War Crimes and the Ruin of Law

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This article explores the manner in which the logic of the war crimes trial authorizes and legitimates the practice of war more generally. It proceeds from the recognition that all war involves injuring or the threat of injuring, and that articulating particular types of injuring as especially problematic takes as one of its effects the normalization of injuring in war more generally. The article queries the function of law through an analysis of the state of exception that is produced in the identification of ‘war crimes’. It argues that the logic of excision, which produces the political conditions in which war crimes become possible is structurally replicated through the excision of the perpetrator in the context of the trial. It also explores the manner in which the narrative strategies of what Elaine Scarry calls ‘active redecoration’ associated with war render most war-related deaths and injuries politically invisible. The article concludes with a number of strategies for rethinking what it means to account for violence.

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The integrity of the criminal justice system in this country is so well entrenched that we can easily forget what it tells us about who we are and how we live.1

As the International Criminal Tribunal for the Former Yugoslavia (ICTY) sees its mandate draw toward a close, it is worth exploring what sort of international justice has been ushered in by its historic activities. The ICTY operates as a conceptual and institutional bridge between the earlier precedent of the Nuremberg and Tokyo trials and the future expectation of war-related prosecutions on a much broader scale.2 As such, the ICTY has served as a pilot project of sorts, a prototype for international criminal justice in the aftermath of violent conflict. According to Feinberg, the ICTY has ‘pioneered a new form of law,’ and ‘trumpets for all to hear that those who perpetrate horrific war crimes, genocide, and crimes against

humanity will not go unpunished.3 Perhaps most importantly, this promise (and the concomitant willingness on the part of international actors to convene war crimes tribunals) ‘has contributed significantly to the nature and operation of the judiciary as a social institution.’4 As such, the war crimes tribunal has a certain seduction associated with it. Despite its logistical complexities, there is something reassuringly simple about what takes place there. Broadly speaking, the war crimes trial is perhaps the most structured and definitive of post-war justice-seeking activities. Unlike the often inconclusive and essentially immeasurable practices associated with other peacebuilding and reconciliation activities,5 the war crimes trial serves as a reassuring reminder that, in a world increasingly marked by blurred ethical boundaries, the ‘good’ can still be differentiated from the ‘bad’, and evildoers can be identified, apprehended, prosecuted, and punished for their crimes.6 Accordingly, the structure of the war crimes trial is reassuringly clear: victims and perpetrators are identified, evidence is presented, and judgment is returned.

It is not the intention of this article to explore the successes or failures of the ICTY on its own terms, but rather to consider the socio-political effects of the war crimes tribunal in terms of its conceptual impact on our collective understanding of war itself. The concern here is therefore to inquire into how war crimes tribunals (of which the ICTY is only one – albeit crucial – example) relate to war as a ready strategy of international and inter-communal political life. A related concern is to inquire into how law authorizes and legitimates war by exceptionalizing certain behaviors in war as uniquely abhorrent. Drawing primarily from the work of Elaine Scarry and Giorgio Agamben, this article will explore how identifying some activities in war as ‘crimes’ serves to elide or obscure

4. Ibid.
5. I have in mind here a range of activities, from community-based confidence-building measures to truth and reconciliation commissions. However, while many of these activities may be victim centered, they are still operating in the context of a legal judgment, even if and where that judgment is to provide amnesty so that closure can be sought. See Jenny Edkins, Trauma and the Memory of Politics (Cambridge: Cambridge University Press, 2003). For an argument that truth commissions invoke an entirely different form of restorative justice and are therefore distinct from the retributive justice of criminal trials, see Ian Ward, ‘The Echo of a Sentimental Jurisprudence,’ Law and Critique 13 (2002): 107–25.
6. Unlike most domestic criminal trials, which are oriented toward a combination of punishment and correction, war crimes tribunals can only be geared toward punishment. The conditions in which war crimes take place are still considered – in both theory and practice – exceptional moments. Without the requisite condition of war and violent conflict, the crimes presumably would not have taken place. For a discussion of the merits and problems of mixing criminal law with international law, see Immi Tallgren, ‘The Sense and Sensibility of International Criminal Law,’ European Journal of International Law 13 (2002): 561–95.
the death and injury that is the currency of war itself in a broader sense. The war crimes trial marks a state of exception – a supposed deviation from ‘normal’ war – and employs a set of procedural logics that have as their main goal the conceptual and material excision of the war criminal from the landscape of legitimate war-related killing. There are a number of effects that directly proceed from this recognition: first, the imperative to identify war crimes preserves from scrutiny those acts in and of war which are subsequently understood as legitimate.7 In making socio-politically visible only some dead and injured bodies, the war crimes trial participates in a logic through which killing itself as a function of war is made ancillary or incidental to the larger (political) goals of war. By training our gaze on only the very specific acts of violence that the trial illuminates, analyses that seek to critique war itself as the permissive condition within which war crimes become possible in the first place are made more difficult.8 In effecting the excision of the war criminal from the realm of legitimate war-making agents, the war crimes trial actually assists in the tacit dismissal of most death and injury in the context of war as acceptable and, indeed, necessary. The war crimes trial thus produces a conceptual hierarchy along which individual deaths are arrayed and narrated as more and less meaningful. Finally, because the war crimes trial operates in extremely limited terms, it simplifies complex relational processes, suggesting in turn that the trial itself is adequate to address – and perhaps even overcome – the problem of large-scale inter-communal violence.

