

Kirby Lecture, 2015, ANU.

Human Rights with a Vengeance: One Hundred Years of Retributive Humanitarianism

2015: Julie Bishop in Manhattan. *Human Rights with a Vengeance*

1915: Edith Cavell at *tir nationale*; Billy Hughes in Whitehall.
“*Treason against Mankind*”.

1937: Nikolai Bukharin in Moscow; Rudolf Slansky in Prague;
Winston Smith at Victory Mansions. *Mistakes, Crimes, Spectacle*

1945: Francoise de Menthon at the Peace Palace; Primo Levi at
Auschwitz. *Humanity's Crimes*

1961: “Lolita” in Jerusalem: *A Digression*

1987-1997: Klaus Barbie in Lyon; Dusko Tadic in The Hague;
Martin Bormann in Frankfurt. *Nazis and others*

1915-2015: David Lloyd-George at Versailles; Rebecca West in
Nuremberg; Leonard Woolf at 46 Gordon Square, Bloomsbury,
WC1; Malika Husseinova in Karabulak: *Four Gardens*

I would like to thank CIPL, the ANU College of Law and the ANU itself for hosting this lecture. Special thanks go to my friend, Kim Rubenstein, for organising the lecture, inviting me to present this evening and for her lovely introduction . Thanks also to Nicole Harman for facilitating this event.

It's a pleasure to be back at the ANU where I spent several happy years and, in Canberra, where one of my daughters, Rosa Cass-Simpson (who I promised not to mention by name tonight), was born at the Calvary Hospital in 1998.

I would like to thank Justice Kirby for giving his name to this lecture and for being present this evening. I came to a Kirby Lecture once where Michael Kirby appeared on an enormous screen behind the podium introducing, but at the same time dwarfing, the lecturer. I am referring briefly to Orwell this evening and there was something vaguely, though benignly, big brotherish about Justice Kirby's appearance that night.

Finally, though, I want to mention the three deans I have worked with at the ANU Law School: Stephen Bottomley for his good-humoured support during my various visits to ANU Law School in recent years; Tom Campbell for hiring me as a lecturer and for intellectual guidance and friendship. And to Michael Coper whose stylish, witty deaning would always light up evenings like this.

2015: Julie Bishop in Manhattan: *Human Rights with a Vengeance*

“Despite an impassioned speech by its Foreign Minister, there was a failure [*Iran failed*] to win Security Council support today for a resolution condemning [*the United States for*] the downing of the [*Iranian*] airliner. Diplomats said they [*Teheran*] would have to settle for a less harshly worded statement.”

This passage is taken from the front page of the *New York Times*, July 14th 1988.¹

The destruction of the airliner was described by the sponsoring state as a “pure act of terrorism, a ruthless crime”. But the state allegedly responsible for the act called it “a tragic but understandable mistake”. The incident was complicated by the fact that it had taken place in the midst of a war with its own very profound geopolitical consequences.

In early July 1988, an Iranian Airbus, Flight 655, carrying 290 passengers was shot out of the sky by two missiles fired from a U.S. warship. The captain was eventually commended for his action with a Legion of Merit. Soon-to-be President George Bush Snr, said on the election trail: “I will never apologize for the United States — I don't care what the facts are... I'm not an apologize-for-America kind of guy”.

The International Civil Aviation Council, meanwhile, at its meeting in Montreal in March 1989: “deeply deplored the tragic incident which

¹ <http://www.nytimes.com/1988/07/15/world/iran-falls-short-in-drive-at-un-to-condemn-us-in-airbus-case.html>

occurred as a consequence of events and errors...which resulted in the accidental destruction of an Iran Air Airliner”²

Of course, this all sounds very like the recent events surrounding the shooting down of MH17.

One very important distinction between this incident and last month’s Security Council meeting - a distinction that lies at the heart of my talk tonight - is that the Iranians wanted a Security Council resolution condemning the U.S. action. The Australian Government certainly wanted that this year but it wanted something else as well. It asked the Council to establish a war crimes tribunal to try those responsible for the deaths of the passengers. The Security Council Draft Resolution was very circumspect in its language, though, with the Council “convinced that *in the particular circumstances* of this incident, the establishment of an international criminal tribunal” is warranted and deciding to establish an international tribunal “*for the sole purpose*” of prosecuting those responsible.

I hope to show tonight that this particularism is a standard feature of war crimes law and that it rubs awkwardly up against the apparent universalism of international criminal justice and the requirements of generality associated with the rule of law itself.

² ICAO News Release PIO/4/89.

In less circumspect language, the Foreign Minister, Julie Bishop, said that the failure to establish a court would be an insult to the memory of the dead and an affront to their survivors. Nothing less than war crimes prosecution would satisfy the Australian Government and the Australian people. There must be no impunity. The Russian veto, as she put it, “only compounds the atrocity”. The Prime Minister, too, called the Russian veto “outrageous”. Samantha Power, the U.S. Permanent Representative to the UN and the author of a well-known book on war crimes and genocide, described the attack as “heinous”, and the use of the veto as “tragic”.

It is doubtful that too many people listening to the ABC broadcast of Ms Bishop’s speech would have found much to disagree with. After all, who could disagree with a call for justice?

In Sloan Wilson’s novel *The Man in the Grey Flannel Coat*, a Judge Bernstein receives a phone call from, Schultz, a man demanding justice. Bernstein reflects on the call:

“How violent Schultz had sounded over the phone. *‘I want justice’* he had said. I wonder how many murders have been committed and how many wars have been fought with *that* as its slogan. Justice is a thing that is better to give than to receive but I am sick of giving it...”.

