

## Inaugural Professorial Lecture: War Crimes Trials, Solemnity and the Problem of Evil.

### I. Introductory Remarks

What Primo Levi, the Italian chemist and Auschwitz survivor, feared most of all on his release from the death camps was disbelief. He dedicated the remainder of his life to recording and re-telling the story of the camps in a series of novels and memoirs. 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.

International lawyers, it might be said, have spent over half a century frantically making up for the failures of comprehension and imagination at that meeting. Since 1945, they have built, more or less from scratch, a new international legal order. We call it either (under inclusively) the law of war crimes or (over-inclusively) international criminal law. Its monuments are found at Nuremberg, at the Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court in The Hague, and at numerous hybridised versions of these courts. Its landmark cases are famous, its defendants notorious: *Goring et al*, *Eichmann*, *Pinochet*, *Milosevic* with *Mladic* and *Bashir* to come: a short history of iniquity.

And so, every day since 26 April 1995, the date of Dusko Tadic's initial appearance before the ICTY, someone somewhere has been on trial before an international criminal court on charges of war crimes, genocide or crimes against humanity.

And this, by any standards, represents a dramatic shift in emphasis for the international political order. Consider this: Prior to 1945 no person had stood trial at an international court for crimes committed against his own people (and, it is a matter of some significance, surely, that war criminals, unless portrayed by Kate Winslet, are almost invariably male).

Before Nuremberg, international law just wasn't interested in a state's internal policies towards its own citizenry. Malcolm Bull, the political theorist, summed it up recently when he said: "States didn't mind their citizens dying as long as they weren't killed by another state." This was at least a version of the doctrine of sovereignty. And even between 1948, (the end of the Tokyo War Crimes Trials), and 1993, (the establishment in SCR 827 of the ICTY), there was not a single international criminal court in existence anywhere in the world though there was no shortage of crimes in Bangladesh, in Guatemala, in Biafra, in Algeria, in Angola, in Greece, in Spain, in Ireland...

This absence or lack, of course, was not simply a commitment to sovereign insularity or an example of moral obliqueness, it was also a form of forgetfulness. In our era of compulsive commemoration (a museum for the bushfires, footballers visiting the Shrine of Remembrance as a motivational strategy), it might be difficult to recall those moments in history when forgetting was official policy. And yet, war crimes trials have been periodically regarded as politically inapposite. In El Salvador investigations began, in 1999, into the disappeared children: those children who were abducted from their villages or taken from the arms of their murdered parents during the civil

war there. Not everyone agreed with the investigations. “Is it worth it to reopen wounds when we have been able to throw a little forgetting on them?” asked General *Adolfo Blandon*. Think of the man who sent Jewish children to the camps from Lyon, Klaus Barbie, in 1985, by then in a mood of belated reconciliation, saying: “It was wartime and now the war is over” or Heinrich Himmler in 1945 imploring Jews and Nazis “to bury the hatchet”.

And there is a respectable or strategic version of this forgetfulness. When Henry Kissinger, (himself the subject of a book of wishful thinking called *The Trial of Henry Kissinger*) writes a 1100 page study on the history of diplomacy, there is no reference to war crimes trials or Nuremberg. Because these events are either irritants (they distract us from the larger task of rebuilding coalitions or reconfiguring the balance the power (today’s war criminal is tomorrow’s ally)) or they are epiphenomenal (war crimes trials just don’t make much difference to the progress of political life in the international order).

International law *begins* in 1648 in a forgetful mood. Here is the Peace of Westphalia from that year ending the Thirty Years War, reconciling Protestants and Catholics and introducing us to sovereignty as a form of forgetfulness:

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, in what place, or what manner soever the Hostilitys have been practis'd, ...but that all that has pass'd on the one side, and the other...during the War, shall be bury'd in eternal Oblivion (Peace of Westphalia).

So, we might begin by thinking of international criminal law as a response to the problems of incomprehension (the lawyer at the camp) and amnesia (the El Salvadorean General) on one hand, and the structure of sovereignty (Westphalia) and the strictures of strategy (Kissinger) on the other.

International law, though, imagines itself to be confronting, as well, another perhaps more obstinate problem.