Each of these effects results in profound limitations for our ability to think through and theorize violence, justice, and responsibility in the context of an international political life that continually carries with it the threat of human injury and death. Indeed, in the immediate context of the continuing war on terror alone, there is an ever more pressing need to question (and perhaps to defy) the accepted logics surrounding the distinction between ‘acceptable’ and ‘unacceptable’ injury and killing – and to reconsider what it might mean to pursue justice in light of the fact that violence or the threat of violence still appears to be the modus operandi of human political relationships. In this context, the structure of law in


8. This article does not seek to adjudicate between the admittedly multiple motives for war (e.g. self-defense, ‘humanitarian’ intervention, and so on), nor does it seek to posit all wars as somehow identical in terms of their causes. What it does claim is that we can analytically separate the goals of war from the means through which war is waged to achieve those goals.
the context of the contemporary war crimes trial is an important factor in the moral differential between deaths in war, and in the subsequent relegation of most deaths to a sphere of necessity and legitimacy. This suggests that the relationship between law and war is one in which each threatens to undermine the other’s presumed legitimacy. That is, were law to recognize and articulate all injury and death in war as unacceptable, two interrelated possibilities would emerge: either law itself would cease to function because it would have no criteria through which to adjudicate between deaths in war; or war itself would be rearticulated for what it is: an activity which employs killing and injuring to reach a desired political outcome. The point here is not to suggest an equivalence between all wars, but rather to shift the analytical focus from the causes of war to the means it employs to reach outcomes both ‘legitimate’ and ‘illegitimate’.

It is important to note at this point that there is a strong sense within both scholarly and policy communities that war crimes trials are the most useful vehicles to pursue and deliver justice in the aftermath of war, even if the political mechanisms surrounding the trial are recognized to be imperfect and in need of some form of reconfiguration. Common criticisms revolve around questions of impartiality and the dangers of ‘victor’s justice’, questions concerning which forms of justice the punishment process should strive to embody, or issues of how victims can speak on their own terms to the legal apparatus. This article does not seek to engage with typologies of legal justice or to debate their relative merits and detractions. I do not wish to contribute to the thinking that leads justice to be understood as the motivating factor of jurisprudence. Here, I follow Jenny Edkins in her argument that the most politically important outcome sought by the war crimes trial is not justice, but closure. This stance does not deny that specific understandings of


10. See, for example, Robertson, Crimes against Humanity; Wringe, ‘Why Punish War Crimes?’

11. Dembour and Haslam, ‘Silencing Hearings?’

12. For a particularly thorough account of this type, see Wringe, ‘Why Punish War Crimes?’

13. Edkins, Trauma and the Memory of Politics, 206. While it is not within the scope of this article to explore truth and reconciliation commissions specifically, I am persuaded by Jenny Edkins that both the war crimes trial and the truth commission seek primarily to effect closure. Jenny Edkins writes that ‘In the case
justice are both enabled and enacted by war crimes trials. What is more important for my argument, however, is the recognition that the trial has socio-political salience, is geared toward a larger audience than the perpetrator and/or the victim, and seeks to conclude a narrative of events that enables clear pictures of right and wrong in what Immi Tallgren calls a ‘miraculous seal of finality.’ The drive for closure is multifaceted: the outcome sought by the trial is not simply a closure involving specific war situations or injuries in war. Rather, what must also be foreclosed is the rupture that the injured or dead body effects with respect to the narrative of war itself. Only some injured and dead bodies matter. Only some of them are made visible by the war crimes trial and, regardless of the legal mechanisms that make this so, the ethico-political ramifications of this for war and war-making are deeply significant.

Rewriting War

Speaking at the University of Toronto in 2001, the former Chief Justice of the ICTY, Louise Arbour, outlined her vision for the future of international war crimes tribunals, arguing that:

we must make a fundamental choice about the type of trial we use. One [model] is to proceed in a narrowly focused, clinical fashion, apparently oblivious to any issue not directly relevant to the guilt or innocence of the individual charged. The second model is to commit to the exposition of the larger picture, to paint the broad and complex historical fresco, not only to expose and record individual guilt but to exploit the dramatic stage of the trial to construct the collective memories upon which both victims and perpetrators, indeed whole nations, will be cleansed of their brutal past.

Arbour’s first, ‘clinical’ vision of the trial is that which aims directly at closure at the level of the individual crime itself. The relevant evidence is produced, and a perpetrator is identified, judged, and sentenced. The second model proposed by Arbour is one of expiation – a ‘cleansing’ of whole peoples’ politics, memories, and narratives. This is also a strategy aimed at closure, but it seeks this closure at the broad interactive levels of culture and history. This is a war crimes trial for a larger political audience, one that spreads the word that the contingency and specificity of violent conflict can be neatly wrapped up into a vision of culture and history that makes of the tribunal, whether a truth commission or a war crimes tribunal, what is sought is closure, either in the form of reconciliation between perpetrator and victim, or the conviction of those responsible for the crime … Both conviction and amnesty are judgements that establish what is to count as truth’ (p. 206).

