

Reading *Faust* into International Criminal Law

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Abstract, Metaphorical references to the devil in international criminal justice are various, varied and tap into a rich vein of allusion, association and meaning. These range from simple references to evil to more complex referencing to Faustian pacts of one form or the other, to the downright esoteric encompassing the arcane origins of the immunity erstwhile afforded to official acts. Kenyan President Uhuru Kenyatta's statement 'That devil shall be defeated' as well as Canadian General Romeo Dallaire's 'Shake Hands with the Devil' are two examples respectively resisting and promoting international individual criminal liability. That Carl Schmitt was asked by his interrogator at Nuremberg 'when did you renounce the devil?' and that defence counsel at the International Criminal court in the Kenyan Situation analogised the Kenyan government as being accused of entering into 'a deal with the devil', to the judge at Rudolf Kastner's case in Israel related to Nazi-era crimes described him as having 'sold his soul to the devil'; cut across perpetrators and victims and speak of knowing and willing compacts with evil in order to, allegedly, produce good. Which is to say that are all political theodicies explaining away evil by linking it in some causal way to good.

Keywords, Giorgio Agamben, Carl Schmitt, Faust, international criminal law, the devil, the office, political theodicy

1. INTRODUCTION: 'MAKE POETRY OBEY YOUR WILL'

International criminal law is replete with metaphorical references in one form or the other to the decidedly non-legal but at once theological and, more to the point, literary devil. Now, why is that? Because the references to the devil are secular appropriations of an originally religious term, in answering the broad research question, this paper owes a huge theoretic and methodological debt to Italian philosopher of language and cultural critic Giorgio Agamben's concept of the paradigm, and his take on the theory of signatures, both which retain a certain 'capacity for elaboration'.¹ Agamben somewhat counterintuitively makes the

point that ‘secularization acts within the conceptual system of modernity as a signature, which refers it back to theology’.² Agamben’s work admittedly does delve deeply into theological concepts but the focus is more on their decisive deployment in secular contexts rather than their systematic theological development over time.³

In that spirit this paper advances the ‘Faustian pact’ as an exemplary paradigm with legal utility, historically borrowed from literature but originating in religion and as a consequence still bearing that originally religious signature which the law could never quite eradicate or completely repress even as it presses that paradigm into service. For Agamben, although ‘figures such as *Homo sacer* [the ‘sacred man’ originating in Roman Law who may be killed but not sacrificed], the *Muselmann* [the concentration camp inmate inured to all suffering], the state of exception, and the concentration camp ... are all actual historical phenomena ... [he treats] them as paradigms whose role was to constitute and make intelligible a broader historical-problematic context’.⁴ As an exemplar exemplifying by example, the ‘paradigm is a form of knowledge that is neither inductive nor deductive but analogical. It moves from singularity to singularity’.⁵ Agamben indicates that ‘the paradigm of every signature’ is founded upon language which is to say the ‘originary signature is language’.⁶

Agamben’s notion of the ‘Signature’ as something in one sphere (say the devil in legal contexts) which is marked by its origin from a different sphere (the devil in literature but in turn sourced by literature from theology) is as a consequence directly relevant and tied along with this Agamben’s own windingly acknowledged debt in his most explicitly methodological volume *The Signature of All Things* to Carlo Ginzburg, Ginzburg’s debt to Giovanni Morelli, and Sigmund Freud’s statement that Morelli’s method was ‘closely related to the technique of psychoanalysis’.⁷ By reading excerpts from Johann Wolfgang von Goethe’s *Faust* side to side with references to the devil in international criminal law this approach promises certain insights into some repressed aspects of legality, a method that Freud compared to psychoanalysis in that they both seek ‘to divine secret and concealed things from despised or unnoticed features, from the rubbish-heap, as it were, of our observations’.⁸ The paper’s approach therefore follows Ginzburg⁹ and surveys the available clues which accompany the ‘signature’ as it were of the devil erupting in international criminal law contexts precisely *because* it does not seem to be *of* law but yet it is *in* law. On that basis, what if we take that marginal topic as our focus? While it is simply not possible to systematically delineate all the possibilities that an exhaustive analysis of the Faustian pact in international criminal law could produce, nor even minutely examine the few examples cited here, it would nonetheless be sufficient to illustrate the Faustian pact metaphor’s enduring utility, rationality and importance to law. What is more Agamben relies on Aby Warburg’s description of [t]he

symbol and the image as ‘the crystallization of an energetic charge and an emotional experience that survive as an inheritance transmitted by social memory, for Warburg, this was true for artists, historians and scholars, who were akin to “necromancers” who consciously evoke the spectres threatening them’.¹⁰ Agamben, makes the point that: ‘conjurer ... encompasses two opposite meanings: “to evoke” and “to expel.” Or perhaps these two meanings are not opposites, for dispelling something-a specter, a demon, a danger-first requires conjuring it’.¹¹ The extensive footnote Agamben appends to that Warburgian analysis shows that the analysis is heavily reliant on *Faust*: ‘Thus he conjured up spectres which quite seriously threatened him. He evaded them by erecting his observation tower. He is a seer such as Lynkeus (in Goethe's *Faust*)’.¹² Agamben further cites *Faust* too in *The End of the Poem*,¹³ *Potentialities*,¹⁴ *Karman*,¹⁵ *Adventure*,¹⁶ and *Infancy and History*.¹⁷ An additional link is that a key interlocutor of Agamben’s in the secularisation stakes is controversial German jurist Carl Schmitt who not only referred to his own secularisation thesis as ‘Faust’s solution’,¹⁸ but he also stated that ‘Even Satan’s power is ... as such from God and not evil’.¹⁹ This renders Schmitt’s devil a more a literary spectre than a literal one, consequently more a political and less a theological device. Thus, the devil as appropriated by these secular thinkers into secular contexts is lacking in piety and as consequence its good faith and fidelity to its origins is not to be assumed absent tangible evidence.

