

## EDITORIAL

Sometimes, it is telling to look back at history to inform ourselves about the real scope and impacts of the challenges and dilemmas facing us, as several of the articles in this issue remind us. This includes the duty to inform ourselves accurately and be prepared to challenge the desire for 'safe-space' in our thinking when we do so. There is always an issue over the accuracy of information about events, as a look back at Thucydides *History of the Peloponnesian War* reminds us. At the end of the fifth century BC, he commented that

There are many ... unfounded ideas current among ... the Hellenes, even on matters of contemporary history, which have not been obscured by time....So little pains do the vulgar take in the investigation of truth, accepting readily the first story that comes to hand.<sup>1</sup>

And it is telling, also, that this comment is taken from an Athenian general's attempt to explain a war that Athens lost, but theoretically should not have lost.

Thus in a painful reminder of the high hopes entertained in the West back in the early days of the Arab Spring in 2011, in the closing weeks of 2016 President Bashar Assad remains in office and the news regularly features the disaster occurring in Aleppo, as part of the ongoing conflict in Syria. Back in October, the *Guardian* ran a column on the 'destruction' of Aleppo, and asked how the West could stand by – two months on, the same question is being asked by outraged individuals, journalists and activists, but beyond protests, there has been no international intervention.<sup>2</sup> Of course, there is an expectation that international action will eventually be taken through the imposition of post-conflict war crimes tribunals. According to many observers, including the UN, war crimes have not only been a feature of this Syrian Civil War (to say nothing of the complications of the rise of IS and its associated activities) from the start, but they continue to be perpetrated in Syria – particularly Aleppo where, as the final battle for the city resulted in a victory for the government's forces, the accusations relate to the treatment of the remaining, desperate, civilian population by those same forces. The talk is of 'execution-style killings' of civilians.<sup>3</sup> According to the UN, what the world is witnessing is the 'complete meltdown of humanity'.<sup>4</sup> Re-reading Thucydides is a reminder that atrocity as an element in

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<sup>1</sup> Thucydides, *History of the Peloponnesian War*, trans Richard Crawley, Book 1, at <http://classics.mit.edu/Thucydides/pelopwar.1.first.html> (accessed 10 December 2016).

<sup>2</sup> For example, 'We are watching the destruction of Aleppo. Where is the rage?' *Guardian*, 8 October 2016; 'We are watching Aleppo burn in real time. And just like in Bosnia and Rwanda, we do nothing', *Daily Telegraph*, 13 December 2016.

<sup>3</sup> See, for instance, 'Syria: reports of "execution-style killings" in Aleppo point to war crimes', <https://www.amnesty.org/en/latest/news/2016/12/syria-reports-of-execution-style-killings-in-aleppo-point-to-war-crimes/>, accessed 13 December 2016.

<sup>4</sup> See 'Aleppo: 'Complete Meltdown of Humanity'', <http://www.bbc.co.uk/news/world-middle-east-38301629>, accessed 13 December 2016.

conflict is no new phenomenon. In particular, his depiction of the 416BC Melian massacre, and the shock aroused amongst Greek contemporaries three years later in 413BC, over the details of the wholesale slaughter of the population of the city of Mycalessus provides a very uncomfortable echo for the present observer of events in Syria. The question for those trying to allocate responsibility for the disaster of Aleppo, especially the sufferings of civilians, as a preparation for potential war crimes accusations, if not actual trials, is how to establish a credible narrative in the chaos and mess of war. Thucydides remains our only credible source for the massacre in Mycalessus as 'one of the greatest calamities that had ever befallen any city'.<sup>5</sup> The physical evidence of the destruction of places like Aleppo, and Palmyra, is clear – but where do we allocate the 'blame' and the 'responsibility' for the perpetration of war crimes associated with this destruction?

The rhetoric in the Western media is generally unequivocal in agreeing to put the 'blame' on Assad and on his ally, Russia, insisting that both the Syrian and Russian governments have perpetrated war crimes – but is it that simple? How far is this a manifestation of our own 'safe spaces' and seeking the assurance that it has always been the fault of Assad that things have been so calamitous for civilians in this conflict? Robert Fisk pointed out in a recent contribution to the *Independent* that, 'there is more than one truth to tell' in relation to the current realities in the Middle East.<sup>6</sup> As Thucydides reminds us, the reality is that in war, all sides behave badly on occasion. There has, of course, always been a substantial impulse, amongst victors, to assume the label of 'good guys' - after all, they usually write the histories. The strategy for confirming this in relation to modern conflict is at least partially represented in the legal processes that label individuals or nations as 'war criminals'. But as the proceedings of war crimes tribunals from 1945 on have illuminated, substantiating the popular and/or media labelling of criminal responsibility that emanates from one side (usually Western influenced) in the outcomes from a courtroom is often extremely difficult. This is because there is rarely universal agreement amongst the core values and understandings of what should be included in international criminal law, especially in terms of individual and state responsibility for actions in conflict. This is underlined by the current challenge facing the International Criminal Court, set up with such high hopes and substantial global support. Now, three African nations (South Africa, Burundi and Gambia) have actually withdrawn from the ICC, with other African nations