15. Considering her tenure at the ICTY, I found Arbour’s use of the term ‘cleansed’ (the term used by Serb militia and media to describe areas forcibly emptied of their Muslim inhabitants) somewhat unsettling.
sense’ in a very particular way. There is an immobility built into the claim of the ‘brutal past,’ in which perpetrators and victims are mapped out across the grain of a highly restrictive personal, social, and wartime history. The call for the painting of a ‘fresco’ that immobilizes a particular conception of the history of violence in a given place and time is an immeasurably complex – and therefore inevitably simplifying – endeavour. For example, where will our narrative of this history begin? How will these collective memories be constructed? Most importantly, how will dispute be minimized? Indeed, the success of any such project rests ultimately on one assumption: that judgment can be made in a way that minimizes and manages dispute.

The minimization of dispute is an important facet of any trial if judgment is to be returned. Here, Edkins’ argument on closure can be considered in light of Giorgio Agamben’s claim that judgment is the overriding goal of the trial. Agamben writes,

‘[a]s jurists well know, law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgment, independent of truth and justice. This is shown beyond doubt by the force of judgment that even an unjust sentence carries with it. The ultimate aim of law is the production of a res judicata, in which the sentence becomes the substitute for the true and the just, being held as true despite its falsity and injustice.’

Drawing on Kafka’s novel The Trial, Agamben argues that ‘[t]he ultimate end of the juridical regulation is to produce judgment; but judgment aims neither to punish nor to extol, neither to establish justice nor to prove the truth. Judgment is in itself the end and this, it has been said, constitutes its mystery, the mystery of the trial.’ In this context, the capacity to judge is the minimal requirement – the foundation upon which all other aspects of law (including justice) are subsequently erected. This foundation is self-referential – an identification and compilation of apparently coherent claims that work to legitimate and secure the finite structure of judgment itself, even as the trial appears to rely only on what is external to it – that is, the events and individuals that must be identified in order for the procedural aspect of law to move forward. In its structural imperative to deliver judgment, the trial does not and cannot pursue justice as either principle or practice. It does not and cannot recoup the losses associated with injury and death, yet its claim to be able to deliver justice (even in the minimalist sense of retribution), and the curious widespread acceptance of this, renders critique on any other than supplemental or procedural grounds extremely difficult.

The claim that law cannot contain the subject of its scrutiny – the claim that law is fundamentally inadequate in the age of death camps, genocide, and nuclear weapons – is to risk its obsolescence and its ruin. This does

17. Ibid., 19.
not, however, mean that recognizing the structural and procedural inadequacy (and even violence) of law is equivalent to the abandonment of justice. Indeed, the goal for justice is perhaps to wrest itself free from the strictures of law, so that justice ‘becomes more than a matter of judging guilt or innocence.’ Rather than immobilizing a certain sense of the past, as Arbour suggests, justice here ‘becomes a matter of entering into the dramatic life of a community,’ a much more fluid and uncertain undertaking. In this way, recognizing the inherent philosophical impossibility of the war crimes trial to deliver justice is not an indictment of justice, but of law. It is to reveal that law at the war crimes tribunal does not adjudicate between the principles or logics of war, but between the acceptable and unacceptable violences contained therein. Thus, it is not war itself that is brought before the mechanism of judgment, but only those specific manifestations of violence within what is seen as an otherwise legitimate political activity. To fail to address the logic of war is to fail to address the manifestations it entails. It is to consider symptoms as causes, morals as ethics; it is, ultimately, to determine which deaths matter and which do not.

If we accept thus far that law does not in and of itself pursue justice, we might now be able to focus on what function(s) law does serve in the context of prosecuting war crimes, and on what effects its judgments have in securing the legitimacy of war itself. If law operates primarily to produce judgment, then this judgment articulates a state of exception in the identification of war crimes as different from the otherwise legitimate activities of war. The identification of this exceptional act requires the identification of an exceptional agent: the war criminal. We can therefore recognize the creation of exceptional space in an otherwise unexceptional logic of war, which is the specific, exceptional, and intentional infliction of profound trauma on identifiable, individual victims. That war crimes are understood as exceptional within an otherwise unexceptional and even commonplace activity should be self-evident. The Bosnian war itself is not considered by the ICTY to have been a crime. Rather, the tribunal has identified particular instances of violence within the context of the war as criminal. This is, of course, as it must be, for were this not the case, then every instance of human injury and death in Bosnia would have constituted a prosecutable offence. An exploration of the state of

19. Ibid.
20. It is worth noting here that in the Bosnian case, intra-ethnic violence is not of concern to the tribunal. Once the conflict was identified as ‘ethnic’ in nature, instances of killing that did not ‘work’ in this framework were ignored. See Elizabeth Dauphinee, ‘The Ethics of Researching War: Looking for Bosnia’ (Manchester: Manchester University Press, 2007). David Campbell expands on the additional pernicious effects of naming ‘ethnic’ conflict in National Deconstruction: Violence, Identity, and Justice in Bosnia (Minneapolis: University of Minnesota Press, 1998).
exception, and an inquiry into its relationship with the juridical order which constitutes it, will help to illuminate these points further.