There are four substantive sections to the paper, preceded by this introduction and excluding the conclusion, which look into, lead to and depart from different and diverse references to the devil but all with strict relation to international criminal law. The second section looks into whether these ostensibly metaphorical references are possibly no more than a mere rhetorical flourish. It considers international criminal law as an apparatus - in which rhetoric plays its part. It seeks to demonstrate that rhetoric is a constitutive part of international criminal law - a crucial limb – not a mere outward flourish. Even more so, it reveals that when law accommodates reference to the devil as embedded in a rhetorical practice it remains a practical operation of a performative kind where speaking *is* doing - very akin to a magician casting a spell. The third section reads Goethe’s (legally informed)²⁰ take on the Faustian pact as a contract which is to say an archetypical legal document, instrument and relation (but also a wager which is a relatively uncommon species of contract) in order to use it as a lens to posit legality as an archetypical Faustian pact (or perhaps better but less innocently as a Mephistophelean offer to treat) where whatever is achieved is what was asked for but not what was sought and whose final outcome is dependent upon the open texture of language, specifically in the gulf between expression and intention. It thus should give rise to at best ambivalence given that it always incorporates a self-aware accommodation of evil. The fourth part considers the

notion of 'office' as a hidden in plain sight referent to the devil in international criminal law specifically as a 'devilish' legal device at the heart of international criminal law's doctrine and practice to a remarkable degree. The conclusion summarises the paper's overall demonstrated argument that the Faustian pact is a hidden but intimate part of international criminal law and by implication legality generally - but only with the active consent, connivance and cooperation of all those that it would hold in its thrall through its tempting equation of evil with good. Its utility in international criminal law lies chiefly in how it mediates between individual actions and their social consequences. Goethe as a legally sophisticated poet is uniquely valuable because of the shared dependence upon language of poetry and law both semantically and semiotically that Agamben amply and repeatedly demonstrates.²¹ The mocking words Goethe as a poet-playwright self-reflexively put in the mouth of the Manager speaking to the poet-playwright in *Faust's* Prelude on the Stage scene:²²

since you pretend to be a poet,
Make poetry obey your will.

are a Mephistophelean challenge to the lawyer in their capacity as a lawyer when paraphrased as: 'since you pretend to be a lawyer, make law obey your will'. Could rhetorical references to the devil only serve and never overpower law's intended purposes?

2. RHETORIC AND LAW: 'YOU SEE AMONG YOUR SERVANTS ME AS WELL'

In order for the law to hold anyone in its thrall a set of propitious words either oral or written is necessary which words when moulded into a formulary work as an incantation once they are effectively enunciated. Which is to say a spell, figuratively speaking, is required. James Boyd White makes the point that: '[L]aw is in the first place a language, a set of terms and texts and understandings that give to certain speakers a range of things to say to each other'.²³ White vigorously asserts that 'language does much to shape both who we are – our very selves – and the ways in which we observe and construe the world. There is no non-linguistic observer, no non-linguistic observed'.²⁴ Agamben concurs that there is no non-linguistic point from which to observe language when citing Jean Claude Milner saying linguistics is "an experimental science without an observation post" ... a science that has the example as its proper mode of experimentation'.²⁵

Agamben further traces two rhetorical aspects relevant to this discussion which bring law and magic into close proximity precisely because of their mutual relation to language. The first rhetorical aspect is the assertion, which is in the

indicative mood while the second is the commandment, which is in the imperative mood. One refers to what 'is' or exists, the other refers to 'be' or shall exist. One belongs to science and philosophy, the other to politics, law, religion and magic.²⁶ The imperative defines the verbal mode proper to law and religion, which have a performative character. This is to say, that words and phrases in those discourses do not refer to being, but to having-to-be.²⁷ No wonder then that Agamben, building on Aristotle, John L Austin and Emile Benveniste, proposes a definition of law as a realm where words have a magico-juridical aspect where 'words and deeds, linguistic expression and real efficacy, coincide'.²⁸ Hence, in law, *saying* something is and cannot be distinguished from *doing* that same thing.²⁹ Likewise, invoking the devil even as a rhetorical device nonetheless has consequences for law which is of course why the invocation is made in the first place. In *Faust* we first meet Mephistopheles in the 'Prologue in Heaven' scene, his first words are spoken with deep irony to the Lord:³⁰

Enter MEPHISTOPHELES.

MEPHISTOPHELES. Since, Lord, You once again are come
to ask us how we're getting on,
and before have often welcomed me,
You see among Your servants me as well.

Angels are present too in the scene and Mephistopheles's words could be taken to mean that he who is not a servant of God is seen among God's servants the angels or that he like them is truly seen as a servant of God. Rhetorical references to the devil can also be seen in the same ambiguous light in terms of its service to legal ends.

Aristotle defined rhetoric as 'the faculty of observing in any given case the available means of persuasion'.³¹ For him – as it is for present purposes – it is a method for analysing the contextually constrained ways in which an audience is brought to a particular view by a speaker. Aristotle classified rhetoric in three ways (only one of which directly concerns international criminal law). First, the *political*, which looks to the future and encourages or motivates to action. Second the *legal* or forensic, that looks at the past in making judgments. Lastly, the *ceremonial* that focuses on the present.³² Clearly in this schema, the ceremonial mediates between the legal (our immediate focus) and the political moving on a temporal line from past to present to future. It must be said, however, that the moments of advocacy, lawmaking and judgment unite all three of these rhetorical varieties.

