



Whither War; Whither the Law of War

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The talk has to be shorter than this text to fit in the allotted hour. So, in my talk I may have summarised some of what follows.

INTRODUCTION

A CV:

Brought up in Bellingham/Catford South London. I had really good parents, a cleverer elder brother who probably opened the door to a very good school and a very good university where I saw privileged boys read law; so, after university I read law. I found it agreeable, but playing the adversarial system of law's games with other people's rights perhaps was not enough for a lifetime. By chance, in 1998, I got a job prosecuting for the UN at its tribunal in The Hague dealing with war crimes committed in the Yugoslav wars of 1991-1999, and later, by even greater chance, got to lead the prosecution of Slobodan Milošević, Former President of Serbia.

After that finished almost 20 years ago - with Milošević's death before the end of the trial - I did interesting work for different countries but, by force of circumstances outside my control as well as by choice, I drifted to the unpaid NGO and similar sector. There, having no paymaster, I was able to think freely, to do some rewarding things – and to avoid looking too closely into the coming 9th decade by giving this talk! Thank you all for coming.

What follows are largely unconnected topics. But we are used to hearing unconnected points about law and war on the media over the last couple of years and must each find a connecting thread, if there is one. I should not impose when not really possible.

THE LAW

What is the relevant law of war?

It will not help for me to assume knowledge of the war of law in my audience and therefore a summary – however short I can make it – is essential. However, it will not be the possible two minute summary because, to make best use of time, I will weave in other things about genocide and the USA as I go. The summary will allow me to lead us towards a *possible* conclusion about the limited effectiveness of law *now* and perhaps our duty – as citizens – to increase its effectiveness. Unhappily, it will also lead us to recognise how our own government, needing nothing but our votes, has no desire to have us involved after voting day to be doing any such thing; as so often, government keeps really critical information from us the voters because government knows best and our government wants international humanitarian law to be as politicians in power want it to be. Nothing more.

RULE OF INTERNATIONAL HUMANITARIAN LAW – THE LAW OF WAR

There was no real law of war until the International Committee of the Red Cross and the Geneva and Hague Conventions came into being in the last part of the 19th Century. The law formed, protecting civilians and combatants in war and about weapons permitted for use in war, may have affected conduct of the war but did not lead to war crimes accountability trials afterwards (save for a few of no real consequence at Leipzig), not least because the arch-enemy(as viewed by some) – Kaiser Wilhelm whose prosecution was specifically intended in the 1019 Versailles Peace Agreement, crossed into The Netherlands where he was granted sanctuary. Hardly possible, thereafter, to try those down the chain of command if the principal possible offender had been let off!

ARMENIA

I need, for a reason that will become clear later, to interpose one detail from WWI, namely the massacre of the Armenians by the ‘Young Turks’. The massacre, well known as happening *at the time* and often *now* described as a ‘genocide’ although the word had yet to be coined, was the killing of 660,000 to 1,200,000 by in-country massacres that began in spring 1915 and during forced deportations - under conditions of starvation, dehydration, exposure, and disease – when Armenians were marched to the desert regions of present day northern and eastern Syria, northern Saudi Arabia, and Iraq. In addition, tens of thousands of Armenian children were forcibly removed from their families and converted to Islam - something to have in mind when we reach the Genocide Convention and its five ways of committing that crime.

Coming up are a few names and pictures of people – bad and good – to whom we are indebted for changing both our vocabulary and how we think.

The driving force for this Armenia massacre was Pasha Talaat.

The humane and decent US Ambassador to Turkey, Henry Morgenthau, was much troubled by the massacre. Pasha Talaat couldn't understand why and asked him:

"Why are you so interested in the Armenians? You are a Jew these people are Christians....What have you to complain of?"

Morgenthau implored the US Secretary of State Robert Lansing to act by getting the powerful USA to save innocent people by doing something within the borders of a foreign country. But Lansing was absolutely committed to the notion of sovereignty, that countries could do what they liked within their borders, as a lecture given the year before the war revealed. In the course of refusing to allow the US to save the Armenians Lansing, as Secretary of State, gave this unconvincing explanation:

*"I could see that the Armenians well-known disloyalty to the Ottoman Government and the fact that the territory which they inhabited was within the zone of military operations constituted grounds more or less justifiable for compelling them to depart their homes."*¹

At the end of the war a tribunal convened by the post-war Ottoman government tried Pasha Talaat *in absentia*, found him guilty of massacres and condemned to death for the extermination of Armenians; but he had already fled to Berlin Germany under an assumed name with bodyguards – and Germany refused to extradite him.

RETRIBUTION, BUT NOT BY DUE PROCESS; AND RAPHAEL LEMKIN

In 1921 Soghomon Tehlirian, something of an Armenian activist and some of whose family members had perished in the genocide, was also in Berlin with a gun. He identified Talaat by name in a street, shot him dead, waited to be arrested, faced a two-day trial at the end of which he was acquitted in an hour by the jury on grounds of the things done by Talaat.

The trial was reported in newspapers around the world including in Lviv, then part of Poland now back as Ukraine, where a philology student Raphael Lemkin could not understand how there had been no way to bring Talaat to justice other than by a gun. Lemkin changed to study law, became a prosecutor, went to many conferences with his concern, taught at universities but as the WWII approached escaped to the USA because he was Jewish. 49 members of his family perished in the holocaust.