Meanwhile, another magistrate, in John Coetzee's *Waiting for the Barbarians*, has spent his life administering the law in a small Fort at the end of an unnamed empire. When Colonel Joll, from the state security services, arrives to dispense justice (in the form of lethal torture) to two barbarian fishermen accused of terrorism, the magistrate, too, becomes sick of justice: "Justice? Once the word is uttered. Where will it all end?" (118: Vintage). Later Joll discovers that the Magistrate has a collection of barbarian scrolls. He takes this to be evidence of treason and the magistrate himself is, then, tortured. At one point, the magistrate is asked to read one of the scrolls:

"See, there is only one character. It is the barbarian character *war* but it has other senses too. It can stand for *vengeance*. And if you turn it upside down like this it can be made to stand for *justice*. There is no knowing which sense is intended (122)."

And John Brigg, the coroner in Ronan Bennett's *Havoc, in its Third Year*, too, grows weary of the endless calls for justice and correction, and, like Coetzee's magistrate, ends up choosing the refuge of the road over the administration of law. The latter two novels are haunting studies about lives doing justice and the refusal, in the end, to continue doing justice. There comes a point, it seems, when one can no longer do public justice. The world won't allow it. Or justice has become revenge or the society has succumbed to what Judith Butler has called "penitentiary logic".

These three works of literature describe a world weary of the endless search for perpetual justice. International law begins in this mode in 1648 when the great European religious wars of the 16th and 17th century come to an end at Munster and Osnabruck. This is from the Peace of Westphalia

“That there shall be on the one side and the other a perpetual...Amnesty, or Pardon of all that has been committed since the beginning of these Troubles,...but that all that has pass'd on the one side, and the other...during the War, shall be bury'd in eternal Oblivion”.

It is these amnesties and pardons - essential to the great diplomatic achievement at Westphalia - that are now so often deplored by Amnesty International and others when such mechanisms are used to shield human rights violators.

Tonight, I want to offer a critical stocktaking of a century of doing or attempting to do international criminal justice. And the central question I think can be posed in the following terms. Can international justice be done in this world? And I mean this in non-metaphysical terms. In other words, I am not interested in whether it can be done elsewhere though this was one of the standard lines of thought advanced by the Nazi War Criminals. Adolf Eichmann, for example, whose name might come up a

bit tonight, demanded that he be judged before God and not before the District Court of Jerusalem. But let's bracket theological inquiry and ask whether the world is constituted in a way that permits us to do justice in a manner that does not simply reproduce or re-enact injustice in a different and disguised register? To put this simply: is the international diplomatic system ready for international criminal justice?

Or have we got ahead of ourselves a bit. To put it even more simply was the Nuremberg Trial, for example, "the trial of the century", the moment when the allies, in Robert Jackson's phrase, "stayed the hand of vengeance"; or was it - in the words of another judge, Jackson's U.S. Supreme Court colleague, Justice Harlan Fiske Stone - "a high-grade lynching party?"³

In the case of Bennett's and Coetzee's magistrates and coroners, the societies in which justice is being pronounced just seem too fragile, violent, radically unequal and full of crazy superstitions to accommodate a form of law that does not inevitably lapse into correction, discretionary, spasmodic and then sadistic punishment; and the eventual peevish resistance of some of its practitioners. This was the insight that the diplomats brought to Saxony in 1648. In a world where claims to justice or religious truth are pursued through savage and implacable violence, it is best that international diplomacy sets aside the claims of justice altogether and simply gets on with the not-simple task of making

³ "History's Greatest Trial Opens", *The Adelaide Advertiser*, 20 November, 1945. "Nazi Gangsters face Judges", *The Melbourne Argus*, 20 November, 1945. *The Age* also reported that Australia was the only British dominion to appoint a special representative at the trial. Major J.L. Lenehan would be accorded "all the privileges of the highest ranking personages at the trial and will stay at Nuremberg's Grand Hotel, which is reserved for distinguished visitors". 21 November, 1945, p1. The newspapers by July 1946 were carrying stories about The Holocaust and about British plans to punish Jewish terrorists from Irgun who had bombed the King David Hotel (at 611).

sure sovereigns at least get on with each other. Sovereignty, in this way, replaces justice.

Antonio Cassese defended international criminal law by saying that some of it was better than nothing at all. And this is an absolutely standard defence of the imperfections of international criminal justice. Is it possible that instead some of it is worse than none of it? Indeed, that a lot of it might be worse than none of it? And that in order to think about this, one must be attentive to the intimacies between law's violence and the violence that law is intended to repress (a familiar enough idea) and alert, too, to the violence that law, certainly international criminal law, might be implicated in the perpetuation of. At the very least, and when faced with the over-heated language of the political class, these seem like possibilities worth considering. But it is rather important that I say something else. The trial of Hissine Habre, which began last week, or the Adolf Eichmann trial, represent moments of tremendous catharsis and, perhaps, healing for the victims of mass atrocity. So, any critique of international criminal justice has to reckon with the enormous and entirely understandable emotional appeal of such trials.

Let me tease all this out a bit by returning to Julie Bishop. There are some things to notice about the MH17 diplomatic tussle. And these markers will appear and reappear as we move through the century.

