

BOOK REVIEW

LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW BY GERRY SIMPSON (CAMBRIDGE, UK: POLITY PRESS, 2007) 225 PAGES. PRICE AU\$40.95 (PAPERBACK) ISBN 9780745630236.

I INTEGRATING AND DIFFERENTIATING LAW AND POLITICS

From 11–14 June 2007, the Special Working Group on the Crime of Aggression, a committee mandated by the Assembly of States Parties of the International Criminal Court ('ICC'), had an informal inter-sessional meeting at Princeton University in the United States.¹ This was part of the present effort to consolidate the codification process for international crimes that began with the trials of the leaders of Nazi Germany and Imperial Japan after World War II. Attendees discussed various proposals pertaining to a legal definition of criminal aggression under the *Rome Statute of the International Criminal Court*.² The issues they looked at in codifying the crime of aggression included defining what constitutes blameworthy conduct by an individual and by the state, and the conditions for the exercise of jurisdiction.

Although these diplomats would readily concede that they were engaged in a political process to produce a legal text, it would be more difficult for a scholar to sustain the claim that their activity was in actuality 'politics in a different key'.³ However, this is precisely what Professor Gerry Simpson seeks to defend in his latest book, *Law, War and Crime*, which is a closely reasoned analysis of the legal project of criminalising aspects of the conduct of war, and war itself.

As the title suggests, the theoretical standpoint of this book encompasses, at least conceptually, issues of law, war and crime. Each of these issues stands on the border of politics and law. The author first renders these issues comparable, and then distinguishes them from each other formally and substantively. The inquiry calls for one to render to politics what belongs to politics and to law what belongs to law.

Given this requirement, a sociological approach to unravelling the similarities and differences would be the key to simultaneously integrating politics and law within a single view. This would not only provide a common basis for comparison, but also subsequently enunciate the telling differences that distinguish law from politics. In fact, the author approaches law as a 'field',⁴ in a manner rather redolent of the form of sociological analysis that Pierre Bourdieu advanced.⁵ However, this methodological issue is not particularly developed and,

¹ Special Working Group on the Crime of Aggression, ICC Assembly of States Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, 6th sess, ICC Doc ICC-ASP/6/SWGCA/INF.1 (25 July 2007).

² Opened for signature 17 July 1998, 2187 UNTS 3, art 83(2) (entered into force 1 July 2002).

³ Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (2007) 1.

⁴ *Ibid* 2.

⁵ See, eg, Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 814.

given the specific focus and argument of Simpson's work, this is probably just as well.

The consequence of this methodology is that — although the book seems to be and is articulated as a work on law, about law and by a legal academic — its central claim is that its subject is politics.⁶ However, how does this stand up to Bourdieu's claim that entry into the juridical field tautologically implies acceptance of the field's fundamental rule that 'within the field, conflicts can only be resolved *juridically* — that is, according to the rules and conventions of the field itself'?⁷ Even further, '[t]he constitution of the juridical field is inseparable from the institution of a professional monopoly over the production and sale of the particular category of product's legal services'.⁸ Simply put, lawyers have the monopoly on law, once it is law. How then can law be politics?

The beginnings of such an inquiry are, intriguingly enough, traceable at the end of the book. In Chapter 8, entitled 'Law's Fate', the author asks a number of questions: 'What sort of wars are we now waging? And how should we respond to them? With law? Or with fatalism and irony?'⁹

These questions challenge the very utility of the law itself with reference to war or, in the alternative, suggest resigning oneself to the problem of war with sophisticated ambivalence. This review attempts to examine how Simpson ended with these questions and aims to identify possible trajectories for future investigation. These could arguably include: is there a distinction between just and unjust force? Who decides this? How? And with reference to what? Couched like that, these questions are more amenable to processing within the legal system from legislation to adjudication and enforcement, rather than by a preponderance of force: the default mode of resolution in the absence of law.