¹Application of his theory of sovereignty was not to end there.

At the end of the war Lansing's same approach led to his opposing war trials in general and the trial of the Kaiser in particular. He said:

The essence of sovereignty was the absence of responsibility. When the people confided it to a monarch or head of State, it was legally speaking to them only that he was responsible, although there might be a moral obligation to mankind. Legally however there was no super sovereignty'

In 1944 he wrote a book defining genocide² – in terms different from today's definition – earlier formulated with concepts of barbarism.

ENTER THE USA; LEMKIN REACTS

Here in London in 1945 the allied powers had met to see through their resolve (made part way through the war) to try Nazi offenders for crimes in war. They had to define the relevant law. Justice Jackson, on leave from being a Supreme Court Justice, was determined that the charges under the law could *not* charge persecution and attempted annihilation of the Jews *specifically* but only as part of a 'regular' war crime.

So in Count 1 of the indictment it was alleged:

The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including **murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations** before and during the war, and persecutions on political, racial or religious grounds, **in execution of the plan for preparing and prosecuting aggressive or illegal wars**, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated

Jackson explained his reasoning:

*It has been a general principle of foreign policy of our government from time immemorial that **the internal affairs of another government are not ordinarily our business**; that is to say **the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems**. The reason that **this program of extermination of Jews and rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war**. Unless we have a war connection for reaching them, I would think we have **no basis for dealing with atrocities**. They were part of the preparation for war or for the conduct of war in so far as they occurred inside Germany and that makes them our concern*

² "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves".

Much earlier in 1933 he proposed sweeping changes to the structure of international humanitarian law. He authored a proposal to the League of Nations in which he used the terms "barbarity" and "vandalism" to describe and define what would become his concept of genocide. In this proposal, Lemkin defined barbarity as an attempt to destroy ethnic, religious, or social collectives, and vandalism as an attack targeting "a collectivity taking the form of a systematic and organized assault against the heritage or unique genius and achievement of a collectivity." In that paper he argued that it is necessary to take action to defend the global, "civilized humanity," that is bound together by a sense of common law. The argument that there is a "civilized" humanity in need of salvation rested on several premises: the existence of a global, common humanity and the idea that the world is made up of binaries - civilization versus barbarism; Europe versus the World; Poland versus Europe; Jews versus Poland; Jews versus Christians. Lemkin intended to deliver his paper at the Fifth Conference for the Unification of Penal Law in Madrid in 1933. However, soon after proposing these ideas, Lemkin lost his government job and turned to teaching. See <https://websterreview.lse.ac.uk/articles/102/files/6878b1b2c8bd0.pdf>

*Ordinarily we do not consider that the acts of a government towards its own citizens warrant our interference. **We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it justifiable that we interfere or attempt to bring retribution to individuals or to 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. We can see no other basis on which we are justified in reaching the atrocities which were committed inside Germany under German Law, or even in violation of German Law by the authorities of the German State***

Lemkin went to Nuremberg for the post WWI trials of the Nazi leaders. He pressed the prosecutors. They used his new term, 'genocide' in documents and arguments – but only as a noun or adjective not as a law.

From the indictment

'They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order **to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others.**

Lemkin realised that the law – so respectful of sovereignty - meant that a genocide of a country's people, occurring other than as part of international war crime, would not allow intervention by an outside power. The Judgment of the court in 1946 confirmed this understanding. Lemkin took leave from his job, lobbied the UN, formed out of the League of Nations in October 1946 at roughly the time of the Nuremberg verdicts. In 1947 Lemkin went to the UN in New York to get the Genocide Convention done. Success the following year, 1948. He died in poverty in New York in 1959 with few at his graveside³. Thus, the end of man who changed the way we all think.

AFTER NUREMBERG

³Wikipedia summary: Death and legacy

In the last years of his life, Lemkin was living in poverty in a New York apartment. In 1959, at the age of 59, he died of a heart attack in New York City. Only several close people attended his funeral at Riverside Church. Lemkin was buried in Flushing, Queens, at Mount Hebron Cemetery. At the time of his death, Lemkin left several unfinished works, including an *Introduction to the Study of Genocide* and an ambitious three-volume *History of Genocide* that contained seventy proposed chapters and a book-length analysis of Nazi war crimes at Nuremberg. His autobiography, *Totally Unofficial*, was edited by Donna-Lee Frieze and published by Yale University Press in 2013.

The United States, Lemkin's adopted country, did not ratify the Genocide Convention during his lifetime. He believed that his efforts to prevent genocide had failed. **"The fact is that the rain of my work fell on a fallow plain," he wrote, "only this rain was a mixture of the blood and tears of eight million innocent people throughout the world. Included also were the tears of my parents and my friends."** Lemkin was not widely known until the 1990s, when international prosecutions of genocide began in response to atrocities in the former Yugoslavia and Rwanda, and "genocide" began to be understood as the worst crime of all crimes

After Nuremberg any general need for war crimes tribunals was frozen by the Cold War. However, the 1990s wars in Rwanda and Former Yugoslavia allowed UN to create *ad hoc* tribunals. They served as forerunners for the International Criminal Court (ICC) formed in July 2002 which allows some people to be investigated and charged with offences of War Crimes, crimes against humanity, aggression (in restricted circumstances) and genocide.