In 1998, just around the time of the execution by lethal injection of Karla Faye Tucker in Texas (her appeal for clemency having been turned down by a Governor Bush), Martin Amis, Saul Bellow and several others were having dinner and discussing the case. Almost everyone was in agreement that the death penalty was an outrage not just in this case but in every case. There was, in other words, a classic liberal consensus at the dinner table punctuated only by the silence of Bellow. Amis turns to Bellow astonished: “I can’t believe it, Saul, you don’t agree with us do you?”. How could the author of *Herzog* or *The Dean’s December* believe in capital punishment? Bellow’s response was simple, it can be summed up in two words: “Adolf Eichmann”.

To glance back at the title of this lecture we might say that Eichmann is the problem, evil is the problem or the problem of evil is the problem.

In tonight’s lecture, I want to make some tentative comments about the relationship between law and war, or, to sharpen the language a little, between atrocity and judgement. I say “tentative” partly, because when it comes to evil, an excess of certainty is morally amateurish.

At its least precise, the argument is that the law of war crimes is one of the singular contributions of post-war international law. It seems, indeed, to provide an answer to the sorts of questions posed earlier: There shall be judgment, there shall be remembrance and there shall be law in the face of sovereignty.

But, throughout my career I have explored an intuition about this legal order. Namely that there is something not quite right about it. International criminal law has, of course been indicted on a number of counts: it is chastised as imperialist, gendered, selective, politically inept, and so on. But I wondered, too, if there wasn't a deeper problem. And I wondered if this had something to do with the atmosphere surrounding war crimes trials and the law of war crimes – their demonstrations of moral purity, their gestures of internationalist superiority, their Olympian detachments from political life. Why did I find myself recoiling from the sombre invocations of justice found in this field?

Perhaps, if I had to sum up the argument of the lecture right now, we might consider sometimes electing the agonising uncertainties of Primo Levi over the solemn and definitive judgments of international criminal justice.

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At the end of a lecture I haven't quite begin to give yet, then, I discuss the solemnity of international law and contrast it with another way of approaching atrocity; this time in an ironic mode. One that has considerable force, I think. "Every war is ironic because every war is worse than expected". "Every war crimes trial constitutes an irony of situation because its subject is so melodramatically disproportionate to its form". This is why Hannah Arendt found the Eichmann trial "worthless", why her some time interlocutor and lover, Karl Jaspers, said war crimes explode the limits of the law and why the most telling exchanges at Nuremberg (Jackson-Speer, Goring-Jackson) are freighted with historical paradox.

Next Wednesday at 5.30 one of my new colleagues here at Melbourne Law School, Kevin Heller, is giving a paper on war crimes entitled "Situational Gravity". I encourage you all to attend this. My lecture tonight, it occurred to me, might be renamed, then, Situational Irony.

Now, though, I want to offer some general remarks about international law's fraught encounter with the problem of evil. There are two problems of evil here. In the first case, international law can be thought of as establishing some sort of relationship with a self-evident category of extreme wrongdoing. Evil in this version is a material or psychological reality that international law must simply suppress or punish.

In the second case, the use of evil itself as a category becomes questionable, perhaps even malign or dangerous.

## **II. The Problem of Evil**

Let's start with the first case, and I will describe this encounter through a brief history of international criminal law. Where do we begin with this field? There are several beginnings. We might trace the roots of international criminal law back to Nuremberg and Tokyo (the latter celebrated its 60<sup>th</sup> Anniversary last year) or the establishment of the ICTY in 1993 or the ICC in 1998 or 2002. Or we could point to its origins in the repression of the slave trade in the 19<sup>th</sup> Century or the assertions of universal jurisdiction over pirates from the inception of international law itself.

Some people are so bad, like pirates, that any state can try them. Hence Eichmann in Jerusalem and Pinochet in Piccadilly. Others go further back beyond piracy and find legalised retribution in Thucydides or a defence of superior orders in Antigone.

Let me begin somewhere in the middle.

Virginia Woolf claimed that the modern world began in London some time roughly around December 20<sup>th</sup>, 1910. Paul Fussell traces the rise of ironic modernism back to 1914 and Thomas Hardy's collection of verse, "Satires of Circumstance". The modern history of international criminal law coincides for me, more or less, with the instatement of irony as the prevailing critical, or oppositional, vernacular of our time.