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<sup>5</sup> Thucydides, *Peloponnesian War*, Book 8. The site of Mycalessus remains uncertain, and what is clear is that it never recovered. It was located somewhere in the region then known as Boeotia, now central Greece, and was probably on the shore of the Gulf of Euboea. Will future scholars wonder where Aleppo once was?

<sup>6</sup> Robert Fisk, 'There is more than one truth to tell in the awful story of Aleppo', *Independent Online*, 13 December 2016, <http://www.independent.co.uk/voices/aleppo-falls-to-syrian-regime-bashar-al-assad-rebels-uk-government-more-than-one-story-robert-fisk-a7471576.html>.

threatening to follow, along with some non-African nations such as the Philippines, because they have claimed Western bias in the process of identification of war crimes and criminality. And in a further threat, President Putin has also signed an order to withdraw Russia's signature from the Court's founding document, signalling real difficulties for advancing any war crimes tribunals in a post-conflict Syria – whenever that state might actually occur, given that Palmyra has just been reoccupied by IS!

This current background of tensions in the wake of conflict, and the likelihood of continuing difficulties for civilians in modern post-conflict situations provides a context for comprehending links between the first two of the articles in this issue of the journal. It also reminds us that, while historical comparisons are never exact and can be pushed too far, such dilemmas have faced populations throughout known human history. Thucydides depicts, very vividly, the consequences of war, political and legal, and their unhappy impacts on individuals. He also reveals the extent to which the realities of such scenarios relate very strongly to the power balances involved. **Karel Siemaszko** addresses the strategies used by the Soviets as they prepared Poland for assimilation into a post-war Soviet (and communist) hegemony. The huge displacement of millions within territories coming under Soviet control is a familiar story, but what is less familiar is the account Siemaszko provides of the use of law to break down possible resistance to the introduction of a Communist regime. Yet in some ways, it should not be seen as surprising that the USSR employed such tactics as they had already been well-established by Tsarist Russia in expanding its borders. In moving into areas like Crimea, back in the eighteenth century, the Russian strategy employed by Catherine the Great involved not only displacement of large numbers of the indigenous Tatars but also, the imposition of Russian legal systems intended to break down any resistance to Russian rule.

Reflecting on Thucydides again, the strategies described by Siemaszko also illustrate the constant challenge through history provided by political self-interest on the part of powerful empires and states in any initiatives to evolve workable standards for international law. In an exercise in what has become known as political realism, Athens subjugated the island of Melos which had remained independent of the Athens-dominated Delian League. At times, during the Cold War, parallels were drawn between the US and Athens (good guys) and the Spartans and the USSR (bad guys) – but incidents like this reveal a much more legally and politically complex picture where, to modern eyes, Athens was very distinctly in 'bad guy' mode, in arguing that its own need for defence meant that it had a right (even a duty) to impose its will on supposedly autonomous states. Not a member of the Delian League, Melos had also chosen to remain neutral in the first stages of the Peloponnesian War. But in 416BC, Athens came to the conclusion that Melos needed to be added to its Empire (as the Delian League

had effectively become), as a way of both ensuring its own security and demonstrating its power. In what has become known as the Melian Dialogue, Thucydides portrayed how the Melians protested to Athens that it was acting illegally and against the 'law of nations'. But the essential message of the Melian Dialogue, as imagined by Thucydides, is that 'might is right', and no invocation of international law is likely to force a determined power to act according to the highest standards of law, morality and justice if it is not in their own self-interest.

The trials depicted by Siemaszko suggest that the Soviet strategy shared much, in the way of intended outcomes, with Athenian thinking in 416BC. The introduction of Russian-style criminal codes intended to break down any local resistance to a reconfiguration of Poland as a communist state was a deliberate attempt to stifle any expressions of dissent. Any written or verbal form of criticism or discontent with the new structures and policies, any reminder of the London-based Polish government in exile, was capable of being criminalised in the courts, in ways that effectively sent messages to the wider population of the dangers of dissent. The new courts and criminal codes were used to legitimise oppression, rather than fight it. The law was used to intimidate the public. And, it worked. The author quotes statistics which, while they may not be fully representative, suggest that of the 194,400 criminal cases heard, a mere 10% represented criminal acts which would in the English system, say, be considered indictable offences. The rest were intimidatory prosecutions, where the crime was essentially that of threatening the interests of the state.

