

REVIEWS

Danilo Zolo, *La giustizia dei vincitori: Da Norimberga a Baghdad*
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ALBERTO TOSCANO

SOVEREIGN IMPUNITY

Over the last decade the Florence-based philosopher of law Danilo Zolo has emerged as one of the most principled and scholarly critics of the doctrine of ‘military humanitarianism’ that has followed the West’s victory in the Cold War. His latest book, *La giustizia dei vincitori*—‘Victors’ Justice’—analyses the 20th-century recasting of the legal status of war and proposes a genealogy of the international tribunals, ‘from Nuremberg to Baghdad’, in which it has been embodied. In a sense, the work may be regarded as the third of a trilogy, beginning with *Cosmopolis: Prospects for World Government* (1995; English publication 1996) and continuing with *Invoking Humanity: War, Law and Global Order* (2000; English publication 2001). Zolo himself has described *Cosmopolis*—a panoramic critique of liberal cosmopolitanism and juridical universalism—as a way of working through his shock and dismay at Norberto Bobbio’s salute to Operation Desert Storm as the harbinger of a new international legal order, founded on individual human rights. *Invoking Humanity* extended this analysis to the Kosovo conflict: it contains a scathing account of the Yugoslav War Crimes Tribunal at The Hague, under Carla Del Ponte, and its political and financial collusion with NATO; and a rigorous dissection of disquisitions on ethical cosmopolitanism by Habermas and others.

If relations between war and liberalism have played a major role in his recent writings, Zolo has been preoccupied with the broader questions of law and power from the beginning of his intellectual life. Born in 1936, in

the Croatian city of Rijeka—then Fiume, and under Italian rule—he studied jurisprudence and then worked as an assistant to the radical Catholic Mayor of Florence, Giorgio La Pira, a strong proponent of disarmament during the Cold War. In the following decade Zolo moved closer to the Della Volpean school of Marxism and wrote widely on law, criminology and politics. In a climate of heightened tension and terror threats during the late 1970s, he defended the practice of democratic legality—*garantismo*—against the government’s recourse to emergency laws, with which the PCI colluded. During this period Zolo produced important work on bourgeois right and the ‘withering away of the state’, notably *Stato socialista e libertà borghesi* (1976). Immanent critiques of classical Marxism’s insufficient and ‘Rousseauian’ attention to law and the state presaged his turn, in the 1980s, towards an engagement with German and Anglo-Saxon social and political theory, including the work of Giddens, Hirst and Beck. Zolo now developed what he termed a realist theory of democracy, turning from the legitimating vocabulary of parliamentary consensus—rights, sovereignty, deliberation, representation—to study the actual functioning of liberal polities. His interest in the ideas of Otto Neurath and Niklas Luhmann was apparent in, respectively, *Reflexive Epistemology* (1986; English 1989) and *Democracy and Complexity* (1987, English 1992).

In contrast to most of the Anglo-German social theorists, however, Zolo’s response to the wars of the 1990s was to become more sharply critical of the international liberal order. The works from *Cosmopolis* onwards combine a long-standing if often unspoken pacifist impetus with a multi-dimensional realism, which embraces not only state-power politics but ethological discussions of human aggressivity, anthropological debates about cultural difference and the crucial role of economic inequality and exploitation. Initially, the overall tonality was a tragic one—witness the proposal in *Cosmopolis* for a ‘weak pacifism’—rather reminiscent of Freud’s exchange with Einstein on war. As the casuistries seeking to legitimate brute force and dispossession have congealed into official discourse, however, a steelier note has entered Zolo’s work. Arguably, *La giustizia dei vincitori*—a potent and articulate *J’accuse* against the manipulation of international law as an instrument of American power—is his most incisive denunciation of the politicization of justice to date. It provides both a welcome guide to the instrumentalities of the system, abounding in vital details and historical erudition, and an uncompromising polemic against the impunity of the ‘lords of peace’.

As his title suggests, Zolo’s central thesis is that contemporary international law, hallowed as the domain of impartiality and universalism by liberal cosmopolitan theorists such as Bobbio, Habermas and Ignatieff, in fact produces an asymmetrical and retributive form of justice from

which consideration of the winners' crimes is systematically excluded. *La giustizia dei vincitori* comprises a number of reworked essays and interventions which build on Zolo's previous research, tackling themes from the definition of 'war crimes' to the doctrine of pre-emption, from 'empire' to terrorism. Though the seven chapters to a certain extent stand on their own, each bears a relation to the central argument of the book: that, behind the veneer of humanitarianism which characterizes the 'criminalization' of war, there lies an instrumentalization of international law and legal institutions to fit the needs of a US-dominated world order, deeply marked by inequality and injustice. Its essence was pithily summarized by a dissenting Indian judge at the Tokyo International Military Tribunal in 1946: 'Only lost wars are international crimes'.