For Aristotle, rhetoric was a counterpart to dialectic or argumentative discourse and therefore not quite the same thing. The rhetorical form of demonstration was the enthymeme. The enthymeme was a syllogism differing from the

dialectical syllogism in that its demonstration was not based on logical proof as such, but instead either on what was probable, or taken from indicative signs of what was sought to be proven. Importantly, in Aristotelian terms, legal rhetoric in particular was more amenable to deception than even political rhetoric.³³ This vulnerability notwithstanding, the possible abuse of rhetoric was not an argument against 'its proper use on the side of truth and justice'.³⁴ That end-justifies-the-means theodicy was in spite of the intriguing fact that the honest rhetorician had no separate name distinguishing them from the dishonest rhetorician.³⁵ In other words, a rhetor was a rhetor and *truth* as such whether relative or absolute, has no place in the discussion. What matters instead is the efficaciousness of the pronouncement in question; that is to say, the *effect* that the rhetorical speech produces in its audience. What then is the effect or are the effects of reaching for the borrowed theological concepts of 'devil' or 'hell' in international criminal law beyond using rhetorically striking language to attract the attention and sway the minds of the audience? If rhetoric here serves the law's purposes, then it does so 'in a curious way',³⁶ as we shall see below.

3. HELL, AND THE DEVIL IN INTERNATIONAL CRIMINAL LAW: 'FEAR NEITHER HELL NOR ITS DEVILS'

When German jurist Carl Schmitt memorably wrote in his *Political Theology* that all 'significant concepts of the modern theory of the state' are secularised theological concepts because of their 'historical development' and 'systematic structure', he accounted for God as analogous to the omnipotent lawgiver, and even for miracles as reappearing in the exception.³⁷ He did not, however, account for what the equivalent of the devil actually was even though as Adam Kotsko notes 'it appears that the devil has served as a privileged conduit for that conceptual transfer' he was referencing.³⁸ This would seem to be a curious omission to say the least, except that he elsewhere engaged with and conflated the devil, Satan and the demonic in his *The Leviathan in the State Theory of Thomas Hobbes*.³⁹ In Schmitt's (who needless to say was intimately familiar with *Faust*)⁴⁰ treatment of Hobbes's famous depiction of the sovereign State as a Leviathan made up of individuals with a head bearing the crown, hands bearing a sword on the right and sceptre on the left all looming over the city from the sea, Schmitt recalls that: 'In *The Book of Job*, Chapters 40 and 41, it is depicted as the strongest and most tremendous sea monster. Portrayed in vivid detail beside him is a land animal, the behemoth'.⁴¹

It bears recalling here that *Faust's* the 'Prologue in Heaven' scene renders a conversation between God and the devil as 'a quite decent... chat... with the very devil',⁴² to set up the entire tragedy as a play within a play or even as a gloss on *The Book of Job*. For Schmitt, moreover the Leviathan and its associations lead

(without Hobbes' knowledge or intention) to a vague association of the State to the devil or the demonic or indeed Satan himself.⁴³ On a cautionary note therefore, he cites Johann Georg Hamann, noting that 'the distance "from transcendental ideas to demonology is not great"'.⁴⁴ Agamben too concurs with the view that the Leviathan is indeed loosely associated with symbolising the Devil or Satan in Christian theology and Jewish mysticism.⁴⁵ Further he insists that Hobbes 'great metaphor' Leviathan inaugurates a 'new political body of the West' based on '[t]he absolute capacity of the subject's bodies to be killed'.⁴⁶ What is more, this Leviathan is 'not a reality, however artificial, but an optical illusion'.⁴⁷

Franz Neumann (who in 1928 attended Schmitt's seminars),⁴⁸ a member of the prosecution staff at the International Military Tribunal sitting in Nuremberg after WWII writing in his *Behemoth: The Structure and Practice of National Socialism* by way of explaining its title states that:⁴⁹

NOTE ON THE BEHEMOTH

IN THE Jewish eschatology—of Babylonian origin—Behemoth and Leviathan designate two monsters, Behemoth ruling the land (the desert), Leviathan the sea, the first male, the second female. The land animals venerate Behemoth, the sea animals Leviathan, as their masters, Both are monsters of the Chaos. According to the apocalyptic writings, Behemoth and Leviathan will reappear shortly before the end of the world. They will establish a rule of terror—but will be destroyed by God. In other versions Behemoth and Leviathan will fight each other incessantly, and finally will destroy each other. The day of the righteous and just will then come. They will eat the meat of both monsters in a feast which announces the advent of a realm of God. Jewish eschatology, the Book of Job, the prophets, the apocryphal writings are full of references to this myth, which is often differently interpreted and often adapted to political circumstances. St. Augustine saw in the Behemoth the Satan.

It was Hobbes who made both the Leviathan and the Behemoth popular. His Leviathan is the analysis of a state, that is a political system of coercion in which vestiges of the rule of law and of individual rights are still preserved. His Behemoth, or the Long Parliament, however, discussing the English civil war of the seventeenth century, depicts a nonstate, a chaos, a situation of lawlessness, disorder, and anarchy.

Since we believe National Socialism is—or tending to become—a nonstate, a chaos, a rule of lawlessness and anarchy, which has 'swallowed' the rights and dignity of man, and is out to transform

the world into a chaos by the supremacy of gigantic land masses,
 we find it apt to call the National Socialist system
The Behemoth.