Consider the map of States Parties of the ICC; only the countries in green are signed up. (and perhaps consider the real size of Africa!).

Critical is that the three most powerful and dangerous countries, Russia, China and the USA, – three of five permanent members of the Security Council who have the power of vetoing cases that might be referred to the International Criminal Court (ICC) – are not members. Neither are India, Pakistan, Israel and many others

PRESIDENT J. DONALD TRUMP COMPLETES A LINE OF THOUGHT

And this brings me to President J Donald Trump, who said at the UN on 25th September 2018:

- *As my administration has demonstrated, America will always act in our national interests. I spoke before this body last year and warned that the UN Human Rights Council had become a grave embarrassment to this institution, shielding egregious*
- *human-rights abusers while bashing America and its many friends. Our ambassador to the United Nations, Nikki Haley, laid out a clear agenda for reform, but despite reported and repeated warnings, no action at all was taken. **So the United States took the only responsible course: We withdrew from the Human Rights Council and we will not return until real reform is enacted.***
- *For similar reasons, **the United States will provide no support and recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority***
- *The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process.*
- ***We will never surrender America's sovereignty to an unelected, unaccountable global bureaucracy. America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism. Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from new forms of coercion and domination***

Look again at the map of ICC States Parties and consider the words of Robert Lansing Justice Jackson and now Trump. Congruity of meaning over 120 years. And it will not change.

AN IMPORTANT CONCLUSION

A conclusion follows. The USA has never wanted any war crimes tribunal except those that suit it – Nuremberg, for example – but then only with a law that would never expose USA

citizens to risk. It took part in drafting the statute ICC's Rome Statute and to limit exposure of US citizens made over 100 agreements with individual governments to protect its armed forces from pursuit by the ICC but didn't join. Yes, President Clinton signed the Rome Statute, and act seen as signalling an intent (sincere or insincere) to ratify later, and President Bush junior 'unsigned', and yes, the USA praises the ICC when it does work that the US wants done – for example over Libya – but all presidents have made clear that US sovereignty is against the US becoming a States Party. Understandably. Why would the world's greatest power want to be judged and have its citizens punished by people from lesser countries?

The USA's disregard for accountability processes for crimes in war is complete. Imposed agreements on Israel-Gaza or Russia-Ukraine will include amnesties for all leaders and thereby save any others junior in the chains of command from facing war crimes prosecutions, something justifying Ukraine's focus on **internal** trials – even in absentia – of war crimes because they may be out of Trump's reach.

Russia signed the Rome Statute and then unsigned without ever ratifying because of the view taken by the ICC over Russia's invasion of Crimea (or so it said).

China and India are resolutely opposed to the ICC on sovereignty grounds.

Hungary, Burundi and the Republic of the Philippines joined but then withdrew and now States Parties Burkina Faso, Mali and Niger are about to withdraw.

Of course, the ICC will continue with the not insubstantial work it can do.

But why would a big and powerful country ever sign up to something that could have individuals from countries they will regard as lesser or hostile marking their performance in conflict and even sending some of its people to jail?

Should we despair if we were beguiled into thinking there was an international rule of law that is no more?

Happily, not quite!

But before optimism two short passages about Genocide and about recognition by states of genocide.

GENOCIDE

Much has been said in the last three years since the start of the Russian-Ukraine and the Israel-Gaza wars concerning genocide. It is only part of the relevant law but let's start there.⁴

The word genocide is understood and used in different ways by lawyers and the public, who are not to be blamed for thinking it always concerns mass killings. It may, but not necessarily.

The legal definition is the only one that counts for trials in court but also and even more important for the responsibility of countries like ours to act – to *do* something – when genocide is happening or is about to happen anywhere in the world.

The Genocide Convention (replicated in other relevant statutes of national and international courts) is a straightforward document (RL).

Convention on the Prevention and Punishment of the Crime of Genocide

Entry into force: 12 January 1951 [effective when 20 states ratified]

- ...**declaration** made by the General Assembly of the United Nationsdated **11 December 1946** that **genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,**
- Recognizing that at **all periods of history genocide has inflicted great losses on humanity,** and being convinced that, in order **to liberate mankind from such an odious scourge, international co-operation is required,** hereby agree as hereinafter provided:

Article I The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II In the present Convention, genocide means any of the following acts **committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,** as such:

- a. **Killing** members of the group;
- b. Causing **serious bodily or mental harm** to members of the group;
- c. Deliberately inflicting on the group **conditions of life calculated to bring about its physical destruction** in whole or in part;
- d. **Imposing measures intended to prevent births within the group;**
- e. **Forcibly transferring children of the group to another group.**

⁴⁴From the Rome statute of the ICC

Article 51 Crimes within the jurisdiction of the Court The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

Article 7 Crimes against humanity 1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:.....

Article 8 3 War crimes 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:.....

Article 8 bis 4 Crime of aggression 1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Article IV **Persons committing genocide** or any of the other acts enumerated in article III **shall be punished**, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V The **Contracting Parties** undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to **provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III**.