One of the consequences of modern warfare is not just a high mortality rate amongst civilians, but also a huge displacement of populations, with individuals fleeing the chaos of conflict. Again, Thucydides reminds us this has always been a reality, especially where a conflict is lengthy: 'The Peloponnesian War was prolonged to an immense length.... it was...without parallel for the misfortunes that it brought upon Hellas... never was there so much banishing'<sup>7</sup> Reporting the speech of the Athenian delegate to the people of Melos, he points to a long-standing reality when it comes to law and the treatment of refugees: 'you know as well as we do that right [or justice], as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must'.<sup>8</sup> It is difficult to think of any convincing historical scenario where refugees have not been in a weak position. The refugee camps set up in the wake of the current conflict in Syria in Lebanon simply add to those established in 1948, to accommodate fleeing Palestinians. **Karin Speedy's article** very consciously addresses such historical echoes when examining

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<sup>7</sup> Thucydides, *Peloponnesian War*, Book 1.

<sup>8</sup> *Ibid*, Book 5, Melian Dialogue.

the worrying phenomenon within the popular imagination in Australia of the 'crimmigrant', which has so served to harden fears and resentment amongst settled populations there of the threat posed by the 'real' character of those seeking a new location in Australia. Her article focuses on a case in 1901, when a small group of recent arrivals claimed they were shipwrecked sailors. They eventually turned out to be Algerian Arabs, who had escaped from the nearby French penal colony of New Caledonia – something that the Australian authorities had suspected from the start. The action taken by the Australian authorities, convicting them of vagrancy, gave the French authorities time to formally request their extradition back to the penal colony. But, as she explores, the reasons for the hostility of the official reaction to these men, and the lack of sympathy displayed, related powerfully to the creation of a white Australian national identity because, as she notes, it was the foreign appearance of the men that was so disturbing to many Australians in 1901.

This takes us back to Thucydides and ancient Greece – for the inhabitants of his world, refugees who turned up in Greece (especially passing through Attica) who were not Greek were, almost automatically, classified as 'barbarians'. This not only implied that they were not Greek, but that consequently, they were not 'civilised' and so not fit to mix and associate with those who were Greek. The term barbarian has, from the start, implied savagery, brutality and criminality, in an interesting echo of the modern criminalisation of refugees. Human rights consciousness ensures that we do not label today's refugees as barbarians, but the greater the numbers, the more we display ourselves to be very wary of their potential for criminal activities – and these activities, as a survey of the popular media underlines, are often described as being 'barbaric' or 'savage'. Almost certainly, a major distinction between the refugees of the past and those of the present day is that in the past, the poor (who have always made up the numerical bulk of refugees), were likely to have been substantially ignorant about the territories to which they fled. Today, thanks to a global media, that is not the case, and the targeting of destinations including Australia has only served to heighten the fears of the settled populations about the threat. Speedy proposes no solution – just a greater understanding of the realities surrounding the refugee problem. But given the tradition of silence (Thucydides made no mention of what happened to the entire population of Euboea who were thrown out when, in 446BC, the island was conquered and resettled by the Athenians),<sup>9</sup> it is important to be more informed about the long history of negativity in association with crises caused by mass refugee numbers – if only to acquaint ourselves with the scale of the challenge in terms of popular attitudes.

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<sup>9</sup> Thucydides, *Peloponnesian War*, Book 1.

The third article in this issue by **Raluca Enescu and Anja Werner** deals with the issue of the legal capacity of the deaf, essentially in the shape of those deaf from birth or early childhood rather than losing their hearing as a result of age or accident. Thucydides may be silent on the topic of deafness, but it is to other figures from Ancient Greece that we owe the attitudes, philosophical, cultural and consequently legal, that dominated until the Enlightenment period. Plato, for instance, argued that intelligence, in the shape of an ability to reason, was linked the ability to speak. This perspective, of course, was reflected in the use of the term 'dumb' to reflect not only an inability to speak but also, as a popular term for being unintelligent or stupid. The substantially successful challenge to this assumption during the Enlightenment was still a matter for debate during the nineteenth century, in terms of how practical accommodations could be made for those who might be deaf but were now accepted as being able to be intelligent and educated, and thus capable of possessing full citizen rights. What, as this article reveals, turned out to be crucial was the ability to communicate verbally, showing that at least part of the Platonic assumption was still in place – a distinction was still being made which favoured the ability to communicate via the spoken word, rather than the signed one as a key qualification for full citizen rights to be awarded. Once again, there are echoes of the kind of political (and so, legal) realism that Thucydides described as being at the core of inter-state and community relations: the requirement for conformity to the expectations of the dominant hearing world for preferred methods of communication.