Most importantly — and this is decisive to this review's critique — even when such brute force is brought to bear, this in itself will not change the law but only breach it. Further, where it is claimed that such use of force has in fact changed the law, then this is (as outlined below) double-edged *violence* — not just *contrary* to law but also *against* the system of law and thus simultaneously a crime of aggression and an abuse of the legal process. This is a violence against the notion of law itself, not only against its provisions but also against the very order of normality that makes the law intelligible. One is thus able to distinguish violence from force in society by applying the distinction between legal (law enforcement and self-defence) and illegal (violence). As Saint Augustine had it, it is an attempt to reconstruct violently the present 'normal' to a state of a new 'normal' more congenial to the ends of the aggressor.¹⁰ In other words, this violence is on the wrong side of a line separating self-defence from taking the law into one's own hands.

⁶ Simpson, above n 3, 12.

⁷ Bourdieu, above n 5, 831.

⁸ Ibid 834–5.

⁹ Simpson, above n 3, 179.

¹⁰ 'For every man is in quest for peace, even when waging war, whereas no one is in quest of war when making peace. In fact, even when men wish a present state of peace to be disturbed they do so not because they hate peace, but because they desire the present peace to be exchanged for one that suits their wishes': Saint Augustine, *City of God* (Henry Bettenson trans, 2003 ed) 866 [trans of: *De Civitate Dei*].

Force and violence both involve coercion. The distinction may be that force is coercion used for social ends (for example, law enforcement or self-defence) while violence is coercion used for antisocial ends (here the crime of aggression). With reference to human society generally, the social–antisocial distinction is congruent with the friend–enemy distinction in the political sphere and the lawful–unlawful distinction in the legal system.¹¹ To increase clarity, this review suggests greater legalisation as a solution to make way for the use of force in society for social ends. This is achieved by either blackening or whitening the current grey areas that politicians continue to insist rhetorically are a matter of politics.

During both war and peace, the current international legal system theoretically constructs its principal actors in the form of institutionalised states possessing certain attributes as the basis for participation in international politics.¹² This construction does not, however, remove a war–peace dichotomy and the resultant differentiation of applicable legal regimes, which is exemplary of an exception–rule scheme. Peace is the rule and armed conflict the exception. This is why, for example, United Nations Security Council resolutions authorising the use of force do not do so explicitly, but use the wording ‘by all necessary means’¹³ to achieve their object, because such wording is deemed sufficient to permit the use of force without specifically recommending it.¹⁴ It follows that in international law, armed conflict is the most radical state of affairs (being literally out of the norm where all that is necessary is permissible).

II PRIVILEGING THE LEGAL OVER THE POLITICAL

The interlocutors in international law must situate themselves in relation to the law, by making themselves amenable to its claims. Arguments about declaring exceptions to the established law on war and peace are even then indistinguishable from issues of legality.¹⁵ The law is thus on both sides of this debate, neither external, nor adjacent, nor even contingent. In other words, the question of whether the law is applicable or not is again a *legal* question.¹⁶ If a

¹¹ The binary coding of Niklas Luhmann’s sociological systems theory is especially useful in this regard, together with the insights of Carl Schmitt. For the similarities and differences between Luhmann’s and Schmitt’s thoughts, see Chris Thornhill, ‘Niklas Luhmann, Carl Schmitt and the Modern Form of the Political’ (2007) 10 *European Journal of Social Theory* 499.

¹² Gunther Teubner, ‘Alienating Justice: On the Surplus Value of the Twelfth Camel’ in David Nelken and Jiří Přibáň (eds), *Law’s New Boundaries: Consequences of Legal Autopoiesis* (2001) 21, 31.

¹³ See, eg, *Resolution 687*, SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (1991); *Resolution 678*, SC Res 678, UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (1990).

¹⁴ See generally Helmut Freudenthuß, ‘Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council’ (1994) 5 *European Journal of International Law* 492; James A Baker III, *The Politics of Diplomacy: Revolution, War and Peace, 1989–1992* (1995) 304–5.