Article VI **Persons charged with genocide** or any of the other acts enumerated in article III **shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction** with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VIII Any **Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...**

Note: there is *nothing* in it suggesting that a judge has to decide on genocide before a Contracting Party's undertaking to act becomes effective.

Genocides, scholarship shows, almost never stop unless forced to do so by outside force. Contracting Parties to the critical Genocide Convention undertaking need to understand that. I have, previously, attempted to make it clear by a simple parallel example. Imagine walking along a street seeing through an open door a man hitting a woman over the head with a house brick. You do not stop to find a judge to say whether you should intervene – you act immediately. Just as Contracting Parties like the UK must act on knowledge of genocide. Immediately.

GENOCIDE RECOGNITION BY STATES; THE UK LETS THE WORLD DOWN

A judge having to decide on genocide *before* a Contracting Party's undertaking to act becomes effective' is one of the positions taken by UK to avoid its undertaking; probably also by many other countries, because no country since WWII has honoured the undertaking of Article 1 by acting against another *state* over an expressed determination that genocide has occurred.

The UK and US also found another way to justify not acting when they should. In Rwanda in 1994, when withdrawing from and taking no action to stop a massacre already being described as genocide, the UK and US governments – in our case by our then Foreign Secretary – simply forbade all personnel to use the word genocide explaining that if they did use the word something would have to be done. Without use of the word nothing need be done. How many of the 800 000 Tutsis killed might have been saved?

Unchallengeable evidence of both countries' use of this technique to avoid saving the lives of others is in the reading list.

As to the phoney 'you need a judge to decide on genocide before the UK's undertaking to act becomes effective (but there is no judge to do that)', David Lammy, in his last days as Foreign Secretary, revealed that you don't need a judge, or rather UK governments don't.

Government replies to me when I have asked for explanation of why governments have not accepted Judgments about China reached by a couple of significant tribunals I will refer to later have fobbed me off with the 'no judge decision – no judge' excuse.

This one from Anne Marie Trevelyan in 2024 concerning a finding of genocide by a tribunal I chaired concerning the Uyghurs of NW China:

As per our previous correspondence on this matter, we are grateful for the work of the **Uyghur Tribunal** in exposing the appalling human rights violations perpetrated against the Uyghurs, but **its findings** have not affected our position on whether a genocide has taken place. It remains **the policy** of the British Government that **any determination of genocide is a matter for a competent court or tribunal, rather than for governments or non-judicial bodies. Our longstanding position on this matter is fully consistent with our obligations under the Genocide Convention and the Rome Statute.**

THE UK GETS CAUGHT OUT – AT LAST

This government somewhat 'snookered' itself in the course of approving export licences for spare parts of F35 bombers and facing a complaint that perhaps those spare parts could be used in planes committing genocide and other war crimes in Gaza. The government accepted in Lammy's witness statement a great deal of what was said of its obligation to act in the face of genocide but said the supply of spare parts was for a global F35 supply process of such importance to collective security that it was not possible to pick out spare parts used in Gaza. It might have been right to say that, and we might all have to agree with the reasoning. But it found itself having to confront and deal with the obligation to decide on whether genocide may have been committed by Israel, one way or the other. Having always said the government *could not* make such decision without a prior judicial determination, David Lammy, then Foreign Secretary, said in written evidence to a court and later in a letter to a Select committee

The duty to prevent genocide under Article I of the Genocide Convention (1948) arises when the UK learns, or should normally have learned, of the existence of a serious risk of genocide.The Government has carefully considered the risk of genocide **As per the Genocide Convention, the crime of genocide occurs only where there is specific "intent to destroy, in whole or in part, a national, ethnic, racial or religious group."** The Government has not concluded that Israel is acting with that intent.

For the government NOT to conclude that one element of genocide was established means that they have been assessing whether it *had* been established. I.E. they have done precisely what, in order to act under the Genocide Convention, they had always said they could NOT do. Those of us pressing governments to say they should/could and probably did privately decide on commission or not of genocide in other circumstances were right. It was, of course, obvious the FCDO (Lets simplify to FO) or Cabinet Office put staff to work to reach decisions about whether genocide had been committed. And ministers' duty on receipt of research work done always was and is to decide whether genocide has or not been committed, and to act thereafter accordingly.

May we see the reports made to him and their reasoning? No. Given the heightened danger in which we live with nuclear wars and even Armageddon spoken should we? My position is that absent truly compelling national security reasons for withholding the reasoning for such decisions as Foreign Secretary David Lammy made, we should know in detail how the decision was reached because in a democracy we have the ultimate power, through votes, of choosing who organises security for us; decisions such as this one go to that security.

OPTIMISM – SOME OPTIMISM

The various tribunals, now disappearing as most have finished their work, have achieved a very great deal including by changing the way we all think and by ensuring the war of law was being taken seriously.⁵

The Yugoslavia Tribunal tried to conviction 93 defendants mostly high-level politicians and military.

The Rwanda Tribunal tried, convicted and punished 6 defendants for their roles in the 1994 genocide

The Sierra Leone Tribunal secured 8 convictions including of Liberia's Charles Taylor former president of Liberia.

The Cambodia Specialist chamber tried and convicted 3 very significant defendants against considerable Cambodia government pressure.