As you leave the National Portrait Gallery in Trafalgar Square from its side entrance, you find yourself facing, among the remembered masters of imperial glory, a statue of a nurse. Her name is Edith Cavell and her execution, by the Germans, in October 1915, was a sensation. It prompted outrage in the British press and a statement by Alfred Zimmerman, the German Secretary for Foreign Affairs, which, might, I think, be the first feminist theory of international law. He said: "No criminal code in the world - least of all the laws of war - makes such a distinction [between men and women]; man and woman are equal before the law, and only the degree of guilt makes a difference in the sentence for the crime and its consequences". For Zimmerman, women, unequal virtually everywhere, could at least be equally executed. There is justice though: Zimmerman went on to lose Germany the war with his famous Zimmerman Telegram bringing America into the conflict.

Meanwhile back in 1915, Edith Cavell, became a lightning rod for anti-German sentiment. Lloyd George promised war crimes trials for the defeated Germans, and the Versailles Peace Treaty contains a provision calling for the trial of the Kaiser for crimes against the sanctity of nations.

This did not take place but 25 years later the Allies convened major war crimes trials at Nuremberg and Tokyo (the latter featuring an Australian judge as president of the Court), and various zonal trials in post-war Germany

The idea from the beginning was to punish evil and prevent it from recurring. "Never again..." became the slogan. And, after a recess from 1948 to 1993 when there were only domestic trials - in Lyon, in Jerusalem, in Frankfurt, in Tel Aviv - international criminal law became an intensely active institutional field.

By the end of the century, there were at least five different forms of international criminal jurisdiction: a permanent international criminal court, two SC created ad hoc tribunals, a bunch of hybrid tribunals from Freetown to Phnom Penh, domestic courts exercising local jurisdiction and the same courts exercising forms of extra-territorial, piracy-like, jurisdiction over foreigners. Hence the Spanish investigations into the complicity in torture of Bush administration lawyers.

These cases (especially the criminal cases) raise some delicate issues for war crimes law and its relationship to evil. I will mention four: precedent, universality, war and banality.

The first is the question of *precedent*. War crimes law is built on an apparent contradiction between a rhetorical commitment to each atrocity's uniqueness and the legal requirements for precursors, for case law. The question, to put this differently, is how to establish juridical precedent on historical

exception. The Allies faced this problem at Versailles where the American delegation upbraided the other Allies for seeking to punish the Kaiser for acts that had not been established as crimes when they were committed. At Nuremberg, the defence argued that there was no (international) law prohibiting the destruction of the Jews in Germany. The law was the law of sovereign prerogative or the law of God but not the law of international law. Eichmann may have at some level understood this when he said he was guilty before God but not before law. Robert Ley, the Armaments Chief who committed suicide before the Nuremberg Trials may have had this in mind when he said: “Put us against a wall, by all means, shoot us, but do not call us c..c...c.. I can’t get the word out.”

The word was criminals. This, for Ley, was a traducement too far.

The precedents for criminalising future Gorings and Tojos were, of course established but in creating them we risked, as I’ll discuss in a short while, normalising these acts or somehow defanging our sense of moral outrage about them.

A second problem lay in the apparently *universal* nature of evil and the universalising tendencies of law.

At Nuremberg, the allies were faced with a dilemma. As I have said, the crimes committed against Germans by Germans were not crimes under international law. The Allies then faced an awkward choice. Either they could choose to apply a largely invented category of criminality to the Nazis, or they could convene a trial that covered all aspects of Nazi criminality *except* the persecution and murder of Germany’s Jewish minority. The latter, of course, was a political impossibility, and so crimes against humanity entered the legal and moral lexicon of our time as a way of internationalising domestic space. But, there was a catch. Robert Jackson, the U.S. Prosecutor, was worried that the Allies might have committed these crimes too.

“We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or states **only because the concentration camps and the deportations were in pursuance** of a common plan or enterprise of making an unjust or illegal war in which we became involved”. (Marrus: 45)

**Note** what is being said here.

Only a state that was both genocidal *and* aggressive would find itself subject to international judicial scrutiny. The Holocaust wasn’t enough, there had to be war as well.

