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Stephan Landsman
DePaul University

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THOSE WHO REMEMBER THE PAST MAY NOT BE CONDEMNED TO REPEAT IT*

Stephan Landsman†

STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS. By *Gary Jonathan Bass*. Princeton: Princeton University Press. 2000. Pp. 402. $29.95.

THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST. By *Lawrence Douglas*. New Haven: Yale University Press. 2001. Pp. xiii, 318. $35.

FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR. By *Richard J. Goldstone*. New Haven: Yale University Press. 2000. Pp. xxiii, 152. $18.50.

CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE. By *Geoffrey Robertson*. New York: The New Press. 2000. Pp. xxxiv, 554. $30.

INTRODUCTION

In The Hague, Slobodan Milosevic is on trial for crimes committed in Bosnia, Kosovo and Croatia;[1] in Arusha, Tanzania, Jean Paul Akayasu, a Rwandan bourgmestre, was convicted of genocide;[2] in London, Augusto Pinochet was detained and adjudged amenable to an arrest warrant issued by a Spanish magistrate for acts of torture

* This title refers to the famous observation of George Santayana, "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 1 THE LIFE OF REASON (1905-06) *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 703 (15th ed. 1980).

† Robert A. Clifford Professor of Tort Law and Social Policy, DePaul University, College of Law. B.A. 1969, Kenyon; J.D. 1972, Harvard. — Ed.

1. *See* Suzanne Daley, *Milosevic Faces Single Trial Asked by Hague Prosecution*, N.Y. TIMES, Feb. 2, 2002, at A4.

2. *See* Judgment, Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998, International Criminal Tribunal for Rwanda), *available at* http://222.un.org/ictr/english/judgments/akayesu.html (a Rwandan bourgmestre is the elected leader of a commune something akin to the mayor of a city).

carried out in Chile;[3] in Belgium, a Hutu Roman Catholic former mother superior was convicted of complicity in the Rwandan genocide;[4] and in Rome a treaty was signed commencing the process that will result in the creation of the International Criminal Court ("ICC").[5] All these events underscore the startling growth of efforts to establish a worldwide criminal process capable of punishing heinous crimes ranging from genocide to grave breaches of the Geneva Conventions. Though the pace of change has been dramatic over the past few years, the forces driving it have been building up for at least half a century.

Each of the four books under review is, in one way or another, designed to address the process of transition from a regime of strict national sovereignty and local prosecution of criminal acts to an international one in which major abuses can and will be punished in courts around the world. Two of these volumes, Gary Bass's, *Stay the Hand of Vengeance*, and Lawrence Douglas's, *The Memory of Judgment*, provide excellent scholarly analyses of various historical aspects of the growth of international criminal prosecution. A third, Justice Richard Goldstone's, *For Humanity*, provides the recollections of one of the architects of transformation about his work as chief prosecutor for the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[6] and the International Criminal Tribunal for Rwanda ("ICTR").[7] The fourth book, Geoffrey Robertson's, *Crimes Against Humanity*, is far weaker than the others, and presents an idiosyncratic and polemical assessment of some of the matters addressed in the other volumes. Part I of this Review examines some of the critical events that have contributed to the current upsurge in international criminal prosecutions. Then each of the four books is discussed. The Review concludes with two suggestions, one a potentially useful means of explaining why change has taken place, the other an exploration of the role of truth commissions in the prosecutorial effort.

I. THE PAST AS PROLOGUE — TRACING THE UPSURGE IN INTERNATIONAL CRIMINAL PROSECUTIONS

While precedent-establishing international prosecution of grave misconduct had to await the conclusion of the Second World War,

3. *See* ROBERTSON, pp. 388-98.

4. *See* Marlise Simons, *Mother Superior Guilty in Rwandan Killings*, N.Y. TIMES, June 9, 2001, at A4.

5. *See* GOLDSTONE, pp. 120-38.

6. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/Res/827 (1993) (approving the Yugoslavia Tribunal).

7. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/Res/955 (1994) (approving the Rwanda Tribunal).

there were rumblings in Europe about the need for some international mechanism to punish the serious misdeeds of military leaders and their minions a good deal earlier. In 1815, there were discussions about prosecuting Napoleon in response to his efforts to subjugate all of Europe by force of arms.[8] Eventually, the British concluded that such a trial was not worthwhile, although several of Bonaparte's most famous subordinates, Michel Ney and Charles de la Bèdoyére, were tried and convicted in French courts.[9]

The idea of using legal prosecution to punish grave misconduct during armed conflicts was revived during the First World War in response to two very different problems. The first of these was the Turkish program carried out during 1915 to murder the Armenian minority within its borders.[10] The second was the allegedly unlawful tactics adopted by Kaiser Wilhelm II and his generals in their efforts to secure a German victory over the Allied forces arrayed against them.[11] The British were the chief proponents of criminal prosecutions in both cases.

A. *Armenians and Turks*

After the Allied victory over the Ottoman Empire in 1918, Britain pressed the newly installed Turkish government to prosecute, while His Majesty's Government moved to incarcerate those Turkish leaders deemed responsible for the slaughter of as many as 1,000,000 Armenians in 1915. This British effort was fueled by strong domestic antipathy toward the Muslim Turks for their unspeakable barbarity toward the Armenian Christians. A large number of Turkish leaders were seized, but the criminal process bogged down both because of proof problems and concerns over the fairness of the proceedings. As time dragged on, prosecutorial momentum was lost. Eventually, the British dramatically reduced the size of their occupation force in the Ottoman Empire. This had the effect of reducing British authority and leverage with respect to prosecutions. A group of ardent Turkish Nationalists (the "Young Turks"), led by Mustafa Kemal Atatürk, seized on the issue of prosecutions as one of several grievances warranting rebellion against the post-war Turkish regime. During the ensuing civil war, the Nationalists took British hostages. Rather than risk the hostages' lives or commit British troops to combat with the Nationalists, the British government decided to abandon its insistence upon prose-

8. *See* BASS, pp. 37-57.

9. *See id.* at 39.

10. My discussion of Turkey's genocidal attack on the Armenians and its legal aftermath is based on BASS, pp. 106-46.

11. My discussion of the Allied efforts to prosecute Wilhelm II and alleged German war criminals is based on BASS, pp. 58-105.

cution. The delay in mounting trials, along with Turkish backlash against British intervention and a lack of complete British military dominance, all worked to undermine legal action against what may have been the first twentieth century genocide.

B. *Pursuing the Kaiser*

The immense blood letting on the Western Front, the wide-ranging use of submarine warfare, the Zeppelin attacks from the air on civilian targets, the use of poison gas, and disregard for the neutral status of a number of nations all fed an Allied clamoring for the prosecution of the leaders of the German war effort, most particularly the German head of state, Kaiser Wilhelm II. The Kaiser, however, fled Germany at the end of the war and took refuge in the Netherlands, which granted him asylum. The British and French were outraged and demanded that Wilhelm be turned over to an international tribunal for prosecution. These demands were resisted not only by Germany and the Netherlands, but also by the United States, which proposed an international commission of inquiry rather than a trial. In the end, the Kaiser was not prosecuted. Instead, Germany agreed to a small number of war crimes trials to be held before the German Supreme Court in Leipzig. These cases were a fiasco — either the accused were acquitted or given incredibly lenient sentences. Since the Allies had not occupied Germany at the end of the war, they had no recourse short of invasion. This choice proved unpalatable, and there the question of prosecution ended, but not before the experience soured a generation of British officials (including Winston Churchill) on international prosecutions and embittered Germans not only against the Allies, but against the newly established Weimar Republic as well.

