Sydney, Australia. The topic about which I will be talking this evening -- *Peoples' Tribunals and International Law* -- is the subject of a current research project funded by the Australian Research Council which is just picking up speed, so my comments tonight are tentative rather than the final results of that research. I had the pleasure of exploring some of these issues last Friday and Saturday with Professor Kaufmann and a number of your colleagues in a seminar on the theme, and I am grateful to them for contributing to my thinking on the issues, and delighted to see a number of them here again this evening.

INTRODUCTION

A little less than three hours ago, in the historic Cooper Union Great Hall in New York's Manhattan – the site of many notable speeches including a famous address on slavery in 1860 by then Presidential aspirant Abraham Lincoln – a body called the Russell Tribunal on Palestine (RTOP) was scheduled to hold the final meeting of its fourth session. This body

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describes itself as 'an International People's Tribunal created by a large group of citizens involved in the promotion of peace and justice in the Middle East.' The objective of the Tribunal is to bring about compliance by Israel with the international obligations binding on it in relation to the Palestinian Occupied Territories – as expressed in the Advisory Opinion of the International Court of Justice on the Israeli Wall and in a range of other international sources. The Tribunal seeks to achieve this by the force of public opinion generated through a series of public hearings in which the role and liability under national and international law of various actors is explored and pronounced upon, on the basis of material placed before the Tribunal. Taking as its starting-point the legal position laid out by the International Court in the *Wall* Advisory Opinion, the Tribunal has examined the role of the institutions of the European Union, of private corporations involved in the supply of various goods and services to the Israeli government including the Israeli Defence Force (ranging from caterpillar tractors to electronic surveillance equipment for use at checkpoints), and most recently the United Nations Organisation and the Government of the United States of America. The Tribunal also held a hearing in 2011, in South Africa, into the question of whether the current situation in Israel and the Occupied Territories could properly be characterised as apartheid as that term is understood in international law.

As you can imagine, the activities and findings of the RTOP have been controversial, dealing as they do with a subject that attracts passionate contention whatever forum or body takes it up. Efforts to engage with the rights and wrongs of the Israel/Palestine situation seem inevitably to bring a barrage of protest and critique from those who do not wish to hear particular views voiced or examined – and the RTOP is no exception. It has been subjected to a systematic critique on-line and in the media that attack its motives, its members' impartiality, its procedures, and its findings. A website to counter the RTOP has been established, as has a Facebook/Twitter presence under the name of 'Russell the Kangaroo', arguing that this Tribunal is nothing more than a denunciatory forum best characterised by designating it with the name of one of Australia's iconic marsupials (a derogatory term invented, it would seem, in America during the Californian gold rushes of the mid-nineteenth century).

Some of the attacks have challenged the bona fides and legitimacy of the Tribunal to make any meaningful evidence-based pronouncements on the matters at issue. For example, it has been described as a 'a troupe of self-appointed individuals who theatrically put Israel on trial to promote the boycotting of Israel and propagate the use of Israel-apartheid analogy'.[2] The organisation NGO-Monitor (which established a website to follow the RTOP) commented to the following effect:[3]

> With no judicial basis, the RToP uses a legal façade to create an image of neutrality and credibility. The sessions have 'jurors' examining expert 'witnesses,' and the 'findings' are then published. The use of legal terms and concepts such as 'witnesses' and 'jurors' belies the complete lack of legal legitimacy and basic notions of impartiality and fairness integral to any legal proceedings.

The South African Jewish Board of Deputies and the South African Zionist Federation dismissed the proceedings in South African on the issue of apartheid as biased and futile:[4]

> The proceedings of the Russell Tribunal on Palestine (RtoP) have conclusively confirmed predictions that it would be no more than an unbalanced vehicle for anti-Israel propaganda thinly disguised as a quasi-judicial investigation … The RtoP, as anticipated, served up one-sided political rhetoric in place of meaningful debate, and sweeping condemnation instead of constructive solutions.

