#178: Justifying the means: The law as accomplice in crimes against humanity

VOICEOVER
Welcome to Up Close, the research talk show from the University of Melbourne, Australia.

JENNIFER COOK
I’m Jennifer Cook. Thanks for joining us. On this episode of Up Close, we enter the dark arena of state crime and genocide and ask just what part does the law play in the mass killing of a people? In what ways are laws created and interpreted, to enable a government or regime to sanction the deaths of those decreed undesirable. How do we even begin to come to grips with figures as horrifying as six million Jews killed Germany’s Third Reich, 1.8 million killed by Pol Pot and the Khmer Rouge in Cambodia or the estimated 300,000 killed in Bosnia Herzegovina following the break up of Yugoslavia? Today’s guest says we must examine the role that the state plays in the crime of genocide. Dr Jennifer Balint reminds us that killing en masse requires organisation. In other words, it requires the compliance, either explicit or implicit of the machinery of state. The army, the police, the media and of course, the law. Dr Balint’s research has taken her to Rwanda, the former Yugoslavia, Ethiopia, South Africa and to the International Criminal Tribunals in the Hague and East Africa. Her book on this topic is entitled Genocide, State Crime and the Law in the Name of the State. Dr Balint teaches at the University of Melbourne’s School of Social and Political Sciences. Dr Balint, thank you for joining us.

JENNIFER BALINT
Thanks very much. It’s a pleasure.

JENNIFER COOK
Now, it’s difficult for the mind to process the horrendous impact of genocide, so to set the context, I’d like to read the following statement, which was allegedly made by Adolf Hitler on August 22, 1939. He said, ‘I have issued the command and I will have anybody who utters but one word of criticism executed by a firing squad - that our war aim does not consist in reaching certain lines, but in the physical destruction of the enemy. Accordingly, I have placed my death-head formations in readiness for the present only in the East’ with orders to them to send to death mercilessly and without compassion, men, women, and children of Polish derivation and language.
Only thus shall we gain the living space (Lebensraum) which we need. Who, after all, speaks today of the annihilation of the Armenians?? So Jennifer, why did Hitler speaking there, in advance of the atrocities in Eastern Europe in 1939, refer to the Armenians?

JENNIFER BALINT
Well, the Armenians were the genocide that had occurred prior to that perpetrated by the Third Reich; the genocide of the Jews. The Armenians had been targeted by the Ottoman state during World War I, so under cover of war, we had a policy of destruction of a people, of the Christian Armenians in the Ottoman state, so a people who had formerly been tolerated, not completely included, but had some semblance of citizenship, were to be completely excluded, were to be destroyed and what the Turkish state, the Ottoman state, did to the Armenians was extraordinary. Extraordinary in its barbarity, in the means of destruction of these people from the drafting of Armenians into the armies, where they were then left to die as in labour battalions who just worked to the bone. We then had the killed of key Armenian leaders throughout the towns of the Ottoman state and then after that, we had deportation and it was the deportation of the Armenians, which was the most horrific, so you had whole families, whole communities sent out in the desert to die and to suffer extraordinary brutalities and these were all eye witnessed. I mean, this is the interesting and amazing thing, really, about this genocide is that while today we have a denial, continuing to this day, by modern Turkey, at the time, we had eyewitness reports and we also had eyewitness reports from consuls, from American consuls, from German consuls, Italians and so on and we also had a trial afterwards, so the Armenian genocide was, quite clearly, the precursor to the Nazi holocaust of the Jews.

JENNIFER COOK
Could you talk us through some other examples of genocide?

JENNIFER BALINT
Well, I guess, what?s most recent in people?s minds is the genocide in Rwanda. So this was the genocide that occurred under the gaze of the world, so the media, the world, knew what was happening, so we had this genocide of the Tutsis perpetrated by the reigning Hutus in Rwanda in 1994. Over just three months over a million killed in the name of the state; in the name of new Rwandan state. A state based on Hutu power.