C. *Nuremberg*

Thus, it was in a historical context of failure and frustration that debate about prosecution arose during World War II. As the tide of battle turned against the Nazis, discussions began about post-war punishment of war criminals. In 1943, representatives of Great Britain, the Union of Soviet Socialist Republics ("USSR"), and the United States met in Moscow and declared:

> [T]hose German officers and men and members of the Nazi party . . . who have been responsible for . . . atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. The above declaration is without prejudice to the case of the major war criminals whose offenses have no par-

> ticular geographical localization and who will be punished by the joint decision of the governments of the allies.[12]

While this declaration did not settle precisely how war criminals would be dealt with, it did contemplate prosecution at the scene of the crime for lesser criminals as well as some as yet unspecified process for the newly minted category of "major war criminals."

By mid-1944, the end of the war was in sight and the debate about the handling of war criminals intensified. In light of their World War I experience the British, particularly Churchill, pressed for summary execution of major war criminals. Although some factions of the American government were sympathetic to this idea, others (centered around the Secretary of War, Henry Stimson) vigorously opposed any solution that did not " 'embody . . . at least the rudimentary aspects of the [American] Bill of Rights, namely notification of the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his own defense.' "[13] Surprisingly, even Stalin opposed the British on summary executions, declaring " '[t]here must be no execution without trial otherwise the world would say we were afraid to try them.' "[14] What Stalin may have had in mind, however, was not American-style trials but "show" trials of the sort he stage-managed in Moscow during the 1930s[15] and the Soviets used in Kharkov in December 1943 to convict three Germans and a Soviet accused of atrocities.[16]

After long and difficult negotiations, the American approach was adopted and the Allies agreed, in the so-called London Agreement and Charter, to create an International Military Tribunal ("IMT") to try leading Nazi war criminals.[17] Although the tribunal bore the name "Military," it was not designed or intended as a court martial but rather as a proceeding with the fundamental attributes of civilian criminal justice.[18] The first (and only) trial to be conducted by the IMT took place in Nuremberg, Germany, beginning on November 20, 1945. This trial had two principal purposes. The first was the traditional one

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12. Moscow Declaration of Nov. 1, 1943, *reproduced in* EUGENE DAVIDSON, THE TRIAL OF THE GERMANS 4-5 (1966).

13. Memorandum from Henry Stimson to John McCloy, Assistant Secretary of War (Sept. 9, 1944) *quoted in* ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 54 (1983).

14. Letter from Winston Churchill to Franklin D. Roosevelt (Oct. 22, 1944) (detailing conversation Churchill had with Stalin) *quoted in* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 31 (1992).

15. For a powerful description and analysis of the Moscow Show Trials, see ROBERT CONQUEST, THE GREAT TERROR (1973).

16. *See* WHITNEY R. HARRIS, TYRANNY ON TRIAL 6 (1999).

17. The Charter of the International Military Tribunal is reproduced as Appendix A in TAYLOR, *supra* note 14, at 645-53.

18. *See* JOSEPH E. PERSICO, NUREMBERG — INFAMY ON TRIAL 464-65 n.34 (1994).

of punishing top Nazi leaders for the crimes they had personally committed during the Third Reich. The second was something quite different. It had little to do with the defendants at all — the goal was to create an indelible record of Nazi tyranny from 1933 until Germany's defeat in 1945. As Secretary of War Stimson described this objective, the trial was to be used as a "way of making a record of the Nazi system of terrorism and the effort of the Allies to terminate the system and prevent its recurrence."[19] There were a number of motives behind this second objective. Churchill, Roosevelt, and other Western leaders had been obliged, before the start of World War II, to deal with revisionist claims about the *First* World War. In the United States, such revisionism reinforced a tendency toward isolationism and in Britain, an inclination toward appeasement. There appeared to be a feeling among key leaders that such problems should never be allowed to arise with respect to the Second World War. As Judge Samuel Rosenman, a Roosevelt confidant, said of his leader:

> He was determined that the question of Hitler's guilt — and the guilt of his gangsters — must not be left open for future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents . . . In short, there must never be any question anywhere by anyone about who was responsible for the war and for the uncivilized war crimes.[20]

Similar sentiments were echoed by members of Congress and the American Chief IMT Prosecutor, Supreme Court Justice Robert Jackson who declared:

> Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.[21]

There were other reasons as well for the Allied desire that Nuremberg document the history of the Nazi Reich. Generals Eisenhower, Bradley, and Patton all witnessed firsthand the horrors of the Nazi concentration camps. They ordered their troops to visit the camps and directed that German civilians be compelled to go as well. They believed there should be as many witnesses as possible to the reality of the Nazis' crimes. The big picture of Nazi criminality was also needed to help establish a predicate to punish not only the Nazi hierarchy, but the tens of thousands of Hitler's followers who also commit-

19. H.L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR (1947), *quoted in* 1 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 31 (1999).

20. SAMUEL L. ROSENMAN, WORKING WITH ROOSEVELT 518-19 (1952), *quoted in* WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG 25 (1970).

21. Report from Robert Jackson to Harry S. Truman (June 7, 1945), *quoted in* TAYLOR, *supra* note 14, at 54.

ted serious crimes. A stirring and complete record might serve as a substitute for painstaking fact-finding in each case. Such a record could also serve a number of political goals, including homefront justification of the costly war effort and encouragement of Soviet/American cooperation in the tense post-war period.

Pursuing the full historical story while at the same time prosecuting individual criminals is an immensely costly, time-consuming, and difficult task. It requires the tracing of a whole regime's plans, intentions, and actions as well as those of the accused in the dock. Focusing on the words and deeds of the defendants alone will not do. In the Nazis' case, this meant that the life of Adolf Hitler became a central part of the trial, as did the activities of the Gestapo, Foreign Ministry, Wehrmacht and a host of other government entities.

The conditions at Nuremberg were uniquely well suited to the preparation and presentation of an enormous didactic case.[22] Almost every top Nazi official still living was available for interrogation and prosecution. Both because of the Nazis' own predilections and the completeness of the Allied victory, the triumphant governments were in possession of an unprecedented collection of meticulous records presenting, in the Nazis' own words, the nature and scope of their crimes. This treasure trove was augmented by a host of films and photographs, making possible a graphic presentation of Nazi atrocities. Because the Germans had unconditionally surrendered, there was no government in place to resist anything the Allies chose to do at Nuremberg. Germany was under firm Allied military control, with no room left for the sort of organized resistance that arose in Germany at the time of the Leipzig trials or in Turkey when the British sought the prosecution of those who massacred the Armenians. The United States, the most powerful and wealthy country in the world, committed itself fully to the Nuremberg prosecution. America made virtually unlimited resources available for the scouring of records, preparation of films, interrogation of witnesses and presentation of a vast historical case. Both the American and British trial teams were staffed with gifted advocates, beginning with the enormously eloquent and energetic Justice Robert Jackson. Finally, there was no effective defense bar in place to resist the puissant prosecutorial teams. The German lawyers asked to represent the defendants had virtually no resources and had, themselves, just lived through twelve years of numbing Nazi tyranny.

To pursue the two goals yoked together at Nuremberg, the prosecuting governments agreed to use an essentially adversarial process that relied on the parties to generate the evidence and conduct the

22. For a description of the background to, and operation of, the Nuremberg Tribunal, see TAYLOR, *supra* note 14. The following assessment of Nuremberg is based, primarily on Taylor's outstanding work.

proceedings. This approach served the victors well, allowing the American government to use its vast resources to prepare the prosecution case while leaving the defendants more or less on their own. The defendants were forced to do double duty as individuals accused of specific crimes *and as representatives* of an evil regime deserving of condemnation. The trial shifted from a focus on personal responsibility to a recitation of enormous and organized criminality. It grew into a mammoth nine-month undertaking that generated more than forty-two volumes of evidence and a series of stunning film presentations. To make its lasting historical record, the Nuremberg prosecution focused not on witnesses but on Nazi documents, a virtually unimpeachable source. Traditional rules of evidence and procedure were abandoned so that the complex story could be told unimpeded by traditional constraints regarding relevance, hearsay, and authentication.