But this is one of the hidden stories of international criminal law. It has always combined its innocent pretensions to universality with a wily, sometimes disfiguring, pragmatism. It often seems to be saying: “These are crimes everywhere at all times for everyone but not here, not now, not yet and not under this jurisdictional regime and not while they exercise a veto or not while I am President and entitled to immunity and so on...”

The third problem is the problem of war itself. Was war the great evil? Despite the Nuremberg Tribunal characterising it as containing “the accumulated evil of the whole”, law has found it hard to make up its mind about aggression and war. In *The Queen v Jones*, a case concerning British anti-war protestors who disabled military equipment bound of Iraq, the House of Lords found that

the crime of aggression existed under international law but not in England. In the end, we have trouble with war because it is viewed by many people as both at the same time a great evil and a radical solution to great evil: many reasonable people demand war in Darfur (carefully calling it intervention) and condemn intervention in Iraq (characterising it as war). The international community still can't come up with an adequate and acceptable definition of this once-supreme crime.

Finally, there is evil's most famous problem. If Nuremberg was about extraordinary and atrocious crimes committed by extraordinary men, then the trial of Adolf Eichmann was about something more chilling: extraordinary crimes committed by ordinary men. There were no monsters in Auschwitz according to Levi. The whole question of banality has been taken up, perhaps even invented, by Arendt in *Eichmann in Jerusalem*. It's there in her sub-title: *A Report on the Banality of Evil*. Were the Nazis normal? A psychiatrist fresh from an interview with Adolf Eichmann was asked this question. "More normal than I, having interviewed him", came the reply.

And Goering, who considered it "unsportsmanlike" to kill children (*Nuremberg Interviews* at 132), said in an interview before his suicide that one or two of his fellow defendants were "not normal men" (at 109). This implies that the rest of them were and, of course, what is most confronting is are the stories of Tojo tending his garden or footage of Hitler playing with his nieces. George Steiner describes "a man who can play Schubert and Bach in the evening and go to his day's work at Auschwitz in the morning".

Meanwhile, as Eichmann was being tried in 1960, Stanley Milgram was curious about whether there were enough people in America to guard the concentration camps. He set up a famous experiment in which average citizens were given fairly non-coercive instructions to torture subjects. He concluded that there were sufficient people in New Haven alone.

For Giorgio Agamben, the full horror of the mass killings is expressed in the football game played in the camps between the sonderkommand and the SS each Sunday. For Agamben we are always in the midst of this soccer match: averting our eyes from some horror as we play. This is the seduction and normality of evil.

### **III. The Problem of the Problem of Evil.**

Let me now turn to the problem of the problem of evil. The recourse to the idiom of evil has several disturbing or, at least, worrying effects on our legal and political culture. I can only sketch three of these here.

I'll begin with the Prime Minister. Kevin Rudd seems to be a decent man. I want to dedicate the next three minutes of my lecture to Mr Rudd. The 20<sup>th</sup> Century was a century soaked in the blood of bloody acts but these acts were preceded by an assault on our language. To read Stalin or the Guatemalan Generals of the 1980s or Hitler is to see humans transformed into things, to read and hear the metaphors of sub-humanity: "*untermenschen*, undesirables...scum of the earth". The first step in the destruction of a human being lies in the destruction of her humanness or humanity. To hear Mr Rudd talk about people smugglers as scum is to see him conjoined rhetorically, provisionally, just for a moment, with the very projects he and we would want to condemn out of hand. Goebbels famously described German Jews as the scum of the earth. One of the central tasks

of the contemporary politician is to keep apart his populism and someone else's fascism. The first thing to go is the language.

A second problem is that references to "evil" tend to have depoliticising effects. President Bush's response to the attacks on the Pentagon and the World Trade Centre was to re-insert the language of evil deep into the heart of our political discourse while at the same time emptying it of politics. The purpose of the White House National Security Strategy in 2002 was to transform a complex and morally ambiguous international order into a simple mythic structure in which good was perpetually at war with evil. Hence the war on terror. Once an enemy is identified, the task becomes elimination.