Curiously enough this explanatory note was completely and silently omitted from the subsequent edition of the work perhaps as a marker of the aforementioned marginality of the trope of the devil in international criminal law. Importantly however in terms of the historical context of international criminal law, Ian Kershaw's definitive biography of Adolf Hitler notes numerous instances where its subject reaches for the devil as a figure of speech including: 'I'll brew them [the British for their support of Poland] a devil's potion,' and that the ethnic cleansing they were engaged in involving both 'cleverness and hardness' was 'the devil's work', necessary because it 'must save us from again having to enter the fields of slaughter on account of this land'.⁵⁰ Hitler even tried to explain away the Molotov-Ribbentrop pact as 'a pact with Satan to cast out the Devil'.⁵¹ Ironically an early supporter of Hitler's Georg Schott represented Faust as 'Goethe's ideal of the Fuhrer'.⁵² Given this ample historical allusion we would need therefore unpack elements of what makes Faust's pact with the Devil *Faustian* in order to approach more contemporary references to the devil with a clearly developed analytic framework that is up to that task.

In Goethe's *Faust* we first encounter a scholarly and world-weary Faust in his narrow gothic chamber of a study fearing 'neither hell nor its devils' in a scene titled: 'Night A high-vaulted, narrow Gothic room. FAUST, sitting restless at a desk'.⁵³ This scene follows on from the three introductory scenes before the tragedy begins proper of the 'Dedication', the 'Prelude on the Stage' and the 'Prologue in Heaven'. Faust prior to the pact is already unusually steeped in learning; philosophy, law, medicine, and theology who in his own words:⁵⁴

I've studied now, to my regret, Philosophy, Law, Medicine,
 and—what is worst—Theology
 from end to end with diligence.
 Yet here I am,
 a wretched fool and still no wiser than before.
 I've become Master, and Doctor as well,
 and for nearly ten years I have led my young students a
 merry chase,
 up, down, and every which way—
 and find we can't have certitude.
 This is too much for heart to bear!
 I well may know more than all those dullards,
 those doctors, teachers, officials, and priests,

be unbothered by scruples or doubts,
 and fear neither hell nor its devils—
 but I get no joy from anything, either,
 know nothing that I think worthwhile,
 and don't imagine that what I teach
 could better mankind or make it godly.

Already we can see that Faust is an uncommonly successful man with more talent than most even before the deal with the devil is entered into. Given Faust's demonstrated gifts, the pact does not seem necessary. This apparent *unnecessariness* is an initial identifiable element of the Faustian pact. Nonetheless, the world weariness of this gifted but unsatisfied academic drives him to conjure up the 'earth spirit' but as will become clear his amateurish attempt in no way allows Faust to keep the spirit after summoning them.⁵⁵

He takes the book and mysteriously utters the sign of the spirit. In a flash of reddish flame the EARTH SPIRIT appears.

SPIRIT. Who calls to me?

FAUST (turning away). A fearful apparition!

SPIRIT. You've used great efforts to attract me,
 have long exerted suction on my sphere,
 and now –

FAUST. Alas, I lack the strength to face you!

SPIRIT. You beg and pant to see me,
 to hear my voice, to view my face;
 your urgent prayer has made me well disposed,
 so here I am! What paltry fear
 now cowers a demigod! Where is the summoning soul,
 the breast that in itself conceived a world
 it bore and cherished, the breast that swelled
 in trembling joy to reach our spirit-plane?

Where are you, Faust, whose ringing voice I heard,
 who strove with all his faculties to reach me?

Can he be you who in my aura
 tremble in all your depths of being—
 a worm that writhes away in fright?

FAUST. I stand my ground before you, shape of flame!

I am that Faust, I am your peer!

SPIRIT. In the tides of life, in action's storm,

I surge and ebb, move to and fro!

As cradle and grave,

as unending sea,
 as constant change,
 as life's incandescence,
 I work at the whirring loom of time
 and fashion the living garment of God.
 FAUST. How close I feel to you, industrious spirit,
 whose strands encompass all the world!
 SPIRIT. Your peer is the spirit you comprehend;
 mine you are not! *[Disappears]*.
 FAUST (collapsing). Not yours?
 Whose then?
 I, made in God's image,
 not even your counterpart!

This ability to invoke but inability to bind is similar in theme to that covered by Goethe in the poem *The Sorcerer's Apprentice* where the apprentice while being able to enchant a broom to fetch water was quite unable to stop it from hauling water from the stream until his master comes along and voices the requisite spell. This theme caught the attention of not just Walt Disney who memorably adapted this in his 1940 animated film *Fantasia* but Karl Marx too when he spoke of the capitalist as: 'Like the sorcerer who is no longer able to control the powers of the netherworld whom he has called up by his spells'.⁵⁶ In this, Marx (who was familiar with and quite fond of quoting *Faust*)⁵⁷ was on common ground with Schmitt who while speaking of Hobbes' use of the image of the Leviathan in the frontispiece of the book of the same name stated that: 'Whoever utilises such [demonic] images easily, glides into the role of a magician who summons forces that cannot be matched by his arm, his eye, or any other measure of his human ability. He runs the risk that instead of encountering an ally he will meet a heartless demon who will deliver him into the hands of his enemies'.⁵⁸ This is a second identifiable element of the Faustian pact, its *uncontrollability*, in that it is always beyond the control of whomever enters into it.

The scene above and two subsequent ones in the same setting both titled *Faust's Study* are required to set out the immediate terms and context for the pact (which incorporates a contractual wager) at least as laid out in the first part of the tragedy. In the first study scene the Earth Spirit 'devil' gets away with a mocking 'Not I'. Faust's situation is similar in outlook and effect to *The Sorcerer's Apprentice* in that while it was well within their amateurish powers to voluntarily invoke the magical powers both were unable to control them just like the capitalist in Marx's terms or Hobbes over *Leviathan* as per Schmitt. This inability to either keep them or dispel them demonstrates agency on the part of

the magical powers so invoked and thus enables a contractual relationship based on mutual consent to be entered. Both too run the risk of a present evil in order to produce some claimed future good. In Faust's Study I, Faust asks of Mephistopheles:⁵⁹

The essence of such as you,
good sir, can usually be inferred from names
that, like Lord of Flies, Destroyer, Liar,
reveal it all too plainly.
But still I ask, who are you?