The issue of language and the ability to communicate in 'acceptable' ways remains problematic for international and national legal systems. The authors describe how there was suspicion and distrust surrounding the use of sign language, where it was not only seen as an 'inferior' form of communication but also a ridiculous one, evocative of pantomime and so (presumably) capable of turning the solemnity of the courtroom into the wrong kind of theatrical performance. But they also demonstrate, through dissection of a number of court cases heard in the Imperial Court in Germany, just how it was possible for someone deaf to negotiate a positive and precedent-setting legal outcome. Once again, though, it was up to the deaf person to accommodate the expectations of the hearing world, by demonstrating a high grasp of the educational standards and outputs that underpinned that world and its hierarchies. Interestingly, one of the cases explicitly made comparisons between the deaf who were unable to communicate orally with foreigners who spoke no German. This links back to some of the judgments on the Algerian Arabs in the previous article, and their ability to communicate in ways that were considered legally credible. Again, if a process of criminalising individuals is conceptualised in the shape of an 'othering' process, it becomes clear that one feature of most cultures, past and present, is the tendency to privilege communication in the 'right' form of language. Hostility and distrust of not just refugees but also those with physical or mental

disabilities can be shown, through a variety of court cases in different jurisdictions, to be linked to their inability to communicate in ways that resonate with the established expectations of the legal process.

What this also underlines is the extent to which, taking a socio-legal perspective, both the formal legal system and the cultural frameworks within which consent and support to the legal processes in action are generated and sustained, rely heavily on stereotypes and mythologies in establishing the boundaries between legal and illegal conduct. The final two articles reflect on different aspects of this, in ways in which – once again – a resort to the literature of Ancient Greece can be used to provide some extra illumination. Greek drama presented a series of characters already familiar to audiences, but playwrights like Aristophanes used the dramatic process to relate the individuals they chose to invoke in ways that related very powerfully to contemporary themes and ideas, and with a very didactic end in mind. Plays like Aristophanes *The Frogs* used stock characters and stories in ways that were essentially contemporary, to inform and warn audiences.

Written during the Peloponnesian War, *The Frogs* took Heracles (Hercules) and depicted him not as an inspirational hero, but rather as a foolish glutton whose actions were driven entirely by self-interest. It was intended to warn against trust in the demagogues and other prominent figures of the day in Athens, when they insisted their advice on what was in Athens' best interest in terms of war policy was entirely high-minded and disinterested (it is worth remembering the other great play by Aristophanes we recall is his anti-war play, *Lysistrata*). It makes for very interesting reading in association with Thucydides and his comments on the impacts of such men! Similarly, at a time when most educated men would have been familiar with such works of classical literature, **Stephen Basdeo's** article shows how, in the context of an eighteenth century crisis over growing criminality amongst the population, the familiar figure of Robin Hood was invoked by authors writing about the topic in order to warn against any sympathy for the criminal. As Basdeo point out, there was no doubt during the eighteenth century that Robin Hood was a historical character, and given his familiarity, how he was presented and understood was of importance to those entrusted with policing a perceived crime wave.

In understanding their need to portray Robin Hood as a brutal and unattractive figure without redeeming features, this article needs to be read and understood against the background of how other eighteenth century literary products portrayed criminality in ways that posed a real challenge to the authorities and elites of the day. At the same time as several of the texts presenting Robin Hood in a negative light appeared, there were other works which provided a

direct challenge to the concept of the 'good', or at least sympathetic, criminal character. Notably, there was Moll Flanders, in Defoe's novel published in 1722. It advertised itself as telling the 'true' story of an authentic female criminal, tracing her life from her birth in Newgate via various criminal episodes (and other disreputable, if not quite criminal ones), and including transportation, to her eventual reformation. Moll was described in the novel as profiting enormously from her criminal career, and as a character, was depicted in a generally sympathetic way so that the reader could rejoice at her happy and prosperous old age, retired from criminality and married to her true love. Equally, in Gay's *Beggar's Opera*, first staged in 1728, the libretto drew what were, for contemporaries, explicit parallels between his criminal characters, including his 'hero' Captain Macheath, and leading figures of the day, including Sir Robert Walpole. As Basdeo points out, the key concern for eighteenth century contemporaries was property theft – helping to explain why this put thieving Robin Hood so obviously in view as the ideal character to expose as a brute really, and not a hero. A more modern depiction of similar themes might be the 2007 More4 satirical production, *The Trials of Tony Blair*.