First, something has happened to the way we think about the world, and this shift in sensibility can be felt in the differing responses to the 1988 incident and the present crisis. It now seems natural to call for war crimes trials in 2015 in a way that would have seemed incongruous or diplomatically maladroit even as recently as 1988. And this reflects an adjustment in our thinking that dates back to the beginning of the 20th century. In essence, we seem to be in a more retributive age now than we were at the end of the nineteenth century, or at least, the mood of retribution is much more juridical than it was at that point. What might have seemed unnatural in 1915 has become commonplace in 2015. Of course we punish our enemies in trials. Haven't we always?

And, indeed, the language of war crimes law has become a primary *gidiom* through which war is resisted, too.

In 2015, to argue against the misery of war is to speak like a lawyer. In 1915, resisters spoke like poets. Now, though, "Serious violations of the laws of war" (Article 3, ICTY Statute) have displaced, in our language, "the butchered, frantic gestures of the dead" (Sassoon, *The Counter-Attack*).

This leads on to a second aspect of the MH17 and Iranian Airbus disputes. Notice the way in which, in both cases, the injured state cast the offence in the language of crime or act of war or atrocity while the respondent state (as it were) preferred to characterise the event as "human error" or political misjudgement. This I think, too, sums up the way in which the move from the 19th century to the 20th can be thought

of in terms of a revolution in the meaning of what it means to be defeated in war. What was once political folly became, at a certain point, criminal act. And so, the descriptions and redescriptions of the M17 and Iranian Airbus incidents mirror a whole historical transformation in the meaning of war. But this relationship between “incidental effect of political action” and “crime against humanity” lies at the very heart of the international criminal law problem. Do we have the moral and political resources to make this distinction stick? The problem is everywhere. International criminal law is a curious mix of moral certainty or righteousness, and political opportunism.

And we seem to understand war and peace through the relationship of errors and crimes. Among the North Atlantic elites, decisions to go to war remain at worst “mistakes” to be subjected to administrative action (Chilcot, Hutton and Butler) or electoral reversal (Blair, Aznar).

Elsewhere, though, such mistakes quickly become crimes (Gaddahfi’s war on Benghazi).

In this sense, while it may be temporally accurate to say that mistakes have been converted into crimes at Versailles, it remains spatially the case that there is a sphere of administrative error and sphere of criminal misconduct.

To put this rhetorically, their mistakes have become crimes while our mistakes remain mistakes.

Third, it is worth attending to the silences and evasions present when there is a call for a war crimes trial. What is not being demanded? In the case of the MH17, we might note that there is no call for a permanent tribunal to consider civil aviation terrorism in general or we might notice the lack of enthusiasm for a Tribunal to look into alleged Sri Lankan killings of Tamils or the destruction of cultural property in Tibet. So, the call for an MH17 tribunal feels a little like the Royal Commission into Pink Batts or Windfarms. One encounters such proposals and thinks: why this? Why not that? And I think, again, any institutional history of war crimes trials has to continually reckon with this question. This is what I would call the problem of *ad hocery*.

Ad hocery or selectivity is not just an occasional effect in the application of justice. Of course, one can never do justice all the time to all people but war crimes law is built on a deep structure of unequal application that can't just be wished away by better law or the hope of moral improvement. International criminal justice *is* the application of ad hoc law. It always has been and it will be for the next fifty years. We must stop judging it by what it might become.

And it is not just unequal application. Its norms themselves, even if they were applied all the time against all war criminals, would simply establish a world in which there was a sharp and now familiar division between expendable and non-expendable life or between precarious and precious life or between the violence of death by machete and the violence of death by political economy. Not man's inhumanity to man but "the

inhumanity of specific categories of men”.⁴ (See, ICC in operative paragraph 6 of Resolution 1593 of 2005 referring the situation of Darfur to the ICC).⁵

As the Malaysian representative said in the debates around the Security Council Resolution: “All those who travel by air will be more at risk if the perpetrators are not held to account”. Maybe the world really is divided between people who travel by air and people who travel by boat.

Finally, we have the problem of vengeance. I subtitled or titled this lecture, *Human Rights with a Vengeance*. I take this to mean at least a couple of things. One is that international criminal tribunals are imagined, I think, as a way of giving human rights machinery the potency that it,;,lmkkk has sometimes lacked. To apply human rights with a vengeance is to apply rights with power, credible force and vigour.

I don't think I have come across a single student in the past ten years who has expressed an interest in working for the UN Human Rights Committee. The UN Human Rights Committee, as many of us know, promotes and encourages human rights observance. If Weber is right, and politics is the long, slow boring of holes. Then the Human Rights

⁴ G. Simpson, *Law, War & Crime – War Crimes Trials and the Reinvention of International Law* (Polity Press, 2007), at 51. See also, C. Gevers, ‘International criminal law and individualism: An African perspective’, in C. Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 221.

⁵ S.C.Res. 1593, U.N.Doc.S/RES/1593 (March 31, 2005), at op. para. 6. For a useful discussion of the various ways that operative paragraph 6 may be interpreted, see R. Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, 19 *Leiden Journal of International Law* (2006) 195, at 209-214. For other attempts by the Security Council to limit the jurisdictional reach of the ICC, see S.C. Res. 1422, U.N.Doc.S/RES/1422 (July 12, 2002), at op. para. 1; S.C. Res. 1487, U.N.Doc.S/RES/1487 (June 12, 2003) (renewing Resolution 1422); and S.C. Res. 1497, U.N.Doc.S/RES/1497 (August 1, 2003), at op. para. 7.

