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Richard Ashby Wilson

Excerpt

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## 1

## Assessing Court Histories of Mass Crimes

## 1.1. NOTHING BUT THE LAW?

Now, in a country of laws, the whole law and nothing but the law must prevail.

– Tzvetan Todorov (1996:114–5)

In the literature on legal responses to crimes against humanity, a consensus has emerged that courts of law produce mediocre historical accounts of the origins and causes of mass crimes. This book reviews recent international criminal trials, and it finds much evidence to support a critical view of law's ability to write history. At the same time, historical debates in international trials have provided important insights into the underlying factors of an armed conflict. By examining closely the concrete strategies pursued by prosecutors and defense lawyers, this study seeks to understand their motivations for venturing into the past in the first place and to discern the legal relevance of historical evidence.

A cursory review of recent international criminal trials would lend support to a skeptical stance toward the place of history in the courtroom, and at no point has the incompatibility of these two activities been more evident than during the four-and-a-half-year trial of Slobodan Milošević at the International Criminal Tribunal for the Former Yugoslavia (ICTY). With the death of Milošević in March 2006, only months before the court could pass judgment, a British *Financial Times* article diagnosed the Tribunal's central mistake: "the court confused the need to bring one man to account with the need to produce a clear narrative of war crimes and atrocities for the history books."<sup>1</sup> Observers condemned the prosecutor's excessive concern with history and the judges' failure to curtail Milošević's "interminable forays into Ottoman history, Balkans

<sup>1</sup> Quentin Peel, "Lessons for Prosecutors of War Crimes Trials," *Financial Times*, 13 March 2006.

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ethnology, [and] World War Two Croatian fascism.”<sup>2</sup> Prosecutor Geoffrey Nice’s strategy of leading extensive historical material played into the hands of the accused, it was argued. With the international courtroom as his podium, the deposed president relished “the opportunity to present his version of history, which is his main goal in this trial. It is not about proving real facts, but – as it has always been – about reinterpreting history,” as one Balkans commentator noted.<sup>3</sup>

Many at the Tribunal were discouraged after the *Milošević* trial ended so inconclusively, which led some to reflect on the prosecution’s decision to foreground historical arguments. One member of the Milošević prosecution team, Senior Trial Attorney Dan Saxon, asked,

Are we furthering the purposes of the Tribunal when we allow him [Milošević] to go on long historical tirades? The purpose of a criminal trial is to get at the truth about the crimes and produce a fair and reasoned judgment about the guilt or innocence of the accused and get some finality . . . so the victims can get closure. Historians can keep reinterpreting, but we only get one chance.<sup>4</sup>

Beyond the pragmatic need to expedite trials, there are some fundamental legal principles at stake in this discussion. Drawing inspiration from an omnipresent idea of the rule of law, the minimalist “law, and nothing but the law” conception of criminal trials is one of the few legal axioms that garners support across the political and legal spectrum.<sup>5</sup> Yet beneath the apparent unanimity of opinion can be found a variety of outlooks and justifications, only some of which are compatible. If we look more closely, there seem to be two broad schools of thought maintaining that courts are inappropriate venues to delineate the origins and causes of mass crimes. First, the doctrine of liberal legalism asserts that the justice system should not attempt to write history at all, lest it sacrifice high standards of judicial procedure. Second, law-and-society scholars have claimed that, even when courts attempt historical inquiry, they are bound to fail as a result of the inherent limitations of the legal process. The latter group of commentators are less inspired by liberal-democratic thinking than

<sup>2</sup> Helen Warrell and Janet Anderson, “Hague Court’s Record under Scrutiny,” Institute for War and Peace Reporting Tribunal Update No. 444, Part 2, 17 March 2006, [http://www.iwpr.net/?p=tri&s=f&o=260408&apc\\_state=henitriod79598b179f1bec4e34352b5115c0a7](http://www.iwpr.net/?p=tri&s=f&o=260408&apc_state=henitriod79598b179f1bec4e34352b5115c0a7).

