WHAT IS A CRIME AGAINST HUMANITY?

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Abstract

In this paper I attempt to rescue the notion of a crime against humanity from the charge that it is either redundant or else a pseudo-concept. I argue that crimes against humanity are gross violations of basic human rights when the categories of neither war criminality nor sovereignty are available.
WHAT IS A CRIME AGAINST HUMANITY?

I. THE LAY OF THE LAND

Not many years before he died, the subject of the Holocaust came up - the more ‘politically correct’ term is Shoah¹ - and my father, whose credentials as an enlightened liberal had until then been impeccable - volunteered that “They should have just nuked the damn country!” By which he meant, presumably, all of Germany! Horrified though I was, can any of us deny having had similar thoughts of our own, with respect to Japan, Serbia, interbellum Iraq perhaps, or whatever?!

Last year, in my Philosophy of War class, a young woman who had earlier announced herself opposed to capital punishment even for the likes of Paul Bernardo² - opined, with respect to Milosovic, that - and I quote - “Someone should just go in there and shoot the fucker!” I suppose that when feelings run high, consistency flies out the window.

Or does it?

The notion of collective entitlement goes back as far as Genesis and the Covenant with Abraham, and that of collective liability is as old as Exodus and ‘the death of the first born of Egypt’. No doubt at least half a million of those slaughtered that night were innocent children. So why not bomb Tokyo, Baghdad, or Belgrade?!

Some of us - notwithstanding its centrality in our ‘mind-set of origin’, so to speak - are inclined to reject the notion of collective accountability.³ But then how do we make sense of war reparations? Without a notion of collective liability all that remains to us is that reparations are a misnomer for spoils of war. We might be prepared to say this about, say, interbellum Iraq.⁴ But would we be as comfortable saying the same about compensating the survivors of the Shoah?⁵

Even if Augusto Pinochet had not been released and allowed to return to Chile, he’d have died of old age long before - if trial there ever would be - any verdict was ever pronounced upon him. So if the

¹ A ‘holocaust’ is a burnt offering, which many post-Shoah Jews find theodically offensive. The word ‘shoah’, by contrast, meaning simply destruction, is more theodically neutral.

² Paul Bernardo - convicted of the kidnap, rape, torture, and murder or two young women - is the Canadian paradigm of the sadistic serial killer.

³ This is, of course, much easier for gentiles than for Jews.

⁴ In fact, with respect to interbellum Iraq I suspect this is what many of us would have said.

⁵ I pose this as a rhetorical question. But I suppose one could say that compensating Jews for expropriations made from 1933 to 1945 was a spoil of the Allied victory. Still I’d be careful where I said it.
object of such an exercise is to send a message to would-be dictators that they won’t live to taste the fruits of their maleficiency, shouldn’t some mother of one of his victims have simply gunned him down years ago? Is there a jury in the world that would have convicted her?! On the other hand, this kind of ‘summary execution’, though effective, might also discourage anyone from entering public life. For example, there can be little doubt that then Prime Minister Jean Chretien was either personally responsible for, or at the very least complicit in, the assault on the student protesters at UBC at the 1998 APEC conference. No one died that day, but the fact that the provincial attorney-general declined to prosecute, and that the only avenue of redress remaining, the Public Complaints Commission, stonewalled beyond any prospect of remediation, meant that a chill was cast over all peaceful protest in Canada, and cast with impunity. When the police break the law, there is no law! What remains is brute force. And isn’t the most effective way to meet brute force with brute force?!

So suppose, as I say, that the way to respond to the APEC incident is, as my student said of Milosovich, to “Shoot the fucker!” Or at the very least pepper spray him. At a minimum the RCMP, the Prime Minister, his staff, and the Solicitor-General should have been declared persona non grata on every campus in the country. So if we can go after Milosovich, why not Chretien? And if Chretien, why not …?

But the call for due process is motivated not just by the fear of anarchy. There’s also a need - at least a perceived one - to visit these summary consequences on the right party. Suppose it was a member of Chretien’s staff who overstepped his authority at APEC. Suppose Chretien himself really is innocent. But if we could, and perhaps should, suppose this, why not suppose likewise with respect to Milosovich?