Committee is boring very deep holes, very slowly. This might feel like bureaucratic madness or institutional heroism. Whatever it is, this sort of human rights work – patient, cajoling, politically sensitive – is nowhere near as glamorous or high-profile as working for international criminal courts. I once received a letter from a person working on the prosecution team at a war crimes trial. He wanted me to read a quite lengthy draft essay of his on some aspect of international criminal law doctrine. Because I didn't know him and because I wasn't interested in reading the essay - and because I haven't yet read *The Brothers Karamzov* - I very politely declined and wished him well in his work.

I received an outraged email back the next day accusing me of being uncollegial and reminding me that he was “prosecuting President...”. Well, I won't say which President he was prosecuting. The point is that, for some people, to work in international criminal tribunals is to feel oneself to be at the very centre of international politics and to be, unlike everyone else in that realm, riding on the wings of angels: doing human rights not with a slow boring of holes but with vengeance.

But vengeance has more literal meanings though, too. Is international criminal law a form of human rights work motivated or inspired by a desire for vengeance? Revenge is never announced as the engine or rationale for war crimes trials. The standard panoply of justifications include remembrance, reconciliation, vindication and, usually wedded together, peace and justice. But as we can see some of the language of the M17 diplomatic spat sounds quite full-blooded and full, too, of intimations of revenge.

And, - and here I begin my long awaited stock-taking - international criminal law begins with a moment of vengeful fury.

1915: Edith Cavell at the *tir national*, Brussels; Billy Hughes in Whitehall: “*Treason against Mankind*”.

When does history begin? Or the history of a particular field? One possible history of war crimes law begins, conveniently almost exactly 100 years ago. We are in the era of the anniversary: The Somme, Gallipoli, Vimy Ridge. My history begins on August 3rd, 1915 with the court martial of an English nurse, Edith Cavell. Cavell had been found guilty of aiding Allied prisoners in their escape from Belgium during the German occupation of Belgium. She was convicted of a breach of German military regulations and an act of treason.

A strange charge in this context - given that Cavell owed no loyalty to the German state - but a charge that has, as we shall see, an interesting history in this field of law. Despite a flurry of diplomatic protests – the German ambassador to the US, rather unhelpfully, said he would shoot five English nurses if he had them in custody - Cavell was executed on the morning of October 14th at the National Rifle Range in Brussels. The Germans, already accused, often falsely, of unspeakable crimes against the Belgian population, were immediately demonised further. Lloyd George went to the 1918 election with one of the most compelling election slogans of the 20th century: “Hang the Kaiser”. The

promise was made, and though the Kaiser remained resolutely unchanged after the war, this promise became the foundation of international criminal law. Kaiser Wilhelm died peacefully on June 3, 1941 a month or so before Hitler's invasion of the Soviet Union and these two events together conjoin two origins of the field at Versailles and later at Nuremberg where Hitler's march on Moscow is prosecuted as a crime of aggression.

Back in 1918, though at the Imperial War Cabinet meeting, at 12 noon on November 20th Lloyd George is presenting his proposal to try the Kaiser for the crime of aggression. Lord Curzon, the Lord President of the Council, opens the meeting by remarking that there is no need even to argue for the trial of the Kaiser. He is after all, "the arch-criminal". Indeed, as Curzon reports, the French had not yet bothered to consult their own jurists about international law. No matter, the Kaiser could be put on trial and declared a "universal outlaw". Indeed, he goes on, wouldn't it be ideal to begin the League of Nations experiment on this note of trial and retribution? Lloyd George continued the discussion. "With regard to international law, well [such a lot hanging on that word "well"], we are making international law and all we can claim is that international law should be based on justice....there is a sense of justice in the world".

There is some resistance to this innovation, though. Billy Hughes, the Australian Prime Minister, is puzzled by the suggestion. As he famously puts it: “why not try Alexander the Great and Moses”?

Hughes’s point seems to be that what we call the “crime of aggression” used to be known as “history”. “You cannot indict a man for making war”, Hughes continues. And, in a supremely evocative phrase, he equates the whole idea of criminalising war with what he called: “treason against mankind”.

An absurd and eccentric idea for him, but a phrase that carries enormous weight now as we consider how un-self-conscious we have become about deploying the international community against outlaws, or about referring to “crimes against humanity”. Hughes is, in the end, outvoted but not before he receives some support from the Minister for Munitions, only there in an advisory capacity. This minister, Winston Churchill, argues that the Allies would be “within our rights to kill the Kaiser as an act of vengeance” but that it would be much more dubious to deal with him on the basis of “what is called justice and law” (note the hesitant phrasing). Churchill remains attached to this idea in 1945 when he at first seems to support summary execution for the defeated Nazi elites.

At Versailles, then, the law of war crimes begins with some familiar patterns: anxiety about the relationship between revenge and justice, a cavalier attitude to the role of actual lawyers, a belief on the part of

proponents of trial that the justice of the cause renders unnecessary legal process and precedent, and the first sign that when it comes to war crimes and crimes against humanity, the identity of the perpetrators matters as much as the identity of the crime.