Nuremberg is the seminal event in post-World War II international criminal justice. It is the precedent upon which all ensuing developments are based. In large measure, this is due to the widely shared perception that Nuremberg worked. The Nazis convicted at Nuremberg clearly deserved condemnation and the didactic record the Allies produced has withstood the test of time. This has led more recent prosecutors and legislators to see Nuremberg as an appropriate model for emulation. Nuremberg's success bolstered the belief that vast narratives of governmental bestiality can be presented in sprawling trials, with the interests of individual criminal defendants properly respected. In Nuremberg's wake, it has become acceptable to assume that both didactic and individual goals can be met in the same proceeding.

What may not be clear from a cursory look at Nuremberg is that it succeeded because of the incredibly advantageous conditions in which the trial was held, and due to the outstanding fairness and care of the judges, most particularly the IMT's President, Sir Geoffrey Lawrence. Many of the safeguards that ensure the integrity of adversary proceedings were abandoned at Nuremberg. The defendants were provided inexperienced and underfunded counsel. The protections afforded by a host of evidence rules were put aside. There was no arrangement for appellate review and there was intense pressure for a speedy resolution of the case. The main targets of the prosecution were not the defendants, but rather such monsters as Hitler, Himmler and Goebbels. The men in the dock were, frequently, little more than stand-ins. It is truly remarkable that the Nuremberg trial succeeded in doing and appearing to do justice, rather than getting sidetracked by prejudice and the temptation to treat the accused as fall guys. The Tribunal displayed a nuanced appreciation of the individual defendants' positions when it acquitted three of them and sentenced a number of others relatively leniently. Despite the Soviet view that indict-

ment was tantamount to conviction and that conviction always warranted death, the Tribunal majority differentiated and showed careful judgment.

Several other aspects of the work of the IMT are worth noting. The didactic case prepared and presented, in large measure, by the American prosecutors was not primarily focused on the Holocaust. Rather, it conceived of military aggression as the Nazis' chief crime. The Americans worked to show unlawful aggression by producing thousands of German government documents — so many in fact that Lord Justice Lawrence eventually imposed limitations to ensure that the Tribunal and defense would not be overwhelmed. At that moment, the Americans, sensing a loss of momentum and credibility, turned from their documentary tale of aggression to proof of atrocity and, inadvertently, the Holocaust. This "new" evidence, most particularly a film entitled *Nazi Concentration Camps*, was riveting, restored prosecutorial momentum, and regained the moral high ground for the prosecution. The Americans would return to atrocity evidence to revive flagging fortunes several more times while the French and Soviet prosecution teams would make such matters the core issue of their cases. Nuremberg displayed to the world and prosecutors just how affecting and persuasive Holocaust evidence could be and thereby bound future trials to such materials. In presenting an enormous and horror-filled case, Nuremberg raised the stakes of international criminal prosecutions. Any failure at Nuremberg would have been perceived as a devastating blow, discrediting the Allies' view of history and their claims of Nazi barbarity. The two-track approach resulted in a high-stakes gamble.

D. *Eichmann*

Nuremberg was the bedrock upon which was built the next great international[23] criminal prosecution — the 1960 trial before an Israeli court of the Nazi architect of the Western European Holocaust, Adolf Eichmann.[24] Nuremberg served as precedent that Israel's prosecutor, Gideon Hausner, viewed as essential. He stated that in preparation for the trial he "consumed [the forty-two-volume record of Nuremberg] at the rate of a volume per day."[25] The whole Nuremberg record was eventually placed in evidence at Eichmann's trial.

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23. "International" is here used in the sense of a trial taking place in one nation but considering events in another.

24. For a description of how Eichmann was kidnapped from Argentina and brought before the court in Jerusalem, see ISSER HAREL, THE HOUSE ON GARIBALDI STREET (1975).

25. GIDEON HAUSNER, JUSTICE IN JERUSALEM 290 (1966). Unless otherwise noted, my analysis of the *Eichmann* case will be based on the factual material set forth in Hausner's work.

Like Nuremberg, *Eichmann* was conceived not simply as a criminal prosecution but as an opportunity for a didactic proceeding — one that could present the entire story of the Jewish Holocaust, which Nuremberg itself only incompletely addressed. David Ben Gurion, the Israeli Prime Minister, in a letter to the World Zionist Organization, wrote:

> The Holocaust that the Nazis wreaked on the Jewish people is not like other atrocities that the Nazis committed in the world, but a unique episode that has no equal, an attempt to totally destroy the Jewish people, which Hitler and his helpers did not dare try with any other nation. It is the particular duty of the State of Israel, the Jewish people's only sovereign entity, to recount this episode in its full magnitude and horror; without ignoring the Nazi regime's other crimes against humanity — but not as one of these crimes, rather as the only crime that has no parallel in human history.[26]

Hausner shared these views and wrote in his book on the case:

> There was, in fact, much more to it than a desire for a complete record. I wanted our people at home to know as many of the facts of the great disaster as could be legitimately conveyed through these proceedings. It was imperative for the stability of our youth that they should learn the full truth of what had happened, for only through knowledge could understanding and reconciliation with the past be achieved. Our younger generation, absorbed as it was in the building and guarding of the new state, had far too little insight into events which ought to be a pivotal point in its education. The teenagers of Israel, most of them born into statehood or during the struggle for it, had no real knowledge, and therefore no appreciation, of the way in which their own flesh and blood had perished. There was here a breach between the generations, a possible source of an abhorrence of the nation's yesterday. This could be removed only by factual enlightenment.[27]

By committing the *Eichmann* prosecution to telling the full story of the Jewish Holocaust, the Israelis embraced the two-track strategy of Nuremberg and expanded its reach by focusing on a lower level (although still significant) official brought to trial long after the war ended. The Israelis' motivations included a desire to challenge the impression that Europe's Jews had gone meekly to their slaughter. To this end, the prosecution sought to emphasize the heroism of the Jewish victims. Rachel Auerbach of Yad Vashem (the official Holocaust memorial institution of Israel) served as an adviser to the prosecution team. She outlined the sorts of witnesses who ought to be called including, most particularly, those who could describe "deeds of

26. *Quoted in* TOM SEGEV, THE SEVENTH MILLION 329-30 (Haim Watzman trans., 1993).

27. HAUSNER, *supra* note 25, at 291-92.

self-sacrifice, resistance, rebellion, revenge, and flight."[28] Auerbach's approach was adopted.

Although the *Eichmann* prosecution did not have all the advantages that the Allies had at Nuremberg, the Israelis still found themselves in a situation that might facilitate a big didactic trial. The defendant, while not a leading Nazi, was a significant functionary in the ministry that had arranged the deaths of millions of Jews. He was a criminal of the sort who, doubtless, warranted the most severe punishment. Eichmann's work had generated a vast body of incriminating evidence. There was no doubt about his identity or his guilt. Documents and witnesses were available in abundance to prove his connection to murderous operations on an unimaginable scale. Moreover, Eichmann, like his more illustrious Nuremberg Nazi brethren, was a man with no real political protectors. He was not being tried on his home turf and lacked connections with any nation willing to act on his behalf or protect the ideas with which he was associated. He faced prosecution by a modern nation-state with relatively large resources available to prepare its case. Eventually, Eichmann would be defended by one of the same lawyers, Dr. Robert Servatius, who handled the cases of a number of Nuremberg defendants. Servatius had absorbed the quiescent and cooperative style of other Nuremberg defense counsel. He did not set out to challenge the Holocaust or discredit its victims. Moreover, he was a continental lawyer unschooled in the adversarial art of cross-examination.