But innocence and guilt, even supposing all the facts are in, are not easy determinations to make. For example, shall we recognize the Eichmann defence or not? That is, is “I was just following orders!” a legitimate defence against a charge of war crimes or crimes against humanity? We’re inclined to say not. But try fighting a war with each soldier needing to consult Torah and Talmud before he can execute an order!

Still, we might say, prosecuting war crimes, not unlike prosecuting sexual harassment, is a worthwhile corrective against wholesale military unaccountability, even if doing so is more than occasionally unjust. But this path is dangerous too. For how is this rationale to be distinguished from the rationale for exacting reprisals? What we’re saying is that “If any member of your party does this or that, we’ll randomly select a scapegoat from your midst. So if you don’t want to be randomly selected for reprisal, monitor the conduct of your comrades!” The problem with this take on war crimes trials is that it’s itself among the very crimes war crimes trials presume to prosecute!

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6 This is another rhetorical flourish, to which I’m probably not entitled. No doubt Gandhi, for one, wouldn’t consider the answer as self-evident as I do.

7 It’s worrisome - is it not? - how so many world leaders descend so quickly in public consciousness from savours of their respective nations to psychopathic monsters. But we sometimes forget, I think, that what was done to Hussain and Milosovich was done to Hitler with like alacrity.

8 Soldiers aren’t as litigation-shy as physicians and structural engineers. But neither are they completely oblivious. Some soldiers in the Canadian military, for example, have reported to me that part of the decline in their morale in recent years is directly related to courts martial in the wake of the Somalia Affair.
But - would that it weren’t so - matters get even worse! Notwithstanding the conviction of William Calley\(^9\) - who was eventually pardoned, recall - and notwithstanding that the Israeli Supreme Court recently reversed its own earlier ruling that torture is lawful - funny thing is, though, no sigh of relief rose from the streets of Hebron! - it’s almost always the vanquished who are put on trial for war crimes, almost never the victors. True, that most criminals are never caught is hardly grounds not to prosecute those that are. But if a judge consistently convicted guilty blacks but acquitted guilty whites, we’d be hard-pressed to claim that the injustice of the latter doesn’t impinge upon the justice of the former.

Besides, a year before it hit the news most North Americans didn’t know that East Timor existed, let alone where, let alone that the atrocities upon which the media finally reported had been going on there for a quarter of a century. Eventually even the dullards among of us catch on that what distinguishes the lead story from filler is not that the former is new whereas the latter’s been sitting in the archives for months waiting for a ‘slow news day’. Rather, “This is so-and-so reporting live from the island of such-and-such!” indicates nothing more than that a Holiday Inn has finally been built on the island of such-and-such.\(^10\)

And when we realize that these atrocities go on everywhere and all the time, and that the ‘news’ is just selective reportage, we begin to feel manipulated. We’re being entertained by the atrocity of the week. What’s worse, since we can do nothing about these atrocities, but are fascinated by them nonetheless, we begin to wonder whether the media is just tapping into something morbid, and not at all laudable, in ourselves. “Say what you will, those Nazis had great fashion sense. Let’s see what the Indonesians are wearing this season!”\(^11\)

Worse again, this manipulation is becoming less and less covert, probably because it no longer has to be. Even the once-lofty CBC\(^12\) has descended into the most yellow journalism imaginable. For example, the story of the Serbs pulling out of Pristina - some Serbs, understandably enough, given that the cameras were rolling, wearing ski masks - was voice-captioned, “Serbs hiding their shame!” The fact that a perfectly innocent soldier might be fearful of guilt by association for the malfeasance of his comrades apparently never occurred to this reporter. But here’s an interesting question: Is the CBC promoting or just reflecting ‘guilt by anonymity’ as among the new principles of natural justice generated by the TV age?