However, it is not my purpose this evening to examine the rights and wrongs of the RTOP and its particular findings, but rather I mention it as a live example of the phenomenon of international peoples' tribunals. These are sometimes known as international citizens' tribunals or international public opinion tribunals, and have become a common form of activism in the modern world. In just the last two years or so, in addition to the RTOP, there have been international peoples' tribunals held in relation to agrochemical transnational corporations (organised by the Pesticides Action Network under the auspices of the Permanent Peoples' Tribunal), the legality of the Iraq war (the Kuala Lumpur War Crimes Tribunal, an initiative of former Malaysian Prime Minister, Dr Mahathir Mohammed), the

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[2] 'The Forrest Gump of Israel Advocacy', *Algemeiner*, 14 March 2012, www.algemeiner.com/2012/03/14/the-forrest-gump-of-israeli-advocacy/

[3] 'Russell Tribunal on Palestine', NGO-Monitor, http://www.ngo-monitor.org/article/russell_tribunal_on_palestine (3 October 1012)

[4] 'Russell Tribunal a vehicle for anti-Israel propaganda – SAJBD', *politicsweb*, 7 November 2011 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=265412&sn=Marketingweb+detail&utm_source=twitterfeed&utm_medium=twitter

campaign for a living wage among garment workers in the Asian region (held in Sri Lanka and Cambodia, building to a full international hearing before the PPT), and hearings in relation to Mexico held by the PPT. Forthcoming tribunal hearings include a hearing in relation to Argentina by the Latin American Water Tribunal, a body established in 1998 which has held over thirty hearings since that time.

My remarks tonight take up some of the basic issues about these tribunals, whose existence and activities are often met with scepticism and bemusement by those who are not involved in them – such tribunals are often seen as a curiosity that shows commendable imagination and energy on the part of organisers but as lacking legitimacy and any practical relevance to the real world of law, rights and politics. A quaint subject for academic study perhaps, but little more.

In brief, the questions I will address are:

- What are these bodies, and how do they distinguish themselves from other forms of oppositional or contentious politics?
- How do they justify their claims to authority of any sort, in particular the entitlement to invoke and interpret different bodies of law, whether State-made or sourced from elsewhere?
- Why do social activists or oppressed groups turn to this mode of politics?
- What is their significance (a) to those who are involved in them) and (b) to those whose actions they scrutinise and purport to judge; and (c) to the general public?
- What is their impact?

I will be making two arguments. The first is that these tribunals continue to have relevance in the modern world as a form of political and legal activism, notwithstanding the conventional challenges to their legitimacy. Secondly, and more generally, I will argue that these bodies can be seen as a manifestation of the democratisation of international law insofar as they represent yet another form of challenge to the monopoly of States and formal inter-State institutions to the making, interpretation and application of international law.

MODERN HISTORY OF PEOPLES' TRIBUNALS

The conventional history of modern peoples' tribunals traces their origins in the post World War Two world to the Russell Tribunals held in the late 1960s and early to mid-1970s. These were the brainchild of the British philosopher and mathematician, Bertrand Russell, who together with Jean-Paul Sartre and other like-minded leftist intellectuals, wished to hold the United States to account for its actions in prosecuting the war in Vietnam. This was the subject of the first Russell Tribunal, held in Sweden and Denmark in 1967, at which a mass of primary and secondary evidence was presented in relation to alleged violations of international law on the use of force, international humanitarian law and human rights law was presented to the Tribunal. The members of the Tribunal comprised a mix of prominent intellectuals – it was not a panel comprised of legal experts. The Tribunal found that a range of violations of international law had been committed by the United States and various of its allies in the initiation and conduct of the war – and sought to place these violations of positive law within a broader narrative of US imperialist expansion. The Tribunal was criticised by many as partisan, procedurally flawed, and illegitimate, and assessments of its contemporary impact and subsequent legacy vary. The Russell Tribunal itself subsequently held sessions in relation to repression in Latin America (1973-76), freedom of opinion and public sector employment in West Germany (*Berufsverbot*)(1978-9), and the rights of the Indians of the Americas (1980), followed twenty years later by a tribunal on the rights of psychiatric patients (2001).