Mephistopheles's arch response is:⁶⁰

A part of that force
which, always willing evil, always produces good.

This third and most critical identifiable element of the Faustian pact is its studied *ambiguity* in purporting to produce good through enacting evil. What about its relation to law and legality?

3.1. Concentration camps as 'hell unto itself': 'so even hell is bound by laws?'

A fourth identifiable element of the Faustian pact, is its *legality*, made clear where Faust quite by accident binds the devil through the workings of a law that he had no clue about:⁶¹

FAUST. Why don't you go through the window, then?
MEPHISTOPHELES. For demons and for spectres there's a rule:
where they've got in is where they must go out.
The former's up to us,
the latter's not in our control.

This essential legality of the contractual relationship fascinates Faust and he inquires of the Devil:⁶²

FAUST. So even Hell is bound by laws?
I like your implication that one could
safely make contracts with you gentlemen!

Mephistopheles responds with an entreaty:⁶³

MEPHISTOPHELES. You can be sure of getting all we promise,
 without a single niggardly deduction.
 But it takes time to work out such arrangements,
 so let's discuss the matter fairly soon.
 Right now, however, I urgently request
 that this one time you give me leave to leave.

Legality stretches too to concentration camps which were frequently compared to hell on earth.⁶⁴ Holocaust survivor Olga Lenyel describes Auschwitz as an 'antechamber to hell', Birkenau as 'a hell unto itself' and an SS guard as a 'blonde devil'.⁶⁵ Another survivor account reaching for the 'hell' metaphor is, *A Theory and Practice of Hell: The German Concentration Camps and the System Behind Them*, it was based on the experience of its author and holocaust survivor, Eugen Kogon, at Buchenwald.⁶⁶ Agamben relies on Kogon's analysis of the *Muselmann*.⁶⁷ Standard international criminal law texts typically orient their discipline's history, at least in modern times, to the trial of the Nazis following the Second World War.⁶⁸ The Nuremberg trials were a response to the Nuremberg laws. The central event in this is the Holocaust. The deeply ambiguous role of the law, in perpetuating the conceptualisation and running of the concentration camps (and other machinery necessary for perpetrating mass international crimes), is nevertheless considered an anomaly when it is not glossed over or ignored. There are two instances of the concentration camp's normative spatial arrangement that may be taken as a conceptual starting point for legality and the Faustian pact. The first is illustrated best when holocaust survivor Primo Levi recounted a football match between the SS and inmates that took place at the centre of Auschwitz.⁶⁹ The second is the intriguing fact that the only tree left standing in the centre of Buchenwald was a legendary oak, where supposedly Goethe had sat with his lover and written poetry underneath its shade. Whilst the Nazis preserved the tree to associate themselves with High German culture, the prisoners looked to it as a reminder of the other Germany that - just like them - was taken hostage by the Nazi regime.⁷⁰ Goethe would probably recognise both these moments of contrived normality within the horrors of the camp as exemplifying two hearts that *still* beat within modernity's breast. No wonder then that Agamben's *Homo Sacer* uses a photograph of 'the second master plan for Auschwitz' on its cover. His entire *homo sacer* or 'sacred man' nine-book project can be viably read as the patient explication of the Faustian pact at the heart of international law in that he develops two paradigms regarding legal personality and political territoriality that are of particular relevance here. Firstly, is that human rights are founded on the banning of 'bare' or natural life from politics and secondly that 'the camp' is the political space where power confronts pure biological life. For Agamben the camp and its inmates

(rather than the city with its citizens) is the paradigmatic modern spatial and temporal political practice.⁷¹ Agamben notes in this regard that ‘the law is defined as an articulation of violence and justice’.⁷² He positions this definitive aspect of the law as a political theodicy – a justification of evil - stating that ‘the law consists of essentially in the production of a permitted violence, which is to say in a justification of violence’.⁷³ His analyses therefore demonstrate that the law both in the positive presence and in the negative absence remains stubbornly indispensable to the conception, setting up and running of concentration camps.

3.2. ‘That devil will be defeated’: ‘a devil in hand is well worth keeping’

A fifth identifiable element of the Faustian pact is its *voluntariness*. James Boyd White illustrates the necessary voluntariness of the Faustian pact.⁷⁴ Interestingly, Perry Bechky argues that in James Boyd White’s discussion, while violence or cunning might have their place in effecting a willed intention, cooperation can only be achieved through rhetorical discourse.⁷⁵ The voluntariness of both parties is made clear where Faust fails to keep the devil ensnared in the inadvertent trap seen above where Faust is disinclined to let the evil spirit go and the back and forth dialogue that ensues along the lines of:⁷⁶

FAUST. Do stay another moment and, before you go,
let me hear more of your fine stories.

MEPHISTOPHELES. It’s time you let me go!

I’ll call again soon,

and then you can ask any question you wish.

FAUST. I didn’t lay a snare for you!

You put yourself into the trap.

A devil in hand is well worth keeping:

it takes a good while to catch one again.

MEPHISTOPHELES. If it’s your wish, of course I’m glad to stay

and keep you company—but only if

you’ll let me use the arts in which I’m skilled

to entertain you in a proper way.

FAUST. I’ve no objection, and leave the choice to you.

Just see to it your arts are entertaining!

Faust however is tricked into falling asleep after which Mephistopheles makes good his escape. Upon waking:⁷⁷

FAUST (*awakening*). Have I been duped once more? Are life-giving forces so quickly spent— did a lying dream invent my devil, and did a poodle simply run away?