In the wake of such well-founded skepticism, cynicism is bound to follow. Is it any wonder, then, that so many of us have turned ourselves off to these atrocities of the week, just as we’ve long since turned ourselves off to the famine of the week?

And yet surely this is even more dangerous than our orchestrated outrage. People who become

\(^9\) Of My Lai Massacre fame.

\(^10\) Normally I’d hold back from ‘dissing’ someone else’s rice bowl. In fact I have nothing but respect for both politicians and lawyers. But a profession that lays claim to freedom of the press on Millian grounds - i.e. that an informed electorate needs access to information - and yet at the same time is utterly indifferent to the truth, is worthy of neither the freedoms it enjoys nor any respect. If there’s a journalist I’ve unjustly maligned who should escape my scorn, I’ve yet to encounter her.

\(^11\) The eroticization of National Socialism is a well documented phenomenon.

\(^12\) Canadian Broadcasting Corporation
enured to atrocities abroad are ripe for tolerating them at home. “They came for the ... but I wasn’t ... so I did nothing. Then they came for the ... but I wasn’t ... so I did nothing. Then they came for me, and there was no one left to do anything!” “This is the way the world ends,” T.S. Eliot once predicted. “Not with a bang but a whimper.”

So there we have it. A veritable minefield, is it not? But if tread we must, let’s at least tread softly, beginning, safely enough, with ...

II. WHAT’S A WAR CRIME?  

The question, “Why go to war?” - what came to be called the jus ad bellum conditions - made about as much sense to our ancestors as, “Why talk?” or “Why hunt?” But just as from the speaking of a language emerges a grammar for it, and just as from hunting emerges principles of animal husbandry, so from war rules of war emerge. And these are what came to be called the jus in bello conditions.

Rules are, of course, dynamic. But they’re also - perhaps because they’re dynamic - unspecifiable. They’re unspecifiable because they’re descriptions of a practice, and because every description is underdetermined by the practice it describes. That is, rules aren’t of the form, “We shouldn’t do this!”; but rather, “This is something we don’t do!” “We don’t end a sentence with a preposition.” “We don’t harvest a doe until after her fawns are weened.” “We don’t shoot prisoners of war.” What makes rules pre-scriptive, then, is just that there’s a reason we have the rules we do. Rules that work for us perpetuate themselves. Rules that don’t get replaced by ones that do.

Penalizing people who break the rules is itself just another practice, one governed - read: described - by its own set of rules. The rule of arbitrary reprisal works excellently for an occupier combatting resistance. It doesn’t work at all for running a criminal justice system. But the very opposite might be true of shooting prison guards for shooting prisoners.

So what’s a war crime? Not a crime committed merely in association with the prosecution of a war, but rather a violation of a rule of war.

Fair enough. But then what are the rules of war? Hard to say. But probably no harder than identifying the rules governing any activity. Does writing them down do a whole lot for us? Probably not much more than dictionaries do for speaking a language. Dictionaries are mere reports on the appropriate use of a word. Worse yet, they’re just somebody’s take on the appropriate use of a word. The real question is this: “A preposition is something we don’t end a sentence with!” There, I said it! Now what’re you going to do about it?!

III. THE JUST WAR TRADITION

We’ve just seen that, left to their own devices, the rules of war, not unlike those of logic, take care of themselves. It’s only when we attempt to impose a logos on them that they become, as Wittgenstein put

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13 It’s one thing to learn from the experiences of another culture. It’s quite another to presume to participate in that culture’s understanding of its experiences. Accordingly I confine myself to the reflections that have taken place in what’s loosely known as the West.
it, pathologized, and so require ‘philosophical therapy’.\textsuperscript{14}

What’s just been observed about rules of war seems almost banal at the dawn of the third millennium. But Wittgenstein’s insight was a long time in the making, and longer still in coming to our collective consciousness. For most of our history we laboured under the natural law conception of rules, according to which there’s a fact of the matter about how we should treat each other, independent of how we actually do.\textsuperscript{15}

Fortunately - and as already noted - second-order conceptions are subject to the forces of natural selection no less than first-order ones. So, for example, the view held by the Greek, the Christian, or the Spaniard - that he was of a different ontological kind from the Persian, the heathen, or the savage, respectively, and that therefore different rules apply when these pairs meet to do battle - made perfect sense so long as the former remained militarily superior to the latter. But in the same way that it amazes a son how much his father has learned between the time he was fifteen and now that he’s twenty, it’s likewise amazing how quickly the savage becomes ‘civilized’ once he masters the weapons by which he was erstwhile so effortlessly defeated.