1937: Nikolai Bukharin in Moscow, Winston Smith at Victory Gardens: *Mistakes, Crimes, Spectacle*

Treason, of course depends less on what is done and more on where one stands. And where one stands can be a matter of chance. Or as Lenin once put it: “he went into one room and found himself in another”. Usually, the history of war crimes trials passes over the inter-war years in silence. This was a period in which the efforts of progressives seem to be directed at social and economic change or minority rights treaties or welfare or the sort of softer internationalism found in Geneva at the League of Nations. But are the Moscow Show Trials, perhaps, the missing link between Versailles and Nuremberg? Historians of international criminal law tend to think of Solferino or The Hague Peace Conference in 1899 or the German war crimes trials in Leipzig as the precursors to the trials in post-war Germany. Moscow, 1937 is an embarrassing antecedent after all. Judith Shklar defines show trials as the “liquidation of political enemies using legal procedure”.

Stalin knew all about that but, in this, he does not seem too far removed from Lloyd George and Lord Curzon. Establishing a tribunal for the specific purpose of liquidating or punishing an enemy? This is what the Imperial War Cabinet was debating in 1918 and it looks a little like what the Security Council was debating two weeks ago.

Of course, the Moscow Show Trials were very unlike the Nuremberg War Crimes Trials in many very important respects but the idea that people's justice or humanity's justice or a sense of justice can somehow dispose of the need for proper procedure or legal precedent represents a sort of sibling dark side of these trials. A show trial is one in which it is obvious that the guilty are guilty. The trial seems otiose, the mere performance of a justice already delivered elsewhere. Vishinsky, the Soviet Prosecutor at Moscow was also at Nuremberg. During dinner with the judges at Nuremberg he raises a toast "To the defendants, they will all hang". This was before the trial had begun. But Roosevelt, too, was worried about acquittals and his concerns made their way into the IMT Charter where Article 19 states that

"The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value."

But then maybe these trials are as much about political spectacle as they are about legal propriety. For Hannah Arendt, a show trial is a “spectacle with prearranged results” or the obliteration through compulsive staging of “the irreducible risk” of acquittal. The point of the trial is the trial itself: its ramifications, its warnings, its effluxions of terror. George Orwell understood this.

Mrs Parsons lives with her two little daemonic children at Victory Mansions. Her drains are blocked, as they often are, and she calls Winston Smith down to help her unblock the sink. The two children torment Winston, calling him a Eurasian spy, threatening to vaporise him and shouting “Goldstein” as he leaves the flat. Mrs Parsons is apologetic; the children are furious, she explains, because she failed to take them to the hanging:

“Some Eurasian prisoners, guilty of war crimes, were to be hanged that evening...this happened once a month and was a popular spectacle” (at 22 (1949: 1974 Penguin Books).

It strikes me as important to think about trials in this way; not as depoliticised programmes of management but as slightly wild-eyed theatres of revenge: human rights with a vengeance. As one of the observers of the Moscow Show Trials eerily put it: these were “dramas of subjective innocence and objective guilt”. This objective guilt was repeatedly enunciated in the months preceding the major trials at Nuremberg and Tokyo where the Nazis are repeatedly described as the world’s worst criminals and where the defendants were chosen with

great care on the basis of political impact. The show trials, themselves, continued into the 1950s, most famously in Prague where the purpose was not to determine guilt or innocence, nor, even, to remove political opponents but rather to create them.

The trials there were initially conceived as trials of fairly low-level *apparatchiks*.

Under pressure from Moscow, President Gottwald found a higher level defendant, Otto Sling, a district party secretary. Under torture, Sling implicated Rudolf Slansky, the General Secretary of the Czech Communist Party, in a fantastic and implausible conspiracy. Finally the Soviet advisers had a defendant of sufficient seniority. The Czechs were initially shocked and bemused. What about the evidence? One Soviet legal adviser, soon to be himself purged, said: “We have been sent here to stage trials not to check whether the charges are true”.

As for the existence of legal norms. Again this didn't matter. The instincts of the proletariat would stand in for what Kyrilenko, one of the Moscow prosecutors, called “Bourgeois sophistry”. And this recalls, too, a Nazi Law of June 28, 1935 referring to the need to punish criminals and deviants according to “the sound perceptions of the people”. Ten years later, though, President Roosevelt was worrying about acquittals on technicalities and Robert Jackson - pressed on the existence of crimes against humanity or aggression - replied by saying “We can avoid these pitfalls of definition if our test of what is a crime gives recognition to those things which fundamentally outrage the conscience of the

American people”. This became at trial the idea of “shocking the conscience of mankind”.

1945: Françoise de Menthon at the Peace Palace, Primo Levi at Auschwitz: *Crimes against Humanity*

Mankind, of course, has now become humanity. Just as the old language of enemies of mankind has been reworked as “crimes against humanity”. When someone at the Imperial War Cabinet asks what crime the Kaiser is being charged with, Lloyd George replies: “The crime of plunging this country into war”. Sir Robert Borden, the Canadian PM, smoothly offered a gloss on this by interjecting that “it was a crime against humanity”. And there it is, the moment when the Great Powers begin to think of themselves as “humanity” rather than a coalition of victorious powers. At least the victors at Vienna 100 years earlier merely thought of themselves as “Europe”. But the idea of “crimes against Europe”, while far more accurate as a description of extra-textual law, might seem too openly self-serving.

What then are crimes against humanity? Justice Kirby noted in the High Court’s 2008 decision, *The Queen v Tang*, that those “who engage in “slavery”, piracy and other special crimes are enemies of mankind” (para. 111).

François de Menthon, one of the French Prosecutors at the Nuremberg war crimes trial in 1945, was assigned the task of defining humanity. The context was a trial in which a more or less new legal category – crimes against humanity – had to be created to encompass the system of abuse and murder instituted by the Nazis in the mid-1930’s.