On Wednesday 5 February 2014, Mr Fergal Gaynor, then the Legal Representative of Victims at the International Criminal Court (ICC), alerted the court of and took issue with the accused, Uhuru Kenyatta, President of the Republic of Kenya and as having obliquely and derogatively referred to the ICC as '[t]hat devil will be defeated, and Kenya shall move forward'.⁷⁸ Although the victim's representative found it fit to call attention to this, it must be said the court did not appear to do anything with this information. What is more, Kenyatta's statement even if taken in precisely the sense proffered by the victim's representative, did not appear to affect the victims directly, but seemed to attack the prestige or perhaps better, the legitimacy of the court. In any event, not even the prosecutor deemed it necessary to take this discussion any further. Gaynor not only introduced the devil into the courtroom but also in his (but not only him) official capacity in a sense represents a rather more esoteric aspect of the Faustian paradigm. Let us for a moment look at the key characteristics of victimhood as enumerated by the ICC starting with the aforesaid voluntariness:

Victim as a participant⁷⁹

1. Participation is voluntary
2. Communicating to the Court their own interests and concerns
3. It is up to the victims to decide what they want to say
4. Participation is possible at all stages of proceedings when considered appropriate by the Judges
5. Always entitled to be represented before the ICC by a legal representative
6. Normally participates via a legal representative, and need not appear in person

Clearly, in order to participate at any stage of the proceedings and in order to be heard, voluntariness is front and centre for victims. The main point, focusing upon the fifth and sixth characteristics of victimhood especially, is that victims are an abstraction that is or are *only* present in court through their representative. To reinforce this point, their representative has even been known to produce a 'representative sample' of the victims, thus further highlighting the victim's presence by their very absence.⁸⁰ This is partly why Agamben can say that:

humanitarian organizations...can only grasp human life in the figure of bare or sacred life, and therefore, despite themselves, maintain a secret solidarity with the very powers they ought to fight.⁸¹

This inclusion by exclusion in part helps explain that victims are represented in the adversarial trial process as neither prosecution nor defence at the expense of not being actually present and this can only be done through and by their consent. What is more victims at international criminal law are very often perpetrators and victims and witnesses and at least, in the Kenyan case, apparently all three at once.

3.3. 'When did you renounce the devil?': 'Oh no! the devil is an egoist'

In September of 1945, Schmitt was arrested by the Americans and held in internment until March of 1947, during which period they brought him to Nuremberg as a potential defendant in the ongoing international criminal trials.⁸² At his interrogation, Schmitt on being asked when he had renounced 'the devil' [the NAZI party] responded with a terse '1936'.⁸³ Quite ironically, Schmitt himself was described as 'a strong spirit of a satanic kind'.⁸⁴ More crucially for present purposes, he has also been described as 'an author of Faustian temperament'.⁸⁵ No wonder then that Schmitt 'had something about him that led some to compare him to ... Mephistopheles'.⁸⁶

Although Faust was as seen above tricked into falling asleep all was not lost however as in the second study scene the Devil's representative comes back of his own volition. Faust has to repeat the invitation three times which while further demonstrating the voluntary nature of the pact highlights the mutual distrust between the parties where bad faith is substituted for the usual good faith in contracts:⁸⁷

FAUST. A knock? Come in! Who bothers me this time?

MEPHISTOPHELES. It's me.

FAUST. Come in!

MEPHISTOPHELES. That must be said three times.

FAUST. Come in, then!

M EPHISTO (*entering*). Now you've done it right!

Lengyel and Kogon above both experienced the Nazi concentration camps as enslavement.⁸⁸ That makes diabolical sense given that the Mephistophelean invitation to treat is explicitly one of enslavement:⁸⁹

I'll gladly place myself at your disposal
here and now.

I will be your companion
and, if I suit you,
become your servant and your slave!

FAUST. And in return for this, what am I to do?

MEPHISTO. You've lots of time until that needs to be considered.

Faust's hesitation and distrust at the offer to have Mephistopheles as his slave for life on earth coupled with Mephistopheles' coyness about what he would require in return brings us to a sixth identifiable element of the Faustian pact, because of the mutual bad faith it is inherently and mutually *antagonistic*.⁹⁰

FAUST. Oh no! The devil is an egoist
and is not apt, for love of God,
to offer anyone assistance.
State in clear terms what you expect—
there's trouble in the household otherwise.

3.4. 'Shake hands with the devil': 'I will bind myself to your service'

A seventh identifiable element of the Faustian pact is that once it is entered into it is a contract of *servitude*. That is to say it is contracting out of freedom through the exercise of freedom.⁹¹

Mephistopheles. I'll bind myself to serve you here,
be at your beck and call without respite;
and if or when we meet again beyond,
then you will do the same for me.

There is at least one good example of the devil in the context of servitude deployed in the international criminal law process. To start with, Bruno Stagno Ugarte, President of the Assembly of States Parties of the ICC from 2005 to 2008, cited Romeo Dallaire's memoir *Shake Hands with the Devil*⁹² as stating precisely the purpose of the ICC and the commitment of its State Parties:

We need to study how the genocide happened not from the perspective of assigning blame - there is too much to go around - but from the perspective of how we are going to take concrete steps to prevent such a thing from ever happening again. To properly mourn the dead and respect the potential of the living, we need accountability, not blame.

This accountability referred to a criminal process holding perpetrators accountable, while blame referenced the perceived failings of the international

community to prevent the Rwandan genocide. Dallaire provides two instances referencing the devil; one a simple simile, the other a more complex metaphor of making a deal with the devil. To start with the first:⁹³

... I know there is a God because in Rwanda I shook hands with the devil. I have seen him, I have smelled him and I have touched him. I know the devil exists, and therefore I know there is a God.

