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Aldo Zammit Borda

Histories Written by International Criminal Courts and Tribunals

Developing a Responsible History Framework

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To Ash.

Thanks for your patience, support and good humour…

Foreword

'Off with his head'

Perfect for resolution of the war crimes trials of William Wallace (1305) and King Charles 1st (1649), assuming either trial was a war crimes trial:

Retribution: maximum, total, complete;
Deterrence: Total for the man decapitated; possibly quite strong for his followers;
Rehabilitation: Not required.

Each event would have featured in relevant histories: of the independence of Scotland or of events leading to Oliver Cromwell's republican commonwealth. But did the trials—indictment read to Wallace before he was so cruelly deconstructed; some 30 witnesses for Charles—add much to the overall history of the two conflicts themselves? Perhaps not.

Happening between these two beheadings was another of significance. Sir Peter von Hagenbach beheaded in Breisach in 1474 for atrocities committed when serving the Duke of Burgundy is famously, if controversially, relied on as the sentence imposed by the first international war crimes trial.[1] Von Hagenbach was tried by 28 judges from regional cities for murder and rape, crimes counted by some as early forms of 'crimes against humanity'. Von Hagenbach was tortured into confession and six witnesses were called against him. The trial and beheading led to revenge by the Duke of Burgundy, von Hagenbach's master; but the trial record is not itself often, or ever, relied on for an account of anything except the particular acts of von Hagenbach himself.

[1]Perception as history's first 'international war crimes trial' started with a *Manchester Guardian* op-ed by English jurist Georg Schwarzenberger, published while the International Military Tribunal (IMT) at Nuremberg was deciding the fate of major Nazi war criminals. The op-ed argued that von Hagenbach's trial acted as precedent for many of the legal positions taken by the IMT prosecution at Nuremberg, including charging crimes against humanity **a**nd rejecting the defence of superior orders. See Oxford Scholarship Online.
https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199671144.001.0001/acprof-9780199671144-chapter-2.

But maybe it was not just in the fourteenth, fifteenth or seventeenth centuries that trials or atrocities are no more than they seem and often seeming less like proper trials and more like political events. Passing over the few (Germans only) tried for fairly minor offences at Leipzig after WWI—the Kaiser himself was given sanctuary in the Netherlands—what of the Nuremberg trials that followed WWII? Critically tagged as 'victor's justice' they were efficient with short sharp drops to neck break or strangulation for ten of those tried in the first famous leadership trial: 11 were sentenced to death—Göring cheated the hangman.

Two statements of the value of war crimes trials were delivered but possibly in chronologically reverse order of relevance. Hartley Shawcross, British prosecutor at Nuremberg said:

> This tribunal will provide a contemporaneous touchstone and authoritative and impartial record to which future historians may turn for truth and future politicians for warning.

Hannah Arendt on the Eichmann trial—about which more below—said:

> The purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes can only distract from the law's main business: to weigh the charges brought against the accused, to render judgement and to mete out punishment.

The Nuremberg trials after WWII were short and efficient but discredited because no thought was given to criminality of the other side—*our* side if from the UK or US. There was a great deal of evidence but has the evidence from those trials featured much in the works of historians explaining the context in which the crimes were committed? Not too much. Evidence was mostly focused on the criminal acts of individuals. Arendt's approach seems more applicable than Shawcross's.

The privilege of writing this foreword to Aldo Zammit Borda's book on *Histories Written by International Criminal Courts and Tribunals: Developing a Responsible History Framework* allows me, as a sometime bystander and then practitioner in various courts, not only to suggest that there may have been limited value for *historians* in the record of the trials reviewed so far, but to go further.

Between the Nuremberg and Tokyo trials, which only lasted a few years altogether, and 1993 when the two ad hoc tribunals for Rwanda and the Former Yugoslavia were established, what was going on in the world of international criminal trials? Not much. Let me explain without reference to scholarly authority.