De Menthon invokes three distinguishable concepts. The first two were familiar enough but the third, and most radical, concept of humanity saw it as a unified and indivisible category, a moral or juridical agent. There is a paradox at the heart of international criminal justice though. While its core animating idea is the abolition of all distinctions within humanity, some of its most energetic practices are dedicated to punishing “inhumane” acts (acts committed by individuals who have lost their humanity?) and acting on behalf of humanity against those who are deemed to have stepped outside or defied humanity (think of Leon Bourgeois, at the Versailles Peace Conference, insisting on “penalties to be imposed for disobedience to the common will of civilized nations” (Paris Peace Conference 1919: 185)) or the editorial in *The Canberra Times* on 3 October, 1946, p3 which thundered that the Nuremberg trial was “....a landmark from which the United Nations must press on to police and enforce world peace against all potential or actual disturbances of the peace or crimes against humanity”.⁶

Its favoured penalties, indeed, often come in the form of extreme violence applied to these outsiders (historically, the quartering of pirates, the beheading of tyrants; more recently, the hanging of war criminals and the waging of “humanitarian wars”). But this history of violence does not appear to have unseated or even qualified humanity’s self-confidence. Speaking very much in this vein, Raymond Poincaré, the

⁶ Quoted In Paul Bartrop, “Nuremberg Trials as Viewed from Australia” *Australian Jewish Historical Society Journal*, November, 1994, Volume 12, p606-618.

French President, announced, also at Versailles: “Humanity can place confidence in you, because you are not among those who have outraged the rights of humanity” (Paris Peace Conference 1919:159).

But humanity here included the Belgians, French and British each of whom were, by this time, responsible for three centuries of sometimes violent, certainly racially-inflected, Empire.

Though the Imperial War Cabinet meeting on November 20th began at noon, there was a lot to get through. The main line of business was the disposition of the Kaiser. What were the representatives of humanity going to do about this outlaw? But first, there were some minor matters to take care of. Lloyd George: “there are two or three questions we are not clear about...Palestine, East Africa...questions of that kind” (at 2). “We have not quite settled in our minds *what sort of government we will set up in Mesopotamia*”. It was ever thus. Here are the representatives of civilization, just prior to elaborating the idea that aggressive war would be a crime against humanity, reordering their imperial outposts, themselves, as Justice Pal remarked at Tokyo, the result of three centuries of aggressive war.

I went back recently to the National Archive documentation from this meeting. How did the Imperial War Cabinet get from its own imperial consolidations and restructurings to the enemy’s crimes against humanity? After all they each seemed to be grounded on precisely the same combination of non-consensual territorial acquisition and mass

violations of human rights. Was there a hint of self-consciousness? What was the hinge?

Well, between the surprisingly cursory discussion of Palestine, Syria and Iraq and the lengthier debate about the Kaiser there is one short announcement. A telegram is read out from the *Association of Universal Loyal Negroes of Panama*. It reads: “Negroes throughout Panama send congratulations on your victory and in return for services rendered by the negroes throughout the world in fighting...beg that their heritage wrested from Germany in Africa may become the negro national home with self-government”.

This is passed over in silence and the discussion moves on to the Kaiser’s terrible crime of making war on Europe and the shock this delivered to the conscience of mankind.

1961: “Lolita” in Jerusalem: *A Very Short Digression*

Mankind is, of course, shocked by many different things at different times, something the US advisors, Robert Lansing and James Brown Scott argued at Versailles when they resisted whole idea of crimes against humanity claiming that there was no such thing as humanity, only nations with different moral outlooks. In Jerusalem, Adolf Eichmann seemed unshockable. His thoughtlessness, indeed, was his most remarkable quality. Arendt, again: “The longer one listened to him the more obvious it became that his inability to speak was closely

connected to his inability to think...he was genuinely incapable of uttering a single sentence that was not a cliché”(328-329). He seemed curiously affectless, in other words. At one point, he is handed some novels to read. One of them is *Lolita*. After two days Eichmann returned the novel, visibly indignant; “That is quite an unwholesome book”, he tells the guard.

1987-1998: Klaus Barbie in Lyon, Dusko Tadic in The Hague, Martin Bormann in Frankfurt: “Nazis and others”

While Eichmann was running the Final Solution from an office in Berlin and then Budapest, Klaus Barbie was hunting down Jean Moulin, the French Resistance leader in Lyon in 1942. Barbie might have found Moulin in Françoise de Menthon’s house where he occasionally spent time. de Menthon at this time had become a resistance sympathiser. Barbie tortured Moulin to death but de Menthon went on to develop the concept of crimes against humanity at Nuremberg, a category of criminality that would be later applied to Barbie himself during his trial in Lyon in 1985. The Barbie case ought to be given its full name: *The Federation of Resistance Fighters v Klaus Barbie*. This was to be the trial that established a judicial record of the heroism of the French resistance. There was a small problem though. At ten past eight in the morning of April 6th, 1944, Klaus Barbie had sent a telex to the Office for Jewish Affairs in Paris. It reads:

“This morning, the Jewish children’s home “colonie enfant” in Izieu was cleaned...total 41 children aged 3 through 13 years were apprehended....Transport to Drancy to follow”.

The children were transported in manacles to Paris and then sent east to the camps. All of them were murdered (two of the boys were executed in Tallinn, Estonia).