¹⁵ See Fleur Johns, ‘Guantánamo Bay and the Annihilation of the Exception’ (2005) 16 *European Journal of International Law* 613.

¹⁶ ‘The exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic’: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, 1985 ed) 12–13 [trans of: *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*].

zone of non-legality were being claimed politically, outside and beyond the formal system of domestic and international law, then executive orders and even presidential decrees would lose all meaning. This is because they too are essentially legal–juridical concepts not factual–physical phenomena.

In Chapter 1, entitled ‘Law’s Politics: War Crimes Trials and Political Trials’, Simpson formulates a dialectic between the legal and the political to disentangle the meanings and demarcate the spaces occupied by the two.¹⁷ He argues that ‘war crimes law is a place where politics happen’,¹⁸ in that the ‘political’ is understandable through four perspectives that frame or distort war crimes trials:

deformed legalism (the idea that war crimes trials represent a form of flawed or deformed legal practice); *transcendent legalism* (the idea that war crimes law promises the application of uncontaminated legal categories to the problem of war and mass atrocity); *utopian politics* (the idea that war crimes trials are a form of bad or imprudent or insufficiently retributive politics); and *legalistic politics* (the idea that war crimes trials can achieve defensible or indefensible results depending on the political arrangements that define them).¹⁹

Given the preceding discussion, in a conflict between law and politics the question of regulating force presents itself no longer as a distinction between law and non-law, distinguishable under the proposition that a politician through some alleged and allegedly overwhelming compulsion should decide.

It is a differentiation between normal law (during peace) and exceptional law (during armed conflict) and accordingly is amenable to adjudication via reference to rules.

Although the author concedes that ideally ‘the trial is a place liberated from politics and the contamination politics threatens’,²⁰ he challenges this ‘orthodoxy’ by arguing that war crimes trials are political trials,²¹ because ‘war crimes law is saturated with conversations about what it means to engage in politics or law’.²² He goes on to say that these politics can be thought of as a set of relationships: these relate the cosmopolitan to the local (Chapter 2); the collective to the individual (Chapter 3); the didactic to the juridical (Chapter 4); show trials to legitimate proceedings (Chapter 5); law in war to law of war (Chapter 6); and legal sanction to extra-legal action (Chapter 7). Apparently, these relationships ‘are international criminal law’.²³

The author cites the case of Ramush Haradinaj in the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’)²⁴ to bolster his argument. In that case, the Court was engaged ‘in a dispute about the limits of the law and the boundaries of the political’,²⁵ and eventually ordered that Haradinaj be supervised by both the United Nations Mission in Kosovo (‘UNMIK’) and the ICTY, a political and a judicial body respectively. According to Simpson,

¹⁷ Simpson, above n 3, 4.

¹⁸ Ibid 12.

¹⁹ Ibid 28 (emphases in original).

²⁰ Ibid 11.

²¹ Ibid.

²² Ibid.

²³ Ibid 29 (emphasis in original).

²⁴ *Prosecutor v Haradinaj (Trial Chamber I)* Case No IT-04-84 (2 April 2008) (Judgment).

²⁵ Simpson, above n 3, 25.

[t]his form of rather delicate decision-making could be viewed, though, as simply politics by other means or legalistic politics: the court applying legal standards as honestly as it could while at the same time, remaining aware of the political effect of its judgment (but allowing none to trump the other).²⁶

It is not at all clear that this example can *only* be read as politics triumphing over law. The legal process is, by its very nature, more objective than mere ad hoc decision making within society. It transforms politically unsolvable conflicts into technical legal questions, answerable within and by procedural and conceptual means.²⁷ Consequently, a legal question may, on its face, have virtually no direct connection with the social conflict at issue.²⁸ The law thus creates fictions about the outside world, but has to treat them as hard realities.²⁹ Therefore, legal competence is required to *decide* when the legal process is appropriate or appropriately utilised to bring a construct within the purview of the law. This boundary-riding is merely to determine any instance where the legal system is utilised for a purpose for which it was neither designed nor intended. The making of this decision, and its maker, are what is actually at issue. Crudely put, this is a contest between might and right. The presupposition underpinning this contest is that force is first actualised, then politicised and finally legalised.

