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WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS

Why do international criminal tribunals write histories of the origins and causes of armed conflicts? Richard Ashby Wilson conducted empirical research with judges, prosecutors, defense attorneys, and expert witnesses in three international criminal tribunals to understand how law and history are combined in the courtroom. Historical testimony is now an integral part of international trials, with prosecutors and defense teams using background testimony to pursue decidedly legal objectives. Both use historical narratives to frame the alleged crimes and to articulate their side's theory of the case. In the trial of Slobodan Milošević, the prosecution sought to demonstrate special intent to commit genocide by reference to a long-standing animus nurtured in a nationalist mind-set. For their part, the defense calls historical witnesses to undermine charges of superior responsibility and to mitigate the sentence by representing crimes as reprisals. Although legal ways of knowing are distinct from those of history, the two are frequently combined in international trials in a way that challenges us to rethink the relationship between law and history.

Richard Ashby Wilson is Gladstein Distinguished Chair of Human Rights, Professor of Anthropology and Law, and Director of the Human Rights Institute at the University of Connecticut. He has been a Visiting Professor at the University of Oslo, the New School for Social Research, and the University of the Witwatersrand. Presently, he serves as Chair of the Connecticut State Advisory Committee for the U.S. Commission on Civil Rights. Professor Wilson is the author of *Maya Resurgence in Guatemala* (1995) and *The Politics of Truth and Reconciliation in South Africa* (2001) and is the editor or coeditor of numerous books, including *Culture and Rights*, *Human Rights and the "War on Terror,"* and *Humanitarianism and Suffering*. This book was completed during a fellowship from the National Endowment for the Humanities (2009–2010).

Preface and Acknowledgments

A sense of shared history is one of the main ways a people come to constitute themselves as a group or nation and to forge a collective identity and a sense of shared destiny. In times of peace and prosperity, this common past may enhance a sense of mutual purpose, instill a pride in public institutions, and fortify a civic patriotism. However, during economic and political crises, some political leaders stir up nationalist sentiments to bolster their increasingly shaky hold on power and legitimacy. Unable to effectively address deepening social and economic problems, they instead vilify an historic enemy, recall past wrongs, and seek to take advantage of the atmosphere of threat and insecurity. If armed conflict breaks out, then historical injuries may be recalled when atrocities are committed against enemy civilians, which are usually justified as reprisals necessary to ensuring the very existence of the group. Although this scenario is neither modern nor new, ethno-nationalist conflicts characterized by extensive civilian casualties became especially frequent after the end of the Cold War.

The politically instrumental use of history during an armed conflict is highly complex and selective. It is not simply a matter of fabricating outright lies, for many of the events that continue to generate a sense of grievance did really happen. As noted in this book, widespread atrocities were indeed committed against Serbs during World War II, and Hutus were cruelly subjugated by Tutsis during the colonial period in Rwanda. Although distortion of the past is widespread, the most common travesty is one of omission, wherein populist leaders neglect to mention the crimes committed by their own side or recollect them in such a way that evades accepting full responsibility. That politicians are so able to evoke historical arguments in these ways results from a prior failure of the society to engage in a full and frank encounter with past wrongdoing. In Tito's Yugoslavia, for instance, there was a deep-seated avoidance on the part of party officials to engage with the legacy of World War II, to openly

admit the crimes committed by each side, and to accept responsibility. Where a pervasive regime of denial exists, the past can serve as rich pickings for political demagogues seeking to manipulate popular sentiments.

These arguments are widely accepted by many donor governments and UN agencies, which now perceive accurate historical documentation of an armed conflict as a key dimension of creating accountability and the rule of law and as an essential part of any postconflict reconstruction program. Beyond official statements and projects, however, the process of postconflict historical reflection is long-term and occurs along many tracks and in many different venues. It may occur in photographic exhibits or avant-garde art installations, or in the performing arts, such as film or theater. Talented writers of fiction such as Guatemala's Victor Montejo or South Africa's Zakes Mda offer subjective insights into the experience of an epoch of violence and insecurity that might not otherwise be imaginable. Museums and places of remembrance can ensure that mass crimes do not slip into obscurity. Teaching critical thinking about history in schools and universities is one of the principal ways in which students come to challenge the generational transmission of past animosities. Official government apologies and programs of reparations for victims have also become increasingly familiar, if uneven, ways of addressing the past. And there are more.