The International Criminal Court – ICC – despite many difficulties and pressures - has tried some 35 cases leading to about 14 convictions, most recently a week or so ago the case of Abd-Al-Rahman guilty of 27 counts of crimes against humanity and war crimes, in Darfur, Sudan, between August 2003 and April 2004.

⁵With thanks to Harry Rogers for research

And recently, as all will recall, the ICC issued arrest warrants for leaders of both sides of the Israel-Gaza war and for two Russians, Putin and another, in the Russia-Ukraine war.

The law itself has been developed at all tribunals as well as the ICC.

Thirteen years ago, Thomas Lubanga Dyilo was found guilty in 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in one of the conflicts forming the War of the D.R.C.

The ICC reflected on one of the defining horrors of the Balkan wars, too early for its jurisdiction, where '*Bosnian women would be forced to bear Serbian babies*' to control the Bosnian Muslim population through forced pregnancy and control of the reproductive cycle. Forced pregnancy was not prosecuted at the ICTY, but in 2021 the International Criminal Court tried and convicted Dominic Ongwen⁶ of 61 crimes committed in Northern Uganda between 1 July 2002 and 31 December 2005 including sexual and gender-based crimes by forced marriage, torture, rape, sexual slavery, enslavement, forced pregnancy, and outrages upon personal dignity. As well as the crime of conscripting children under the age of 15 to participate actively in hostilities.

This marked a substantial step forward in the ability of women to seek justice after experiencing atrocities.⁷ And however much often *justified* complaint can be made about the time taken by international trials, cases like this are far from easy or quick to investigate and prosecute.

⁶⁶This lack of prosecution at the ICTY reflects a broader complicated relationship with reproductive rights at an international level. During the negotiations that led to the incorporation of the Rome Statute, Saudi Arabia, Libya, Iran, and the Holy See, intervened to ensure that any attempts to criminalise forced pregnancy were watered down so as not to dilute national abortion laws, leading to the messy compromise at Article 7(2)(f).

⁷⁷Dominic Ongwen was a commander of the Lord's Resistance Army in northern Uganda during the 22-year civil war. He was accused of multiple crimes against humanity, including forced pregnancy. In 2021, the Court delivered its judgment (upheld on appeal) which for the first time recognised '*reproductive autonomy*' as a protected value under international humanitarian law. Subsequently, the concept of reproductive violence was incorporated into the ICC Office of the Prosecutor's (OTP) 2023 Policy on Gender-Based Crimes and the 2024 Policy on Slavery Crimes.

The *Ongwen* case was a remarkable advancement in the development of gender and sex-based crimes, as it was the first time that the ICC has recognised forced pregnancy as its own, stand-alone crime alongside other sexual crimes. Preventing victims from exercising sexual and reproductive autonomy violates their rights to bodily integrity, to health, to determine the number and spacing of their children, to equality, and to privacy. It violates their right to life and to be free from torture and degrading treatment and can prevent the realisation of many other human rights.

Given the widespread nature of rape as a weapon of war, and that the practice of imprisoning women and their reproductive cycles stems back centuries, this was overdue and much to be welcomed.

Innovative lawyering has allowed states that are not ICC States Parties to find their citizens vulnerable to ICC jurisdiction where a crime may be found to have continued across the border between a non-States Party and a States Party – as in a case brought against Myanmar/Burma. And there is nothing USA or Russia or China can do about that.

However much leaders of a powerful nations of citizens who may be immune for the time being from ICC jurisdiction, they cannot deny the likely preference of citizens around the world, you and me, to have a preference - heightened by events of the last few years - to have war crimes investigated and punished. That preference may not always be satisfied but it is unlikely to go away. The world may change unexpectedly, as it did rather when Charles Taylor and Slobodan Milosevic found themselves on trial to their surprise.

And no doubt in part stimulated by knowledge of what the international *criminal* tribunals and courts were doing there have been successful challenges to commercial activities that may be shown to have supported commission of war crimes and have been stopped (as intended and yet to be resolved in the F35 spare parts case).

Even if the full potential of international humanitarian law has not been realised, we can always dream of better things ahead built of past events. The Courts and tribunals and those working with them have changed for all time how we think about accountability for all war crimes, in the way Lemkin did specifically for genocide.

A DREAM

Of two other specific things I have yet to cover, the first is short, part driven by dreaming and in part by a personal experience, the other longer in the telling.

The first is, again, Israel Gaza related and again I express no view on merits.

In 2014 Israel and Hamas in Gaza were in an armed conflict named by Israel 'Operation Protective Edge'. It lasted about 7 weeks. 2000 Palestinians – including 500 children – and maybe 100 Israelis were killed.

After it was over Hamas and the Palestinian Authority on the West Bank wanted the ICC to have jurisdiction to assess whether crimes were committed in the conflict. I happened to be in Gaza in December 2014 and to be told this by Ismail Haniyeh, effectively prime minister of Gaza at the time, in an interview with him. He who confirmed the obvious, that investigation by the ICC would be of **all** sides.