Whatever its problems, the Russell Tribunal did, however, provide inspiration, a model and theoretical justification for the holding of such tribunals – fora in which the actions of governments and others were subjected to scrutiny against international legal standards, as well as against other legal and non-legal norms. It is this category of peoples' tribunal that is of particular interest for the (international) lawyer – tribunals that seek to harness the power and legitimacy of law and claim for themselves a role in interpreting it and holding its addressees accountable in public albeit informal way. It is this emphasis on law – international law in particular – and a deliberative process of evaluation of evidence in the light of law that distinguishes these tribunals, for example, from a speech at a public rally denouncing violations of international law by States. The difference lies in the extent to

which the forms and procedure of a legal proceeding are observed, as well as in the cogency of the analysis and reasoning that it adopted --- not all tribunals aspire to or achieve this.

The major successor to the Russell Tribunal – and one of the few repeat institutional players in the field of peoples' tribunals – is the Permanent Peoples' Tribunal (PPT) based in Rome. The PPT was established by the Italian leftist senator, Lelio Basso (who was himself involved in the Russell Tribunals), in conjunction with the International League for the Rights and Liberation of Peoples. The PPT has held almost 40 hearings since its commenced its work in 1979. It represents in its founding documents and orientation the two strands of legal authority that have been drawn on at different times by international peoples' tribunals – the positive law of nations, and the law of peoples, a body of law which claims its validity from outside the Westphalian system in the sovereignty of peoples that exists independently of that system – in particular the Universal Declaration of the Rights of Peoples adopted in Algiers in 1976 by the International League. While in many of its earlier decisions the PPT referred to the Algiers Declaration and does so sometimes still as a formal gesture, the focus so far as law goes has become very much the positive law of nations, though the right to reject or amend law that is at odds with the interest of peoples is still maintained. The enduring impact of the Algiers Declaration and the thinking that underpins it can be seen in the analysis of the adverse impacts of globalisation on people and the assertions of the illegitimacy of the positive international law that permits such impact.

Sources of authority

The Russell Tribunal noted that it had no formal status in so far as it had not been granted any mandate by the institutions of any State or State-sanctioned international body. Rather, it articulated the source of its authority and legitimacy as deriving from the failure of States and the international community to uphold their own standards as embodied in international law, but also in the right of peoples to hold governments to account, the ultimate source of the authority of national and international law being the people. The Tribunal also recognised that its lack of formal authority and enforcement power meant that its legitimacy and impact would ultimately have to rely on the quality of its work – the record of evidence that it compiled and the thoroughness and fairness of the assessment of the evidence in the light of the applicable legal standards.

It is these ideas to which the organisers of peoples' tribunals have regularly returned to justify their undertaking public inquiries of this sort. There have been many tribunals set up to emulate the Russell Tribunal, and these have varied considerably in the extent to which they have laid emphasis on adopting a juridically orthodox approach to their task. Some have been composed only of jurists, though most have tended to combine jurists with (other) well-known figures, in an effort to serve the twin goals of high quality juridical reasoning, and public visibility and credibility through the presence of leading public figures of recognised achievement and high moral stature as members (though the addition to the RTOP jury of Roger Waters, former member of the band Pink Floyd, is an interesting choice!).

Why are they used and why are they so common?

Both the organisers of such tribunals and some scholars explain and justify the resort to such tribunals as the result of the failure by the State or international system to abide by their own rules and to provide a remedy for those who have suffered violations of human rights. Cases in which individual States have oppressed their peoples or sectors of their populations or colonised and occupied populations have been the classic examples of this category – tribunals that have looked into military regimes in Latin America, the Indonesian occupation of Timor Leste, Chinese treatment of the Tibetan people in Tibet, and the Armenian Genocide, are just some of the many examples, where there has been no adequate opportunity for redress available at the time through formal national international channels.