States of Exception

Giorgio Agamben describes the state of exception as ‘being outside, and yet belonging.’ For Agamben, the state of exception is not simply the suspension of the law, but rather marks the limit of law itself – the legal creation of a space which operates outside law and yet which continues to rely on law for the validity of its very existence. This space of exception is made intelligible through the normalizing conditions that produce the state of exception as exceptional. In other words, there is no space that law does not lay claim to (even if that claim is to make no assertion at all), such that even those things that are excluded from law’s purview are still included on the basis of their exclusion. Thus, Agamben observes, the state of exception is outside law, but remains of it. Here, the imperative of inquiry is not to deduce the character of the state of exception by what takes place there (which might cause us to miss the structural similarities), but rather to interrogate the state of exception by inquiring into what it is and into its relationship with the normative juridical order. In so doing, we will come to recognize that war crimes and war itself are structurally indistinguishable. Both have the same two targets: a people and its civilization; the deconstruction of those objects and elements that help to make us (if such an ‘us’ can be identified) who we are in our worlds, in our societies, in our relationships, and in ourselves.

Agamben identifies the concentration camp as the paradigmatic state of exception. The camp is a juridico-logical space whose inhabitants are stripped of their political subjectivities such that they are reduced to what he calls bare life. Bare life is life that can be killed or otherwise excised with impunity. The camp comes into existence through the creation of a legal state of exception – which is law’s production of a space outside of itself. The state of exception is both physical space and conceptual space, for one is never possible without the other. In the context of the war crimes trial, we can identify two spaces of exception (which are nevertheless structurally identical, as will become apparent): first, the space of exception which is identified as having produced the victim in the first place (the political and sometimes legal logic that underpins the expulsion and extermination of a people and the atrocities associated with the politics that make possible the ‘war crime’). What bears recognizing is that here the state of exception is occupied by the tribunal’s

22. Agamben, Remnants of Auschwitz, 166.
identified victim. The extent to which she is constituted as bare life is tied to the specific political practices that rendered her exceptional in the first place, and not by the injuring logic of war itself. War is simply one of the mechanics through which the annihilation takes place.

The second state of exception that can be located in the context of the war crimes trial emerges within the contours and logics of the trial itself, which excise the perpetrator from the realm of legal legitimacy and into a state of exception through the mechanism of judgment. As the perpetrator erases the victim through the political logic that articulates her as bare life, so the mechanism of the trial erases the perpetrator from the landscape of legitimate killing through a legal articulation of his violence as radically abhorrent. The juridical sentence acts as a symbolic death through incarceration and the stripping of legitimacy – both political and personal – from the body of the war criminal. Both of these excisions operate at the limits of law itself, marking the unfolding of the exceptional space in which what threatens the stability of identity and order is contained and isolated. As bare life is produced through the identification of others as threats to be eradicated in particular socio-political contexts, so the perpetrator in the context of the war crimes trial undergoes an excision from what would be otherwise understood as ‘normal’ killing in war. Both are legal excisions of particular subjects from the realm of the political. However, this is the moment that should alert us to the fact that what is being marked is, in fact, profoundly political. This is not to suggest that the excision of the perpetrator through the contours of the trial is a violence of equal measure and consequence to the excision of the victim, who is reduced to an abject state such that her being becomes a target for the inscription of torture, violence, and death.

To repeat, this is not to lodge an equivalence between what takes place in these states of exception, but it is to show what the state of exception is, what its juridical logics are, and, more importantly, what the state of exception seeks to securitize in the normative juridical order. It is precisely because the lived experiences do not give us enough purchase on the problem that Agamben asks us to interrogate what the state of exception is, and not what specific acts are committed there. It is important to ask what the state of exception secures in the normative juridical order which produces it, and which produces the bodies that are subsequently excised into this logical space.

In both instances, what is secured through the state of exception is the legitimacy of war itself. This means that, rather than articulating war as the exceptional space, we need to see war as the normalizing space (which in turn produces spaces of exception) that works to securitize its own activities as legitimate and necessary. Foucault argues that the work of sovereign power is to ‘make live’ and to ‘let die,’ which obscures the work of killing that the ‘making live’ is already always engaged in.24 Put

24. Michel Foucault, Society Must Be Defended: Lectures at the Collège de France (New York: Picador, 2003), 241. For a series of essays on the relationship between Foucault and Agamben in International Relations scholarship, see Elizabeth
simply, insofar as the exercise or attempted exercise of sovereign power remains and resides in the capacity to engage in war, war as an extension of the political is oriented toward preserving one population through the destruction and/or subjugation of another. The mechanisms of exception – whether war crimes trials or concentration camps – operate to secure the legitimacy of the political order in which they emerge and through which they are made intelligible. In the context of the war crimes trial, specific iterations of violence are identified and cordoned off as illegitimate. The effect of this is that the injuring tactics of ‘legitimate’ war can be denied or obscured by appeal to larger, presumably legitimate, goals (such as the securing of national interests, ‘humanitarian’ intervention, or the defense of a people or way of life). The successful excision of the perpetrator through the war crimes trial effects the securitization of war more generally by pathologizing only very specific articulations of the violence that occurs within its structure. This violence must be very narrowly defined and articulated in order to remain intelligible as ‘criminal’. In other words, the human death and suffering that follows from all war, regardless of intention, is effectively erased when only specific iterations of that violence are understood as worthy of the war crimes trial. Let us turn to reflect on the strategies of narrating war more generally in order to appreciate the ways in which this human death is obscured or evacuated.