Eichmann's trial conformed to the Nuremberg pattern. It relied on precisely the same sort of adversarial approach utilized by the Allies in 1945. The Israeli trial court heard evidence that ranged over the entirety of the Holocaust, from early anti-Semitic activities like the Nuremberg race laws and Kristallnacht, to the murderous mass killings in the East by the mobile killing units (Einsatzgruppen) and the operations of the death camps at Auschwitz, Sobibor, Treblinka and the rest. The prosecution incorporated this, and a great deal more, in its vast fifteen count indictment, diligently pursuing two tracks. The first focused on Eichmann. The second encompassed an enormous flood of Holocaust materials that had nothing to do with the defendant in the protective glass booth. Weeks were spent on the Einsatzgruppen and Operation Reinhard (the organized murder of Poland's Jews). Eichmann was not demonstrably connected to either of these criminal activities. Still, the prosecution plowed on. In the end, for one middle rank Nazi official, there were 1400 documentary exhibits (some of them stretching to many thousands of pages), 121 prosecution witnesses and ten months of hearings. The witnesses were a new addition to the two-track didactic criminal prosecution. At

28. SEGEV, *supra* note 26, at 339.

Nuremberg, prosecutors called only thirty-three live witnesses. The *Eichmann* court adopted a virtually identical approach to evidentiary questions as had its forebear. Relevance restrictions were few; hearsay flooded in; and authentication requirements were loosened.

As had been the case at Nuremberg, the Jerusalem trial generally came to be viewed as a legitimate exercise of legal authority, as well as the producer of a compelling narrative about the Holocaust. Again, however, a dangerously expanded and vulnerable process was saved from potential problems by the intervention of a particularly vigorous and fair-minded judge, Supreme Court Justice Moshe Landau, who worked tirelessly to keep the proceedings on track. That his achievement was both difficult and significant is suggested by the abject failure of one of his colleagues on the *Eichmann* bench, Benjamin Halevi, to manage effectively an earlier Holocaust-related matter involving a libel accusation regarding a former Hungarian Jewish official.[29] Part of the reason for Landau's sedulous care may have been the fact that Eichmann had been illegally kidnapped from his hideout in Argentina by Israeli intelligence agents and, at the beginning of the case, the world community was highly critical of Israel's action. For whatever reason, Landau vigorously policed the proceeding, managing to keep it from tilting into damaging excess. At the end of the case, the judges, led by Landau, drafted a judgment that refused to treat Eichmann as the superhuman monster the prosecution had sought to depict and weighed the evidence presented in an evenhanded and persuasive manner.

The *Eichmann* case did more than simply mirror Nuremberg. It redefined the focus of such cases and incorporated a broader array of evidence (most particularly that from victim witnesses). The atrocity materials that had inadvertently become so important at Nuremberg were the conscious heart and soul of the proceedings in Jerusalem. The Holocaust's evidentiary power was grasped and used not simply to resolve prosecutorial trial problems, but as the *raison d'être* of the case. To prove the Holocaust, the Nuremberg documents and films were augmented with the testimony of scores of witnesses. These witnesses presented a number of problems. Some were so emotionally or psychologically damaged as to prove incapable of testifying competently. One fainted on the witness stand and could not continue.[30] Another was assailed by health problems before testifying and failed to respond to court directions once on the witness stand.[31] Some witnesses appeared to use the process to attempt to strike questionable

29. *See* DOUGLAS, p. 156.

30. 3 THE TRIAL OF ADOLF EICHMANN — RECORD OF PROCEEDINGS 1237 (Eng. Trans. 1993) [hereinafter EICHMANN RECORD] (testimony of Yehiel Dinur).

31. 1 EICHMANN RECORD, *supra* note 30, at 499, 517-18 (testimony of Rivka Yoselewska).

blows at Eichmann.[32] Others seemed out to advance their political careers[33] or literary ambitions.[34] All faced difficulties related to the, at least, fifteen year hiatus from the time of the Holocaust to the beginning of the trial.

The *Eichmann* prosecution's vast two-track approach had a distorting effect on the trial. At least one third of the proof (all that concerning the Einsatzgruppen, Operation Reinhard in Poland, the operation of specific concentration camps and the rise of pre-war German anti-Semitism) had nothing to do with Eichmann at all. This meant that something like 40 of the 121 prosecution witnesses were literally irrelevant to the case against the defendant. When documentary evidence, films, and photographs are considered, perhaps as much as half the prosecution's case was irrelevant. Not only was much of the proof irrelevant, the prosecution's conception of Eichmann was inflammatory and distorted. The prosecution chose to argue that Eichmann was second only to Hitler in responsibility for the Holocaust. This claim was patently ridiculous. Eichmann had been a mid-level functionary. Ranged above him were the great monsters of the Third Reich including Himmler, Heydrich, Bormann, Frank, Höss and the rest. Eichmann was a murderous bureaucrat, not a blood-spattered monster.[35]

The stakes the Israelis risked in trying Eichmann in the manner they did were enormous. By abducting the defendant from Argentina, Israel had challenged the world political order. If Eichmann were exonerated, or Israel shown to be a lawless state willing to indulge in a fraudulent show trial, the consequence would have been international ostracism. Moreover, if Eichmann were not persuasively proven guilty, the entire Israeli effort to have the Holocaust taken more seriously, both at home and abroad, would have been profoundly damaged. Mounting this enormous two-track prosecution meant risk of the most substantial sort, as well as enormous financial expense.

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32. 1 EICHMANN RECORD, *supra* note 30, at 455-66 (testimony of Abba Kovner sprinkled with improbable and emotion-laden material aimed at damning Eichmann).

33. 3 EICHMANN RECORD, *supra* note 30, at 1123-27 (testimony of Zvi Zimmerman, a member of Parliament, found to have virtually no relevance to the case).

34. 2 EICHMANN RECORD, *supra* note 30, at 709 (testimony of American judge Michael Musmanno described by defense counsel as "a publicist traveling from place to place gathering material with a view to publication").

35. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM — A REPORT ON THE BANALITY OF EVIL (1963). Arendt's account of the Eichmann trial, however, has come under serious criticism. *See* JACOB ROBINSON, AND THE CROOKED SHALL BE MADE STRAIGHT (1965).

E. *Demjanjuk*

The Nuremberg two-track approach was not abandoned after *Eichmann*. Rather, it was refined and expanded upon when Israel returned to the question of Holocaust criminality in the trial of John Demjanjuk in 1987.[36] Demjanjuk was accused of having been Ivan "Grozny,"[37] the particularly vicious operator of the gas chamber apparatus at the Treblinka death camp in Poland during the Second World War. After lengthy denaturalization and extradition proceedings in the United States (where Demjanjuk had been living for many years), the defendant was extradited to Israel for trial. Both the United States and Israel appeared hopeful that Demjanjuk's prosecution and conviction would usher in a new era in which Nazi murderers would finally (more than thirty-five years after the end of World War II) be punished for their crimes.[38] This increased desire to see Holocaust criminals punished was a reflection of changing attitudes in both the United States and Israel.[39] The attractiveness of prosecution was enhanced by the fact that the passage of time was rapidly thinning the ranks of Holocaust survivors who could identify criminals and provide live testimony at their trials. As Michael Shaked, one of the Israeli prosecutors, declared in his opening remarks:

> There can be no doubt, this may be one of the last trials where it is possible to bring to the stand witnesses who can say, "We were there, we saw what happened with our own eyes. We can testify as to what happened."[40]

The *Demjanjuk* prosecution was also, at least in part, motivated by an Israeli desire to distract attention from the Palestinian *Intifada* then raging, by re-presenting the story of the Jews' suffering at the hands of the Nazis. With all this in mind, it is not hard to see why the two-track grand narrative approach pioneered at Nuremberg and refined in *Eichmann* was again deployed.