But the trial was a curious affair. What was it about? From the perspective of the French State, it was about French resistance to Nazi occupation. Jewish groups in Lyon needless to say believed that the trial would provide some reckoning for Barbie’s micro-Holocaust at Izieu. Barbie’s defence lawyer, Jacques Verges - later to defend Carlos the Jackal and Saddam Hussein – believed the trial was an opportunity to embarrass the French state by pointing to crimes against humanity closer to home: institutionalised torture in Algeria and fascist collaboration in war-time Vichy. And so, a problem emerged. From the perspective of the prosecuting state, crimes against humanity in its then standard definition was a category both over and under inclusive. Over-inclusive in the sense that it threatened to encompass French colonialism in Algeria, under-inclusive in that it seemed to be about attacks on civilians and therefore could not encompass Barbie’s murderous behaviour towards the French resistance. But as someone once said, every war crimes trial is saying this of the prosecuting state: “We, at least, and whatever we have done in the past or might do in the future, are not Nazis”. And so, crimes against humanity in the Barbie trial were defined

as crimes committed in furtherance of a policy of racial discrimination. Broad enough now to cover the resistance crimes, narrow enough to exclude Algeria where the French, at least, were not Nazis.

The narrowing, at least, was quite explicit. Recalling the original French draft at Nuremberg, crimes against humanity were defined as crimes committed by a state practising an ideology of racial discrimination. Though the Court in *Barbie* seemed to narrow the reach of crimes against humanity improperly this simply reflected a long-standing tendency to equate crimes against humanity with a very particular genre of crimes against humanity, namely the crimes of Nazis. Indeed, from 1945 to 1997 (Tokyo apart), it would have been possible to figure the history of war crimes as a history of Nazi war crimes. In the Australian War Crimes amendment act, for example, war crimes are defined as those crimes committed in Europe between 1939 and 1945. So, in a way, international criminal law often begins in the spirit of universalism but ends in the practice of particularism. Crimes against humanity are acts committed anywhere by anyone against anyone at anytime but not here, not now, not before 1988, not in relation to this person who is protected by her official position, not in relation to these peacekeepers immunised through Security Council Resolution 1224, only if the perpetrators acted in the name of national socialist ideology and so on.

Of course an orthodox account of the history of international criminal law inverts this trajectory thinking of the practice of tribunals as having begun with the particular (victors justice at Nuremberg) and ended in

the universal (the ICC with its broad ranging jurisdiction). So, we might say that modern de-nazified retributive legalism begins on May 8th, 1997, the day that Dusko Tadic is convicted of murder as a crime against humanity: the first non-Nazi to be tried before an international criminal court in Europe since 1946, and one of the first non-Nazis to be tried anywhere for crimes against humanity. Or maybe it begins a year later when a set of human remains are subject to DNA testing in Frankfurt and determined to be those of Martin Bormann, the last Nazi, or at least the last of the Nuremberg defendants to be unaccounted for. Bormann's ashes are scattered in the Baltic just as Eichmann's are disposed of in the Mediterranean. These removals at sea anticipating the burial of Osama Bin Laden and perhaps gesturing back to the roots of war crimes law and anti-terrorism jurisdiction in the original crime of crimes, namely that of piracy on the high seas.

Let me begin to come to an end....

Has modern international criminal law somehow cleansed itself of the moral obtuseness and political opportunism of those early trials that have formed most of this evening's history? The legal principles certainly *seem* more transparent yet the institutions are engineered in a way that makes even facially apolitical prosecution and trial unlikely. "We are objects of history" as Varenc Vagi said on his way to the gallows in Prague after his show trial. The practice of international war crimes law suggests that only those on the wrong side of history get prosecuted: Ghaddafi, the Lord's Resistance Army, Radovan Karadzic, Omar Bashir.

To situate the development of international criminal law in its historical setting, then is to suggest that crimes against humanity do not simply exist in some supervening ethical space to be picked off by appropriately articulated rules. Crimes against humanity are violent acts committed by enemies of mankind in concrete circumstances. And the enemies of mankind change depending on the exigencies of the situation. Every legal rule expressed in neutral, generally applicable language seems to have another more particular norm hovering, ghost-like, around it. At first the transparency of these ideological commitments is almost touching. At Versailles, the Kaiser is specifically indicted in Article 227 of the Peace Treaty. By Nuremberg, there is a softening of this language; a not-very-good faith effort to make it sound like a universally-applicable legal rule. Remember the French wanted this definition of aggression at Nuremberg: “Aggression is an act carried out by the European Axis Powers in breach of treaties and in violation of international law” (Hankey, 21). In *Barbie* and *Eichmann*, these tendencies continue. There is less of this around now but the most recent articulation of a legal rule came in 2010 with the definition of aggression added to the Rome Statute by the Kampala Agreements. The crime of aggression is now defined as “a manifest violation of the UN Charter”. “Manifestness” will depend on scale, gravity and character. Character will depend on the existence of an arguable legal case. The existence of an arguable legal case will at least partly depend on the particular position of the state making that case.

In particular, international criminal law, properly anatomised, continues to be in most instances the law applied to “enemies of mankind”.