JENNIFER COOK
Your book concerns itself with a central question. How can the law be used or how has it been used to pave the way for action that can lead to genocide and then, on the other hand, how does that law then be used to redress the crime itself? Such a tension.

JENNIFER BALINT
It was really interesting, or certainly what I find interesting, is the way in which all of these perpetrator regimes define themselves in relation to law. So this can state law
or this can be informal or living law, so normative orders, ways that people do things. So in Cambodia, for example, the first act that the Khmer Rouge did was to actually kill all the Buddhist monks, so in that way, they removed the current normative order of that society, so that the ruling men of that society were removed, so the Khmer Rouge could step and take their place. At the same time, the first official act that they took was to draft a new constitution. A constitution that said how what this new Cambodia was to be, this state of the people. That was sent internationally to the world. I mean, that was the only piece of legislation that they actually drafted in those years, from 1975 to 1979, while the Khmer Rouge ruled, but what?s really interesting is the way in which they use law and we see this in all genocides and other forms of state crime. In Rwanda, we didn?t see actual legislation passed, but the way in which people participated in the genocide, there was references to the laws and the ways of doing things in that particular community, so people would talk about taking a victim to the official, as they did in the past, if someone was accused of being a criminal, they would take them there. In Germany, of course, we had the Nuremburg laws, which really provided a very important framework for the exclusion of first German Jews and then, Jews throughout occupied Europe.

JENNIFER COOK
On the basis of nationalism is at the heart of it, isn?t it? Identifying who they seem themselves as a people, as a country, going forward and somehow casting off undesirables, sort of cutting away what doesn?t fit that vision.

JENNIFER BALINT
Absolutely. I mean, that?s why law is playing that role in conjunction with the state. That?s why law is very much a companion to genocide and state crime, because it assists the state in creating this new nation and creating a framework of who is included and who is excluded. Who will be citizen and who will not and that?s what we see in all of these genocides.

JENNIFER COOK
We should make it clear the definition of the term genocide. The United Nations, in its General Assembly Resolution passed on 11 December 1946, said, ?Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.? So Jennifer, how is genocide different, I suppose, to racism, torture, mass discrimination?

JENNIFER BALINT
I think what is commonly understood to be distinctive about genocide is it is the intent to destroy a group. Now, this is quite different to all of these other halves and this is where it gets complicated, too, because many groups attempt to claim genocide and this is our problem. That why aren?t other crimes and other forms of crimes against humanity seen as equally deserving of recognition and redress, so torture is a terrible crime and other forms of crimes against humanity are terrible crimes, but genocide is distinctive, in that it is this attempt to destroy a group. Now, Jennifer, you say that although law does not sanction genocide, it does do something very interesting. It can provide a space where these crimes can be committed. Can you
talk us through how these pathways are laid down?

JENNIFER BALINT
What we find in situations of perpetration of genocide and other state crimes is this presence of law and it’s not that law actually plays a direct role in perpetration, so we don’t have laws that actually state that this group is going to be destroyed. I mean, the Armenian genocide, we come the closest where we have the deportation laws, but these were passed after the fact as forms of legitimation, essentially. So we don’t have laws that actually direct perpetration of genocide, but what we have is a use of law and a use of law in those early stages, which makes that exclusion, that destruction less remarked on, so law provides a space, then, for this perpetration of genocide and other state crimes, so law, then, makes these acts more allowable in that nation state.

JENNIFER COOK
It’s like a legitimacy.

JENNIFER BALINT
Absolutely. Absolutely.

JENNIFER COOK
Now of course, it can’t happen in a vacuum. Let’s talk about the role of the institutions of the state. The police and the army, as well as the legal system and of course, the role of the media. How do they come in to play to form part of this jigsaw?

JENNIFER BALINT
Well, these are state crimes and I think that’s what’s really important to note in any discussion of genocide and state crime. These are crimes perpetrated by the state and in the name of the state and so in order to do that, in order to commit these mass harms, then they need to harness all these institutions. These institutions both of the state and the non-state. So the institutions of the police and the army and the media. State media and so on, but also, institutions such as the church, the business community and so on and so that’s what gives these kinds of crimes their character, their particular character that they are perpetrated in the name of the state and utilising the institutions of the state, either has direct control over or can harness.