Zolo's starting point is Carl Schmitt's insight in *The Nomos of the Earth*: that the outlawing of armed state aggression, starting with the 'Wilsonian cosmopolitanism' of the League of Nations, in reality served as prelude to unlimited and dehumanizing forms of warfare. For Schmitt, Zolo suggests, the Great War had signalled the end of the *jus publicum europaeum*, the Westphalian system based on sovereign-state equality with its recognition of the *justus hostis*, the legitimate enemy. The new order of the world suggested a return to the 'just war' model of Christian scholars, itself a re-elaboration of the Israelites' 'holy war', with its ethico-political dimension. With world peace supposedly guaranteed by the 'despatialized' League of Nations, war was redefined as an international crime—one that could be imputed to an individual as easily as to a state, as in the calls to 'try the Kaiser' in the wake of World War One. Building on Schmitt's periodization, Zolo presents a genealogy of 20th-century international law and its move from a concept of *justus hostis* to one of the aggressor as criminal, with the expansion of law beyond domestic jurisdictions. In this diagnosis, the post-Westphalian order legitimates a no-holds-barred onslaught against those defined as the enemies of humanity. Yet the ethical universalism that initially saw itself embodied in the League of Nations has proved unable, or unwilling, to generate genuinely impartial global institutions for the exercise of law beyond national sovereign jurisdictions. It ends by subscribing to a Manichean vision of conflict, pitting humanity against barbarism, at the behest of the dominant powers.

La giustizia dei vincitori then turns to examine the corrupting amalgam of law and military triumph constituted by the Nuremberg War Crimes Tribunal. Against the consensual view of Nuremberg as a paragon of virtue, Zolo sees it as the institution *par excellence* of winners' justice. As he points out, the Tribunal was established by the Allied powers' London agreement of 8 August 1945: two days after Hiroshima and two days before Nagasaki. But the perpetrators of nuclear destruction would not be tried at Nuremberg,

whose jurisdiction was limited to the defeated state. Here, as in the even more instrumentalist tribunal in Tokyo, Zolo highlights the double standard that exonerates the victor's crimes—whether of *jus ad bellum*, resort to war, or *jus in bello*, conduct in war—while prosecuting those of the enemy in ways that break with myriad legal principles, from *habeas corpus* and the right of appeal to the rules of admissible evidence and the non-retroactive character of law. Zolo argues that the 'Nuremberg model' conforms to Otto Kirchheimer's definition of 'political justice', in which 'the differential functions of justice and politics are annulled' and the criminal justice process becomes characterized by 'the ritual theatricalization of politics, the personalization and stigmatization of the enemy, and the procedural legitimation of expiatory sacrifice'. The victorious powers granted themselves impunity and—with no pretence of impartiality—appointed the prosecutors and judges from their own ranks. The rights of the accused were at the discretion of the judges. Sentences were envisaged as exemplary and retributive, evoking biblical models of expiatory punishment.

The 'crimes of aggression' that Nuremberg was designed to punish were left remarkably ill-defined. As Zolo notes, the UN Charter lacks a workable definition of 'aggression', and it was therefore left to the UN Security Council, through Article 51, to decide whose deeds should count as such. As to the efficacy of criminalization in preventing war of aggression—the 'supreme international crime', according to the judges at Nuremberg, since 'it contains within itself the accumulated evil of the whole'—Zolo suggests that it is 'enough to point to the American war on Vietnam, or the Soviet invasion of Afghanistan' to judge its results. The same double standards of victors' justice apply to the international law on occupied territories, formulated in the Fourth Geneva Convention of 1949. While military occupation—in Kosovo, Iraq, Lebanon or Palestine, for example—has routinely been the outcome of a war of aggression, Article 64 states that the invading power may abrogate local laws if this is necessary for 'the occupiers' security'. As Zolo writes:

By a sort of magical normative transubstantiation, the fact that armed aggression has succeeded, setting in place the military occupation, produces an immediate amnesty of the 'supreme crime' itself and legitimates its outcome.

