JUDGING WARS, CREATING TRUTHS

• JARNA PETMAN •

Slobodan Milosevic began his defence at The Hague by characterizing the trial as a sham: 'I wish to say that the entire world knows that this is a political process. So we are not here speaking about legal procedures that evolve into political ones. This is a political process to begin with, and as far as what I would prefer, I would prefer the truth.'

Indeed, it is the promise of law to deliver not only justice but also a form of truth. So, as war-crimes trials are set up, they are meant to offer the wounded community retribution and vindication, punishment and justice, restoration and deterrence, and, importantly, a final and authoritative account of the truth of events. The purpose of such trials is as much to enlighten the innocents of today as it is to punish the criminals of yesterday. As a pedagogical event, a war crimes trial certainly resuscitates history transmuting it into a judicial present by telling a compelling story of human suffering. As such, it is a work of memory as well as law.

Justice and history are rarely in harmony during war crimes trials, however, for history consists of a multitude of complex and deeply ambiguous narratives. While historiography has long ago accepted the idea of complexity of truths, in trials there is, by necessity, an orientation towards finality, towards one single account of what 'truly' took place. This establishes a tension between producing history and maintaining judicial propriety. While history is about remembering, law must also be about forgetting—as a war crimes trial strives towards resolving and vindicating a single historical description, navigating through the various versions of history with purpose, it must discriminate between 'relevant evidence' and 'irrelevant' or 'inadmissible' histories. Moreover, in any such trial it cannot be admitted that the history being examined is in fact the history of war crimes, one in which these crimes have been and continue to be committed every day; instead, the history of atrocities on trial must be seen as an abnormal and uniquely horrid series of disparate events detached from the progress of history itself. And so, although war crimes trials are deeply situated in history, they will have to seek to transcend it by erasing the wider context from view. A trial that undoubtedly is an act in commemoration is also an attempt at closure and, accordingly, an invitation to suppress other crimes of history.

Think of the first war crimes trial. As the Allied Powers signed the London Charter on August 8th, 1945, establishing an international tribunal to try the major German war criminals in Nuremberg, on that same day, the United States dropped its second atomic bomb on Japan, devastating the city of Nagasaki and immediately killing at least 70,000 of its inhabitants, almost all of whom were civilian (two days earlier the first bomb had destroyed Hiroshima). Today, of course, we celebrate Nuremberg as the triumph of universal humanism, of the final subordination of violence to law. It declared acts of criminality during war intolerable, and condemned the wholesale destruction of civilian populations as a crime against humanity. Because such crimes were seen to transcend territory, time and nation, their condemnation was to be applied universally, paying no regard to rank, affiliation or nationality. And yet, as the victorious Allies set to try their German and Japanese adversaries, it was obvious that they would never subject their own

war-time behaviour to these same laws. They never had to, for the authorized historical account ascribed every atrocity of the Second World War to Axis aggression. The 250,000 killed by the acute effects of the atomic bombings in Japan and the 600,000 civilian deaths in the carpet bombings of Germany were but a consequence of that original aggression. Indeed, as war-crimes trials underline the acts to be condemned, they by the same token tell us what acts do *not* belong in this category. And so, quite like Nuremberg strove to tell us that Nagasaki was not a war crime, the trial of Saddam Hussein, for instance, sought to suggest that whatever acts the occupying troops committed in, say, Abu Ghraib or Haditha, they were, under the circumstances, in compliance with laws of war.

To be sure, trials of war crimes tend to occur where defeat and criminality coincide. In trying to narrate a historical episode in a way in which good and evil are clearly identified and distinguished, these trials very often come to associate the prosecuting states with absolute good just as surely as the accused becomes synonymous with ultimate evil. When Milosevic was brought to The Hague to be tried, he came in as a man whose visage had appeared on the cover of Newsweek, framed by raging hell fires and labelled as 'The Face of Evil'. The former British Prime Minister Margaret Thatcher had called him the 'Butcher of Belgrade', emphasizing that, in the end, there were 'no humanitarian wars', for 'it is the men of evil, not our troops or pilots, who bear the guilt'. Did anyone at The Hague sincerely entertain any doubt as to the willingness of the Tribunal to underwrite this view?