In the period after the war, parents in Britain did not spend time talking to their children about the war—at least mine did not and neither did my aunts and uncles, the parents of friends, schoolteachers. When I got to university—only about 20 years after the end of the war—it was rarely mentioned. The 1948 Declaration of Human Rights did not feature in either the philosophy or politics (not law) that I studied. The Genocide Convention was unheard of. We *were* concerned with rights and freedoms, but not the freedom from war; that was over. Sexual freedom in the 1960s was more of a preoccupation along with some interest in social diversity and gender inequality. In the background, it is true, efforts were being made—starting immediately after WWII—to create a permanent international court.

There were resolutions in the General Assembly of the United Nations as early as 1950 on the subject. Draft statutes were produced and much work was done between then and the time when the two ad hoc courts were created;[2] but no one outside a narrow circle of lawyers and politicians knew anything about them. They were irrelevant to the rest of us. And this is easy to check.

Google, I am quite sure, is never turned to by serious academics but it can be the researcher's friend, if carefully used. Interrogate it about UK films, year by year starting immediately after the war; ask: 'UK films 1946' 'UK films 1947' and so on. Or ask Google about 'first Holocaust films'. Imprecise or incomplete though the answers may be, they accord with personal memory and are, in any event, overwhelming. There was little public appetite for films about the war or the Holocaust. A few war films—derring-do more than reflections of history—started in about 1955. Nothing about the Holocaust. Plenty of 'Carry On' films, humour of the most silly kind. That is who we were in the UK and there is little point in deceiving ourselves. We were not bothered.[3] We had by some means—and for some unexplained reason—been inured to the agony we should have felt every day in contemplation of what happened to the Jews. Shoah, the 9½ hour film on the Holocaust made over nine years by Claude Lanzmann, came out in 1985. It was almost impossible to watch or not to watch. It showed in a way that could not be resisted quite how evil had been the treatment of Jews by the Nazis; it showed how I—perhaps we—had been content to put to the back of our minds what as citizens we should have had right there at the front. And it was not the case of our not being on notice.

Adolf Eichmann was tried in Jerusalem in 1961–2 and hanged for crimes connected to the Holocaust. That trial—at least for its Prosecutor Hausner—was purposefully leaving a historical trail and was not focused only on Eichmann's acts. Hausner's opening speech began,

> It is not an individual that is in the dock at this historic trial and not the Nazi regime alone, but anti-Semitism throughout history.

Of the two statements above, for this trial Shawcross's statement would seem a better description of the prosecution's purpose and Arendt's—spoken in assessment of her critical appraisal of the trial itself—not.

Eichmann's trial did stimulate some interest in the Holocaust outside Israel. But not that much. And so, how else did we deal with the horrors of being human? Certainly not by thinking the law could help.

Consider the Vietnam War that lasted over two decades from 1955 to 1975. The US committed obvious war crimes—as did the Vietcong—and the war drew mass protests around world of intensity and great anger. But what did we want,

[2]Triffterer (ed.) (1999) The Rome Statute of the International Criminal Court (Nomos), p 19.

[3]Contrast the former Yugoslavia 15/20/25 years after the ends of the conflicts. In the region, there is much—almost endless—talk of the wars. Films and books are often—may it be nearly always?—rooted in the wars. They have not been forgotten, and at the time of writing, it is hard to conceive of when they will be.

those who protested? To stop the war, to have the troops withdrawn. Ask Google, again, to help with 'Vietnam War protests' and then press the 'images' icon. There are one or two placards saying Presidents Johnson and Nixon were war criminals but by far the majority—page after page of the images of the protests—were aimed at getting out of the war, of bringing troops home. No mention of having people tried, not least I suppose because there was nowhere to try them and the idea had not taken root. The citizens' public interest and concern was political not judicial. And no US leader was ever even close to a criminal dock.

It is true that Lord Bertrand Russell, the British philosopher, together with Jean Paul Sartre, the French philosopher, and others, established in 1966 a 'People's Tribunal' to consider whether war crimes were committed by the US in the Vietnam War. And it is true that in an opening statement, Sartre said:

> It would have sufficed that the body created for the judgement of the Nazis had continued after its original task, or that the United Nations, considering all the consequences of what had just been achieved, would, by a vote of the General Assembly, have consolidated it into a permanent tribunal, empowered to investigate and to judge all accusations of war crimes […].