The theoretical assumption making this possible is that the law is an inexorable process with irrepressible logic; unique and separate within society. It is an inexorable process in the sense that objective laws procedurally followed and substantively applied by neutral observers are indispensable in resolving disputes. This process, at its core, applies past texts (laws) with reference to future events within a given society. It has an irrepressible logic in that it divides the world into black and white. That is, a strictly binary code (law–fact, lawful–unlawful, legal–illegal) is applicable in classifying, selecting, distinguishing, applying and deciding — in a word, judging. These assumptions are supportable within Niklas Luhmann’s sociological systems theory, which posits a circular explanation of the law as a self-referential process.³⁰ The legal process is further operationally concerned with internal validity, not external legitimacy. The law thus has the last word on legal issues and cannot be adequately conceptualised otherwise.

The relationship between force and law is a problematic one. Although force is not necessarily linked to law, the opposite is demonstrably false. Law and force are intimately connected through the notion of *enforceability*.³¹ Clearly, while force may exist in the absence of law, law cannot exist in a meaningful sense without force to back it up *as a last resort*. This is one sense in which force *precedes* law.

In domestic law, force used within the law’s bounds (for instance in self-defence and for the apprehension of criminals) is considered legitimate.

²⁶ Ibid 26.

²⁷ Teubner, above n 12, 23.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See Niklas Luhmann, *A Sociological Theory of Law* (Elizabeth King and Martin Albrow trans, 1985 ed) [trans of: *Rechtssoziologie*].

³¹ Jacques Derrida, ‘Force de loi: Le “fondement mystique de l’autorité”’ (1990) 11 *Cardozo Law Review* 920.

However, force used outside the law is considered illegitimate, either in the sense that it is contrary to law, or against the legal order itself. Force outside the law is repressed as violence as long as it remains repressible unless, and until, it is of such a magnitude that it successfully overthrows the legal system. Therefore, it is a matter of extra-judicial or even meta-judicial fact with legal consequences.³² Thus, in a sense, force also *succeeds* law. This demonstrates that law is the appropriate medium in which to discuss regulating violence in a globalised society. The tragedy of our times is that it is easier to accept the consequences of generalised and perpetual warfare than it is to contemplate the results of this analysis.

By primarily relying on force without law, we refashion the entire globe into a space of violent political struggle instead of a place of mutual peaceful existence sanctioned by laws. The difference with the past is that the law is now imminently reducible to the status of a stalking horse and is no longer a guide to conduct. Rule *by* law supplants the rule *of* law. That is, the crime of aggression now coincides with the abuse of legal process on a global scale. Therefore, in regulating force, global law has conceptually shifted from passive force and law (immanent in and regulating an identifiable place) to active aggression and legal process (effective in and ordering a given space). How does this rather abstract process connect with persons within these places and spaces?

III SPACE AND PLACE

According to Simpson, ‘the regulation and criminalization of war represents the culmination of the juridification project’.³³ Whilst this is a bold statement, it is nevertheless essentially correct. By regulating and criminalising war, law is in a sense freed from what preceded it (that is, force or violence). We are instead subject to it, unable to negate it through force, because the law now provides for its own negation³⁴ in war. This negation occurs in exclusively legal terms and law is therefore truly independent.

Chapter 2, entitled ‘Law’s Place: Internationalism and Localism’, considers ‘the *place* of international criminal law’.³⁵ In the chapter, the author attempts to show that the question of space or location is always in play in both the choice of place (domestic or international) and the choice of style (provincial or cosmopolitan) of trials. Simpson pits internationalists against nationalists and teases out ‘what it means to act in the name of humanity as opposed to more particular politics.’³⁶ The conclusion is that international criminal law is idiosyncratic, being neither international nor national but a peculiar combination of the two.