Still, all would have been well had our ancestors anticipated Wittgenstein’s advice and declined to philosophize about the rules of war. But shortly after Jesus failed to return as quickly as had been supposed, and so

1) Christians had to take seriously that no one could know when to expect Him, and since
2) pacifism is a non-replicating disposition, save by the pleasure of those who are anything but pacifistic, and since
3) in any event there were now heathens and heretics out there that had to be dealt with,

it occurred to the Fourth and Fifth Century church fathers - and Augustine of Hippo in particular - that the existing rules of war could benefit from a sprinkling (no allusion to baptism intended) of Christian precisification. What emerged is what we now call the Just War Tradition.\textsuperscript{16}

The Just War Tradition dominated our thinking from the time of Augustine until 1945. There were, of course, periodic assertions of positivism, most notably Hobbes. But insofar as Christian ethics and political theory presuppose the existence of natural law, the Just War Tradition reflects that presupposition. And its myriad difficulties, as we shall see, arise from that presupposition.

Among its several jus ad bellum conditions - last resort, reasonable prospect of success,

\textsuperscript{14} That said, there’s a tension in Wittgenstein’s position, is there not? If ways of conceiving of rules are no less susceptible to natural selection than these rules themselves, won’t they too take care of themselves? Or is it that philosophical therapy just is one of the ways that ways-of-conceiving-of rules take care of themselves?

\textsuperscript{15} Here and throughout I use the terms natural law and positivism in their ontological sense, not their epistemological one. That is, we’re concerned here with what a rule or law is, not how we come to know the rule or law.

\textsuperscript{16} A term which, note, stands to just war theory as Kleenex stands to facial tissue. That is, it’s not as if theories that stand outside the Just War Tradition are therefore not theories about just war.
promulgation, and so on - two as-yet-unmentioned are of especial interest to us here. One is *just cause*, to which I’ll return in Section V. And the other is that the war being contemplated be such that one could prosecute it without violating any of the jus *in bello* conditions.

But among the jus *in bello* conditions, in turn, of especial concern to us is the immunity of innocents/non-combatants. For it’s for *this* reason that the Just War Tradition advocates nuclear disarmament, if need be, *unilateral* nuclear disarmament. Since, argues Robert Holmes\(^\text{17}\),

1) one can’t possess nuclear weapons without either
   a) *intending* to target innocents/non-combatants - thus violating what Gregory Kavka calls the Wrongful Intentions Principle\(^\text{18}\) - or at least
   b) endangering innocents/non-combatants against their will - Steven Lee’s version of the argument\(^\text{19}\) - it follows that
2) one can’t conscionably possess such weapons.

Notwithstanding these last gasps, it’s no coincidence that the Just War Tradition began to lose its grip on us about the time the abolitionists lost the disarmament debate. Laudable though it may have been, the Just War Tradition simply did not have the conceptual resources to deal with the emergence of nuclear weapons. True, if *everyone* subscribed to the Just War Tradition, *no* one would have nuclear weapons. But this is entirely beside the point. If no one broke the law neither would there be a need for police. But, as Kavka argues,

1) once nuclear weapons have been invented, they can’t be *uninvented.*
2) One can’t conscionably expose one’s population to nuclear blackmail. And so
3) one can’t conscionably forego nuclear deterrence.

Thus, concludes Kavka, the emergence of nuclear weapons may have permanently reversed a *number* of what we erstwhile took to be core axioms of morality, not the least of which being that it’s wrong to intend, even conditionally, to kill millions of innocents/non-combatants.