President Bush, *State of the Union Address*, 2002 at "We've come to know truths that we will never question: evil is real, and it must be opposed." (Applause), <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>

This sounds wrong. On the other hand, we shouldn't jump to conclusions. If Barack Obama or Nelson Mandela had said it, it might have sounded right.

But by designating individuals as enemies of mankind or evil we risk placing them in a category exempt from the usual mores of international behaviour or restraints on maltreatment. It was for this reason that Lord Steyn described Guantanamo Bay as a "legal black hole".

But the additional problem with configuring a discipline around evil or around an enemy of mankind is that the category itself has been remarkably fluid over the centuries. It is not clear that we do know evil when we see it. And so pirates have been transformed into privateers, war criminals have been recruited as intelligence agents (Barbie) or diplomatic partners (Milosevic), terrorism is a category constantly moving between substance and form, terrorists start out as allies and end up as the epitome of evil (Bin Laden) and torturers are routinely immunised from prosecution.

Barak Obama's reassurances to the CIA are part of a long tradition. Our rhetorical confidence collapsing in the face of political necessity.

The third problem with "evil" as an organising concept is that it has the effect of obliterating or using up political capital. By absorbing our outrage it neutralises other political projects that seem less concerned with evil. Or, to put this differently, the attention to individual "evil" gives us the comfort of acting decisively but cheaply on some questions while continuing to procrastinate over others. Future historians pondering over ecological catastrophe might wonder why so much rhetorical energy was mobilised around people smugglers or terrorists. Perhaps the great crime in retrospect will be the same one that always threatens us: the crime of looking away or leaving it to the next generation.

#### **IV. Confronting Atrocity: Solemnity/Irony**

So, to recap, we have two problems of evil: the problem of evil as a reality of political life to be responded to through law (this is the conventional story of war crimes trials), and the problem of evil as a moral category or linguistic gesture to be approached with an conscientious awareness of its failings and dangers (this is the story I have just told).

I associate each of these problems with a different idiom or style of thinking, speaking and writing. And it is here I turn, as previously advertised, to solemnity and its counterpart, irony.

There is, as I argue in the flyer for this lecture, a gap between our intuitions about what justice can be or might become, and the circumstances of its institutional exercises. Contrast, the ringing phrases in the preamble to the ICC with the endless politicking around Security Council referrals to the ICC or the promise of universal justice in the Rome Statute with the reality of a tiny number of indictments all focussed on African cases.

Irony arises and flourishes in the midst of such gaps. Yet irony hardly seems an appropriate or polite way to go about thinking about war crimes trials. Practitioners and scholars in the field take themselves and the field very seriously indeed (it would be strange if we didn't). What, indeed, could be more grave a matter than the prosecution of those responsible for grave crimes? Irony seems to be positively excluded by the requirements of solemnity, legality and remembrance.

Alongside this becoming and respectful gravity (a word, after all, found everywhere in international criminal law) is an entirely different tradition marked by (a deadly serious) laughter, literary playfulness and the commemoration of forgetfulness. In this tradition we find Brecht (say, *The Resistible Rise of Arturo Ui*), both Roths, Karl Kraus, Charlie Chaplin's *Great Dictator*, maybe even Roberto Benigni and, of course, Milan Kundera reminding us that forgetting has been dominant in the 20<sup>th</sup> Century: "until [as he puts it] everyone has forgotten everything".

Paul Fussell, in *The Great War and Modern Memory*, explores the way in which this ironic tradition emerges in the trenches of France to displace a whole Edwardian panoply of virtues and attitudes (tradition and duty being two obvious examples). It does so because of the comically gaping chasm between the patriotic insistence on the imminent triumph or vindication of civilisation, and the outright "abridgement of hope" present in the trenches.

These traditions (gravity and irony) are found in the two major responses to The Holocaust (international criminal law's foundational event). The first involves fastidious documentation (Raul Hilberg) or moral outrage (Elie Weisel) or dramatic representation (Spielberg, Uris). The second embraces comic despair (Roth, Bellow, *Fiddler on the Roof*), sardonic dissent (Jacques Verges in the *Barbie Trial*, Arendt in *Eichmann in Jerusalem*) and mordant observation (say, Howard Jacobson in London, Woody Allen in Manhattan).