One peculiarity, often overlooked, is that by controlling the legality of the use of force, one may not only legitimately impose legal order on chaos but may also

³² See Noel Cox, ‘*Republic of Fiji v Prasad*: A Military Government on Trial’ [2001] *New Zealand Armed Forces Law Review* 5, discussing *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J, Barker, Kapi, Ward and Handley JJA, 1 March 2001); *Madzimbamuto v Lardner Burke* [1969] 1 AC 645; *Uganda v Commissioner of Prisons* [1966] EA 514; *State v Dosso* [1958] 1 PLD SC 533.

³³ Simpson, above n 3, 133.

³⁴ *Ibid* 93.

³⁵ *Ibid* 30 (emphasis in original).

³⁶ *Ibid* 5.

then disorder ‘illegitimate’ legal orders by creating spaces open to violence from places erstwhile governed by rules. This renders the resisting enemy criminal, and therefore a legitimate target in combat and punishable outside of combat. Both strong and weak states perceive order protected by law as overwhelmingly positive. According to Simpson, ‘international criminal law is galvanized by the idea of humanity as a category to be protected’.³⁷ Thus, international justice evolves from a cosmopolitan or internationalist view (incipient hegemony), but there is perpetual negotiation between this and the local (privileged parochialism). The chapter argues that international criminal law is made out of this negotiation.³⁸

This negotiation is desirable for strong states in order to maintain and consolidate their possessions and positions, and for weak states to be secure from a superior force. This is facilitated through their inclusion in the largest possible collective (the international community) in whose name violence is not eradicated but the next best thing, a monopoly on the legitimate use of force, is imposed.

IV CONJURING PERSONALITY UP AND AWAY

Chapter 3, entitled ‘Law’s Subjects: Individual Responsibility and Collective Guilt’, is structured around the dialectic of the social and individual, and addresses the conundrum of when the state is itself criminal in war, and how it then can be the judge of criminality in a trial. Simpson rightly points out that ‘international law is largely auto-interpretative and states are beholden to no super-sovereign’.³⁹ Connected to this is the international personalisation of individuals via international criminal law and international human rights.⁴⁰ There is a perpetual tension apparent between the collective and the individual in international criminal law.⁴¹ Within it, mass criminality tends to be viewed variously as individual criminal psychopathology, socio-political joint responsibility, historical inevitability or national temperament.⁴² These tendencies are reflected in institutional oscillation between state crime and individual responsibility, in the ambiguities of a legal order addressing both personal agency and collective conspiracies, and in how the structure of the field is constructed around the problematic moral responsibility of groups and persons.⁴³ In sum, international criminal law is the widest generality (humanity as sovereign) brought to bear upon the narrowest specificity (the individual as subject).

Here, Giorgio Agamben contributes the notion of *homo sacer* or ‘sacred man’ defined as human life included in the juridical order solely in the form of its

³⁷ Ibid 45.

³⁸ Ibid 53.

³⁹ Ibid 56.

⁴⁰ Ibid 57.

⁴¹ Ibid 58.

⁴² Ibid 78.

⁴³ Ibid.

exclusion.⁴⁴ *Homo sacer* is therefore a figure *excluded* from law itself, while being *included* at the same time. Crucially, his figure is the exact mirror image of the sovereign who stands on the one hand, *within* law (exercising constitutional and statutory powers) and on the other hand, *outside* law (exercising prerogative power including suspending law itself).⁴⁵

This brings to the foreground certain practices wielded with life itself as the object. Specifically, where law is viewed as a set of ‘enforceable rules’, fidelity to the rules is reduced and discretion to apply force (which is now unbound and is therefore violence) is increased. This occurs through manipulating the link between law and the force ordinarily associated with the law. In this manner, human personality (the ‘person’ as a bearer of rights and duties within a legal system) may be conjured up (through, for example, the grant of citizenship and its pertinent rights) or conjured away (through reduction to the status of an alien or non-person). The global war against terror is exemplary but not unique in this regard. In contrast to Australia, the British demanded that their citizens be repatriated from Guantánamo Bay. Australian David Hicks sought and obtained British citizenship to avail himself of protections similar to British citizens, only to have the citizenship stripped after a matter of hours to deny him the remedy.⁴⁶ This is a clear instance of executive discretion being employed at the expense of rights, in the name of enforcing those same rights. This internally contradictory process has to be legitimated and granted a patina of procedural objectivity in which the instrumentality of law’s narrative style is indispensable. How is the law, or more accurately its process, captured?