**Erasing War**

Although we can differentiate between the causes and political motives for individual wars, it is much more difficult to draw distinctions between war’s effects. This leads Elaine Scarry to posit a first order claim about the conduct of war, which is that its main purpose is to injure. This is so regardless of whether the population to be injured is constituted by the enemy’s soldiers or by the enemy’s civilian population and infrastructure. This seemingly facile observation, however, is in practice ‘indirectly contested by many means and disappear[s] from view along many separate paths’ in the narrative iterations of war. The indisputable fact that torn, bleeding, injured, obliterated bodies is the currency with which the ‘outcome’ of war is purchased is so self-evident as to seem nearly tautological. The goal is to injure – and specifically to out-injure – one’s identified opponent. Of course, one claims (and

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26. That some populations are considered to be legitimate targets and others are not does not alter the fact that war is by definition an institution that utilizes physical force to defeat the perceived opponent.

must claim) that there are other ‘goals’ in war, goals more noble and more important than the destroyed lives which are required to achieve them – for example, self-defense, the bringing of democracy, the preservation of freedom, humanitarian intervention, the neutralization of terror. But in order for the political goals of war to justify the process of injuring through which those goals are achieved, the injury of war must be assimilated in such a way that it is made to disappear or emerge as comparatively unimportant. This involves the management of a massive volume of dead human beings that are the direct consequence of the activity of war.

The process of managing injury and death in war takes a number of interrelated tacks: first, the omission and active redescription of the injuring activities of war are required. There are a number of strategies through which this is achieved, either partially or wholly. Scarry notes that, in the process of active redescription, ‘the act of injuring, or the [human] tissue that is to be injured, or the weapon that is to accomplish the injury is renamed.’ Scarry provides an array of historical examples, of which only a limited number can be highlighted here: American warheads are called ‘peacekeepers.’ The Russian artillery rocket is called ‘Katyusha’ – the affectionate short form of a woman’s name. Scarry notes that the American incendiary bombs dropped over Vietnam were referred to as ‘Sherwood Forest’ or ‘Pink Rose,’ as Japanese suicide planes were called ‘night blossoms,’ and ‘the day during World War I on which thirty thousand Russians and thirteen thousand Germans died at Tannenberg came to be called the “Day of Harvesting”.’ Carol Cohn has also traced this active redescription in the context of nuclear weapons, observing that the ‘technostrategic’ language of defense intellectuals enables a discussion of nuclear war that is entirely devoid of human content. She writes, ‘clean bombs may provide a perfect metaphor for the language of defense analysts and arms controllers. This language has enormous destructive power, but without emotional fallout, without the emotional fallout that would result if it were clear one was talking about plans for mass murder, mangled bodies, and unspeakable human suffering.’

That strategies of redescription are applicable both to war and to ‘war crimes’ should be illustrative of the similarities associated with the imperative to erase human death from both the political and colloquial language of war. One must be cautious in assessing why this renaming occurs, and how it becomes possible as ordinary description. Conventional accounts of war may or may not be instrumentally intended to obscure human hurt, but that is their effect, and it is effect that is of concern

28. Ibid., 63–81.
29. Ibid., 66.
30. Ibid.
here. Recall that these narrative accounts manage, describe, explain, understand, and interpret an event understood to be so profoundly complex that an entire academic discipline is apparently warranted to address it. This article does not seek to interrogate or identify the reasons why these disembodied accounts circulate as and where they do, but takes only as its relatively modest goal the tracing of some of the effects of redescription, and to note that redescription ‘assists the disappearance of the human body from accounts of the very event that is the most radically embodying event in which human beings ever actively participate.’

Of course, the invisibility of the injured body cannot always be maintained. Bodies pile up. They become a problem, often appearing in numbers that threaten war itself with the elemental possibility that the violence and death it produces may not be worth the stated goals of war, even if and when those goals are themselves to put a stop to violence and death. The dead and injured body poses an elemental problem: it must be buried, cremated, vaporized, or provided with medical attention and rehabilitation assistance. When invisibility is no longer a sustainable option, visibility must be managed. One of the ways this is achieved is through the admission that dead bodies are indeed present in this sphere of war, but that they are ancillary to war’s political goals. Management is variously oriented toward understanding injured and dead bodies in war as ‘by-products’ of war, or the (unfortunate but necessary) ‘costs’ of war – or, in the mainstream euphemisms of contemporary war, ‘collateral damage.’ In this way, as Scarry demonstrates, ‘injury becomes the extension or continuation of something else that is itself benign.’