The second instance describes his first meeting with members of the *Interahamwe* militia responsible for acts of genocide, not just key leaders like Augustin Bizimungu and Théoneste Bagosora, but also important actors such as Robert Kajuga, Bernard Mimiragaba and Ephrem Nkezabera. These named individuals were the personification of the very devil for the Canadian. This is more than just a description by simile however, it goes beyond that to actually doing business with this devil. Dallaire states that he had to anaesthetise himself to the ethical and moral dimensions of meeting with génocidaires in order to negotiate transfers of displaced persons. It was on the way back to his headquarters after the meeting when he felt that he 'had shaken hands with the devil', that they 'had exchanged pleasantries' he continues 'I felt guilty of evil deeds myself since I had actually negotiated with him'.⁹⁴ This key episode gives the book its title and arguably its central premise. For our purposes, it is important to note that the only justification proffered for dealing with the devil as it were, was transferring displaced persons and orphans out of harm's way. The evil of dealing with the devil is rendered necessary by the indisputably good imperative of saving lives. It is consequently in its way trying to justify or at least explain the presence of evil that is a patently lay theodicy.

3.5. 'A deal with the devil': 'I'll give you things no mortal's ever seen'

An eighth identifiable element of the Faustian pact is its combined danger and risk, its *hazardousness*. Mephistopheles urges Faust to 'take the risk':⁹⁵

MEPHISTOPHELES. You can, on these conditions, take the risk.
Commit yourself, and you'll soon have the pleasure
of seeing here what my skills are;
I'll give you things no mortal's ever seen.

Faust is not taken in by this given that the devil's reputation precedes him:⁹⁶

FAUST. And what have you to give, poor devil!

Has any human spirit and its aspirations
 ever been understood by such as you?
 Of course you've food that cannot satisfy,
 gold that, when held, will liquify
 quicksilver like as it turns red,
 games at which none can ever win,
 a girl who, even in my arms, will with her eyes
 pledge her affections to another,
 the godlike satisfaction of great honor
 that like a meteor is gone at once.
 Show me the fruit that, still unplucked, will rot
 and trees that leaf each day anew!

There are two senses to 'deal with the devil'. The first involves entering into a contractual relationship, while the second by contrast seeks to cope with, control or even overcome the infamous deity. *Faust* as the passage above makes clear combines both.

On 23 September 2011, during Francis Muthaura's Pre-Trial hearing for crimes against humanity before the ICC, his legal counsel Karim Khan said:

Your Honours, another essential plank of this Prosecution's case is what can only be described as an unholy alliance, a deal with the devil, between the government and [sic] Kenya and a criminal, a lamentable, an invidious criminal group called the Mungiki.⁹⁷

Given that this purported deal led to trial before the ICC after Kenyatta became president it would not quite have met expectations given that strictly speaking Mungiki's violence did not lead to his election.⁹⁸ His political alliances with would be rivals did swell his vote however those alliances would probably not have been entered into but for the looming trials at the ICC. Ironically therefore the ICC in spectacularly unintended ways contributed to Kenyatta's ascension to the presidency.

3.6. 'Sold his soul to the devil': 'blood is quite a peculiar sort of juice'

A ninth identifiable element of the Faustian pact - despite its inherent risks, or hazardous nature given that it is a wager and consequently no ordinary agreement - is its bindingness to the strict letter of the agreement, which is to say it is completely *literal* and tied to language as expression but not as meaning let alone intention.⁹⁹

757 FAUST. If on a bed of sloth I ever lie contented,
 758 may I be done for then and there!
 759 If ever you, with lies and flattery,
 760 can lull me into self-complacency
 761 or dupe me with a life of pleasure,
 762 may that day be the last for me!
 763 This is my wager!

764 MEPHISTOPHELES. Here's my hand!

765 FAUST. And mine again!
 766 If I should ever say to any moment:

767 Tarry, remain!—you are so fair!
 768 then you may lay your fetters on me,
 769 then I will gladly be destroyed!

770 Then they can toll the passing bell,
 771 your obligations then be ended—
 772 the clock may stop, its hand may fall,
 773 and time at last for me be over!

774 MEPHISTOPHELES. Consider well your words—we'll not
 775 forget them.

776 FAUST. Nor should you! What I've said
 777 is not presumptuous blasphemy.

778 If I stagnate, I am a slave—
 779 why should I care if yours or someone else's?

780
 781 We see this bindingness to the letter when Mephistopheles insists upon a con-
 782 tract in writing with blood as the ink:¹⁰⁰

783
 784 Any small scrap of paper is all right.

785 A tiny drop of blood will do to sign your name.

786 FAUST. If this is all that you require, we may as well go through
 787 with the tomfoolery.

788 MEPHISTOPHELES. Blood is a very special juice.

789
 790 Ironically, at the end of the second part of Faust part of the reason why Faust
 791 ultimately wins over the devil is precisely because his actions completely inad-
 792 vertently cleave more closely to the letter of the agreement than Mephistopheles'.
 793 Thus, the literal terms of the agreement replace the intention behind the agree-
 794 ment. Fidelity to the words expressing the intent supplanted the intent itself
 795 and, in that way, Mephistopheles failed to get his end of the bargain, Faust's
 796 soul. These difficulties in the way of judgment are amply demonstrated in the
 797 case of Rudolf Kastner, a Hungarian Jew who entered into a deal with the Nazis
 798

to facilitate the escape of some Jews while abandoning the rest to their fate. For this act, a judge in Israel described him as having ‘sold his soul to the devil’,¹⁰¹ Pnina Lahav, renders it as ‘sold his soul to Satan’.¹⁰² Leora Bilsky examines the Kastner trial through narrative theory, developed through the field of law and literature, to explore the difficulties and ambiguities surrounding the judgment of evil.¹⁰³ Bilsky identifies the phrase ‘sold his soul to the Devil’ as not only based on Faust but also as linked to the better known international trial of Adolf Eichmann.¹⁰⁴ Edwin Black provides another example of reaching for the Faustian pact metaphor to make meaning of the same context when he narrates the:

[s]tory of a negotiated arrangement in 1933 between Zionist organisations and the Nazis to transfer some 50,000 Jews, and \$100 million of their assets, to Jewish Palestine in exchange for stopping the worldwide Jewish-led boycott threatening to topple the Hitler regime in its first year.