V ENABLING AND ENFORCING ORTHODOXY

Chapter 4, entitled ‘Law’s Promise: Punishment, Memory and Dissent’, concerns the ‘didactic and dissident functions’ of war crimes trials and the tensions between these and other effects and imperatives.⁴⁷ This chapter discusses the educative function of law in telling a compelling story and sets this off against the limits of the law, in that it legitimises ideological innocence and facilitates erasure of memory.⁴⁸

The law itself is both a terrain of, and a weapon in, the struggle. The *Justice Trial*⁴⁹ at Nuremberg charged legal practitioners for participation in an organised system of injustice that violated the laws of war and of humanity, which was perpetrated, however, in the name of law through the instrumentality of the courts. That is, functionaries of the Nazi state captured the legal process for their

⁴⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998 ed) 83–5 [trans of: *Homo sacer: Il potere sovrano e la nuda vita*]. See Claudio Minca, ‘Agamben’s Geographies of Modernity’ (2007) 26 *Political Geography* 78 (see especially 80–1).

⁴⁵ *Ibid.*

⁴⁶ Annabel Crabb, ‘Law Strips Hicks of UK Citizenship in Hours’, *The Sydney Morning Herald* (Sydney, Australia) 20 August 2006 <<http://www.smh.com.au>> at 23 May 2008.

⁴⁷ Simpson, above n 3, 79.

⁴⁸ *Ibid.*

⁴⁹ *US v Alstötter*, reported in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Order No 10: Nuernberg, October 1946 – April 1949* (1951) vol III, 3 (‘Justice Trial’).

own ends. However, upon losing the war, the Allied Powers tried, convicted and punished them for grossly abusing the legal process.

Under the heading, 'Discordant Notes', the author discusses what could well be the crux of the matter. Firstly, trials 'retain at their core a symmetry that can never quite be dissolved by the political elites who convene the trial'.⁵⁰ Secondly, the 'politics' in such trials are 'a contest between authorized and bastard versions of history, law and politics'.⁵¹ Law and, in particular, trials allow for usually forbidden forms of political engagement. Thirdly, law's adversarial nature, its commitment to equality of participation and its openness mean that it creates occasional space for dissenting judgments that challenge the legitimacy of the law itself.⁵² This may even take the form of challenges to the use of legality in judging political acts.⁵³ That is to say, the law procedurally entertains within itself the possibility of its own substantive negation.⁵⁴ It is exactly this projected negation that makes it law.⁵⁵ What then distinguishes international criminal law?

VI OBJECTIVE GUILT AND SUBJECTIVE INNOCENCE

Chapter 5, entitled 'Law's Anxieties: Show Trials', claims that war crimes law is the application of legal categories to the problem of war, where the defeated deserve defeat and punishment because they did wrong.⁵⁶ Simpson identifies certain similarities between war crimes trials and show trials in terms of procedure. He argues that the notion of objective guilt and subjective innocence brings to light that both sorts of trials transform hitherto political acts into crimes.⁵⁷

The similarities are, first, 'the idea that individuals can be punished because they pose a danger to some new configuration of political forces or some contested notion of community'.⁵⁸ There is 'the same setting aside of existing legal rules (as with preventative war) in order to remove threats to the revolution (Moscow), national security (Guantanamo Bay), the international system (Iraq) or peace in Europe (Serbia)'.⁵⁹ There is also the same 'disposability of human beings in the name of political projects' and the 'shared appeal to intuition over legality'.⁶⁰ The crucial difference identified by Simpson, however, is the 'degree of risk' that is present in war crimes trials, but negligible or non-existent in show trials.⁶¹ According to this characterisation, show trials are political projects under the guise of law as distinct from war crimes trials, which are legal projects, albeit heavily influenced by politics. This distinction, though fine, is telling — war

⁵⁰ Simpson, above n 3, 93.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* 94.