Unfortunately, *Demjanjuk* was not the sort of case that could easily support such an approach. Ivan the Terrible, whoever he was, was not a major figure in, or architect of, the Holocaust. He was simply one of its bestial foot soldiers. In contrast to prior cases, the *Demjanjuk* pretrial investigative work was slipshod and incomplete — emblematic of the case's start as a relatively minor matter. The victim witnesses who were relied upon for identifications had been handled

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36. Unless otherwise noted, my analysis of the Demjanjuk case will be based on the factual material set forth in TOM TEICHOLZ, THE TRIAL OF IVAN THE TERRIBLE (1990).

37. "Grozny" translates into English as "Ivan the Terrible." *Id.*

38. *See* DEMJANJUK V. PETROVSKY, REPORT OF THE SPECIAL MASTER 146-47 (1993).

39. *See* ALLAN A. RYAN, JR., QUIET NEIGHBORS (1984).

40. *Quoted in* TEICHOLZ, *supra* note 36, at 103.

in a careless manner (particularly with respect to suggestive photo arrays) that substantially increased the risk of erroneous identification.[41] The American prosecutors, who conducted much of the preliminary investigation (in support of their denaturalization effort), employed a narrowly focused "hardball" approach to the proof that deprived the defense of critical information and lent a misleading air of certainty to the case.[42]. There were no document troves from which to cull damning evidence. In fact, there was only one document that directly connected Demjanjuk with the death camps, the Trawniki camp identity card. This card did not even tie Demjanjuk to Treblinka but rather to a different death camp, Sobibor. That Demjanjuk was not tried until more than 40 years after the end of World War II only added to the difficulty. This meant that memories had likely faded and all available witnesses were likely exposed to a variety of suggestive experiences, including testimony at prior trials, exposure to media reports, participation in various memorial activities, as well as tainted investigative efforts. Finally, the quiescent defense counsel who had generally been in charge at Nuremberg and during Eichmann's case had been replaced by aggressive, publicity hungry American and Israeli advocates well versed in adversarial techniques, if not the evidence in the *Demjanjuk* case. The cooperative spirit with which the earlier trials had been managed no longer existed. Instead, a resounding clash between prosecution and defense could be expected.

The special three-judge Israeli court that tried Demjanjuk followed in the footsteps of its two-track predecessors. The adversarial burden to produce evidence was placed squarely on the shoulders of the parties. The prosecution sought, once again, to present a narrative of the Holocaust. To this end, it used materials presented at previous trials, elaborate expert analyses and a great deal of victim witness testimony. The prosecutors went about their job with the utmost zeal. They cast Demjanjuk in the role of villainous mass murderer. In their zeal, they seemed to ignore the possibility that Demjanjuk was not Ivan the Terrible. The court used the same loose approach to evidence that had been adopted in Nuremberg and *Eichmann*. Relevance was ignored, hearsay embraced and authentication requirements abandoned. Even cautionary rules designed to ensure the integrity of eyewitness identifications were disregarded. The court, as a matter of principle, adopted the view that the victim witnesses had suffered so deep a trauma that it was impossible for them to forget their experiences or the identity of their tormentors.

41. *See* WILLEM A. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY (1988).

42. *See* Demjanjuk v. Petrovsky, 10 F. 3d 338 (1993).

The resulting trial was a sprawling and contentious affair that ran for more than a year. Unfortunately, there was no great judge to guide and protect the proceedings. The pedestrian panel hearing the case placed excessive reliance on the victim witnesses and was eventually shown to have misbehaved in its relations with the press. Despite several warning signals, the court wholeheartedly embraced the proof suggesting that Demjanjuk was Ivan the Terrible and dismissed out of hand anything pointing in the other direction. The prosecution's zeal knew no bounds. Prosecutors seized virtually every available opportunity to strike blows at both the defendant and his counsel — including the incendiary accusation that the defense and some of its witnesses were associated with Holocaust denial groups. The prosecutors painted the defendant as a monster of the most profound depravity. No opportunity to attack his character was missed.

Demjanjuk's defense team, particularly its two American members, was simply inadequate to the task of representing the target of so vast and controversial a case. Their interrogation of victim witnesses was insensitive and infuriated both onlookers and the court. The experts they called were, for the most part, shown to be charlatans or incompetents. They dismissed evidentiary sources (particularly those from behind the Iron Curtain) that would eventually prove critical to the case. They were so distracted by the media coverage of the trial that they often lost sight of their client's best interests. As the trial progressed, the pressures of the case, and their lack of adequate skill and preparation, led Demjanjuk's American lawyers to veer toward simplistic claims tinged with Holocaust denial. When the trial eventually spun out of control, the Demjanjuk family decided to fire the American lawyers and place their full reliance on Yoram Sheftel, the sole Israeli advocate on the team. Sheftel, while clearly more competent, was not particularly effective. He was so combative that he eventually came to be viewed as perhaps the most hated man in Israel.[43] While the defense team's weaknesses caused much of its difficulty, the pressures generated in resisting a two-track didactic prosecution are likely to push even the best of defenders into denial of historical facts and victim denigration.

The result of all this was a travesty of justice. The court convicted Demjanjuk and wrote an opinion it declared to be a tribute to the victims of the Holocaust, "a monument to their souls, to the holy congregations that were lost and are no more, to those who were annihilated."[44] All doubts and questions were summarily swept aside in the fervor to pay homage.

43. *See* YORAM SHEFTEL, DEFENDING IVAN THE TERRIBLE (1996).

44. THE DEMJANJUK TRIAL 39 (Asher Felix Landau ed., 1991).

Demjanjuk appealed his conviction and as the case ground slowly ahead, evidence raising the most serious questions about the accuracy of the decision began to surface. Witnesses came forward to say that Ivan the Terrible was really a man named Marchenko. Others presented proof that Demjanjuk had been stationed at Sobibor and a number of other camps, but never at Treblinka. Information became available that the identifications relied upon by the Jerusalem District Court were tainted and might be erroneous. Eventually, the Supreme Court of Israel declared that the conviction was unsound, had to be reversed, and Demjanjuk freed. There was a public outcry in Israel because a man shown to have been a camp guard was being released, however, the lack of clear proof and the appearance of judicial blunder seemed to foreclose any other choice. The failure of the *Demjanjuk* prosecution struck a fatal blow to Holocaust prosecutions in Israel — there would be no more. The stakes had been raised so high that there was no way to go on once the *Demjanjuk* effort was discredited. The miscarriage of justice produced by too light a regard for basic safeguards about evidence and identifications had destroyed the legitimacy of the prosecutorial effort.

Despite the *Demjanjuk* disaster, the two-track didactic case model invented at Nuremberg has not been abandoned. It was used with disastrous consequences in the Canadian trial and acquittal of Imre Finta, a Hungarian Gendarme Captain allegedly responsible for the loading of Jews onto trains bound for the extermination camps.[45] Far more seriously, it has been used as the model for the early prosecutions mounted by the ICTY and ICTR. The first full-scale trial at the ICTY, that of Dusko Tadic, was marked by a strikingly similar approach.[46] The trial in that case dragged on for more than a year, focused more on Serb policy than on the defendant, utilized exceedingly lax rules of evidence and eventually faced extremely serious witness problems, including the demonstrated perjury of a witness introduced into the proceedings through the machinations of the Bosnian Muslim government. While Tadic was properly convicted, the process used holds little promise of becoming an effective and reliable prosecutorial mechanism. There were similar difficulties in the ICTR trial of Jean-Paul Akayasu.[47] Even the Rome treaty outlining the nature of the International Criminal Court seems to contemplate a Nuremberg-like process with didactic trials, loose evidence rules, and robustly adver-

45. R. v. Imre Finta, 1994 S.C.R. 265 (Can.).

46. My discussion of the Tadic case is based upon MICHAEL P. SCHARF, BALKAN JUSTICE (1997).

47. *See* Judgment, Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998 International Criminal Tribunal for Rwanda), *available at* http://222.un.org/ictr/english/judgments/akayesu.html.

sarial procedures.[48] Nuremberg was a powerful and positive precedent in international law. It has, however, had a decidedly negative impact on international criminal *procedure*, inhibiting development of a more effective, efficient and careful sort of courtroom process. Such an approach heightens not only the *risk* of failure but also the *cost* of failure. Even success can come with a prohibitively high price tag.