What has also become clear is that these tribunals are seen as having a role to play in relation to transnational phenomena which may not in any case be capable of regulation by any one state, whether because they concern violations involving movement across borders, or because they concern systemic patterns of violation that result from globalised systems of asymmetrical economic and political power. Many of the tribunals held under the auspices of the PPT have moved into this area – the recent tribunal on agrochemical corporations is one such example. In this case the lack of effective regulation of transnational corporations which produce pesticides that have adverse effects on workers' health cannot easily be sheeted home to one jurisdiction or a complaint taken to one

instance, given the multijurisdictional spread of TNCs and the imbalances in power between them and many national governments in many developing countries, the TNCS and local elites. The remedial options at the international level for many human rights violations, such as they are, largely focus on the obligations of individual States – and this may fail to capture the full complexity of many situations.

Nor does substantive law always assist – as is evidenced by the ongoing discussion of the extent to which States are under extraterritorial obligations with respect to their human rights treaty undertakings – especially those with respect to economic, social and cultural rights. The same might be said in relation to the discussions of whether and how the State of incorporation of a company should obliged to regulate the activities of that company abroad – something that appears at first sight an attractive option in cases where companies are marketing in foreign countries chemicals that are banned for use at home, but raises a series of difficult issues.

Thus, notwithstanding the explosion of international procedures which confer the right to seek a remedy for some violations of international human rights, there continue to be many gaps, both formally and in practice. In this context it should not be forgotten that some half of the world's population lives in a region where redress under national law is uncertain, hard to access, often affected by prolonged delays, and administered in many cases by corrupt officials – if it is available at all. For those living in Asia Pacific the international level provides only a few opportunities to seek redress, given the absence of any regional or sub-regional bodies that can play an effective role in this regard (notwithstanding the establishment of recent mechanisms by ASEAN), and the relatively limited acceptance by countries in the Asia Pacific region of international human rights procedures.

Significance

Reactions to peoples' tribunals by those outside the immediate constituency which is engaged in the campaign around an issue, the tribunal organisers and tribunal members themselves, have ranged from the indifferent to the hostile. The major criticisms have gone to issues of legitimacy (that is, a lack of it) – of origin, authority , procedure, and substance. The tribunals, of course, provide an easy target in many respects for those who see the

world of 'law' though a formalistic, State-based framework; and some tribunals provide easier targets than others when they decide to adopt a mode of carrying out their task which diverges from more orthodox standards of quasi-judicial inquiry and procedures. The challenges arise in particular when tribunals seek to achieve goals that are in tension with each other, as was the case with the World Tribunal on Iraq (2003-2005) that combined both the elements of a worldwide anti-war movement brought together in the solidarity of opposition to the Iraq war of 2003, and a forum in which pronouncements were made on the international legal liability of various actors in that war.

Yet even those tribunals which hew most closely to a legalistic mode in their substantive analysis and procedure, recognise that their procedures can never fully satisfy the due process requirements that are legitimately demanded of courts and tribunals whose pronouncements have direct and enforceable legal consequences for their objects under national or international legal systems. Indeed, as the Tokyo Women's International War Crimes Tribunal on Japanese Sexual Slavery argued in 2001, this very lack of efficacy arguably justifies a lesser standard of due process – in that case the Tribunal was addressing the question of how it was consistent with accepted ideas of due process to conduct what purported to be an inquiry into criminal inability of persons who had died decades earlier.

As has also often been noted, defendants – or at least State defendants – rarely if ever appear or respond – the tribunals' lack of legitimacy justifies rejection of them by the States or institutions targetted, and this in turn adds to perceptions of their illegitimacy. At the same time, it may be noted that this is not the whole story: a number of recent Tribunal hearings have created sufficient pressure on named corporate defendants so that they have felt it appropriate to respond in some way or another to the fact of the hearing and the allegations raised against them. For example, in the London session of the Russell Tribunal on Palestine, there were a couple of responses from corporate 'defendants', some simply dismissive but at least one reasonably detailed response from a pension fund to allegations relating to its investments in companies that might be engaged in acts contrary to international law in Israel or the Occupied Territories. In the People's Tribunal on the Garment Industry examining the existence of the right to a living wage in Cambodia, held earlier this year, a number of the international 'Brands' – companies such as Adidas and