War crimes trials belong, of course, in the first camp. They recombine documentation, outrage and representation in a tone of absolute reverence. But, it turns out that they are subject to the operation of the second response (irony et al) Let me end by organising the possibilities for irony across two themes embedded in the international criminal legal order: disproportion, and the gap between our illusions and our experiences.

## **Proportion**

### i. *Aggression*

In international criminal law is there, perhaps, a melodramatic lack of proportion between the gravity and scale of the offences under scrutiny and the whole idea of the criminal trial? Take the “crime” of aggression as an example. It may be that aggression and war defy legal analysis.

In 1919, the Commission at Versailles established to determine “authorship” of the war in fact rejected the whole idea that wars could be authored. There was, for them, an ironic lack of proportion between the scale and magnitude of war, and the smallness and specificity of criminal trial and the idea of authorship.

Of course, the whole idea of an unbridgeable gap between the minute rituals of legalism and the sweeping totalities of war forms part of the ongoing critique of “aggressive war” as a category of crime. As Justice Pal put it at Tokyo:

“...the historic causes of the war simply defy legal judgement”.

But Pal could see a further ironic gap between the forcible acquisition of territory by the European powers for some four centuries and their rather sudden decision that forcible acquisition was to be rendered a crime (at the very point when they were its victims).

Reading Azar Gat’s recent biblical study on war through the ages, one begins to realise how complex and unchanging the causes of war are, and how fundamentally quixotic our efforts to deter them through legal mechanisms. In short, and this is very much Pal’s view, the personalisation of responsibility for war is likely to be arbitrary, counter-intuitive and accidental, and subject to the operation of irony.

### ii. *crimes*

But, what of the crimes of war themselves?

Karl Jaspers believed there was something rather measly about using law to confront the unspeakable horrors of the Shoah: “something other than law was at stake here and to address it in legal terms was a mistake”, he argued. Hannah Arendt, too, famously pronounced that hanging Eichmann was necessary but totally inadequate (Arendt, 1994).

Ralph Lemkin gave the world the word “genocide” to describe what happened to the Armenians, the Gypsies, the Jews and the Slavs but in coining the term he, inadvertently no doubt, may have transformed the unspeakable into the routine.

Could it be that the human heart loses some of its capacity for indignation when evil is judicialised?

Law’s preoccupations begin in 1945 with a sense that it is unable to confine or limit the sheer horror of mass atrocity. Existing categories hardly seem adequate. By the 1990s, the categories had expanded and the language of mass criminality was ascendant and ubiquitous. But had law, by now, explained too much? Was there now an ironic disjunction between the technical requirements of law and the moral response to mass atrocity?

Could it be that the more we memorialise through elaborate legal ritual, the less we are capable of remembering as moral event?

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#### 4. The Abyss

International criminal law, then, is a law of unintended consequences. It is the chasm between our commitments to human dignity, progress, rationality, law and civilisation, and the experience of blood, war and atrocity that provokes ironic (and comic) gestures.

The comic tradition arising out of modern war (as bleak as Wilfred Owen's "S.I.W.", as farcical as "Black Adder", as black as "Catch 22") is a rich and substantial one. The laughter of the Tommies in their grave trenches is perhaps the most trenchant of commentaries on the defining absurdities of that war; it must have, at times, seemed like the only possible response to the war.

Commentary around war crimes trials, too, has occasionally emphasised the grotesque nature of the proceedings: Milosevic's posturing, Eichmann's passivity, Goering's buffoonery. Okawa's madness, Speer's cool pleas of innocence. Let me give just one final example of the ironic in the midst of legalised retribution.

Shumei Okawa, the Japanese propagandist, was eventually declared insane, and unfit to stand trial by William Webb, the Presiding Judge at the Tokyo War Crimes Tribunal. But Okawa is a key figure in the history of ironic disjunctions. He is famous for having slapped Tojo over the head during the trial. This incident contributed to his removal from the court-room and discharge from the trial itself. Yet, Okawa, we might say, was simply playing out, theatrically, the very content of the trial itself. This was a trial, after all, whose end-point was the (metaphorical and, surely, very nearly literal) removal of Tojo's head altogether.