2015: *Four Gardens: Lloyd-George at Versailles, West at Nuremberg, Woolf at Address in Bloomsbury, Woman in a Refugee Camp.*

But what should we make of this history? This is a matter that requires enormous delicacy. Thousands of people work conscientiously in the field of war crimes law (investigating, prosecuting, helping victims, trying to reform the system, calling for universal forms of justice, arguing against Great Power immunity), many more victims of horrible atrocities view a trial as their last great hope for justice. No-one can read about the moral strenuousness of the witnesses in the Eichmann Trial or the personal anguish of a man like Hersch Lauterpacht (struggling in Cambridge to develop a workable theory of crimes against humanity while his family disappears into the Polish and Ukrainian bloodlands) or the bravery of those testifying in the Balkan trials in The Hague without stopping to acknowledge that the law of war crimes has become a site of great courage and the bearer of the some of the ethical hopes of humanity.

Yet, there is something deeply awry with this system of justice. Indeed, one could justifiably describe it as a system of injustice. And these are

not just remediable defects of the sort one might encounter in the way Family Law is administered in France. Rather they go to the question of what it might mean to live under the rule of law in a particular society. The history I have recounted leads to a possible conclusion that crimes against humanity are those crimes committed by enemies of mankind. Let me put the two problems in this way: the identity of the violator seems more significant - decisive even - than the identity or nature of the violation. But, more than this, the identity of the violations is already too narrowly imagined creating morally suspect distinctions between different types of violence.

The question always asked of the critic is “well, what instead?”. In 2002, I participated in a debate about the legality of the Iraq War. I offered several arguments against the war. During the question and answer period, a man stood up at the back and asked me what *I* would do about Iraq? I replied that if not intervening in Iraq constituted doing nothing, then I would prefer to do nothing. Not creating a war crimes tribunal to specifically investigate MH 17 might strike many people as the right thing to do. But the objections one might have to the Bishop Initiative might easily bleed into the whole edifice of international criminal law. Certainly, *not* doing international criminal law might help us attend to other things. How helpful is it to demonise Russia using international criminal law? Haven't we been here before at Versailles? In Baghdad? The world is very complicated but international criminal justice can be very simple-minded and linear.

How should we respond to atrocity? The truth is I don't really know. I am not even sure that war crimes law isn't sometimes the right answer: maybe in North Korea, maybe in Colombia or Georgia. But law often is experienced as incongruous or technocratic or literal. Could it be that the more we memorialise through elaborate legal ritual, the less we are capable of remembering as moral event?

What Primo Levi, the Italian chemist and Auschwitz survivor, feared most of all on his release from the death camps was disbelief. In one of his earliest books he describes a meeting with a lawyer shortly after the liberation of Auschwitz. The interview is marked by awkwardness on the part of Levi and, on the lawyer's side, incredulity. At the conclusion of the meeting, the lawyer gets up, shakes the writer's hand and "urbanely excuses himself." There was nothing the lawyer could do in the face of this survivor testimony. He could neither believe it nor find a legal response to it. Perhaps, if I had to sum up the argument right now, I would argue that we might consider sometimes electing the agonising uncertainties of Primo Levi over the solemn and definitive judgments of international criminal justice.

Or we might do some gardening.

Unusually for a law journal, each front cover of the *London Review of International Law* features a different photograph. The 2015, volume 3 Issue 1 cover has a photograph by Simon Norfolk from his series: *A Place of Refuge: The First Safe Place*. The place is a refugee camp on the border of Chechenya and Ingushetia. Many of the people living there have been in the camp since 1999. It's a bleak place but at the centre of

the photograph is an image of Malika Hussienova and her family standing outside their military green tent. Surrounding the tent is a formal vegetable garden: a mini-Versailles and a small gesture of hopefulness after atrocity.

The story I have told began near the gardens at Versailles where the Great Powers in 1919 engineered one of the most transformative reforms in international legal history when war, for the first time in history, became crime. Twenty years later, working outside another greenhouse (probably in Gordon or Tavistock Square in Bloomsbury), Leonard Woolf was interrupted in his gardening by a call from his wife Virginia. “Hitler is on the radio giving a speech”, she shouts. Leonard calls back: “I shan’t come. I am planting iris, and they will be flowering long after he is dead”. (Glendinning, 344) *Iris reticulate* is a violet-coloured iris. In the final sentence of Leonard Woolf’s biography, “Downhill All the Way”, these irises are still blooming 21 years after Hitler’s suicide.

Nine months after Hitler’s suicide, the Nuremberg War Crimes Trial began. In *A Train of Powder*, Rebecca West remembers being asked what was the most remarkable thing she had witnessed at Nuremberg. Well, she said, there was a man with one leg and a girl growing cyclamens in a greenhouse. As I have said elsewhere, the bathos in this – a sort of decentering of the trial - makes us smile. This little girl is demanding our engaged sentiments not our pitying tears, we want her horticulture to succeed. Here she is growing her cyclamens only a few months after Bomber Command’s final assault on the civilian population of

Nuremberg on the night of 16-17 March when 277 Lancasters pulverised the remnants of the historic centre for the second time. ‘Nuremberg’ refers to the trial, of course, but also, now, for me at least, the bombing and the greenhouse. West sounds as if she is a little disaffected by the justice on offer at Nuremberg. And this mirrors the mood of Hannah Arendt when she goes to Jerusalem in search of justice and discovers instead spectacle. Sometimes, it is permissible to be sick of justice: sick of receiving it, sick of giving it, sick of its imperfect instantiations in an imperfect world.

International criminal justice – the great institutional machine engineered by talented and humane diplomats, kept in motion by lawyers who have sacrificed material reward for a life in pursuit of humanitarian ends, directed at putting defeated enemies and human rights violators in jail, and celebrated every week in a public lecture advertising its virtues – might now be one of the less auspicious ways to do good in the world.