Fatou Bensouda the Chief Prosecutor of the ICC launched a preliminary investigation into Operation Protective Edge in January 2015, the year when Palestine's wish since 2012 to

accede to the ICC was finally achieved.⁸ The Palestinian authority had formally referred Operation Protective Edge to the ICC but for diplomatic, political and other reasons things moved very slowly from then until 2019 when Fatou Bensouda explained that there was a reasonable basis to proceed with an investigation into war crimes having been committed in the West Bank, including East Jerusalem, and the Gaza Strip.

Meanwhile there had been threats of the most extreme kind to Fatou Bensouda, including effectively to her life and family, and to her successors to stop any ICC investigation of Israel.

Why mention this?

Idealistic thoughts sometimes should replace the workings out of politicians and governments, happy to feed people by their tens of thousands into killing machines, always to satisfy this or that technicality, this or that alliance and international partnership or simply by blunders.

Step aside from wars in your minds for a moment. Imagine any unresolved conflict where two aggressive combative protagonists are still standing – the alleged bully and victim in a school playground; employees in a work dispute which you, as their boss, have not been able to resolve; the regular possible litigants in regular court proceedings. One says they will be only too happy for an independent arbiter to hear both sides and decide about merits. What do you do you or advise? What would be the natural, obvious, sensible thing to do?

No states supported the ICC prosecutor. None suggested that with Hamas willing to be investigated then obviously the best course would be for both sides to be investigated in an

open way and for countries with evidence to help. None encouraged abbreviation of the otherwise long process in order to save lives. Why not? Had they done so then the change of Hamas's mind from willing participant in an objective investigation to criminally evil approver or instigator of the October 2023 massacre might never have happened. October 2023 and everything since might never have happened; another solution just might have been found.

Did our government raise this with you as electors to approve of as an idea? Of course, not our democracy does allow for your intelligence to get in the way of grown-up government thinking. But did it even think of it itself? No evidence that it did. Why not when so obvious?

⁸⁸The wish to accede was first expressed to 2012, the year when the Palestinian Authority became a non-member observer state of the UN.

Why have our leaders not understood that *investigations* can control or tie or limit those being investigated, at least for a time, *not* to do further bad things such as those subject of the investigation? War crimes *convictions* are not shown to achieve anything by way of deterrence of the next intending war lord or war-inclined state.

PEOPLE'S TRIBUNALS

The second topic which may connect to much of what has gone before concerns people's tribunals. They are what they say they are – tribunals of regular people who consider and reach conclusions on issues that official bodies – governments and international bodies most often – dodge when, it can be argued, they shouldn't. I was engaged in four.

IRAN TRIBUNAL

The first was the Iran tribunal, investigating grave offences committed by the regime of Ayatollah Ruhollah Khomeini in the 1980s. I was invited to join the Advisory Board and did so without special enthusiasm. There was another lawyer on the board, and we both gave legal advice to the diaspora from Iran organising the tribunal led by an inspired man living in Sweden called Babak Emad. Most of our lawyerly advice was rejected and usually shown to be wrong. Always a good lesson for lawyers. I attended hearings of witnesses in London, my limited enthusiasm slowly grew and at the 2nd and final part of the process in the wonderful conference centre, that is part of the Peace Palace in The Hague, I called some witnesses and made a short speech to the bench of judges. The tribunal was run by a man called Hamid Sabi, an Iranian lawyer who escaped the 1979 revolution against the Shah on the last plane and who has contributed pro bono to multiple good causes. He ran the tribunal efficiently and with all due regard to such legal principles and the law as were appropriate. The judges were chaired by a much-respected retired judge of the top Constitutional Court of South Africa and were themselves experts in human rights and other law.

When they delivered judgement in the sunlit beautiful conference room I could understand one value of the tribunal - later there was to be another. That event was probably more profound in its effect than any of the big decisions at the UN's Yugoslav tribunal. I was discovering the lesson which the Iranian diaspora, gathered in large numbers, got there and then. The dreadful tragedies that they and their loved ones had gone through were outlined and analysed, and the grave crimes committed against them were pronounced in public. This does happen to a limited extent in domestic/national criminal trials and international war crimes trials but perhaps with value to victims and bereaved always a secondary consideration.

THE SECOND TRIBUNAL ON WHICH I WORKED

After this I was invited to work on another tribunal which I won't name, although you can find details in the reading list, because I found several faults with it – *as a tribunal* - despite it being composed of people of the very highest quality and best intentions. And indeed, despite my criticisms, the tribunal did I believe have significant good effect. It concerned a historic event far away from these shores kept from public recognition in large part because both the United States and the United Kingdom had been involved on the side of the very bad guys. I proposed to those inviting me that I would happily help by advising on procedure because I could see the procedure was not going well, and certainly not as well as it had gone in Hamid Sabi's Iran tribunal. I was pressed to join the bench of judges. I pressed back, was pressed again and yielded. I would have been better in some ways as an adviser because the procedure was indeed hopeless in many respects and the whole edifice would have failed but for a truly wonderful registrar doing as well as could be done despite the witnesses being the best informed and most sincere of people you could ask for.

But being a judge was a good thing because it taught me a really important lesson. Chaired by a different retired judge from that same respected judiciary, other judges were experts and many of them already knowledgeable of, and even committed to, the very issue under consideration. In retirement, when unobserved, they found it quite impossible to do the job allocated to them namely to assess the evidence and reach factual conclusions to which the law could be applied. They could not help themselves from arguing the case which was not their function to do.