JENNIFER COOK
This is Up Close coming to you from the University of Melbourne, Australia. I’m Jennifer Cook and guest today is Dr Jennifer Balint and we’re talking about the role of the state in genocide. Jennifer, you’ve said in your writings that it’s so important to understand the role of the state, because otherwise, when we see the prosecution of crimes of genocide, less important people being targeted, so talk us through that. How can looking through this lens of genocide and this state crime take us to this other end of redressing the problem correctly? Problem is such a small word for it, isn’t it?
JENNIFER BALINT
Well, the issue is of accountability, so how do we bring to account and if we?re going to bring to account, how do we do that holistically and fully? How do we make sure that all the actors are brought to account, by law, in the wake of such crime. So I suggest that we?ve really got to make sure that not only do we address the individuals, we don?t just find those particular individuals who were perpetrators, but we?ve also got to look at the state and it?s institutions. So we?ve got to think of ways of bringing them into accountability, into the framework of accountability. One concept that I suggest is that of civic liability, so that there is a form of liability that can actually be attributed to these institutions. So it?s not necessarily that we criminalise the institutions, but that we establish a process, whereby these institutions are addressed within a process of accountability and that then, there?s a possibility of a preventative framework that can be established after that. So we look at these institutions. We say, well, what happened? Why it happened. How were they involved? So this becomes a process of civic liability. Civic in that there is a duty owed by these institutions to civil society and the citizens that they actually did not protect, so in the case of the army and the police, institutions which we expect will protect our citizens, don?t. And the case of other non-state institutions, they also participating and in many cases, benefited, from the regimes, which they supported.

JENNIFER COOK
Now, Jennifer, we do, as a society, expect the law to do something. We expect reconciliation, retribution, justice, so how effective is the law in providing this in this case or this crime?

JENNIFER BALINT
It?s a good question. I think law tries to do many things in the wake of state crime and genocide. So law tries to bring justice. Of course, justice for victims is different to justice a society as a whole. Law also attempts to reconcile, and this has become a big theme in the last number of years. Pretty much since the 1980s with the Truth Commissions that were established in South America for the military regimes there and reconstruction, too. Law is expected to reconstruct a society.

JENNIFER COOK
I think of South Africa post-apartheid and so much of that was people?s stories being heard, which you don?t see as happening within law. So laws had to change and a society did have to re-imagine a way forward and a healing and through that was those stories being told.

JENNIFER BALINT
Absolutely. I mean, law can play a really exciting role in that way in providing that space for stories to be heard and official acknowledgement, as well. So victims who have been struggling for years to have it acknowledge anywhere, have it acknowledged by the state and the state says, we accept and we acknowledge that what happened to you did happen. So in the case of South Africa, Justice Richard Goldstone, who had been a judge on the Constitutional Court of South Africa, and of course has played many roles since, he said that if it was for the Truth and
Reconciliation Commission in South Africa, people today who might have been saying apartheid did not exist, today, they can just say, we didn’t know about it. But they can no longer say it didn’t exist. And that’s a really important and critical role that law plays in the wake of state crime and genocide of that official acknowledgement by the state and creating a new, moral, normative framework for that society. It’s a really important role for law and we see that, when we see the converse. So in the situation, the Armenian genocide, we did have a set of trials afterwards. We did have those stories told. We have incredible evidence that was brought before the court’s marshals that were established my Ottoman state at the end of World War I. But then, with the change of regime in Turkey, over those tumultuous post war years, the court’s marshal was shut down we had another message sent out of denial.

JENNIFER COOK
Now, Jennifer, can we move to Cambodia and can you talk us through what happened there after Pol Pot, after that experience?