But that had not happened. Meanwhile some protestors self-immolated as the only way to achieve change in US policy—one Quaker famously killing himself in his personal fire of desperation outside Defense Secretary Robert McNamara's window—but there was no cry for a court to hear evidence of criminality; neither during the war nor when—finally—it ended in 1975. In 1975, the ad hoc tribunals for Rwanda and Yugoslavia were still about 18 years away.

Why may this be relevant? Because the real law is the law as comprehended by the citizen, not by what is going on in the minds of specialist lawyers and academics; it is what is in the minds of the people and they cared nothing for war crimes courts until perhaps, for whatever reasons good or not so good, the Rwanda and Yugoslav Tribunals, and later the so-called permanent International Criminal Court, came into being.

It was the work, encouragement, pressure of very many committed people, such as Cherif Bassiouni and Antonio Cassese that made these courts. Ben Ferencz, another long-term supporter, had prosecuted the Einsatzgruppen trial that followed the leadership trial in Nuremberg; he celebrated his hundredth birthday in 2020 still arguing for 'Law Not War'. Without him—and the many other others like him who saw the need not to leave the Nuremberg trials as isolated events—we might never have had any international criminal courts. But for about 40 years between 1950 and 1993, the general public thought little or nothing of them.

Lawyers, historians and academics of all sorts enjoy finding connections, especially connections of modern events to things happening in earlier times.[4] But given how the non-expert citizen has truly wanted peace where there is war it may not be helpful to suggest, however lightly, that what has been wanted was courts of law in place of fields of war.

It may be better to consider what has happened in international courts of law since 1993 as *new* work by *new* people. Good work at that. And good to keep in mind these few things: leading prosecutors Hartley Shawcross and Robert Jackson had both experienced something (at desks) of the war criminally pursued by those they prosecuted; the courtroom itself had the presence of men still in the uniforms of all sides of the conflict; Ben Ferencz charged—rightly I have absolutely no doubt—with prosecuting the Einsatzgruppen trial has recorded the following:

> As soon as I received my law degree I became a private in the supply room of an anti-aircraft battalion being trained for the invasion of France. […] After almost three years of military service, I was honorably discharged as a Sergeant. […]
>
> [As prosecuting lawyer at the military tribunal] Witnesses were ordered to write out a complete description of the criminal event—under penalty of being shot. Confessions from accused were obtained by similar persuasions.
>
> I entered several concentration camps, such as Buchenwald and Mauthausen strewn with putrid bodies of the dead and dying. […] Amid the overwhelming stench of burning skeletons, I was exposed to the filth of dysentery, diarrhea, typhus and other diseases that racked the emaciated bodies of the liberated inmates. I uncovered many mass graves as I followed trails of starving prisoners who had been whipped through the woods by fleeing guards—only to have their brains blown out when they could no longer go on. To keep from going mad, my senses became numbed as my mind built an artificial barrier and refused to be derailed by what my eyes saw. But the trauma was indelible and will remain with me forever.[5]

And in his account in the Washington Post:

> Someone who was not there could never really grasp how unreal the situation was […]. I once saw DPs (displaced persons) beat an SS man and then strap him to the steel gurney of a crematorium. They slid him in the oven, turned on the heat and took him back out. Beat him again, and put him back in until he was burnt alive. I did nothing to stop it. I suppose I could have brandished my weapon or shot in the air, but I was not inclined to do so. […]

[4]For example: Cyrus's 539 BC cylinder shows how to rule a multifaith empire. Sound practical advice as a minimum turned to by Thomas Jefferson when founding the US. But does it connect directly, as some would like, to the concept of inalienable human rights, as also claimed—or is that a step too far?

[5]Ferencz (1999) A Prosecutor's Personal Account—Nuremberg to Rome. URL: https://benferencz.org/articles/1990-1999/a-prosecutors-personal-account-nuremberg-to-rome/ Accessed 28 July 2020.