The moral certainty about the defendant's unsurpassable evil and the rectitude of the trial itself may, however, give way to a debilitating array of jurisprudential doubts, ethical quandaries and emotional ambivalence, when the dominant narrative is challenged by an alternative history—a bastard version of 'truth'—that seeks to bring in the wider context. Trials, of course, are particularly well suited to the disclosure of dissenting voices, for there is a commitment in trial proceedings to an 'equality of arms': in an optimal case, prosecution and defence are afforded equivalent legal expertise and allocated equal time for their respective arguments and histories. Trials thus form a public forum for voices that have been pushed to the margins of the official collective memory. When, for example, Klaus Barbie was put on trial and eventually convicted of having committed crimes against humanity in 1944 in occupied France, his savvy, insolent counsel Jacques Vergès managed to taint the authorized historical lessons by recounting stories of not only French collaboration with the Nazis in occupied France but also, and more importantly, of torture and crimes against humanity carried out by the French troops in occupied Algeria. By suggesting piercing analogies between Nazi rule in France and the French occupation of Algeria, Vergès converted the proceedings into a Third World anti-colonialist attack on French imperialism and, accordingly, into a diatribe against the hypocrisies of the French nation.

The assertion of potentially embarrassing political truths was also the intended defence strategy of Saddam Hussein as he sought to expose the collusion of Western powers in his rule. Milosevic, too, turned his accusing finger towards the West, poking at the Security Council's political patronage of the Tribunal and indicting the NATO states for their alleged complicity in the destruction of Bosnia-Herzegovina, for the fickleness of their support, and for their eventual acts of aggression against Serbia. Throughout the trial, his sole aim seemed to be to offer his own, alternative version of the 'truth' by bringing back

into the proceedings the complex structural causalities of the vexed history of the Balkans as a pawn in the Great Power politics that had so carefully been left out when the material and the temporal jurisdiction of the Tribunal had been framed. And now it is Radovan Karadzic's turn. There is no reason to be surprised by his chosen strategy that has been described by his defence counsel as one of 'fighting for history'.

War-crimes trials are acts of remembrance, and that of forgetting. Histories may be re-ordered through trials. Memories may be erased in them. Whatever 'truth' will be produced by them will not be ideologically innocent. As well-intentioned and transformative as war-crimes trials may be, they are never free of implications for the accuser. It is important that we are aware of this, aware of the deeply political nature of the process; it is only then that we can reach for more consistent and fair procedures. While war crimes trials are judgments on history, history will ultimately judge our conduct of these trials.

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MEANDERING ALONG THE ICL PATH
WHERE ARE WE HEADED?

• KIRSTEN J. FISHER •

International criminal law (ICL) is still a fresh adventure. In an attempt to respond to atrocities that 'shock the conscience of humanity' (United Nations 1998), there were starts and stops and stumbles. The project of holding individuals accountable developed slowly, then came to a halt before regaining momentum; it faced charges of partiality and injustice, but is seen by many as a bright path in a fight to end impunity for perpetrators of pervasive and purposeful mass political violence. The current main debates concern the right institutions by which to administer ICL, including whether any judicial mechanism is necessary, or even reasonable, for transitional justice (see Tutu 1999). A major challenge is in developing an institution that can balance the ownership needs of a community with the need for a certain level of external evaluation of cultural practices and values, and the cessation of impunity for local powers.

Serious problems that overwhelmed the effectiveness of the first 'international' judicial mechanisms—post-Second World War tribunals, Nuremberg and Tokyo—still burden, to differing degrees, subsequent attempts at post-atrocity response. These are problems of authority, selectiveness and legitimacy, and with the validity of *ex post facto* or retrospective law. Questions of authority point to the legal basis for the judicial institution's existence. Selectiveness in prosecution is the perceived or very real choice by the court's agents to prosecute some perpetrators and not others. The application of *ex post facto* laws involves