JENNIFER BALINT
Well, in Cambodia, there have been a number of legal processes, so immediately, after the invasion of Vietnam, which effectively stopped the reign of the Khmer Rouge, there was a show trial where Pol Pot and Ieng Sary, who were number 1 and number 2 of the Khmer Rouge were put on trial in absentia, so they weren’t there and they were charged with genocide. Victims came and told their stories, the Vietnamese broadcast this to the rest of the world to say, we’ve done this. We’ve put them on trial. And effectively, it was a break between the old and the new, which is what law does at these times. It says, that was then, this is now. This is the new regime, so that was an important trial, I think, although clearly, not according to rule of law guidelines. The next process that we had was a, kind of, informal trial that put Pol Pot himself on trial, just before his death. There was a Western journalist, Nate Thayer, who was present for this and broadcast to the world this trial of Pol Pot by the Khmer Rouge. Again, a very strategic trial that portrayed to the world, that told the world that the Khmer Rouge were changing, that allowed them to come into power sharing and peace talks within Cambodia. Again, not a trial according to rule of law guidelines. People were shouting, long live Cambodia. Down with Pol Pot and so on, but it was an important trial in many ways. What we have happening at the moment is a tribunal that was established jointly between the Cambodian Government and United Nations. United Nations had actually recommended against this early on. There had been concerns of corruption in Cambodia. That while it might be important to hold such a trial in the Asia Pacific region, it shouldn’t be held in Cambodia itself, but a compromise was struck and we have a tribunal which is joint, between the United Nations and Cambodia, with both international and Cambodian judges, which has had one trial held in 2010 of Comrade Duch, who was the head of the infamous prison in Phnom Penh called S-21 and those who were held inside were victims of the Khmer Rouge. Those who were deemed non-Khmer who were, essentially, political prisoners, but very few survived this prison. It was interrogation and torture and ultimately, death. And a second trial has commenced
in December 2011, where four of the key Khmer Rouge leaders were put on trial, some of whom had been given amnesty earlier, it’s a complicated scenario, where you have the Prime Minister of Cambodia quite reluctant to do this, yet deciding to do it, to actually hold these trials, establish this tribunal, though he himself had been a member of the Khmer Rouge at the time.

JENNIFER COOK
Jennifer, let’s move now to Rwanda and what’s happened there.

JENNIFER BALINT
Well, in Rwanda, we’ve also had a number of proceedings and this is often the case with genocide and other state crime. That you have a number of different proceedings held concurrently and they don’t necessarily fit neatly together. So in Rwanda, you had the International Criminal Tribunal for Rwanda, which was established by the United Nations and held in Arusha. Dusty safari town of Arusha in Tanzania, which aimed to put on the key leaders of Rwandan genocide. The Rwandan Government had been supportive of the International Tribunal, although when it realised it wouldn't have quite the control over it that it had hoped for, it was less supportive and actually set up its own criminal trials, which were running throughout Rwanda until recently. So there genocide was in 1994, the trials began after 1996, with the legislation established for them, so these were held throughout Rwanda in small courthouses. Rwanda ended up with over 120,000 in jail and many without files. They just didn’t have the people power to actually process that many alleged genocidares, alleged perpetrators of the genocide. So they decided to establish a process of Gacaca, kind of community meetings based on prior, informal legal processes in Rwanda, where former perpetrators would come back to their community and confess and be then, if this was accepted, reintegrated back into the community. So you have a situation now, which I find extraordinary, of former perpetrators and former victims living together, where there are just not the choices to leave. People aren’t able to move around and so, you have a situation of a, kind of, forced reconciliation. And this is, as well, has been very much a Government process of bringing the society back together. Firstly, making sure that people are moved out of prisons, which just can’t hold them, but secondly, trying to find a way to bring this society together. I think that it’s really important to understand and to portray these crimes as state crimes and that’s what Rwanda didn’t do. Early on, it looked like they were moving towards this, of somehow portraying these crimes as state crimes and creating and crafting a legal approach that would encompass that, but they moved more to the individual criminal liability of individual victims and individual perpetrators, which really missed the state nature of this genocide. There will be real questions as to what kind of justice has been done. I mean, on the one hand, the telling of the stories, as we’ve discussed has been really important. On the other hand, the broader frameworks, the structural frameworks of addressing people’s poverty and discrimination and access to health care and so on. I mean, these kinds of justices. I mean, this is across all state crime, genocide, post conflict, situations, like to the extent of which the state is involved in this, when it, sort of, delegates this doing of justice to communities and individuals, rather than taking it on itself.
JENNIFER COOK
Jennifer, let’s talk about, now, the case of survivors bringing their cases to the state. It’s happened here in Australia.