Puma – appeared at the Tribunal and supplied material to it. Whether driven by a sense of social responsibility and commitment to address an agreed problem or by concerns about bad publicity if they did not (or both), the engagement of these corporations with the Tribunal shows the possibilities that they might generate. Such willingness to engage was, however, not evident on the part of the agrochemical companies which were invited to participate in the Permanent Peoples' Tribunal session on Agrochemical Corporations held in December 2011 – and it must be said that this absence tends to be the norm. The appointment of amicus curiae or lawyers to present the defendant's cases, which is often done in such tribunals, is only a partial answer to the concerns about due process seen in orthodox terms.

The findings and recommendations of peoples' tribunals vary considerably, both in their designation and in their structure and content. These reflect the orientation and mandate of individual tribunals – which might range from a quasi-criminal proceeding, through a civil law-type proceeding relating to the international responsibility of a State or international organisation or the liability under domestic law of a corporation, or a commission of inquiry style approach that ranges more broadly. These different functions are sometimes reflected in the name assigned to the body itself – Tribunal, Jury, Commission – and to its product -- 'Judgment', 'verdict', 'sentence' 'declaration of the jury'.

Common to all the tribunals however, is the fact that their findings and recommendations have no formal legal status (one might note in passing that neither do those of the United Nations human rights treaty bodies!). For some tribunals, this provides a certain freedom, to be able to make findings on broad issues and to make recommendations to parties who might never all be brought together before the same deliberative body in this way. For others, the lack of formal legal status is a spur to hyperlegalism, as they know that the weight and influence of their findings cannot derive from their formal status, but can only come from the persuasiveness of their reasoning and their evaluation of evidence against clearly established legal standards. The Tokyo Women's Tribunal (2000-2001) is perhaps the most pronounced example of such a commitment to a heavily legalistic approach. That Tribunal portrayed itself as a reconvening of the post-World War Two International Military Tribunal for the Far East, closely following the procedures familiar from modern

international criminal proceeding so far as possible, and engaging in a lengthy orthodox legal analysis of the international law issues and the evidence – though not without some innovation and feminist perspectives. While one may not be completely persuaded by all aspects of that Tribunal's reasons, when one gets to the end of the judgment's thousand or more paragraphs of detailed description, analysis and evaluation, there is no doubt that one has experienced some fairly assiduous orthodox legal analysis. There are many other instances of this sort, particularly from within the corpus of the hearings of the Permanent People's Tribunal – the cases relating to Tibet and Timor Leste are but two of the many cases in which the Tribunal has engaged in what can be described as well-constructed orthodox legal analysis.

It has been the hope of some tribunals that their progressive interpretations of existing international law, or their advancing of new concepts, might contribute directly to the development of positive international law. It is not clear that this has happened to any significant extent, though the intellectual archaeological work in relation to a number of tribunals still needs to be undertaken.

What impact?

The question of impact tends to be the killer question that springs to everyone's lips when the topic of peoples' tribunals comes up – rather like the perennial cocktail party question (as David Harris calls it) of 'whether international law is really law' whenever one engages in discussion of the topic with non-international lawyers (and, indeed, some international lawyers).

There are various ways in which can respond to this question. The first is a methodological one – namely the argument that in any complex situation it can be extremely difficult to separate out the influence of a particular factor on any given outcome, so trying to support a claim that a Peoples' Tribunal hearing has brought about change is profoundly difficult. But this is not satisfying to one's politely interested cocktail party companion: 'What empirical evidence or examples do you have' they will ask, 'that might be relevant, even if we can't be sure that there was a direct impact?' This, of course is harder, partly because of the lack of empirical work in this regard (and the difficulty of doing it in some cases decades