This, I thought, could help if I was never asked to create a future tribunal.

CHINA TRIBUNAL

Sometime later I was approached by Ben Rogers of Christian Solidarity Worldwide at the time and later of Hong Kong Watch and asked if I would write an opinion on crimes committed by the People's Republic of China in what was called 'forced organ harvesting', killing people – in particular Falun Gong practitioners and others - to order, cutting them open to extract their organs for use in China's commercial human organ transplant business at which they excelled.

I advised him that this would be a waste of time because nobody would read my opinion let alone act on it and its prospects of becoming an op ed in the smallest regional newspaper were limited. Had the people for whom he was making this request, an NGO called The International Coalition to End Transplant Abuse in China (ETAC), considered a people's tribunal?

They had not and did not think it a good idea and I could understand why. These were committed people – some Falun Gong practitioners with non-Falun Gong highly respected academics from Australia and Canada – who had already formed a clear view about what China was doing. They had succeeded in getting evidence raised to the level of congressional committees. Why would they want an unknown collection of strangers from another land ignorant of everything to start forming a view and possibly reaching a completely different view from the one about which they were certain? Hamid Sabi was with me so that we could explain to them how such tribunals might work; they were unpersuaded. But later they changed their mind; despite the recurring problem that the individual citizen or NGO's can rarely cut through in a way that politicians can, just maybe the independence of a tribunal we could form could persuade where ETAC had been unable to do so.

So, I was commissioned to form the China tribunal although the NGO favoured things I did not. It wanted high-level famous people, lawyers and experts as judges. Despite my earlier experience with the previous tribunal Hamid Sabi and I tried to find them big names but unsurprisingly - this was at a time of China being everyone's best friend - big names were never available and it was eventually left to me to chair the tribunal and to appoint members to it. Even then the NGO wasn't entirely convinced that it would be better to have a *wide* variety of people. Martin Elliott they accepted immediately, *in part* for his medical expertise; not to give us evidence but to ensure that in private deliberations when without other access to medical expertise we didn't *misunderstand* the medical evidence we had heard.

As we were trying to fill panel seats I suggested to them on two or three occasions that an English businessman, known as an ethical businessman and known to me from civil society/NGO work not as a friend, might be useful. A *businessman* did not appeal to them! At a critical stage between hearings of evidence he noted how we had already reached a part conclusion beyond reasonable doubt and that was the time for us to speak because early pronouncement of a quasi-legal finding might save lives. The rest of us were a bit timid about something so irregular. But we did as suggested and gave a '1/2 time' judgment from which we never had to resile, and which is seen by many people as a critical factor validating the work of the tribunal. His idea not mine.

At the end of the process the tribunal found - by applying the strictest rules of evidence the most conservative view of the law which we took from outside experts - China to be culpable by having these dreadful acts done to prisoners of conscience of had committed crimes of torture and crimes against humanity. We did not find, despite considering the issue, genocide to have been proved. We expressed real respect for China's success with government of its enormous population but concluded that, to the extent of the crimes found proved, it was a criminal state. The judgement was public was approved and accepted and adopted by many parliamentarians and professional transplant bodies around the world. Our

government 'wrung its hands' in gratitude for our work but could not, of course, accept our conclusions as these were not for us to make or at least not for them to accept.

Evidence in this case included that the Muslim Uyghurs of Northwest China's Xinjiang region had been some of the victims of forced organ harvesting.

UYGHUR TRIBUNAL

A separate NGO, the World Uyghur Congress (WUC), asked for a people's tribunal to be established with me as chair, Hamid as registrar and now the businessman Nick Vetch as Vice Chair. It was established during Covid lockdown and at good speed. The panel of nine was selected to avoid any with related expertise by which they might have been vulnerable to prejudgment or to wanting to be witnesses not the 'jurors' they should be. As before, strictest laws of evidence and most conservative approach to law on which the panel was instructed by independent experts. The NGO and other bodies offered evidence, Hamid checked and search for anything favourable to China to be included, the panel could ask for additional evidence if required.

There was much other activity about the Uyghurs at this time and China was no longer best friend. Other bodies – NGO's, groups of lawyers - were keen to find China culpable of all 5 ways on which it might be committing genocide against the Uyghurs. Lots of people were sanctioned by China with sanctioned UK parliamentarians counting being sanctioned as a badge of honour. (Oh dear. 'Me Me Me')

The Tribunal just got on with our work and in a judgment found crimes against humanity and one only of the five ways of committing genocide - interfering with births – proved, all beyond reasonable doubt.

There was an unchallenged vote approving the Judgment in the House of Commons following a two hour plus debate and a great deal of other support and approval from round the world. But we, like the NGO's for whom we worked, had troubles cutting through to *government* to get things done.

The World Uyghur Congress is a very substantial NGO working around the world and the Tribunal Judgment features in a great deal of its work just as, it does in research and similar work by other organisations and academic institutions.

Requests to government to accept the Tribunal's findings drew unhelpful responses of the kind you have already seen from Anne-Marie Trevelyan.