The sovereign exemption of the great powers—evinced *inter alia* by the very structure of the UN Security Council, a sedimentation of relations of force among the World War Two victors—is an intrinsic dimension of this legal order.

Zolo explores in some detail the criticisms levelled at the Nuremberg Tribunal by its contemporaries, including Hannah Arendt and Hans Kelsen,

the renowned Austrian jurist. Arendt had cast grave doubt on the victors' motives, while pointing out that the accuseds' 'crimes of aggression' had not been defined as such—by the 1928 Kellogg–Briand pact, for example—at the time they were committed. Kelsen's critique, appearing on the heels of his influential *Peace through Law*, was still more damning: Nuremberg was so flawed that it should serve not as precedent but as negative example, like original sin. In fact, the model of the Nuremberg Tribunal was largely mothballed during the half-century of the Cold War. It was only after 1990 that it was resuscitated by the now-global victors, in a series of ad hoc tribunals: the International Criminal Tribunal for the former Yugoslavia was set up at The Hague in 1993, followed by the International Criminal Tribunal for Rwanda at Arusha, Tanzania, in 1995. Three years later, the statutes of a permanent International Criminal Court were approved, and the ICC was established at The Hague in 2003. In addition there has been a proliferation of 'mixed' jurisdictional instances—in Cambodia, Sierra Leone, Kosovo, East Timor—at which national ordinances were applied by international judges. Finally, in 2003, an Iraqi Special Tribunal was established in Baghdad.

The Yugoslav Tribunal—anatomized in detail in *Invoking Humanity*—provides Zolo with an almost pure example of the Nuremberg model. Set up by the UN Security Council following an initiative by the Clinton Administration, and largely funded by the latter, it breached every norm of impartiality. Its prosecutors collaborated extensively with NATO, liaising personally with the Supreme Allied Commander in Europe and the UN Secretary General about 'modalities of cooperation and assistance'. IFOR and SFOR troops functioned as judicial police, pursuing investigations and undertaking searches and arrests. NATO's 78-day bombardment of the remains of Yugoslavia in 1999—the 'supreme crime'—was discounted. The Tribunal's jurisdiction was retroactively applied to the constituent states of Yugoslavia from 1991. The accused were selected as much by mass-media pressure as on strictly juridical grounds, and for calculatedly political-theatrical effect. Despite the fact that they had been appointed by the UN, Zolo argues, the relationship between the occupying powers and the Tribunal's prosecutors, Louise Arbour and Carla Del Ponte in particular, was little different to that between the Allies and their equivalents at Nuremberg: Robert Jackson, Hartley Shawcross, François de Menthon and Roman Rudenko, notorious for his role in Stalin's show trials.

The Rwanda Tribunal, meanwhile, proved a catastrophe: six years after it had been set up, 120,000 pre-trial detainees still languished in desperate conditions. In the end, it was abandoned in favour of the local Gacaca court system. The ICC, for its part, proved the rule of sovereign impunity by exception: the US did not run it but sabotaged it, granting its own troops exemption from prosecution by dint of a UN Security Council

resolution, and then proceeded to exact bilateral ‘impunity agreements’ with ratifying states, that they would not surrender US nationals to the Court. Congress, meanwhile, passed the ‘Hague Invasion’ American Service-Members Protection Act of 2002, authorizing the use of force to free US (and selected allied) personnel from the ICC’s cells. To date, no trial has been held there.

The Iraqi Tribunal was, of course, pointedly constituted as a ‘national’ juridical process by the Americans; but, as Zolo points out, it shares many of the attributes of the international ‘Nuremberg model’. Its statute issued from the Iraqi Governing Council, which had itself been appointed by the Coalition Provisional Authority, under the US military governor Paul Bremer, and possessed no legislative powers. The Tribunal’s judges were selected on clearly political criteria, with no pretence of impartiality, and operated on the basis of statutes written by American jurists. The trial of Saddam Hussein ‘reproduced and radicalized the logic of stigmatization and retributive vendetta that dominated the Nuremberg trials’, reducing it to ‘a propagandistic theatricalization of justice’ that did nothing to serve the democratization of Iraq.