The final article in this issue, by **John Walliss**, deals with the growing concern in the nineteenth century over the behaviour of execution crowds. Crowds, historically, have provided a problem to authority, even while they have also been a necessity. In Greek dramas, especially the tragedies, the chorus, often representing the crowd, was there to act as witnesses to the core events in the narrative. In Sophocles *Antigone*, the chorus represented the population of Thebes (or at least its male citizenry, the 'important' element in the population). They commented on the actions of the various protagonists, initially endorsing the policy of Creon, the newly-installed King, who was seeking to resolve a post-conflict situation in the shape of a recent civil war by criminalising one side. As a result, the body of one of Antigone's brothers was given honourable treatment, while that of her other brother, Polynieces, was – on Creon's orders – to be left to the mercy of the elements, essentially treated as a criminal. But, that same crowd warns Creon to change his policy to avoid tragedy, which he does too late. This, in many ways, sums up the dilemma of the crowd and its behaviour in modern legal and political history. On the one hand, the crowd is needed in a democracy, to express support for the system of government in general, and in particular, specific government policies. But crowds have always shown themselves, when assembled (actually or virtually in some way) to participate in the democratic process, to be unpredictable (note the Brexit referendum). *Antigone* depicts, amongst other things, the tendency of a crowd to change its sympathies.

This, in effect, was the dilemma facing nineteenth century government (local and national) in dealing with execution crowds. The intention behind public hangings was a demonstration to



the public of the power and authority of the state's criminal justice process. According to Foucault, for instance, the aim was to convince and reassure the witnesses of a public hanging that justice was being done, that a perpetrator had been detected, tried, convicted and was now being appropriately dealt with. It was also, of course, a spectacle intended to terrorise the witnesses in the shape of the crowd into good behaviour. There are alternative and more nuanced expositions of the intentions of the authorities in staging hangings, put forward by scholars including Gatrell and Friedland.<sup>10</sup> However, what Walliss demonstrates is that this unpredictability of the crowd had, by the 1830s, in England, begun to seriously worry the authorities, even to the extent of forcing a radical change in policy. Wallis has spent some time exploring the behaviour of crowds outside London – a location generally favoured by historical scholarship simply because of the volume of hangings there and the amount of material reflecting on crowd behaviour and contemporary reactions. He has examined crowds in Norfolk, and now turns his attention to those in Lancashire, drawing on the reportage in the provincial press – with a substantially 'respectable' readership (unlike the profile of the crowds depicted therein).

As well as providing an interesting survey, which usefully nuances the conclusions reached by other scholarship on execution crowd behaviour in London, this article is a sound exposition of how to use the newspaper press effectively, prioritising its qualitative potentials but not neglecting the quantitative ones. Thucydides would, I feel, be proud of his approach to evidence gathering and interpretation. What is interesting is that Wallis reinforces the idea that a 'good' crowd, one appropriate in terms of its make-up to witness a demonstration of authority and power from the state, was a male crowd. He clearly shows, from the contemporary perspective, the extent and implications for a potential challenge to government authority of having women and children as part of the crowd. It changed the nature, and ability of that crowd to learn the intended lessons. Linked to that were the reported concerns over the behaviour of execution crowds. They did not behave with due solemnity, appropriate to those witnessing a solemn and morally inflected act of justice. Instead, they behaved as if it were a popular sensational performance, staged for their entertainment rather than their edification. It provides a clear example of the reasons why, in 1868, public executions were halted. While capital punishment was to remain the ultimate sanction on the statute books for the next century, it was not any longer to be a public spectacle, because government could not trust the crowd to take from such an event the appropriate lessons. We also include in this issue

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<sup>10</sup> See V.A. C. Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford: Oxford University Press, 1994); Paul Friedland, 'Penance, Compensation, Terror: the Theory and Practice of Capital Punishment in Early Modern France', in J Rowbotham, Marianna Muravyeva and David Nash (eds) *Shame, Blame and Culpability: Crime and Violence in the Modern State* (London: Routledge SOLON, 2013).

two book reviews, which in themselves raise further critical reflections on the issues raised in the foregoing articles.

Judith Rowbotham, Kim Stevenson and Samantha Pegg, December 2016.