Okawa argued, too that "The trial is not the realisation of justice but the continuation of war" (at 33). This brilliantly Clausewitzian formula anticipates later critiques of the Trial and of international criminal justice itself. And finally, Okawa asserted that Japan's imperial war was not an aggressive war at all but an act of pre-emptive self-defence. This argument was rejected by the Tribunal, of course. The Soviets, in particular (later to pre-emptively attack Czechoslovakia) declared the doctrine to be disreputable. Meanwhile, half a century later, Okawa's insanity was to become Bush's foreign policy. Okawa is the Shakespearean Fool: a madman speaking obscure sense.

Adopting an ironic approach to all this, is not just a temperamental or intellectual choice, nor is it one unaware of the corrosive effects of irony in collective political action nor does it deny the importance of solemn remembrance.

Instead, it is linked to an awareness that one cannot simply recommence the work of civilisation and its surrounding artifice of language and law as if nothing changed in 1944. It is linked, too, to the problem of evil. The ironic mode I associate with moral vigilance. It is important to laugh at dictators. Laughter is power's anaphrodisiac. With justice perpetually not quite present and with so many children dying on our watch, and given this generation's disastrous commitment to neurotic, suicidal over-consumption in the face of ecological catastrophe, this is not the moment to permit solemn self-satisfaction as we contemplate our efforts to eradicate the most obvious examples of wrong-doing. Instead, we require a sort of attentiveness and conscientiousness to the small-scale humiliations and degradations that precede moral catastrophe. It may be right to pursue war criminals and prosecute them in humanity's courts. But we are disbarred from getting too much pleasure out of this task while remediable structural and everyday cruelties persist.

And we must beware, too, of solemn edification. The lesson of 1939 to 1945 is that there is no lesson. By then, it was too late for lessons. Extreme evil, it turns out, is a misleading tutor. The real lessons are found earlier, perhaps in 1932 or 1933, with the deformations visited on the body politic, the low-level humiliations endured by those marked as different, the cruelties of a monstrous economic order and the sometimes subtle violations visited on language. For this final lesson, we need to have (as Orwell and Joseph Heller had, as the soldiers in the Great War trenches had, as Wilfred Owen had and as Thomas Hardy had) a keen sense of irony.

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To return to my preliminary remarks about gravity and irony, and to conclude this lecture we can, perhaps, say that two views of the international order are in tension here. According to George Steiner, in *The Death of Tragedy*, tragedy is unknown to the Judaic tradition because there is always, in the end, reason and justice (Steiner, 1961).

In the Judaic account of justice and punishment there is "a marvellous continuity between thought and action" (at 7). Subjective behaviour determines outcome.

In the standard legalist account of war crimes trials, there is a similar continuity between thought (conspiracy, intent), action (aggression, killing) and culpability (trial, imprisonment). The defeated in war deserve defeat and the resulting punishments because they have been defeated and because they have done wrong.

Greek tragedy functions quite differently. Instead of a rational universe in which thought, action and consequence are in perfect alignment, there is a chaos of arbitrary death and pointless destruction overseen by capricious gods. Judgement is selective. And punishment, if it comes, is accidental and morally inexplicable.

For sceptics, war crimes law is a field in which the arbitrary outweighs the rational, in which objective political forces determine punishment and in which judgement is *ad hoc*, unrepresentative and discretionary.

The war crimes field, then, is founded on a schism between Judaic judgement and Greek fatalism; between the solemn invocation of justice's power and the ironic representations of its

absence. In the Judaic version of the action/accountability axis, men are punished for a moral failure of some sort: they do wrong and are condemned before the tribunals of man or a reasoning God. In the Greek version, men are at the mercy of gods; they are unanchored to any rational universe. The continuity between thought and action dissipates to be replaced by “an ironic abyss” (at 7).

Sometimes, it is in that abyss that the work of humanity and law has to begin anew.

Sometimes, too, we get the occasional glimpse of justice. On May 11<sup>th</sup>, 1960, Adolf Eichmann was approached by two Israeli agents on the streets of Buenos Aires where he had been living under the assumed name of Ricardo Klement. . As they approached through the dark, he turned to them and said: “I’ve been waiting for you”.

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