In these tribunals, as in the convoluted justifications for the 1990s imposition of ‘no fly zones’ in Iraq, Zolo traces the development of a politics of humanitarian intervention unmoored from any genuinely universal institutional or normative basis. Financially and ideologically inextricable from their Atlantic sponsors, their *ad hoc* and *ad hominem* criteria reproduce inequalities of power and influence. In this respect, following Kelsen’s criticisms of Nuremberg—also echoed by Arendt and by Hedley Bull, in *The Anarchical Society*—Zolo sees the enforcement of international law as offering, not impartial justice, but the continuation of aggression by other means. Placed at the disposition of the great powers, the ‘inspirational Kantian and Kelsenian message of *world peace through world law*, with its promise of guaranteeing an end to war through juridical means and universalist institutions’, has proved to be an instrument of what Hans Morgenthau once called ‘the cosmopolitanism of the Holy Alliance’.

Zolo is scathing in his account of the hypocrisy that joins a selective criminalization of war to the normalization of great-power aggression, albeit often as undeclared conflicts and low-intensity warfare. In his analysis, war emerges as a prosthesis of US-led globalization, frequently justified by its apologists in terms of a juridical and humanitarian universalism. The latter’s partiality and incoherence are subjected to closely argued critique. From ‘Nuremberg to Baghdad’, international jurisdiction over war crimes has been predicated on victory, and the crime of aggression has never been dealt with through a truly universalizable procedure: the victors always

retain their fundamental immunity, and it is they alone who set the terms of legal—not to mention political and moral—universality.

Zolo carefully unpicks the forms of collusion between liberal-humanitarian ideology and military intervention which, because it presents itself as the expression of a universalist morality, evades any legal or normative oversight. Thus what initially appears as a commendable humanist impulse—treating individual human rights as a principle superior to that of state sovereignty in the international order—turns out, given the deeply partial conditions for enforcing international law, to provide *carte blanche* for warmongering outside of any legal or diplomatic constraints. In the absence of the humanitarian world order that their position requires, the Kantian defenders of juridical pacifism—from Kelsen to Bobbio, Rawls to Habermas—find themselves justifying, in the name of human rights but with a kind of realist caveat, forms of military and political power that are entirely outside the law. Thus, while the West's military might is presented as 'the armed wing of Amnesty International', the trumping of sovereignty by human rights in fact ensconces the untrammelled sovereignty of one great power. In this respect, for all the differences that separate them from such perspectives, juridical pacifists end up aligned with those such as Michael Walzer who seek to revive notions of 'just war' as more or less organic to US foreign policy. The result is summed up here as an 'imperial monotheism', in which war is founded on 'humanitarian-fundamentalist' principles.

In developing this critique, Zolo deftly focuses on Bobbio and Ignatieff, enlisting their doubts on the philosophical coherence of the universalism of human rights to attack their defence of the same. Yet the results are not always convincing. Turning Ignatieff against himself, Zolo goes on to denounce the 'intolerance, aggressiveness, negation of cultural diversity and complexity of the world' that characterize all universalisms.

This tendency to blame juridical universalism itself, rather than its political instrumentalization, can lead him to treat the power projections of the West as in some sense the manifestation of a homogenizing Eurocentric dogma of rights; one that might be countered by a recognition and regulation—through multilateral institutions—of the plurality of cultural and normative constellations. Thus Zolo sometimes identifies the absence of cultural context and differentiation as the real error of international law as it currently stands. Though attention to debates on social or collective rights and economic inequality is welcome (addressed here through the work of Kymlicka and Sen), there is a risk of realism collapsing into cultural relativism when Zolo sympathetically refers to the doctrine of 'Asian values' as an example of the need to accept normative plurality in the international order—as if these values were somehow the natural expression of 'cultures' rather than the ideological instruments of modern states, no less

than the doctrine of humanitarian intervention. In these respects it may be said that Zolo is still burdened by a notion of complexity which functionally differentiates between the legal, the cultural, the political and the economic, rather than treating them in their conflictual or dialectical entanglement. Zolo holds out hopes that Europe and China may one day offer an alternative pluralism of powers—an opening towards an archipelago of cultures. This is unconvincing. What historical basis is there for thinking Euro- or Sino-capitalism any less self-interested than the American brand? It is not ‘universalism’ that is the problem with international law, but the fact that the latter’s universal application is an impossibility within a radically asymmetrical political–economic order, since powerful states will always use its statutes to clothe their interests and frame its jurisdictions to suit their needs. In its lucid delineation of the manner in which they do so, *La giustizia dei vincitori* makes a memorable and eloquent contribution.