As a result of the effective evacuation of injury and death from war, it is particularly shocking when we are confronted with a motive for death that cannot be managed within these redescriptive frameworks. In this context, it becomes imperative to pathologize the specific injury that has broken through the otherwise disembodied accounts of war. This pathologization reveals the mutually constitutive linkages between legitimate injury and death in war, on the one hand, and the war crime, on the other. The war crimes trial actively manages the visibility of injury and death in war, narrating these deaths and injuries not as expected

32. Ibid., 71.

33. The NATO-led war against Kosovo is a case in point here, as the vast majority of Albanian deaths occurred after the NATO bombing began. See Elizabeth Dauphinee, ‘Rambouillet: A Critical Reassessment,’ in Understanding the War in Kosovo, eds. Florian Bieber and Zhidas Daskalovski (London: Frank Cass, 2003).


consequences of war, but rather as the unacceptably extreme behaviors of culpable agents. Note that now the ‘war crime’ is not unacceptable because of its uniquely abhorrent character, although this may appear to be the case at first glance. Rather, the ‘war crime’ is unacceptable because its tacit admission that war is by definition an excessively violent activity threatens all war with this exposure. In other words, the war crimes trial secures the state of exception, thus protecting the institution of war itself as a legitimate enterprise. Paradoxically, then, with respect to the content of the trial, it is not the victim identified by the tribunal, but the victim that is rendered invisible by the tribunal who occupies the space of bare life. This is the victim who will never receive attention, because no law recognizes the crime, and because no law can recognize the crime.

Excision/Embrace

It is hardly novel in international relations to argue that the construction and securitization of identity proceeds from the production and identification of external threat. Threats are controlled and managed in different ways, but one important mechanism of control is the attempt to excise that which threatens from the object to be secured. In his consideration of Derrida’s Force of Law: The Mystical Foundations of Authority, Willy Maley points out that law polices most heavily those frontiers and borders of its own constitution that are the most fragile.36 Following Derrida, he asks, ‘how are we to tell the difference between the violence that brings law into being and the violence that it then employs to safeguard its interests?’37 For Maley, as for Derrida, there is a fundamental distinction to be made between law and justice – one that seeks at the very least to open law to the inevitability of its own injustices while maintaining justice itself as a possibility that fundamentally transcends the force of law. Here, it is not the procedural inadequacy of law that forms the problem, but the depth of its desire to preserve the order which constitutes it. It is this element of law that limits the possibility of justice, because justice in law operates as a politics of auto-security and of revenge against what threatens its coherence.38 It is in this context that we find ‘the outlaw’ as ‘an essential part of the system, albeit while remaining on the surface as an excluded element.’39 The war crime is thus an essential part of the institution of war, securing war’s legitimacy through the identification of uniquely abhorrent war-related practices. The critical and analytic scrutiny is shifted from war itself onto the ‘war

37. Ibid., 53.
38. Ibid., 58.
39. Ibid., 54.
crime,’ even though war is the permissive institution within which the ‘war crime’ is made possible.

Furthermore, while the war criminal is understood to be subject to the law (standing before and answerable to the tribunal), the function of law itself is to excise him from the realm of legitimate injuring in war. It performs this excision on the basis of another, earlier excision, which is the rendering invisible of the multitude of other bodies that are injured and destroyed in war such that these particular bodies warrant our immediate attention. This state of exception remains exceptional in that the war criminal is positioned as having acted outside of the law – in contravention of the law – and in that the punishment associated with the trial is his conceptual and physical excision from the socio-political landscape. Yet he is excised into a space that is still fundamentally legal and juridical – an entire apparatus of excision that operates within law itself, which is precisely Agamben’s structure of the state of exception – outside, and yet belonging. The removal of the perpetrator from the realm of legitimacy through judgment and sentencing cannot entirely remove him. The trace of him yet remains in the anxiety associated with the selective identification of some injuring in war as ‘criminal.’ The identification of some injury in war as criminal threatens, despite its rhetoric of exceptionality, the exposure of all war and all war-making as effectively identical.

This crisis becomes particularly urgent as the law which governs activity in war attempts to embrace more and more specific categories of death and injury as ‘criminal’ (e.g. genocide, torture, ethnic cleansing, and now, after Bosnia, rape). In identifying the criminal, the focus of law is concerned with what can be known about intention, and does not consider effect as such. To adjudicate on the basis of effect is to lodge an equivalence between civilian and military deaths and between the tactics used to kill and injure in war. It is to suggest that ‘accidents’ or the successful targeting of ‘legitimate’ populations (i.e. military personnel) is not effectively different from any other sort of death in war, for human death is still death. The news is not good for those who applaud law’s creeping movement to criminalize more and more behaviors in the context of war. Law can never embrace all the disastrous acts of war-related violence: either law would cease to exist as such, or war as a means of human political engagement would come into radical question. Since war and the law which manages war are mutually constitutive and reinforcing, there is no way to address the problem from within the law, and certainly not from within the structure of international war-related life that authorizes law. But the war crimes trial plays a crucial role in attempting to complete the closure by providing the sense that law can address the problem. Agamben notes that, at Nuremberg, ‘[d]espite the necessity of the trials and despite their evident insufficiency (they involved only a few hundred people), they helped to spread the idea that the problem of Auschwitz
had been overcome. The judgments had been passed, the proofs of guilt definitively established.40 The ICTY has sentenced 53 defendants to date, and has so far failed to secure the physical presence of those whom it was arguably designed to prosecute in the first place – Radovan Karadzic and Ratko Mladic.41 In this sense, we can view the ICTY as strikingly similar to the trial at Nuremburg, a comparison which its supporters have also made, though to different effect. It has helped to spread the rumor that the problem of ethnic cleansing can be addressed and overcome in the parameters of a juridical structure whose primary purpose is actually the regulation and legitimation of the very activity in which ethnic cleansing takes place as a matter of course. Indeed, this death in war is total death. It is the death not only of individual lives, but of the principle of life itself. The distinction between legal and illegal, moral and immoral, victim and perpetrator reaches an Agambenian point of fusion from which there is neither recompense nor return.