⁵⁴ *Ibid.* 93.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* 131.

⁵⁷ *Ibid.* 123–4.

⁵⁸ *Ibid.* 128.

⁵⁹ *Ibid.* 129.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* 130.

crimes trials are lawful while show trials are politics. Besides that, objective guilt and subjective innocence is a feature of the criminal law generally in the privileging of the objective (intention) over the subjective (motive) in discerning criminality. It is not only restricted to international criminal law. The high stakes international politics involved only make it more apparent.

VII LAW AS POLITICS AND POLITICS AS LAW

Through distinguishing law from politics and privileging the former in disputes concerning the regulation of force in society, one is better able to counter their conflation. Simpson explores this aspect in Chapter 6, entitled 'Law's Hegemony: The Juridification of War'. This chapter investigates the conduct of politics in the courtroom by a transmutation of politics into law. According to Simpson, war crimes trials belong to 'juridified diplomacy', which is but a genre of international politics.⁶² He argues that this juridified diplomacy translates political conflict into legal doctrine, and then resolves these conflicts in legal institutions. Essentially, the whole book is about just this tendency.

In this particular chapter's first section, Simpson discusses recent examples of the law's preponderance in areas of international conflict, and links this to the juridification of politics generally. The second section considers war as the most visible instance of juridification of law and crime.⁶³ Schmitt contends that once the international community declares war, 'pest control' displaces war.⁶⁴ Simpson disputes this contention by claiming that a fundamental interaction in international criminal law is 'around the tension between the project to criminalize war and a counter-project that denies the applicability of criminal categories to decisions about war and peace'.⁶⁵ He mentions Justice Pal who, in his dissenting judgment at the International Military Tribunal for the Far East at Tokyo,⁶⁶ regarded international law as a project for stabilising and securing inequitable power distributions within international society.⁶⁷ For him, criminalising aggression was stabilising an unequal status quo.⁶⁸

The chapter also argues that the juridification of war through the criminalisation of aggression has been so hugely controversial that 'the idea of individual responsibility for war ought to give us pause'.⁶⁹ This is principally because 'the juridification of war has been fixated on questions of individual agency'.⁷⁰ Second, juridification, in rendering atrocity or war through law, may create unjust equivalences or rely on 'idiot's rules' that are oblivious to the nature of war or character of different wars; thus, criminalising aggression may

⁶² Ibid 132.

⁶³ Ibid.

⁶⁴ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulmen trans, 2003 ed) 123–4 [trans of: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*].

⁶⁵ Simpson, above n 3, 143.

⁶⁶ Radhabinod Pal, *Judgment of the International Military Tribunal for the Far East: Dissident Judgment* (1953).

⁶⁷ Simpson, above n 3, 147.

⁶⁸ Ibid.

⁶⁹ Ibid 157.

⁷⁰ Ibid.

be too blunt a mechanism for the problem of force in international relations.⁷¹ Third, crimes against peace supplant prudent judgement by sharply distinguishing between what is and what is not acceptable.⁷² Rather counter-intuitively, Simpson goes on to summarise the problem as being that, in the absence of clear standards or shared values in international society, we tend to ‘criminalize our enemies *because* they are our enemies’.⁷³ Provision of clear standards, earlier disparaged by Simpson as supplanting prudent judgement, surely would be the ready antidote, not the devaluing of law or condoning of war.