JENNIFER BALINT
Absolutely. In Australia, we’ve had very little state acknowledgement of genocide of our indigenous peoples. So we have had a Government apology, but mainly to the Stolen Generations, not acknowledging genocide as a whole.

JENNIFER COOK
That was a Federal Government.

JENNIFER BALINT
Federal Government in 2008. But what we do see, because of this, without this state acknowledgement, without this bringing of cases by the state, establishing of a tribunal or a truth commission by the state, the victims themselves have needed to bring these cases of genocide to our legal processes.

JENNIFER COOK
And Jennifer, what about refugees who have resettled and then, they bring their cases? Can you give us some examples of that? That’s happening more and more, isn’t it?

JENNIFER BALINT
Absolutely. We see this throughout the world. So for example, Rwandan refugees who have settled in Belgium. Belgium is a former coloniser of Rwanda. Rwandan refugees have brought cases in Belgium against former perpetrators. We’ve also seen this, and this has been for years, in the United States through its Alien Torts Claim legislation that refugees are able to bring cases through that, alleging all sorts of crimes against humanity. Here in Australia, as well, in October 2011, we saw a case attempted by a group of Sri Lankan refugees trying to pursue a case through the state of Victoria in Australia, through its processes.

JENNIFER COOK
What are these refugees trying to get, bringing forth a case in a different jurisdiction?

JENNIFER BALINT
Well, at times, it’s criminalisation. So you would have Rwandan perpetrators and victims living together. Say in Belgium, that was being the case. They weren’t only civil cases. They were criminal cases, as well, that were brought, trying to bring individuals to account. But it’s an important question, because it’s also that recognition again that harm has been perpetrated.

JENNIFER COOK
Jennifer, talk to us a little bit more about the role of law and reconciliation.

JENNIFER BALINT
Well, law has increasingly been seen to play a role in reconciliation, so if we look at mandates for tribunals of truth commissions, many of them note the importance that this tribunal truth commission will play in reconciliation, national reconciliation, individual reconciliation, reconstruction, so it’s unusual to see a mandate now without reconciliation being used. I think, where we might see the importance of law and reconciliation is this authority or recognition. So if it is clear and the state makes it clear what has occurred, what has been perpetrated, this is a firm foundation upon which reconciliation might be built. When we don’t have that, I think we do have a shaky foundation. When we don’t have that institutional recognition, when we don’t have that institutional framework established, we really are expecting too much of victims. And I think, that to me, is the important link between law and reconciliation. I think that’s what we need to see law as doing, as providing a framework for reconciliation, not creating reconciliation, because I think that’s misplaced expectation of law, but of possibly providing that framework where we might see a society coming together. We might see a reconstitution of that society and that’s what we can expect of law. Not more, but not less, hopefully, as well.

JENNIFER COOK
Jennifer, thank you so much for joining us on Up Close. It’s been, I won’t say, a pleasure talking about genocide, but the insight into the power structures and this crucible of the law has been fascinating.

JENNIFER BALINT
Thank you. It’s been a pleasure.

JENNIFER COOK
That was Dr Jennifer Balint from the University of Melbourne’s School of Social and Political Sciences and she was talking with us about conceptualising genocide and state crime. Relevant links, a full transcript and more info on this episode can be found at our website at upclose.unimelb.edu.au. Up Close is a production of the University of Melbourne, Australia. This episode was recorded on Tuesday, 20 December 2011 and our producers were Kelvin Param and Eric van Bemmel. Audio engineering by Gavin Nebauer. Up Close is created by Eric van Bemmel and Kelvin Param. I’m Jennifer Cook. Until next time, goodbye.

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