after the event), but also because of the non-engagement by many subjects of tribunals with the process or the result. There are, however, some traces in some cases that the holding of such a tribunal can cause at least discomfort to States and others whose conduct is subject to scrutiny. Apart from those cases where there has been some engagement with the process (that I have meniotned earlier), there are cases where pressure has been brought on governments of the State where a tribunal is to be held to use laws relating to assembly or powers to deny visas to foreign visitors to make it difficult for the tribunal to meet. This was the fate of the first Russell Tribunal, whose plans to meeting in the United Kingdom and France were stymied by the intervention of the authorities, forcing the event to take place in two Scandinavian countries. The Chinese government sought to use its influence to try to prevent the Permanent Peoples' Tribunal hearing on Tibet from being held in France. And there are other examples – small beer, perhaps in the grand scheme of things, but an indication that those who are the subject of security by such bodies are not always as indifferent to the proceedings as they might affect to be.

But in terms of impact it is important also not to neglect what is a very important dimension of such events – their contribution as a means of building solidarity and strength through the reinforcement of global or transnational advocacy networks. When one reads the dry words on a page setting out the judgment of a peoples' tribunal, one experiences only part of the meaning of the event. I was privileged recently to attend the PPT on Agrochemical TNCs in Bangalore, India, in December 2011. While the documentary material placed before the tribunal is in many ways compelling (indeed extremely worrying) and the judgment of the tribunal gives a sense of the urgency and importance of the issues, simply reading these does not capture the importance of the event for the participants. This is particularly so for the networks of pesticide activists, workers and others who found affirmation of their suffering in the formal hearings and who felt vindicated by the recognition of the wrongs that they had experienced in legal terms. Both in terms of recognising the suffering of victims/survivors and in providing an opportunity for building alliances and energising efforts, events such as this have an immediate impact, even if their contribution to alleviating the human rights violations they document and denounce may happen only well into the future.

Peoples Tribunals as a form of democratisation of international law

The final point I wish to make is a more general one, and that is how we might understand the use of peoples' law more generally from the perspective of those interested in the operation of the international legal system and the challenges of ensuring compliance with international law norms.

It is really not so long ago that the effective ownership and control of international law and its institutions was confined to a relatively small group – of States, government officials and perhaps a few insiders in the world of academia or industry (Oscar Schachter's invisible college of international lawyers was part of this). But globlalisation – perhaps most especially in the form of the wide availability through the Internet of information that previously was available only to a few – opened up the institutions and substance of international law to a broader citizen base. Sometimes it seems as if everyone is now an international lawyer with views on the legality of almost any controversial issue that might be raised in public debate. This has been lent added momentum by the opportunities that electronic communications and increasingly easy travel possibilities have offered to transnational legal advocacy.

This process has involved not merely the passive reception of information and observation of the councils of State, but has enhanced the historical engagement of civil society organisations with the international law making and implementation process – indeed it has involved a quantum leap in this regard.

What this represents is a significant inroad into the monopoly of States to make and interpret international law, largely free of bothersome inputs from and scrutiny by civil society actors. While the State is still the dominant player in many areas, civil society organisations play a major role as the initiators of new standards, and as monitors of their implementation. While in formal terms under the law of treaties, States may still occupy a special position in relation to the interpretation of treaties, challenges to their proffered interpretations are not infrequent. In recent years perhaps the most notable was the challenge to the interpretation by a number of States of the legality of intervention in Iraq, but there many other cases in which an interpretation by States that seem to suit their own

interests too neatly, has been challenged in a way which has undermined the complacently secure position of the State to pronounce authoritatively on the scope of its international obligations.

The scrutiny to which States are now subjected in the implementation of their international obligations can be intensive and would have been unthinkable a generation or two ago – the almost real-time factual and legal analysis by NGOs of the conduct of military operations is in is a striking example of what is a much more widespread phenomenon.

In my view, the role played by peoples' tribunals can be seen as part of this process of democratisation of the making, interpretation and application of international law. Such tribunals articulate claims to independently interpret and monitor the application of international law standards agreed by States, but also provide examples of the potential contribution of civil society to international law making. No, they do not satisfy all the formal tests of a body legitimated by the State-centric system, but then they don't have to – and that is the source not just of their limitations, but also of their strength.

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