....

Only supported by the underpinnings of America’s economic might was Hitler able to squeeze the Jews, confronting the Zionists with the painful necessity of engineering heartbreaking trade mechanisms with the Devil.¹⁰⁵

And:

motivated by the desire to save both the threatened community and future communities, the Zionists had to coldly assume the distasteful, gun-to-the-temple responsibilities of standing up to the Devil in his own lair and negotiating a way out. That way was the Transfer Agreement.¹⁰⁶

The principal utility of the citing of the devil in the examples above are to enable the shifting of responsibility and blame from oneself to another, for more or less compelling reasons. Desmond Manderson has noted this longstanding aspect of the criminal law.¹⁰⁷ This division between the act and the actor in terms of attribution is not exhausted by these examples. The identical logic of the devil usefully shifting blame elsewhere or attributing agency to actors external to oneself, goes even further, deeper and more obscure. Robert Jay Lifton articulates the concept ‘Doubling’ or the Faustian Bargain as a psychological principle that divides the ‘self’ as a means of adapting to extreme environments. One of these selves can then unrestrainedly embrace evil.¹⁰⁸ This doubling of the persona as we see below enables the notion of having an ‘office’ which ostensibly separates an individual from his actions.

4. THE NOTION OF THE OFFICE: 'HE SERVES YOU IN A CURIOUS WAY'

A tenth identifiable element of the Faustian pact is its presuppositional *irony* in purporting to link good and evil productively. Goethe puts the following words in the mouth of God regarding as to why he uses the devil as his agent for his own purposes.¹⁰⁹

Human activity slackens all too easily,
and people soon are prone to rest on any terms;
that's why I like to give them the companion
who functions as a prod and does a job as devil.

This use of the devil as an agent for God is at the root of the notion of 'office' which distinguishes an action and an actor in terms of both efficacy and responsibility. In looking at official acts, Agamben introduces a crucial distinction between an act in its effective reality and an action insofar as an agent carries it out.¹¹⁰

The first articulation of the doctrine has to do with the theory of the action of demons. The devil serves God and God approves the works that he has done, but not the way in which he has done them: the works done, but, not the doing of the works.¹¹¹

Agamben then traces the distinction to the theory of the action of the devil within the providence.¹¹² In it the devil serves God and God approves his work, but not the way in which he has worked.¹¹³ Furthermore, this religious paradigm of *Opus Dei* or God's work provides the secular West with the term 'office' which: 'is more effective than any ordinary human action because it acts *ex opere operato*, independently of the qualities of the subject who officiates it'.¹¹⁴ Agamben traces the doctrine to the theory of the action of the devil within the providential economy.¹¹⁵ In it the devil serves God and God approves his work, but not the way in which he has worked.¹¹⁶ When Mephistopheles speaks of Faust to the Lord in the Prologue in Heaven as: 'He serves You in a curious way',¹¹⁷ he quite possibly is slyly and ironically describing himself.

When we look to the trials under the Nuremberg Charter, we find its principal innovation procedurally speaking was that official positions were not only no longer a defence, but conversely were now a basis for criminal responsibility.¹¹⁸ Indeed in the *Justice Case* the military tribunal pointed out that because governmental participation was actually a material element of the crimes

charged, it could scarcely be said that it could also be a defence to the charges:¹¹⁹

The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted National Socialist judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.

Importantly, no defendant was specifically charged in the indictment with the murder or abuse of any particular person, all clearly were acts of office holders - judges, prosecutors and the like, standing in for the regime. Consequently, international criminal law was in this way at the vanguard of demonstrating the Mephistophelean aspects of the law transmuting official acts from a complete defence to an actual element of the crime.

5. CONCLUSION

This paper begun by looking at the law's spellbinding effect whose apparatus at crucial junctures engenders rhetorical references to the devil embedded in a practice of a performative kind where speaking *is* doing. It demonstrated the paper's overall argument that the devil is part of international criminal law but only with the consent and cooperation of those that it would hold in its thralldom of evil posing as good. All of the examples surveyed were political theodicies explaining away evil by linking it in some causal way to good. Reading *Faust* alongside references to the devil in international criminal law reveals how the power of both poetry and law is linked to the power of language itself in the space opened up in language between meaning and expression or between semantics and semiotics. Reaching for the law and poetic expression alike promises power through language but only at the price of being bound voluntarily by the strictures of language to language both felicitous and infelicitous.

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106. Black, *The Transfer Agreement* 382.
107. Desmond Manderson "Possessed: Drug policy, witchcraft and belief," *Cultural Studies*, 19:1 (2005): 56.
108. Robert Jay Lifton (*The Nazi doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986).
109. Goethe, *Faust* lines 340-343.
110. Agamben *Opus Dei*, 21.
111. *Ibid.* 25.
112. *Id.* 23.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. Goethe, *Faust* line 300.
118. *Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement')*, Article 6 (8 August 1945), subsequent trials in Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, 31 January 1946, pp. 50-55
119. *Case No. 3, United States v. Altstoetter et al (The Justice Case)*, Opinion and Judgment and Sentence, Green Series, Vol. 3 at 954 (Mil. Trib. No. 31947-12-04) [ILDC] <www.worldcourts.com/ildc/eng/decisions/1947.12.04_United_States_v_Altstoetter.pdf#> (last accessed 11 July 2020).

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