Although political propaganda and nationalist mythologizing is nothing new, what was novel in the post–Cold War era was the array of institutions, from national truth commissions to international criminal tribunals, set up to investigate mass violations of international humanitarian law. In the narrow window of opportunity that existed in the 1990s, an international consensus emerged regarding the need to try war crimes, crimes against humanity, and the crime of genocide in new international criminal tribunals. The first of these was the International Criminal Tribunal for the Former Yugoslavia (ICTY) established in 1993, and the International Criminal Tribunal for Rwanda (ICTR) was created shortly thereafter in 1994. These two *ad hoc* tribunals indicted more than two hundred individuals for violations of international humanitarian law and have processed a majority of their cases, though their prosecution work is now coming to an end. The permanent International Criminal Court, with jurisdiction over war crimes, crimes against humanity, genocide, and aggression was inaugurated in 2003, and its first trials are now under way.

International criminal trials are now prime venues at which a postconflict version of history is investigated, discussed, argued over, and eventually stamped with the imprimatur of a legal judgment. Yet at least since the trials of Nazi war criminals in Nuremberg during 1945–6, commentators have been

asking whether courts ought to write an historical narrative of an armed conflict at all. This debate was reignited during the 1961 Eichmann trial in Israel and intensified during the Holocaust trials in France in the 1970s and 1980s. It took on new relevance during the wave of democratizations in Africa, Latin America, and Eastern Europe in the 1980s and 1990s. Now it is time to critically evaluate the historical accounts produced by modern international justice institutions and ask, Have international tribunals actually provided significant insights into the origins and causes of armed conflict? How have international justice institutions come to comprehend the wider social and historical context surrounding individual violations of international humanitarian law? Do the judgments produced by international criminal courts challenge self-serving lies about the past?

The research for this book was supported by fellowships from the National Endowment for the Humanities (2009–2010) and the Provost's Office of the University of Connecticut (2009) as well as by the Human Rights Institute of the University of Connecticut. My sincere thanks go to Gary S. Gladstein for his support of the Human Rights Institute and his sustained engagement with the empirical research on global human rights issues conducted by University of Connecticut faculty.

The initial impetus for this book began in 2000 with a conversation over lunch with my University of Sussex colleague, the Czech-born political scientist Zdenek Kavan. I had just completed a study of the South African Truth and Reconciliation Commission and was rehearsing the argument that, because criminal trials produced impoverished histories of conflicts, it was better for truth commissions to take over the task of writing history. Zdenek informed me, in his civil and urbane manner, that, although this argument might well apply to national criminal courts, it did not accurately describe the experience of international criminal tribunals. He suggested that I read some recent judgments of the International Criminal Tribunal for the former Yugoslavia, and after doing so, I could see his point. I then began to ponder the different approaches to historical evidence of national and international criminal trials and to speak to international prosecutors, defense attorneys, and expert witnesses, and this research project was born.

Over the past ten years, friends, colleagues, and students have continued to set me straight, and I am grateful to all of them. Being neither a lawyer nor a historian, I am either uniquely lacking in the expertise required to conduct this project or reasonably well placed to view the relationship between law and history with an independent eye. Whichever of the two, I have benefited from a great deal of counsel and assistance from generous friends and colleagues. I

especially appreciate the commentaries of those who read sections of the book: Paul Betts, Eleni Coundouriotis, Robert Donia, Dan Saxon, and Ekkehard Withopf. As usual, Saul Dubow went beyond the call, even when hard pressed for time.

At the three international criminal justice institutions included in this study, a number of staff, former staff, or defense attorneys shared their experiences of international criminal trials and offered invaluable advice on thinking through the issues, including Predrag Dojcinović, Matthew Gillett, Richard Goldstone, Michael Karnavas, Beth Lyons, Daryl Mundis, Navanethem Pillay, Nicole Samson, Paul Seils, Paul Shoup, Sue Somers, David Tolbert, Bill Tomljanovich, Pat Treanor, and Nena Tromp-Vrkić. Andrew Corin was such a rich a source of insights into the research topic that we became coresearchers, and together we developed, implemented, and analyzed the survey on questions of law and history. All staff from the ICTY, ICTR, and ICC quoted in this book have made their comments in their personal capacity, and their remarks do not necessarily represent the views of the ICTY, the ICTR, the ICC, or the United Nations.