Both tribunal judgments are validated by the integrity of people on the panels, unpaid and with no interest to serve apart from getting a significant job done and done properly. Neither judgment has been subject to any challenge apart from predictable but non-specific rejection by the PRC and are accepted around the world as accurate.

In a way tribunals of this type (I make no claim for their being better than those conducted in other ways) hand back to the NGO's who commissioned them tools - weapons even – for the NGO's to use as the tribunal itself and its members recede into memory and the tribunal judgments, by tribunal names, are recognised as components of argument the NGOs want to succeed.

The Iran Tribunal kept the flame of the ayatollah's victims alive and when one of those identified as a member of a death committee – committee that sent people to be executed for no justifiable reason – touched down in Sweden for some medical treatment he was arrested under universal jurisdiction laws in Sweden – laws that give jurisdiction over certain crimes wherever in the world and by whoever committed – was tried in Sweden, convicted and sentenced to life imprisonment substantially on the basis of evidence collected by the Tribunal and reflected in its judgment.

The China Tribunal always had and has the professional conduct of transplant surgeons in it sight as well as criminal courts. In reading material there is a very long list of things it achieved since the judgment was delivered, achievements *in part* based the judgment including:

- Getting a Forced Organ Harvesting Act passed in the US House, now pending in Senate.
- Getting European Parliament Resolution of 5 May 2022 on the Reports of Continued Organ Harvesting in China (2022/2657(RSP)).
- Amending the UK Health and Care Act prohibiting commercial organ tourism.
- Amendment to UK Medicines and Medical Devices Act.
- Having US State Department International Religious Freedom Report relying on the China Tribunal's Judgment.
- Having Korean legislation influenced by the China Tribunal.

And much more.

People's tribunals are no panaceas but can sometimes provide answers to questions of great public importance - Iran Tribunal - even of immediate, grave significance and importance - China. They provide these answers at low cost - less than £300,000 for witness travel and accommodation, hall hire, translation etc - and in reasonable time. Correct public decisions can be made that should have been made for the public good by those with greater resources; governments. Government failure to accept the accuracy of tribunal

decisions may reflect governments not having done what they should have done – pronounce genocides and act accordingly, for example. May widespread public acceptance of what tribunals find drive governments to better conduct in the future – as, for example, now required in relation to genocide recognition? I hope so.

CONCLUSION

Whither war? Wherever Russia, USA and China choose to take or allow war to happen. It will require historians to come to explain how mid-size countries, or the EU as a potential power block, failed to stop wars, if more come, and achieve compliance with the UN Charter.

And if wars come, the law itself, and the threat of accountability during or after wars, may change little not least because there may *be* no after-the-event accountability of any kind. The present (at time of writing) intention of the Israel-Gaza 20-point agreement is that there will be amnesties for leaders on both sides. Vulnerability to present arrest warrants at the ICC for leaders on both sides may somehow disappear – I don't know how; I only sense that it may happen.

So whither the law itself? Despite its present ineffectiveness for wars International Humanitarian Law will not actually disappear and the major institutions – the ICJ and ICC should survive. Their law will likely still be the law of many parts of the world because law can rarely be far out of step with what the public believes is right and the world's public has been getting acquainted from the media with concepts of proportionality, genocide (accurately or not) and other war crimes. And there is no indication that *they* want the law to be disregarded.

The law will be applied in domestic courts trying war crimes and in civil cases where possible.

But will resolution of Israel-Gaza and Russia-Ukraine with amnesties but without war crimes trials or similar return us to a 19th century - pre-Geneva Conventions - world without post-conflict accountability? It begins to look possible.

POSTSCRIPT

I was fortunate to change career path 27 years ago and find myself working within and beside national and international systems and organisations that believed a safer and better world could come from having and applying an international rule of law.

I was less fortunate in living in a time when the political authority of the UN can be disregarded because its institutions – in particular the Security Council – need reform that may never come. And *very* unfortunate if right now we are in a period when post-conflict

accountability at courts and tribunals for war crimes may be disappearing under 20-point plans that reflect only the effectiveness of brute force or threat of brute force.

At the national level it was not entertaining or amusing for me when my immensely talented and qualified China and Uyghur Tribunal fellow members had their judgment rejected, even for careful consideration, by ministers under prime ministers who could inwardly justify partying while locking the rest of us up in Covid, making millions despite having failed in high office held or who – perhaps understandably, are justified in having clothes bought by. Others when a suit's inside pocket needs to be big enough for a rabbit-sized envelope. And it is these ministers and prime ministers, past and present, who we may hear soon arguing: 'Yes, having no post-conflict accountability process can be justified in present circumstances, because.....'

Grim times? Possibly.

What should I do; or you? Write another letter to the Foreign Secretary or Prime Minister - in light of the David Lammy revelation - asking this government to say what was concluded by governments at the time about forced organ harvesting in China and the persecution and genocide of the Uyghurs? Or get some gardening done until a very bright light in the shape of a mushroom appears over a distance horizon?

Probably the former.

Ben Ferencz, prosecutor at Nuremberg who only died aged 103 in 2023, advocated throughout his life for international law and the creation of an international court to replace the 'rule of force with the rule of law'. He had a motto which he always used whenever he spoke to *young* – and younger - admirers 'NEVER GIVE UP!'. So, given the age difference, I will do as he advised.

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