Notwithstanding this, Simpson’s own view is that, ‘aggression [as a legal category] will be consigned to the category of a “crime to come” because it can neither be defined [thickly enough, nor] ... applied universally’ to include the Great Powers.⁷⁴ However, it will remain on the international agenda to describe disfavoured states and their leaders as aggressors.⁷⁵ By first assigning the criminalisation of aggression to represent ‘the culmination of the juridification project’,⁷⁶ but diagnosing it as merely potential, Simpson gives it a decidedly shape-shifting quality, making it permanently imminent for Great Powers but immanently permanent for the not-so-great or not-so-powerful states. In other words, while judgment day is perpetually deferred for powerful states, it is in the here and now for weak states; the latter because they are weak and the former because they are strong. How is this different from what has gone on before?

VIII FROM ENEMIES TO CRIMINALS AND BACK TO ENEMIES

Chapter 7, entitled ‘Law’s Origins: Pirates’, demonstrates international law seamlessly joining ostensibly extra-legal politics through the conferment of outlaw or pariah status, which takes piracy as the paradigm instance of extra-legalism. Pivotaly, individual international criminal responsibility began with pirates who were outside the international order and yet ‘were the only natural persons subject to that legal order’s direct control’.⁷⁷ Both in the case of piracy and the war on terror, the central figure is the ‘enemy of mankind’:

The original enemy of mankind is the pirate: an originating presence who is, at the same time, a harbinger of law’s fate, a construct of war and peace, and an object of both legal regulation and unregulated violence. Piracy inaugurates international criminal law (pirates are the first enemies of mankind) and the pirate figure is reinvented in order to renew (or radically transform) the idea of international community that underpins this legal order (terrorists are the latest enemies of mankind). Paradoxically, though, the re-emergence of the pirate-terrorist, essential to the remaking of the international community through the war on terror, also threatens that community’s prior legal commitments (frequently the treatment of the pirate terrorist is unconstrained by law).⁷⁸

⁷¹ Ibid.

⁷² Ibid 158.

⁷³ Ibid (emphasis in original).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid 133.

⁷⁷ Ibid 162.

⁷⁸ Ibid 159.

This characterisation, echoing *homo sacer* above, yields entities of varying personality: (i) the peacetime outlaw: outside the law, unprotected and open to anything; (ii) the peacetime criminal: inside the law and open to punishment; (iii) the wartime terrorist: outside the law, unprotected and open to anything; and (iv) the wartime enemy: inside the law, open to killing and injury but not open to punishment.

The crucial point that Simpson almost intuitively makes is that, although pirates are conceived of as enemies of mankind or outsiders, they remain mankind or insiders by defining inside and outside. In fact, both Empire and the international community need pirates as agents and objects of imperial ambition.⁷⁹ Moreover, the category of ‘enemies of mankind’ ensures the continued purchase of ‘mankind’ as a category capable of waging perpetual war in the name of international justice.⁸⁰ The difference in movement from enemies to criminals (via legalisation, as at Nuremberg) and from criminals to enemies (via politicisation, as in the war on terror)⁸¹ is that once legalisation is done in the first instance, a precedent is set and law is differentiated from politics. That is, when time-binding is factored in, a being that was an outlaw and therefore open to anything (including legal process; essentially a non-person) becomes both a legally protected and legally responsible entity (a person) following the invocation of legal process. Action contrary to this is then not non-lawful but unlawful.

Perhaps if the question Simpson asked was ‘what kinds of war are being waged *on* (as well as by) us and how is the law relevant to these?’ or ‘is there an *a priori* conceptual bar to legalising a resort to force?’, it would then indicate that the law is indeed indispensable in judging the use of force in a world of increasing complexity and interconnection. The role of politics in this instance would be to provide the forum and enabling environment for binding decisions to be made, embedding the international use of force in an international regime through a global law that covers both victims and aggressors, leaving none outside either the protection or penalties of the law.

Simpson’s acute analysis is a provocatively valuable contribution to the literature and can hardly be done justice in the short space of a review. It instead requires direct engagement and is therefore highly recommended. *Law, War and Crime*’s contribution to jurisprudence must rank among the highest.

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⁷⁹ Ibid 177.

⁸⁰ Ibid.

⁸¹ Ibid 159.

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