While writing this book, I benefited immensely from discussions with University of Connecticut colleagues Jill Anderson, Kerry Bystrom, Emma Gilligan, Shareen Hertel, Rich Hiskes, Peter Kingstone, Alexandra Lahav, and Serena Parekh. I thank Dean Jeremy Paul, Anne Dailey, Michael Fischl, and Mark Janis for welcoming me into the University of Connecticut Law School community. I am grateful to the participants at talks and seminars over the years for their perceptive comments on the ideas contained in this book: the City University of New York, Law and Society Association annual conferences, New York University and New York Law School's Law and Society seminar, the New School for Social Research, Yale University, University of Connecticut Law School, University College London, and the University of Michigan human rights seminar. Colleagues outside my own institution who helped me think through the issues include Nina Bang-Jensen, Thomas Brudholm, Kamari Clarke, Jane Cowan, Thomas Cushman, Laura Dickinson, Ilana Feldman, John Hagan, Robert Hayden, Toby Kelly, Diana Tietjens Meyers, Wiktor Osiatynski, and Miriam Ticktin. I would like to make special mention of Michael Marrus and Sally Engle Merry – both senior scholars of the law whom one can aspire to emulate.

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quantitative data it produced. In adherence to the principle of individual responsibility, all errors of fact or interpretation are my own.

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Glossary

Actus reus (Law Latin, "guilty act"): the material element of a crime

Amicus curiae (Law Latin, "friend of the court"): volunteer or appointed by the court to advise on legal issues. *Amici* have appeared in international tribunals generally when the accused has opted to defend himself or herself.

ARK: Autonomous Region of the Krajina

AU: African Union

Bosniak: Bosnian Muslim

Chetniks: Serb nationalist and royalist paramilitary organization in the Balkans before and during World War II

Dolus specialis (Law Latin, "special intent"): special or specific intent

DRC: Democratic Republic of the Congo (formerly Zaire)

FPLC: Forces Patriotiques pour la Libération du Congo, or Patriotic Force for the Liberation of the Congo

FRY: Federal Republic of Yugoslavia (1992–2003)

HDZ: Hrvatska Demokratska Zajednica Bosne i Hercegovine, or Croatian Democratic Union of Bosnia and Herzegovina

HVO: Hrvatsko Vijeće Obrane, or Croatian Defense Council of Bosnia and Herzegovina

ICC: International Criminal Court

ICJ: International Court of Justice

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

JNA: Jugoslovenska Narodna Armija, or Yugoslav People's Army

LRT: Leadership Research Team of the ICTY

Mens rea (Law Latin, "guilty mind"): the state of mind the prosecution must prove that a defendant held when committing a crime

MONUC: Mission des Nations Unies en République Démocratique du Congo, or UN Mission in the Democratic Republic of the Congo

OTP: Office of the Prosecutor at the ICC, ICTR, or ICTY

Republika Srpska: Serbian Republic of Bosnia and Herzegovina

RPE: Rules of Procedure and Evidence (ICC, ICTR, ICTY)

RPF: Rwandan Patriotic Front

SDA: Stranka Demokratske Akcije, or Party of Democratic Action in Bosnia and Herzegovina

SDS: Srpska Demokratska Stranka, or Serbian Democratic Party in Bosnia and Herzegovina

SFRY: Socialist Federal Republic of Yugoslavia (1943–1992)

STA: Senior Trial Attorney in the Office of the Prosecutor at the ICC, ICTR, or ICTY

Tu quoque (Law Latin, literally "you too" defense): a defense based on the allegation that the opposing party to the conflict committed similar atrocities, often accompanied by the allegation that that party was responsible for the commencement of the said conflict.

UNICRI: UN Interregional Crime and Justice Research Institute

UNSC: UN Security Council

UPC: Union des Patriotes Congolais, or Union of Congolese Patriots

Ustashe: Pro-German state in Croatia during World War II

VJ: Vojska Jugoslavije, or Yugoslav Army (replacing JNA in 1992)

VRS: Vojska Republike Srpske, or Bosnian Serb Army

Contents

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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."[1] Observers condemned the prosecutor's excessive concern with history and the judges' failure to curtail Milošević's "interminable forays into Ottoman history, Balkans

[1] Quentin Peel, "Lessons for Prosecutors of War Crimes Trials," *Financial Times*, 13 March 2006.

ethnology, [and] World War Two Croatian fascism."[2] 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.[3]

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.[4]

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.[5] 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

[2] 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.

[3] Slavenka Drakulić, cited in Tošić (2007:89).

[4] Author interview, May 2006.

[5] 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.[6] 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.[7] 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.[8]

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

[6] 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.

[7] For a helpful discussion of Arendt's thinking on human rights, see Serena Parekh (2004).

[8] Arendt (1965:19).

(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"[9]... 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.[10] 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

[9] Here Arendt is quoting the words of Robert Storey, executive trial counsel at Nuremberg.

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