II. BASS, DOUGLAS, GOLDSTONE AND ROBERTSON

A. *Bass*

Gary Bass has written a first rate scholarly volume about when and why international tribunals are likely to succeed. At the heart of his book are five case studies including both successful and failed prosecutorial efforts. Among the former are Nuremberg and the ICTY, while the latter include international efforts to deal with Napoleon, Kaiser Wilhelm II, and the Turkish leaders responsible for the Armenian massacres. These nuanced and detailed historical studies forcefully remind the reader of the point made by George Santayana that "[t]hose who cannot remember the past are condemned to repeat it."[49] Bass helps us remember this particular and important past, thereby increasing the likelihood that we may learn from it in pursuing international justice in the future.

Bass argues that liberal states are not always likely to support international tribunals. They will sometimes, however, be willing to do so. Understanding when is key to assessing the likelihood of a tribunal's success. On the basis of his five case studies, Bass concludes that prosecution is most likely to work if three critical conditions are met. His first and second conditions emphasize the "selfish" concerns of potential prosecutors about the welfare of their own citizens. If resistance to arrests or trials is likely to lead to a significant risk that soldiers or civilians of the prosecuting nations will be injured, then the prospects for trial are dramatically reduced. Conversely, if the crimes charged arise out of the infliction of serious harm on soldiers or civilians of the prosecuting nations then the chances for trial are substantially enhanced. Bass's third point is that prosecution is often tied to political sentiment in the prosecuting nations. If a wide segment of the populace shares a sense of outrage about an alleged crime, prosecution is far more likely. While none of these points is meant to be an ironclad rule, together they have substantial explanatory power with respect to Bass's case studies. Prosecution failed in Turkey and was placed in serious jeopardy at the ICTY because the Western democra-

48. *See* Leila Madya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000).

49. *See* SANTAYANA, *supra* note *.

cies faced risks to their own troops and citizens in making arrests and conducting trials. The prospects for prosecution were boosted at Nuremberg because there were no such risks, and because the Nazis had committed heinous acts that affected the citizens of all the nations involved in the IMT.

Stay the Hand of Vengeance is strongest on the historical background to the trials and trial efforts examined. The book is full of interesting and illuminating insights about the politics that surrounded each case. Bass presents a great deal of little known information about the treatment of the defeated Napoleon — especially about the protective role played by the Duke of Wellington with respect to his defeated adversary. Perhaps the strongest and saddest section of the book considers the failed prosecution of the perpetrators of the Armenian genocide. The consequences of that failure reverberate to this day. Bass traverses more familiar ground with respect to Nuremberg and the ICTY but still uncovers valuable information. About Nuremberg, Bass informs us that its key American sponsor, Secretary of War Henry L. Stimson, was not only motivated by his sense of fair play in insisting upon trials but by a "genteel antisemit[ism]" (p. 174) that led him to oppose the draconian proposals of the Jewish Treasury Secretary, Henry Morgenthau, Jr. With respect to the ICTY, Bass reminds us that its creation was an admission of Western failure to stop a clearly identified human rights catastrophe, and that it was saved from ignominious failure, in good measure, by the courageous and skillful efforts of several American diplomats including most particularly "the mother of all tribunals," (p. 262) Madeleine Albright.

Bass's book does not assign itself the task of looking closely at the trials that were the results of consummated international agreements to prosecute. His position seems to be that such trials can be very important because they may "help bring out the truth" (p. 144). He does not address the problems inherent in such trials when they become lengthy recitations of general history. He does, however, note the particular problems raised by the prosecution of Dusko Tadic in the ICTY, a case that focused on an insignificant defendant of no real importance in the Balkans drama. Bass remarks on the incredible slowness of that trial, its reliance on marginal evidence, and the prosecutors' need to abandon certain charges and renounce the testimony of certain witnesses.

B. *Douglas*

Lawrence Douglas in *The Memory of Judgment*, does concern himself with an examination of the details of several international criminal prosecutions. His book, like Bass's, is anchored in a series of powerful and well-researched case studies including the Nuremberg trial, as well

as those of Adolf Eichmann and John Demjanjuk.[50] Douglas's objective is to examine whether trials, most particularly those involving the events of the Holocaust, can serve more than just the "juridical" (p. 174) goal of proving the guilt or innocence of an accused defendant. Douglas asks whether the didactic two-track trial born at Nuremberg can serve a number of grander social objectives including the creation of a lasting historical record, the achievement of "collective catharsis" (p. 110), and the establishment of "heroic memory" (p. 154). He takes the position that trials about the Holocaust have successfully served all these ends and rejects the notion that trials should be strictly juridical.

Douglas begins his work with a careful analysis of the background to, and proof used at, the Nuremberg trial. He pays particular attention to the American prosecution film, *Nazi Concentration Camps*. Douglas, however, reminds us that Nuremberg did not start as a Holocaust or atrocity case but, instead, was conceived primarily as an effort to punish Nazi militarism and crimes against peace. As a result the main evidentiary focus (at least by the Americans) was Nazi aggression rather than the plight of the victims of atrocities. To serve that end, the American team sought to present a huge array of Nazi documents while relegating live witnesses (most particularly victims) to a far inferior position. Douglas stresses the transformative impact of *Nazi Concentration Camps* and other atrocity evidence. He nicely demonstrates the dramatic shift in focus as displayed in the closing argument of the chief British prosecutor, Sir Hartley Shawcross. Instead of pursuing the earlier themes of the British case, Shawcross concentrated on a heart-rending affidavit written by Hermann Gräbe describing the slaughter of innocent Jewish men, women, and children by a Nazi death squad. Douglas says of this speech: "It was as if the prosecution itself had finally absorbed the significance of its own terrible evidence and, in so doing, had come to recognize the insufficiencies of the legal case meant to contain it" (p. 93). Douglas argues that the experience of the Nuremberg trial reoriented international prosecution and infused it with a concern to remember and memorialize the Holocaust.

The Memory of Judgment presents this transformation as an appropriate one that eventually resulted in the *Eichmann* prosecution where Holocaust memorialization moved to the acknowledged center of the trial. The didactic elements of the case were recognized and embraced by an extremely zealous Israeli prosecution team and substantially strengthened by the use of 121 live witnesses — most of them Holocaust survivors. The goal was not simply to convict Eichmann but to address the terrible trauma caused by the Holocaust

50. Douglas also focuses on the Canadian trial of a Holocaust denier named Ernst Zundel. Pp. 212-13.

and rehabilitate the reputation of its victims. This project clashed with traditional notions of relevance and led to sharp clashes between the court (which sought traditional juridical goals) and the prosecution (which labored mightily to tell the whole Holocaust story). Douglas finds that the efforts of court and prosecution balanced each other and resulted in a case that was both effective in convicting Eichmann and capable of addressing the Holocaust, in other words, a trial record that could "condemn the accused and . . . acquit his victims" (p. 154). It was also a record that could kindle interest in Holocaust prosecutions around the world.