<sup>3</sup> Slavenka Drakulić, cited in Tošić (2007:89).

<sup>4</sup> Author interview, May 2006.

<sup>5</sup> Brian Tamanaha (2004:1) writes that in the maelstrom of uncertainty after the end of the Cold War, a consensus emerged, “traversing all fault lines . . . that the ‘rule of law’ is good for everyone.”

by critical legal studies, legal realism, and literary criticism. I deal with each of these intellectual traditions in turn.

Liberal legalism claims that the sole function of a criminal trial is to determine whether the alleged crimes occurred and, if so, whether the defendant can be held criminally responsible for them.<sup>6</sup> One of the most influential modern figures to argue this position is Hannah Arendt (1965:5), who insisted in her book *Eichmann in Jerusalem: A Report on the Banality of Evil* that the main function of a criminal court is to administer justice, understood as determining the guilt or innocence of an individual.<sup>7</sup> A court should not attempt to answer the broader questions of why a conflict occurred between certain peoples in a particular place and time, nor should it pass judgment on competing historical interpretations. Doing so undermines fair procedure and due process, and with them the credibility of the legal system. Arendt's austere legalism arose as a reaction to what she perceived as the Israeli government's undisguised efforts to harness the 1961 trial of high-level Nazi bureaucrat Adolf Eichmann to its nation-building program. Arendt observed that "it was history that, as far as the prosecution was concerned, stood in the center of the trial." She quotes Prime Minister David Ben-Gurion, stating, "It is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but Anti-Semitism through history" (Arendt 1965:19). Ben-Gurion's declarations were echoed in the opening address of prosecuting attorney Gideon Hausner, who situated Eichmann's acts in a sweeping historical narrative of anti-Semitism throughout the ages, from the pharaohs of Egypt to modern Germany.<sup>8</sup>

Arendt objected to the prosecution's flights of oratory, calling them "bad history and cheap rhetoric" (*ibid.*). For Arendt, the fact that Hausner construed Eichmann's crimes as crimes against the Jewish people detracted from seeing them as crimes against humanity at large. By portraying the Holocaust as the latest manifestation of a long history of anti-Semitism, the prosecutor neglected the distinctiveness of the Holocaust and its unprecedented industrial annihilation of Jews in Western Europe. Moreover, it overlooked the new kind of criminal that had emerged – a bureaucratic administrator who commits genocide with the stroke of a pen (276–7). Arendt applauded the efforts of Presiding Judge Moshe Landau to steer the trial away from moments of spectacle and back to normal criminal court proceedings, reasoning that the extent of the atrocities obviated the need to dramatize the events further

<sup>6</sup> Gary Bass (2000:7–8) uses the term *legalism* to characterize liberal approaches to international law. Mark Drumbl (2007:5) also uses "liberal legalist" to describe the dominant model of determining responsibility and punishment in international criminal tribunals.

<sup>7</sup> For a helpful discussion of Arendt's thinking on human rights, see Serena Parekh (2004).

<sup>8</sup> Arendt (1965:19).

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(4, 230). Questions of history, conscience, and morality, she insisted, were not “legally relevant” (91). Furthermore, the requirement to do justice foreclosed any efforts to answer wider historical questions by reference to Eichmann’s actions:

Justice demands that the accused be prosecuted, defended and judged, and that all other questions of seemingly greater import – of “How could it happen?” and “Why did it happen?”, of “Why the Jews?” and “Why the Germans?”, of “What was the role of other nations?” . . . – be left in abeyance. (5)

For Arendt, the point of the trial was none other than to weigh the guilt or innocence of one man, Adolf Eichmann. With his receding hair, nervous tic, poor eyesight, and bad teeth, Eichmann was not a towering figure of evil, a Hitler or a Stalin. Instead he was a diligent, unreflective functionary driven by the motive of self-advancement within the Nazi bureaucracy. Despite the banality of Eichmann, “[j]ustice insists on the importance of Adolf Eichmann” (5). The court must dispense justice for one individual and not attempt to write a definitive history of the Holocaust, however tempting that might be:

The purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes – “the making of a record of the Hitler regime which would withstand the test of history”<sup>9</sup> . . . can only detract from law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment. (253)

At the end of her account, Arendt concluded that nationalist pedagogy had detracted from the pursuit of justice and led to breaches of due process (221). Eichmann’s defense was obstructed from calling witnesses and could not cross-examine certain prosecution witnesses. There was a marked inequality of arms, for no provision was made for the defense to receive trained research assistants. The disparities between the resources of the defense and prosecution were even more pronounced than at the Nuremberg trials fifteen years earlier.

Since the Eichmann trial, the justice-and-nothing-more doctrine has resurfaced repeatedly in Holocaust trials, with some commentators urging courts to adopt a minimalist approach and to eschew moral commentary and historical interpretation.<sup>10</sup> For example, Tzvetan Todorov (1996) has criticized the way in which Holocaust trials in France were overwhelmed by deliberations on World War II history, the Resistance, collaboration, and French national

<sup>9</sup> Here Arendt is quoting the words of Robert Storey, executive trial counsel at Nuremberg.

<sup>10</sup> On Holocaust trials in France, see Douglas (2001:185–96, 207–10); Evans (2002); Golsan (2000a, 2000b); Wieviorka (2002); Wood (1999:113–42).

identity. Todorov argued that the trials of Paul Touvier in the 1980s and 1990s sacrificed justice for political concerns, and he balked at the judges' opinion in the Klaus Barbie trial thus: "what is especially worth criticizing . . . is not that they wrote bad history, it's that they wrote history at all, instead of being content to apply the law equitably and universally" (ibid.:120).

As might be expected, many staff at international criminal tribunals adhere to some version of the doctrine of liberal legalism. Even if they qualify their views, they generally endorse a fairly restricted crime-based evidentiary approach to determining individual criminal responsibility. In my interviews, this view was more pronounced among lawyers from the Anglo-American common law tradition than those from civil law systems. Australian Gideon Boas (2007:276), former senior legal officer to the ICTY Chamber in the trial of Slobodan Milošević, writes, "A criminal trial should be a forensic process involving determination of the criminal responsibility of an individual or individuals, and not a truth commission." In our interview, Daryl Mundis, a former ICTY Senior Trial Attorney from the United States, remarked, "Historical evidence is not a significant part of the case proving that individual X committed crime Y. I may lead it in a trial, but only as background to give the judges a bearing on the context."<sup>11</sup> Another ICTY prosecuting attorney offered a stark assessment of the prejudicial nature of historical evidence: "History largely gives legitimacy to the Prosecutor and condemns the accused. A criminal trial must be a forensic process. Those shadows which history seeks to illuminate should not play any part in a serious criminal trial."<sup>12</sup>

Despite their rival position in the trial, quite a few defense attorneys appearing before international criminal tribunals also share these sentiments. After his client Momčilo Krajišnik was acquitted of genocide at the ICTY, defense counsel Nicholas Stewart commented, "It's not a truth commission, it's a criminal trial. The prosecution has to prove the case . . . beyond reasonable doubt."<sup>13</sup> Beth Lyons, defense counsel at the International Criminal Tribunal for Rwanda (ICTR), also defended a strict form of legalism: "The court can only do a limited job – to judge, based on the evidence, whether the prosecution has proved, beyond a reasonable doubt, that the accused person is guilty of the charges in the indictment. If a court goes beyond that, it treads dangerously and leaves the door open for the prosecution to politicize the proceedings."<sup>14</sup>

<sup>11</sup> Author interview, June 2006.

<sup>12</sup> Written comment, ICTY survey, 2009.

<sup>13</sup> Caroline Tosh, "Does Krajišnik Sentence Set Dangerous Precedent?" Institute for War and Peace Reporting, Tribunal Update No. 479, 1 December 2006.