Law thus avoids – and must avoid – confronting the ethical abyss surrounding the subject of its scrutiny and regulation. Here we can locate an additional facet of the war crimes tribunal, which is that it can only operate after the violence has concluded. In the context of war, law is always both participant and spectator, looking for the categories it has constituted which enable it to begin the process of judgment. Jenny Edkins argues that this is so not just in a figurative sense, but also in a procedural sense, noting that after the Kosovo war in 1999, international observers entered the territory seeking out only those whose experiences could be legally intelligible as ‘war crimes’ within the scope of the ICTY.42 This should not surprise us, for in the framework of its own strictures, this is all that law can do. However, it should also not prevent us from exploring the impact of this, both materially and conceptually. First, it severely limits the possibilities surrounding the function of testimony and what, specifically, can be narrated before the tribunal.43 Dembour and Haslam argue that ‘victims inherently become instruments of the legal process when they testify.’44 There is no analytical reason not to extend this observation to defendants, who find themselves caught up both conceptually and materially in the logics and mechanisms of the trial. Dembour and Haslam also explore the concrete effects of this instrumentalization, pointing out that ‘[t]he legal process requires

41. The trial of Slobodan Milosevic was the highest profile case brought before the ICTY in what the Tribunal described as a historical first: the indictment of an acting head of state. Milosevic died before the trial concluded. See ICTY, ‘Tribunal’s Core Achievements,’ http://www.un.org/icty/glance-e/index.htm Accessed 12 November 2007.
42. See Edkins, Trauma and the Memory of Politics.
43. It also limits who will appear before the tribunal.
44. Dembour and Haslam, ‘Silencing Hearings?’, 162; emphasis in original.
victim-witnesses to give their account in a form which leaves them subject to the pace and interest of those who have the power to ask questions… for reasons of relevance witnesses cannot dictate what they are able to talk about, the length of time they take to testify or the terms in which they do so.”45 Secondly, as Edkins points out, “[i]f the ICTY or other court is in the hands of a particular sovereign power – whether it be an individual state or some form of imperial power – the possibility of testimony as a resistance to power will have been annulled from the start.”46 If the tribunal cannot speak resistance to the power that convenes it, and if the witness cannot speak resistance to the tribunal, then we are left to paint Arbour’s ‘historical fresco’ in ways that will privilege some deaths as deserving of justice, but at the expense of others.

‘We are Them’

The war crimes trial is a paradigmatic example of the rigidity of categories to which one can appropriately belong in the aftermath of war. Perhaps that is why trials are growing in their popularity as a post-conflict tool for the provision of justice. One is a perpetrator, a victim, or a witness within the ontological structure of the trial. Accordingly, one must narrate one’s account within the limited relational frameworks offered by these categories. It is this which renders critique so difficult, and which haunts the critique itself with the apparition that an outrage has been committed against the socio-political order of things. Is the implication here that we should abolish war crimes tribunals (a dangerous and perhaps callous sentiment)? Does this mean a return to wholesale war practices in which all violence is permissible because all violence is equally violence? These are not the questions. Instead, the questions must proceed from an awareness of the restrictions inherently associated with law, which in turn requires us to consider whether and how we can understand and pursue justice outside of the corpus of legal right whose purpose is to govern war, not to end it. The questions must be focused on the possibilities and conditions of political responsibility in a context that privileges ethical obligation over legal right. It is to place the risks to others at the forefront of our analysis, and to ask what narratives the limited scope of the tribunal ignores. Recognizing that the narrative account of violence is never complete is not to suggest that the capacity for assuming responsibility is demolished. On the contrary, it opens us to the possibility of allowing for narratives that do not conform to the rigidities of the tribunal, or to the immobilized ‘frescoes’ of history.

Indeed, the war crimes trial does not provide a space for the conveyance of the trauma of war and of the experience of the injured.

45. Ibid., 175.
46. Edkins, Trauma and the Memory of Politics, 210.
body. The law seeks to minimize trauma, and necessarily so, through its insistence on relevant testimony from relevant individuals—a recounting of events whose evidentiary value is based not on the content, but on the form, of their trauma, which in turn relies on the accuracy of their temporal and spatial recounting. The war crimes trial needs to staunch the leakage of trauma that threatens the careful equilibrium between victim and perpetrator. This allows law to get on with the judging which is its overriding purpose. But the tide of human trauma in war everywhere threatens the coherence of the trial. Indeed, the coherence of the trial relies on the coherence of the narratives that are identified and recounted within its framework. When the incoherent begins to leak into the coherent, the authoritative character of the process itself becomes inherently suspect.