This well-reasoned and thoughtful analysis of the *Eichmann* case is far from uncontroversial. As early as the time of the trial itself, powerfully intelligent critics like Telford Taylor and Hannah Arendt were sharply critical of Israel's approach. Arendt in particular was disturbed by Israel's adoption of the two-track approach, viewing it as a betrayal of the juridical mission. While Douglas presents forceful counters to Arendt's arguments, one cannot help but recall that *Eichmann* set the pattern that would result in the *Demjanjuk* debacle. Douglas seeks to address *Demjanjuk* by suggesting that the court took the didactic effort too far. It is hard to see how such a problem can be avoided except by extraordinarily sensitive and fairminded judges. The risk of judicial bias and hazard of distraction (because of a parade of irrelevancies) are inherent in the two-track approach. Moreover, as Douglas points out, errors "in trials staged as didactic spectacles, rituals of justice designed to place the institutions of criminal justice in the fore of the public's mind . . . seem more consequential" (p. 206). In fact, *Demjanjuk* not only brought Israeli Holocaust prosecutions to an end but, Douglas suggests, may even have helped fuel Holocaust denial since it is a short step from witness errors about Ivan the Terrible to witness mistakes about the Holocaust itself.

Douglas goes on to look at other cases affected by Holocaust-related issues. He particularly focuses on a Canadian case involving a Holocaust denier named Ernst Zundel (pp. 212-13). Even here, outside the realm of crimes committed during the Holocaust, the problems of the two-track didactic trial can be observed. The Canadian courts that considered the *Zundel* case were unsettled for years by the myriad of evidentiary problems generated. Although the *Eichmann* case may have been "an extraordinary success" (p. 260), in many ways, it was also an invitation to the development of courtroom processes and attitudes that became increasingly unmanageable, unpredictable, and unsatisfactory. The course that yielded the *Demjanjuk* disaster was charted in *Eichmann*. The law grows by experience and precedent. Where *Eichmann* pointed, *Demjanjuk* and other cases followed, creating an ever more fragile, costly, and risky process.

C. *Goldstone*

In 1994, Richard Goldstone was chosen to be chief prosecutor of the ICTY. He was selected after a great deal of political wrangling in circumstances that raised substantial doubts about whether international prosecution in the Balkans could succeed. In significant part due to his efforts, the ICTY shifted from an aspirational entity with few cases to a serious instrument of justice. In his memoir, *For Humanity*, Goldstone describes the process leading to the ICTY's transformation and also provides a number of insights on the progress of democracy and justice in Goldstone's native South Africa.

One of the things that Goldstone's memoir makes quite clear is the impact of the Nuremberg precedent on the formation of the ICTY and the thinking of its chief prosecutor. At the outset of his discussion of the ICTY, Goldstone notes "the importance of the legacy of the Nuremberg trials" (p. 75). He describes its holdings about jurisdiction and crimes against humanity as fundamental. He embraces Nuremberg's two-track approach most particularly with respect to the creation of a historical record in the courtroom. The connection between the ICTY and Nuremberg also comes through strongly when Goldstone discusses why a tribunal was created with respect to Yugoslavia but not in the aftermath of the war in Iraq. Judge Goldstone begins by pointing out that Yugoslavian ethnic cleansing reminded the Western community of the Holocaust, and that photos of the Bosnian prison camps were uncomfortably similar to those made infamous at Nuremberg. All of this — and the European location of the Balkan atrocities — challenged the Western democracies on their home ground with a vile Nazi-style racism of the sort that had been condemned in 1945. The absence of these factors with respect to Iraq made it appear a far less appealing venue for the creation of a lasting historical record by means of an international tribunal.

Goldstone's book is particularly illuminating regarding the difficulties in getting an international prosecution under way. He identifies a number of problems that must be resolved. Perhaps foremost among these is the organizational effort required to build up a prosecutor's office. By Goldstone's estimate, such an effort takes at least 18 months. Delay of the sort required to accomplish such a project erodes credibility and increases evidence-gathering problems. Evidence gathering presents other difficulties as well. To effectively prosecute high-ranking defendants, let alone present a grand historical narrative, requires a significant supply of evidentiary information. To get that information requires international cooperation. In the case of the ICTY, Goldstone concluded that he needed a significant volume of information from American and British intelligence sources. The CIA and others were loath to turn such information over and a protracted institutional battle with friendly governments ensued. The same sort of

problems arose with respect to the willingness of NATO forces to arrest those indicted by the ICTY. It was only after extensive struggle and political shifts that any significant number of defendants was taken into custody.

Goldstone highlights a number of other institutional problems as well. International prosecutions on a grand scale demand a grand budget. Securing such a budget is a politically daunting task. Goldstone describes in detail his budget battles with a United Nations ("UN") bureaucracy that did not want to fund the prosecutorial effort adequately and sought to use funding as an instrument of control. The judges appointed to the ICTY also threatened prosecutorial independence. Many of them were the products of inquisitorial rather than adversarial justice systems. In the former, courts often have the power to direct and manage prosecutorial operations. Despite the adversary nature of the rules of the ICTY, a number of judges sought to impose their views about the pace and scope of prosecution on Goldstone's office. The chief prosecutor's memoirs suggest just how political the commencement of international prosecution can be. Goldstone, schooled in the task of transitional justice by his experiences in South Africa, was up to the task of making the ICTY a real and functioning prosecutorial mechanism. He, however, needed a great deal of help. Among his allies were the American diplomats Madeleine Albright and David Scheffer. Goldstone left the ICTY to return to South Africa before the prosecutors in The Hague had mounted many cases. His memoirs provide valuable insights into the struggles and difficulties of setting up an effective international justice mechanism.

D. *Robertson*

Geoffrey Robertson's book is an extended effort to chart the rise of crimes against humanity as a prosecutable offense. Unfortunately, it is not carefully grounded in history, and seems to have been written more as a polemic than as scholarly work. Both Bass and Douglas are painstakingly careful in assembling the facts upon which they base their case studies. Robertson eschews careful factual analysis and consequently fails to build a solid foundation for his argument. As early as the Preface to his work, Robertson shows disregard for the need to support debatable propositions. In the Preface, Robertson indicates that it was the Holocaust that "called forth an international tribunal — the court at Nuremberg" (p. xiv). This is not an absurd claim but it cries out for support of some sort. None is forthcoming. A careful look at the matter suggests that there were a number of other and stronger motives for Nuremberg's creation, including Roosevelt's and Stimson's concerns about revisionism, the strong American "legalistic-

moralistic" mind set,[51] Stalin's desire to destroy Nazi credibility, and a number of others. As to the impact of the Holocaust, so centrally-placed a prosecutor as Telford Taylor has said that it was not until he was in the midst of the Nuremberg trial that he began to appreciate the "full scope of the Holocaust."[52] Douglas documents the rising appeal of atrocity evidence over the course of the Nuremberg trial. It was only as the trial neared its conclusion that the Holocaust moved toward center stage. It is simply not good writing or thinking to breezily declare that Nuremberg was rooted in the Holocaust.