<sup>14</sup> Author interview, July 2009.

## 1.2. THE POVERTY OF LEGAL ACCOUNTS OF MASS CRIMES

Law is likely to discredit itself when it presumes to impose any answer to an interpretive question over which reasonable historians differ.

– Mark Osiel (2000:119)

Whereas liberal legalism maintains that it is inappropriate for a court to write a historical account of a conflict, more recent approaches in law-and-society research go a step further to declare that courts will inevitably fail in this task, even when they try. A number of intertwined elements constitute this critique of legal knowledge, and I present four categories herein: incompatibility theory, the Dickensian “law is a ass” view, the partiality thesis, and the view that law is monumentally boring. Although most of these approaches are compatible and overlapping, others are mutually exclusive:<sup>15</sup>

1.2.1. *Incompatibility Theory*

For the historian, it can be disconcerting to see carefully researched historical material ripped out of its context by clever lawyers and used as a bludgeon to beat the other side.

– Richard Evans (2002:330)

The first approach, which I term *incompatibility theory*, lays emphasis on the distinctive methods and principles of history and law.<sup>16</sup> Historian Richard Evans (2002:330) identifies profound incompatibilities between legal and historical approaches to evidence. Although criminal law demands a threshold of proof that is “beyond reasonable doubt,” historians deal in “the broader frame of probabilities.”<sup>17</sup> Further, law and history test the evidence in dissimilar ways, and historians, for instance, are seldom in a position to demand to cross-examine a document’s author to test its veracity.

One could add that Anglo-American law is adversarial and that expert witnesses are often subjected to a hostile cross-examination, whereas historical analysis proceeds through academic discussion and, at least in principle,

<sup>15</sup> Although the partiality thesis declares that law oversimplifies, this contradicts the “just plain boring” critique that courts are excessively embedded in detail and technical minutiae. More often than not, however, these positions reinforce one another. For instance, the partiality thesis and the “law is a ass” stance both emphasize how law’s unique methods of inquiry can lead to a distorted and myopic picture of events.

<sup>16</sup> See Osiel (2000) and Minow (1998). See Borneman (1997:103) on the conflicting aims of historians and the justice system.

<sup>17</sup> Evans is Regius Professor of Modern History at Cambridge University. He served as expert witness for Deborah Lipstadt’s defense in the 2000 British libel trial brought by Holocaust denier David Irving.

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through ongoing peer review. Law's epistemology is positivist and realist, demanding definite and verifiable evidence typically produced through scientific forensic methods. History, however, is more pluralistic and interpretative in both its methods and conclusions. Courts often endorse one version above all others, whereas historians may integrate the elements of competing accounts. Historians often recognize that historical truths are provisional and that their evidence and conclusions are not always verifiable or free of ambiguity. Historians situate individual acts in the societal and cultural contexts as a matter of course, whereas courts are concerned with context only insofar as it impinges on questions of guilt or innocence. Establishing criminal responsibility – the main purpose of criminal trials – is “entirely alien” to what historians do, according to Richard Evans (*ibid.*:330). Courts demand the kind of unimpeachable facts that will allow them to prove the charges in the indictment, and if the requisite threshold of proof is not met, then a court must acquit. Historians, in contrast, are released from such imperatives and can afford to be more open to indeterminacy and a more systemic approach to causality and responsibility.

As a result of the distinctiveness of the court setting, many historians have been wary of becoming embroiled in criminal trials that involve mass violations. Henry Rousso, then director of the Institute for Contemporary History in Paris, pleaded with the president of the Bordeaux Assizes Court to exempt him from testifying when he was called as an expert witness in the 1997 trial of Maurice Papon: “In my soul and conscience, I believe that an historian cannot serve as a ‘witness,’ and that his expertise is poorly suited to the rules and objectives of a judicial proceedings. . . . The discourse and argumentation of the trial . . . are certainly not of the same nature as those of the university.”<sup>18</sup> James Sadkovich (2002:40) claims that on entering the ICTY Trial Chamber in The Hague, scholars cease to be historians or social scientists and become peddlers of “false history” and “advocates, coached and questioned by the prosecution and defense.”