The conceptual inadequacy of the Just War Tradition - and so the impetus for the re-emergence of a *positivist* take on the rules of war - is most instructively demonstrated in the debate between Fullinwider, Alexander, and Mavrodes over the scope of the Just War Tradition’s immunity provisions.\(^\text{20}\) Since there are innocent combatants, retribution can’t be the justification for non-immunizing them. But since there are non-combatants who are anything but innocent, neither can the right of self-defence be the

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\(^{20}\) The Fullinwider/Alexander/Mavrodes debate can be found in Beitz et al, *International Ethics*, Princeton U.P.
grounds for not immunizing them. Retribution and the right of self-defence are both principles of natural law. So, concludes George Mavrodes, the scope of immunity must be an emergent property of Wittgensteinian ‘conventions’.21

At the turn of the millennium, then, notwithstanding that the language of the now-defunct tradition continues to be spoken by the hoi polloi - as does the language of geocentricity - philosophers of war, with some exceptions, have long since made the Wittgensteinian/positivist turn.

IV. IS A ‘CRIME AGAINST HUMANITY’ A PSEUDO-OFFENSE?

There’s no inconsistency between subscribing to legal positivism, and at the same time to the rule positivism articulated in the Investigations. One need simply point out that, contrary to what many legal positivists would prefer, laws needn’t be promulgated in order to be laws, because laws aren’t the kinds of things that can be promulgated. They can only be reported on, with greater or lesser predictability. So that no law against which Eichmann offended was even reported until long after he’d offended against it, is not, in and of itself, an argument against his having offended against it.22 Even if we suppose that he couldn’t have known that he was offending against a law, ignorance of the law is no excuse. By this we needn’t mean that he should have known of the law against which he offended. Or even that he could have. Rather his conviction made the law against which he offended.23 On the rule-positivist view, however, ‘tis ever thus with law, no less with the acquittal of O.J. Simpson as with an adjustment to a tax assessment. What the O.J. Simpson acquittal revealed is precisely what was reported. That is, notwithstanding that he likely killed two people, a jury is apt to acquit when it sees a need to impose a corrective to rampant racism on the part of the police department investigating the case.24

If this is right, or even approximately right, then the difficulty with so-called ‘crimes against humanity’, if difficulty there be, lies not in retroactive legislation being a violation of natural justice - there being no such thing as the latter, nor anything peculiarly retroactive about crimes-against-humanity legislation - but in a) the intelligibility of the charge, and b) the jurisdiction competent to try the matter. Let’s deal with these two difficulties in turn.

There’s no inconsistency between subscribing to the rule positivism articulated in the Investigations and at the same time the logical positivist demand for conceptual clarity issued in the Tractatus and

21 The mechanisms for which are described in David Lewis’ monograph of the same name.

22 The debate between natural law theorists and positivists, and among positivists, on this and cognate issues, is nicely anthologized in Joel Feinberg (ed.), Philosophy of Law

23 Most people have trouble with this, and it’s hard to blame them. But why not think of inadvertently creating a crime for which one is then, by definition, guilty, a case of moral luck? Is it all that much worse than being hit by a truck?!

24 Some commentators refer to this as ‘jury nullification’. 
subsequently precisified by Rudolf Carnap. So, we need ask, are the pseudo-sentences which, according to Carnap, make up virtually the entire corpus of Continental philosophy, paralleled in international jurisprudence by the notion of a crime against humanity? That is, is 'a crime against humanity' a syntactically correct expression but, not unlike 'Caesar is a prime number!', only because of a too-forgiving syntax? Let's see.

So far as I can tell, a crime against humanity could mean one of seven things. It could mean

1) a crime against some humans. It could mean
2) a crime against all humans. It could mean
3) a crime against the property of being human. It could mean
4) a crime against a particular property of humans, namely their 'humanity'. It could mean
5) a crime against the human project. It could mean
6) a crime against some particular human project. Or it could mean
7) a crime against the social order.

(2) can be ruled out immediately. If a crime against humanity is a crime against all humans, then we'd be compensating at least one of his victims by executing that victim. And that, I submit, is absurd.