Robertson's lack of care extends to factual claims of less exalted status as well. He states that the first (American) concentration camp film shown at Nuremberg was "newsreels of Auschwitz and Belsen" (p. 215). This description is wrong on several counts. The film was not "newsreels" but the creation of Hollywood director George Stevens, and it did not contain any footage showing Auschwitz.[53] Similarly, Robertson unqualifiedly states that "crucial documents" (p. 240) presented at the *Demjanjuk* trial were forgeries (in context this can only be read as a reference to the Trawniki document). The parties at the *Demjanjuk* trial spent 8000 pages of transcript and more than 100 court sessions on that question. There is no consensus on the point, though every American and Israeli court that ever ruled on the matter found the Trawniki card genuine.[54]

Aside from documentation problems, Robertson's work is marred by a simplistic heroes-and-villains view of events. Non-governmental organizations ("NGOs") are virtually always on the side of the angels, while diplomats and politicians are almost always venal. That this is unfair to people like Madeleine Albright and David Scheffer, to name but two, is rather clear. Robertson is also prone to fits of hyperbole. He describes the Chilean dictator Augosto Pinochet as responsible for "[t]he century's most vicious human rights violation" (p. 41). Such a claim is simply absurd in light of the crimes of Hitler, Stalin, Mao, and Pol Pot, to name but a few. This is not to suggest that Pinochet is an innocent, but rather that a more finely calibrated argument might have enhanced the credibility of Robertson's presentation. Given all of these flaws, it is hard to credit Robertson's work. Fair description and measured analysis are essential if we are to learn history's lessons.

51. GEORGE KENNAN, AMERICAN DIPLOMACY 1900-1950, at 95 (1951).

52. TAYLOR, *supra* note 14, at xi.

53. *See* DOUGLAS pp. 27-37 (providing a detailed description of the provenance and content of *Nazi Concentration Camps*).

54. *See* TEICHOLZ, *supra* note 36, at 166-77, 251-56.

III. TWO SUGGESTIONS

About 25 years ago the great British historian, E.P. Thompson, wrote *Whigs and Hunters*,[55] a book describing a war that raged in the forests and pastures of rural England in the 1710s and 1720s. That struggle was mounted by small landholders and forest dwellers in an effort to protect their traditional rights in open or common land against the property claims of Whig patricians who sought to seize and enclose the land. The combatants were not well matched and the wealthy won a good deal more often than they lost. Yet they did not always win.[56] Thompson, an avowed Marxist, began his study of this woodland confrontation convinced that he would find that the law was simply one more instrument by which the rich oppressed the poor. What he found, however, surprised him. Although the well heeled often succeeded, legal cases were not a sure thing for them and, in fact, the law grew in ways that progressively hemmed in the options of the powerful. Thompson, in the moving final chapter of his book, referred to this process as the growth of the rule of law and saw it as the instrumentality by which British society slowly and painfully grew toward true democracy. He also saw it as the wellspring of both Gandhi's and Martin Luther King's power to overcome institutional injustice.

One thing that is missing from Bass's and Douglas's otherwise excellent works is any theory of why international law appears to be growing into an ever more effective tool in punishing gross criminal disregard for human rights. For Bass, what seems to be posited as an explanation for recent developments is a convergence of factors that foster prosecution. When these are not present, legal action should not be expected to succeed. For Douglas, each case addressing the Holocaust is presented as a more or less unique artifact that may succeed or fail depending on the balance of forces pulling toward juridical limits and didactic narrative. What is missing from both these views is any explanation or deeper appreciation of the apparent *growth* of international willingness to pursue criminals. Thompson's conception of the growth of the rule of law provides a powerful insight into why global receptivity has increased. It also helps us understand why the trajectory of trial developments over time is important. That trajectory or history can strengthen the limits on human rights abuse. The process, however, is not ineluctable. To encourage the growth of legal con-

55. EDWARD P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

56. *See, e.g.*, *id.* at 136 (tenants successful at Winchester Assizes on question of cutting beech trees); *id.* at 51 (grand jury refused to indict local landowner accused of interfering with red deer in Windsor); *id.* at 79 (despite vigorous prosecution, many defendants were acquitted in criminal proceedings at Wallingford).

straints, the importance of each case in reinforcing the power of law must be appreciated. In this light, the risks inherent in the Nuremberg/*Eichmann* approach must be recognized and corrected. The fact that this was not done in cases like *Demjanjuk* threatens to undermine progress.

One alternative to criminal trials discussed by all four authors is the truth commission — a body charged with the duty of uncovering the truth about certain historical events rather than prosecuting specific defendants.[57] The truth commission separates the second of the two Nuremberg tracks from the effort to prosecute and makes the creation of an accurate record an end in itself. The authors of all the books under review are skeptical about the value of truth commissions as a substitute for prosecutions.[58] But all note that the truth commission idea is one that has been repeatedly suggested and, sometimes, tried. Bass reports that after World War I, when the British and French were pushing for the prosecution of the Kaiser, the Americans (who were opposed to the trial idea) proposed instead "an International Commission of Inquiry be instituted to investigate and report upon the extent of the responsibility of the ex-Kaiser" (p. 101). This proposal was rejected as an unsatisfactory substitute for a trial, a conclusion with which Bass seems to agree. Wilhelm II was never prosecuted and no definitive record of World War I misdeeds was ever created.

Douglas too considers truth commission proposals, most particularly that made by Karl Jaspers in response to the *Eichmann* trial. Jaspers saw the *Eichmann* case as presenting a problem beyond the competence of a normal court of law and suggested that it might "be wonderful to do without the trial altogether and make it instead into a process of examination and clarification" (p. 175). Douglas rejects the Jaspers proposal as lacking the legitimacy and closure of a true legal proceeding. For Douglas, effective "pedagogy" (p. 175) cannot be achieved by entities like truth commissions. He recognizes the risk of distortion engendered by combining pedagogy with prosecution but thinks such risks are worth taking — the *Demjanjuk* example notwithstanding. Goldstone for his part praises the South African Truth and Reconciliation Commission ("TRC") as critical to that nation's transition to democracy but is at pains to emphasize the special healing power of ICTY prosecutions. Finally, Robertson dismisses truth commissions as incapable of addressing serious human rights abuses. He sees them as an inadequate response to extreme criminal conduct and

57. *See generally* Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994).

58. The one possible exception is Justice Goldstone, who emphasizes the value of South Africa's Truth and Reconciliation Commission. Pp. 59-73. He, however, highlights the need for prosecutorial action in the Balkans. Pp. 74-119.

declares "transitional justice [including truth commissions] is a contradiction in terms" (pp. 270-71).

While there is merit to all the authors' criticisms of truth commissions, there is also a great deal to recommend such bodies. They may be brought into being fairly quickly after transition to democracy or the end of hostilities. They are not bound by the legal constraints that require the highest standard of proof for individual conviction. In situations where thousands of victims and potential defendants may exist, truth commissions can address vast numbers of individuals and help begin their reintegration into society. Goldstone makes this precise point when he notes that the South African TRC heard 20,000 victim witnesses and received 8,000 applications for amnesty. Goldstone concludes that "the same result [could not] have been achieved through the normal criminal process. It would have taken scores of long and costly trials to have recorded the history of the human rights abuses perpetrated during the apartheid era" (p. 71). With this background in mind, Goldstone suggests that there might be a place for *both* a truth commission and trials in the Balkans.

Out of this final Goldstone observation a new strategy with regard to two-track trials might be formulated. Rather than encumber each criminal trial with the costly and risky obligation of proving the vast and complex nature of atrocity, why not use a single truth commission proceeding for that purpose? Such a trial could fairly safely be conducted with relaxed evidence rules because no defendant would be directly threatened by either erroneous factual findings or prejudice. The commission charged with such a task would obviously need broad investigative powers and ample staff. It would need both prosecutorial and judicial independence from any interested party. It would also need an effective defense staff comprised of appropriate interveners and/or "devil's advocates" to guard against distortion and fabrications. The findings of such a body might warrant judicial notice in later proceedings. Such notice could operate in the manner contemplated by Federal Rule of Evidence 201 — establishing certain propositions as accurate and reliable.[59] Room, however, might be left for an individual defendant in a later case to challenge personally incriminating findings. Such a procedure could decouple the two-track process while serving both prosecutorial and pedagogic goals.

59. *See* FED. R. EVID. 201.