Insofar as law operates as a technology of judgment which plugs in particular variables to reach indisputable conclusions that claim to directly address, or even resolve, the problem of violence, even in specific contexts, it is unable to contain ethics. To pursue the ethical—to pursue justice—is to put law at risk. It should be evident by now, however, that I am not introducing risk to law where none existed; I am, rather, pointing to the inherent risk that law already contains—a certain blindness to its conflation of justice and judgment—a certain inattention to what it erases and ignores in its efforts to illuminate what it privileges. This recognition requires us to consider how we might conceive of responsibility outside the strictures of the law whose purpose is to govern and regulate war. A starting point for such an undertaking is the awareness that war may simply not be an ethical option. It may be ‘necessary’ in the current political imaginary surrounding international and inter-communal life, but ‘necessary’ does not translate into ‘ethical.’ To render the war crime or the war criminal ‘exceptional’ is to simultaneously claim that his violence is not coequal with ours in its effects. Louise Arbour revealed the anxiety associated with this distinction when she stated that ‘it is truly astonishing that powerful perpetrators of atrocities have not only remained unpunished over the years but that they have not even been ostracized. It is the “them amongst us” that must be addressed through the exposition of their crimes—because as long as they are among us, we are them.’

The fear that we may be them or, conversely, that they may be us, animates the drive to differentiation and judgment in the context of the war crimes trial. The imperative to excise the perpetrator of war crimes rests on an abiding fear that, without the spectacle of the tribunal to differentiate war crimes from other acts of killing in war, we could not differentiate at all. Either all killing would constitute crime, or all killing would be sanctioned as legitimate and commonplace. In either case, the edifice of law that underwrites the tribunal collapses under the weight of its own constitution.

Conclusion

To recognize that war produces death as commonplace is not to trivialize those deaths, or to suggest that there is nothing to be done. To the contrary, this recognition seeks to make visible all death in war, and to argue that war itself is therefore in need of serious and sustained address. We have seen how the active redescription of injury and death has obscured the reality of human hurt that all war effects. The normalcy and even predictability with which these dead and injured bodies confront us is precisely the ground on which war as a legitimate political strategy needs to be opposed. Giorgio Agamben recalls a passage by Primo Levi wherein the ‘special teams’ at Auschwitz were engaged in a football match against members of the SS. For Agamben, this match is not to be read as ‘a brief pause of humanity in the middle of an infinite horror.’ Instead, Agamben views the match – a moment of normalcy – as the ‘true horror of the camp.’ It is precisely the normalization of human death that needs to be viewed as war’s true horror. For Agamben, this is the ‘shame of those who did not know the camps and yet, without knowing how, are spectators of that match, which repeats itself in every match in our stadiums, in every television broadcast, in the normalcy of everyday life. If we do not succeed in understanding that match, in stopping it, there will never be hope.’

If the mechanisms of legal judgment provide us with the adjudicative tools to normalize and obscure the realities of human death and injury in war by highlighting only select instances of it as uniquely problematic, then those mechanisms cannot provide a ground for thinking our way out of the match that Agamben identifies. Perhaps it is naive to suggest that the only remedy for the dilemmas outlined here is to reconsider pacifism as an achievable political goal. Yet in an age when the goals of war are increasingly lauded as ‘humanitarian,’ and when the corpus of international law is oriented toward governance and not eradication, perhaps pacifism is the only real alternative to work toward. In the meantime, recognizing that the war crimes trial works to adjudicate between acceptable and unacceptable violences in war, and that this therefore legitimates most war, we need to fundamentally rethink what it is we seek from the tribunal. If it is the painting of a historical ‘fresco,’ then we are doomed to immobilize our official pasts in the confines of

49. Ibid.
a juridical apparatus whose workings secure its own capacity to paint that fresco through judgment that may or may not incorporate justice. In this formulation, those who appear before the tribunal (both victims and perpetrators) become, as Dembour and Haslam demonstrate, silenced instruments of the legal machinery.\(^{50}\) To think about responsibility is not necessarily to pursue punitive justice in a limited framework, or to seek closure for victims through the inarguable conclusion of the law. Indeed, we know that victims of war do not find closure, but narrate their experiences far into future generations through literature, film, art, philosophy, and other artifacts of memory. Instead, perhaps, responsibility means to consider that war itself is the problem, and to seek long-term socio-political solutions that de-authorize war as an acceptable option when ‘politics’ fails. This requires us to dramatically expand our notion of what ‘politics’ actually is or can be; to include the possibility of a positive and measurable peace in and between human communities, to consider a radical re-evaluation of our expectations of ourselves and one another, and to turn our allegiance and withdraw our support from those who work to convince us that war is a necessity and a right. Until then, the war crimes tribunal is part of the politics of normalization with respect to the injury of war and, as such, whatever else it accomplishes, it will also continue to bear witness against us.

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50. Dembour and Haslam, ‘Silencing Hearings?’, 175.