As is (3). Offending against the property of being human is like offending against the property of being blue. That, I submit, is unintelligible.

Offending against our humanity has some initial plausibility, save that I, for one, don't have the faintest idea what our humanity amounts to, beyond, perhaps, one of the other properties, e.g. compassion or dignity, for which the word is often used as a metonym. But to allow an offense against compassion is to allow double-charging. That is, in some jurisdictions it's an offence to fail to render assistance at the scene of an accident. Once having convicted the offender for that offence, shall we then try her again for failure to exhibit compassion?! So (4) is out as well.

But perhaps this is too quick. Western jurisprudence has long since acknowledged hate crimes. In the U. S. this is called violating one's civil rights. In Canada it's embedded in the dicta in Butler and Keesstra. "If you cut [him], do[es] the Jew] not bleed?" asked the Merchant of Venice rhetorically. But if you cut me only because I'm a Jew, do I not bleed twice, once from by body, but then again for the body of my people?

Still, the problem remains. If a crime against humanity is a crime against a property, one can commit a crime against humanity without shedding any blood at all! Even supposing - as I do not, but as do legal moralists - that homosexuality is actionable on the grounds that it's an offense against public morals, this is not what we mean by a crime against humanity. And even supposing a widespread consensus on certain moral injunctions were possible, this would still not be what we mean by a crime against humanity. A crime against humanity may or may not require tissue damage. But surely it requires more than just an offense to

\[25\] In his famous “Elimination of Metaphysics Through the Logical Analysis of Language”.

\[26\] The Canadian Supreme Court rulings upholding the criminal code provisions on pornography (163) and hate literature (319) respectively.
our sensibilities!

But what about (5)? Is there some joint human project that’s undermined by Auschwitz? Or by Hiroshima? Perhaps. But if so, it couldn’t be one which required that we all consciously entertain it. Most people are preoccupied with much more mundane matters, like feeding themselves and their children. Stop the Sudanese woman, a dying child at each withered breast, stumbling aimlessly across the desert. “Excuse me, madam, but what do you take to be the human project?”

“Please, sir, can you give us some food?”

“Yes, yes, in a minute. But first, what do you take to be the human project?”

Then what about (6)? (6) flies in the face of our liberal commitments, of course, i.e. that ours is not to impose any particular conception of the good. But perhaps liberalism is just wrong. Perhaps there is a substantive notion of the good shared by those who wish to proscribe behaviour inimical to that conception under the rubric of crimes against humanity. I have no knock-down argument against this interpretation, except to say that I get very nervous when people set out on ‘a mission from God’, because these crusades almost invariably route themselves through my holy places. So what we’d end up with - and on this interpretation we’d end up here with certainty! - is its being a crime against humanity to prosecute a crime against humanity. But once we’re there, the notion of a crime against humanity is no longer doing any work.

Last but not least, could a crime against humanity be just such an egregious attack on the conditions of human sociability that, localized though it may be, it cannot but send signals with consequences of global dimensions? This was certainly true of both Auschwitz and Hiroshima, since both established precedents that were, to put it mildly, highly dangerous to us all. It may have been true of Bosnia and Kosovo, because of the embeddedness of these conflicts in wider tensions in the region. Likewise, perhaps, with Ruanda, because of its spill-over into Burundi and Zaire. But can the same be said of East Timor? Perhaps. But perhaps not. And it’s this ‘perhaps not’ that should, I think, give us pause. Do we really want to say that only those genocides or atrocities that impact upon the world order shall be deemed actionable under the rubric of crimes against humanity?

I conclude that crimes against humanity, if such there be, are (1), i.e. just crimes against humans. But not every crime against humans could be a crime against humanity. Paul Bernardo committed no such crime. Nor could even certain crimes against just any humans count as crimes against humanity. The assault at the APEC conference was no such crime. So what, and against whom, is a crime against humanity?