This critique of criminal law is valuable for comprehending why history is often misunderstood and misused in the international criminal courtroom. Yet it is also worth considering how law and history can at times share similar methods and aims. In the broadest terms, both explore the details of the particular while keeping an eye on the general implications of the case in question. Both weigh evidence and finely grade its value. Both carefully weigh their sources, distinguish between primary and secondary documents, and often grant greater weight to the former. Both use eyewitness testimony and search

<sup>18</sup> See Letter to the President of the Bordeaux Assizes Court in Golsan (2000a:194).

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for corroborating documentary evidence. Ideally, both show sensitivity to the context of individual actions and the individual's immediate social environment and historical context. Finally, both rely on overarching narratives to organize individual facts, visual images, and other forms of evidence into a coherent whole.

### 1.2.2. *Legal Exceptionalism, or "The Law Is a Ass"*

While historians have often highlighted the uniqueness of historical methods, a complementary view draws attention to the distinctively legal ways of knowing that arise from specialized legal precepts. As Sarat et al. (2007:2) write, "[I]nside the courtroom, law's ways of knowing seem strange, out of touch, disconnected from the usual ways in which people acquire information or make decisions." The gulf between everyday experience and legal conventions of knowledge has been a source of comment for centuries. Charles Dickens (1970:489) sharply satirized law's rejection of common sense in a scene in *Oliver Twist*, where the character Mr. Bumble, on being told that English law presumes that a wife acts under her husband's direction, explodes in frustration, saying, "If the law supposes that . . . [then] the law is a ass, a idiot."

Law's unique conventions, special categories, and exceptional rules impel courts to perceive historical events through a counterintuitive prism, which leads to all manner of unintended consequences and absurd outcomes. Richard Golsan (2000b:28), for example, derides the "*reducto ad absurdum* of the law itself" in his analysis of the trials of Vichy intelligence agent Paul Touvier. Because of the statute of limitations on homicide in French law, the prosecution had to prove that Touvier's crimes constituted crimes against humanity, not just murder. However, to be considered crimes against humanity, they had to fulfill one rather unusual criterion. In the earlier Klaus Barbie trial, the Cour de Cassation had ruled that a conviction for war crimes, crimes against humanity, or both, could be upheld only against an individual acting on behalf of a state apparatus exercising "ideological hegemony."<sup>19</sup> In 1992, the Paris Court of Appeals concluded that Touvier was an agent of the wartime Vichy regime but that Vichy did not exercise an autonomous "politics of ideological hegemony" because it was dependent on the National Socialist government in Germany.<sup>20</sup> Vichy was held to be an inchoate puppet regime of "political animosities" and "good intentions." And yet many historians of France have argued that the Vichy regime pursued a coherent anti-Semitic

<sup>19</sup> Golsan (2000b:29).

<sup>20</sup> Golsan (ibid.:31).



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ideological project of its own and that Vichy officials participated energetically in the systematic extermination of Jews.<sup>21</sup>

Because Touvier's crimes were not considered crimes against humanity, falling as they did outside the statute of limitations, the Court of Appeals dismissed the case, and Touvier was released. In the subsequent 1994 trial, the prosecution misrepresented the historical record to make the claim that Touvier was a German agent rather than a Vichy operative, linking his crimes to a regime wielding "ideological hegemony," as required by the Barbie precedent. Golsan (2000b:32) remarks caustically, "Now the duty to memory where Vichy's crimes were concerned resulted in encouraging the court to do violence to the very historical realities that the duty to memory was intended to preserve and foreground in the first place." Because courts follow law's own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history.

1.2.3. *The Partiality Thesis*

Trial "truths" can be partial and can get lost in the morass of juridical and evidentiary detail.