I answer as follows:

**V. OF WAR CRIMES AND PEACE CRIMES**

Synchonic with, but unrelated to, the Just War Tradition giving way to positivism, the nationalist take on just cause began to give way to the humanist. According to the former - and this anachronism remains enshrined in the U.N. declaration on the subject, much as geocentricity remains in the weltanschauung of the hoi polloi - a just war is a war in defence of national sovereignty. This made perfect sense in the Greek-city-states-writ-large that constituted modern Europe. But it made no sense at all in Africa, where national boundaries were imposed roughshod over longstanding ethnic ones. As a result the international community had to turn a blind eye to technical violations of its own charter, or else resort to legal fictions, in order to
countenance trans-border incursions that were nevertheless morally mandatory. The most clear-cut case of this is, perhaps, Tanzania’s incursion into Uganda.

As a consequence, some thinkers - David Luban, for one - have been urging that the U. N. rewrite its just cause provisions to reflect that the utile to be protected by just war is not sovereignty, but rather (what Luban calls) ‘basic human rights’. Sovereignty, to be sure, is to be respected, but only insofar as it can acquit itself adequately on just this score.

I’m not all that sanguine about rights-talk, because I’ve never understood what the word is supposed to mean. Nor, even if I did, am I sure what these basic human rights might be. But semantics and specifics aside, there can be little doubt that Luban is on the right track here. Even Hobbes would agree that a sovereign who’s either active or complicitous in the gross violation of the utiles for which sovereignty is warranted in the first place forfeits his sovereignty. The only dispute between Hobbes and his liberal successors is over what utiles those happen to be.

The rules of war dictate that when an army occupies a territory, it temporarily assumes sovereignty over it. That is, an occupying army is obligated to protect the basic human rights of the people thus occupied. Such protection can be very expensive, which is why the Israelis have been so anxious to withdraw from some of the territories they once held. Still, provided the army is in situ, it can’t shirk this obligation. So when the Israelis allowed the Phalange into the Palestinian refugee camps of Shatilla and Sabra near Beirut in 1982, it committed a war crime, pure and simple. Likewise the Nazis when they allowed Babi Yar. Likewise when the Nazi themselves perpetrated Auschwitz.

Only in the case of the German Jews sent to Bergen Belsen do we stand in need of a new category. This is because the Nazis could have sent - indeed did send - German Jews to internment and extermination camps quite independently of the war. So, as a first gloss at least, I conclude that the category of crimes against humanity - as distinct from simple war crimes - is required in order to dissuade gross violations of basic human rights when the categories of war criminality are unavailable.

VI. ‘WHERE THERE IS NO COMMON POWER TO FEARE’

But, as it turns out, even this won’t do. For what do we do when - as has been increasingly the case in recent years - sovereignty is precisely what’s at issue in the conflict in question? A sovereign, or would-be sovereign, who’s attempting to exert his sovereignty cannot conscionably be penalized twice for losing the battle, i.e. once for losing it, and then again for failing to be able to protect the population of the territory he’s just lost. But even in cases like Lebanon and the Ukraine, we want the fault to lie on the Israelis and the Nazis, to be sure, but on the Phalange and Ukrainians as well. But since neither the Phalange nor the Ukrainians could plausibly be called an army - most of the latter, for example, were just local villagers looking to have some ‘fun’ - nor could either be plausibly construed as exercising sovereignty, we need to say that crimes against humanity are gross violations of basic human rights when the categories of neither war criminality nor sovereignty are available. What we want to do, that is, is send a message, as loud, clear, and unequivocal as possible, that one can hide behind neither civilian status nor

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27 See Beitz et al, op. cit.
conditions of anarchy to perpetrate gross violations of basic human rights with impunity. And that, I submit, is what we intend by the invocation of a crime against humanity.

And, say I, just in time! Over the past fifteen years - that is, since the fall of the Wall - the geopolitical considerations that once mitigated against otherwise morally mandatory interventions in gross violations of basic human rights have largely disappeared. This is precisely the non-cynical meaning of George Bush’s ‘New World Order’. But since the end of the Cold War the world has also been significantly demilitarized. By which I do not mean that there’s less fighting and killing going on. Far from it. Rather I mean that these conflicts are being conducted by warring factions for whom traditional military categories are inadequate. So rather than try to stretch our military categories out of all recognition, we’ve elected, rightly I think, to circumvent these difficulties and invent a new category, that of crimes against humanity. No doubt this is an autonomous effect of the end of the Cold War. But it is, I think, a highly fortuitous one!

VII. JURISDICTION

What remains, however, is the question of jurisdictional competence. And this is by no means an easy one. The Israelis were loath to try Eichmann as a war criminal, since to do so would be to suggest that the Nazis were at war with the Jews of Europe. But if the two parties were at war, some of their treatment might have been conscionable.

Still, what entitled the Israelis to try Eichmann? It won’t do to say, “Because no one else would!” Even if Eichmann could have been returned to Germany for trial, the Israelis wanted to try him themselves. But this courts the dual problems of private vengeance and judges who cannot but fall short of impartial.

A movement is currently afoot to overcome both these difficulties by the establishment of a permanent and autonomous world court for developing, through its own subsequent judgments, a jurisprudence for crimes against humanity. But as it develops, it’ll no doubt encounter the following rather troubling implications of the view I’ve been urging on it. Since one of the elements in a crime against humanity is that either the sovereign is in violation of his own responsibilities, or else sovereignty itself is nowhere to be found, it follows that if the second condition can’t be made out, the first condition automatically is. And this is bound to place an enormous burden on public functionaries, with the possibility of autonomous effects that may prove as chilling to public service as the improvement in such service it’s designed to affect. No doubt the courts will have to be sensitive to that tension. Fortunately that’s a challenge with which more traditional jurisprudence is already quite familiar.

VIII. REPRISALS REVISITED

That said, one difficulty remains. And that’s that it may not have gone unnoticed that, in my haste to salvage the intelligibility of a charge of crimes against humanity, I’ve yet to rule out one of the scenarios with which I began, namely that of meeting out collective reprisal. That is, if, as I’ve argued, laws against crimes against humanity arise from the need to protect the otherwise defenceless, the deterrent effect of going after Milosovic might prove inadequate to the task. Why? Because the benefits of his malfeasance in Kosovo, multiplied by the probability that that malfeasance would produce those benefits, might have been such that
the average Serb on the Belgrade omnibus doesn’t really care if, should the campaign fail, her erstwhile leader will be arrested and incarcerated. So if deterrence is what law’s all about, why not bomb Belgrade?

I think I have to grant that, on the analysis I’ve been urging, there’s no way that collective reprisals can be ruled out a priori. This is a disappointment, but not, I think, a reductio against my position. What we have to ask, I think, is why, notwithstanding our retributivist intuitions, in our more sober moments we acknowledge that collective reprisal would be unconscionable. And the answer, I suspect, is just that circumstances have yet to arise for us under which such reprisals would be the appropriate response. But we can imagine such circumstances, can we not? Obviously my father thought that the Shoah was such a circumstance. ²⁸

²⁸ Still, I can’t envision a crimes-against-humanity court ordering the bombing of a city. Nor do I think it likely that I’d issue such an order myself were I on the bench. To which the natural law theorist jumps in, “Aha! What, other than the recognition of a natural law prohibition against punishing the innocent could account for this reluctance?!”

I think I can answer her, though no doubt my answer will seem a tad self-sealing. Positivism and natural law theory are rules for understanding rules. But since, according to post-Wittgensteinian positivism, what makes a rule the ‘right’ one is just whether it self-replicates, I can allow that natural law theory may in some circumstances be ‘right’, in this instrumentalist sense, without having to concede that it’s true. Of course if I then say of ‘truth’ what I’ve just espoused about ‘right’, the natural law theorist will claim victory once again. But then, I need only point out to her, she’d be equivocating on her own conception of truth. And so we’d once again be at a standoff. I confess I don’t know how to resolve such an impasse. But I don’t think this standoff will undermine anything I’ve had to say here.