– Alexandra Barahona de Brito, Carmen González-Enríquez,  
Palomar Aguilar (2001:26)

The partiality thesis extends the critique of legal exceptionalism further to point out how courts can be overly selective and limited in scope, echoing anthropologist Clifford Geertz's (1983:173) famous dictum, "Whatever it is the law is after, it's not the whole story." Whereas in the doctrine of liberal legalism, law's minimal regard for history and sociopolitical context is a cardinal virtue, for these writers, it is a cardinal error, leading courts to overlook the main characteristics of a conflict. Elements of the partiality thesis can be identified in studies of the Nuremberg trials by historians such as Donald Bloxham (2001), Saul Friedlander (1992), and Michael Marrus (1997), who all maintain that the International Military Tribunal did not adequately address the most important Nazi crime of all – the mass extermination of European Jews.<sup>22</sup> The trials left an incomplete and impoverished historical record because crimes against humanity were subordinated to crimes against peace and conspiracy to wage an aggressive war.

<sup>21</sup> Todorov (1996:32) insists that Vichy leader Marshal Pétain was independently anti-Semitic and "signed some of the harshest racial laws of the time," and he interprets the Court's exoneration of Vichy as an attempt to rescue a bruised French national identity. See also Marrus and Paxton (1995).

<sup>22</sup> See Douglas (2001:4) for a discussion of Michael Marrus's work on this theme.

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The strategy adopted by Nuremberg prosecutors was motivated by a specifically legal rationale. Because there existed no precedent for convicting criminal defendants from other states for “crimes against humanity” against their own civilian population, Nuremberg prosecutors adopted a cautious strategy in which crimes against humanity drew legal sustenance from war crimes and the crime against peace. Kittichaisaree (2001:19) explains, “Crimes against humanity were novel. . . . The Nuremberg Charter linked the prosecution of this genus of crimes to the ‘execution of or in connection with any crime within the jurisdiction of the Tribunal.’ In effect, the crimes [against humanity] had to be committed in execution of or in connection with war crimes or the crime against peace.” Consequently, the Nuremberg Tribunal paid more attention to the German war of aggression than to the systematic program to eradicate European Jews.

Many historians have concluded that the Nuremberg trials did not present an authoritative historical account of the Holocaust and that the trials may even have distorted the record for future generations.<sup>23</sup> In place of an explanation built on German nationalism and anti-Semitism, the court identified war and “renegade militarism” as the primary motivating factors for the anti-Jewish policies of Nazi Germany.<sup>24</sup> Justice Robert H. Jackson considered the extermination of the Jews not a principal Nazi objective in and of itself but a function of other war aims of the German High Command. Lawrence Douglas asserts that because the prosecution treated crimes against humanity as secondary to crimes against peace, it implicitly accepted the Nazi’s portrayal of Jews as potential fifth columnists and saboteurs who had to be eliminated in pursuit of a war of conquest.<sup>25</sup>

Many of the preceding arguments were marshaled in the 1990s by the proponents of “transitional justice” to justify a move away from classic retributive justice and towards novel institutions such as truth and reconciliation commissions.<sup>26</sup> These quasi-legal commissions, it was held, ought to replace courts as the main institutions that document past political conflict because they could utilize a wider array of investigative techniques. Since truth commissions are not courts of law, they are freed from the task of determining individual guilt or innocence and therefore can conduct more contextual and open-ended inquiry and garner deeper insights into the origins and causes of

<sup>23</sup> See, for example, Marrus (1987:4). Donald Bloxham (2001) argues that the Holocaust was largely absent in the Nuremberg trials. For a defense of the Nuremberg trials’ historical contribution, see Douglas (2001:65–94).

<sup>24</sup> See Douglas (1995:449).

<sup>25</sup> Douglas (1995:449). Here, the partiality thesis overlaps with the “law is a ass” critique.

<sup>26</sup> See Boraine (2001), Mertus (2000:157–9), and Minow (1998).