> You know how I got witness statements? I'd go into a village where, say, an American pilot had parachuted and been beaten to death and line everyone one up against the wall. Then I'd say, "Anyone who lies will be shot on the spot." It never occurred to me that statements taken under duress would be invalid.[6]

Now consider the 1993 Tribunals and the ICC. Few lawyers, investigators, researchers, etc., if any, with military experience or direct knowledge of the conflict they are prosecuting or defending. They would be excluded altogether if it was thought they had experience that might render them biased or predisposed one way or another . Everyone working in office blocks with at most civilian or UN security presence. Endless discussions about the law (which, of course, did enjoy development at Nuremberg on which later courts have relied), procedure, history of conflicts, involvement of governments. Everyone versed in the 1948 Declaration, the European Convention and countless other codes. Trials so 'meticulous' that one trial for one defendant—Seselj—could last ten times as long as the 11-month first Nuremberg trial of 21 military and political leaders of Nazi Germany, even if the Seselj trial can be heavily criticised for other reasons.

It is possible to argue that it is best to conceive of all the 1993 and later courts as entirely new things and still in experimental development. After all, what modern lawyer would want to be associated with a trial where evidence—even confessions—could be taken at gunpoint, where only one side of a conflict was ever considered for investigation and where capital punishment (with ropes too short for speedy death, as is sometimes alleged) was the norm?

Commentators and jurists may argue for connection to Nuremberg and continuity with earlier objectives—whether the Versailles Treaty that provided for trial of the Kaiser or the arrangement made for the Nuremberg trials that Churchill and some others would have preferred rendered unnecessary by confronting Nazi leaders with firing squads. But why? Perhaps because the Allies were victorious and the trials did what firings squads would otherwise have done. Perhaps because the pictorial images of Göring in the dock are unforgettable and constitute a real image of his loss of impunity. Possibly because the prosecution advocates gave great examples (sometimes—the US's Jackson did have an occasional off-day) of theatrical skill that gave voice to the defeat of wickedness. Perhaps because prosecuting with every required document to hand and no plausible alternative argument meant the trials, however flawed they might otherwise be, need never be seen too obviously to have been failures. We have all wanted them to have been successes; they were part of the end of the war.

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[6]Brzezinski (2005) "Giving Hitler Hell", Washington Post Online, p W08. URL: https://www.washingtonpost.com/archive/lifestyle/magazine/2005/07/24/giving-hitler-hell/1855bf5b-415b-41c1-950f-a5745b491b0a/ Accessed 28 July 2020. Ben Ferencz has been an inspirational contributor to annual Master Classes run by the Geoffrey Nice Foundation with video talks addressed to the students that can be found at: https://geoffreynicefoundation.com/lectures/special-guest-lectures/. His terrible experiences—and appointment at a very young age to prosecute the world's largest ever mass murder trial—showed him how to spend the rest of his life pursuing peace through law, mindful of what he understood of the wickedness of the world even and of how it had to be countered by every means at our disposal.

Conceiving of all the 1993 and later courts as entirely new things is effectively what Aldo does in this book, respectful though he is of the past and able to draw on academic research from the long history to prove how modern international trials for war crimes can—and must—serve purposes beyond Arendt's narrowly defined rendering of justice and nothing else.

Tussle as he does with modern preoccupations of lawyers—the adversarial forms of trials, free assessment of evidence without technical restrictions, access to and availability of evidence—Aldo speaks not from the pulpit occupied by those lawyers and academics with past errors to defend or justify. As a modern man, he can demonstrate that the role of war crimes trials in the writing of history must never be confined too severely because the purpose of trials is not just to try and punish those who emerge from a process as guilty. Maybe it once was, if Arendt got it right, but no more. Or maybe it never really was as she suggested it should be. The criminal trial process is a part of the setting in which the crime occurred—whether for the domestic rapist or the politician with criminal responsibility for war crimes. It always was absurd to think otherwise and only those whose sole interest in criminal process was to watch mediaeval executions of immense savagery or to see modern convictions as confirmation or disproof of a bigoted political ideology would think differently.

The book's central issue of whether history can and should be established in courtrooms can be helped by common sense. Turn, in your imagination, to any domestic legal system that uses juries and imagine being allowed to interrogate a juror who has just finished a trial. The trial was—say—about a killing in the juror's home town by one gang member of another in a setting of an extensive but well-hidden gang culture, something of which the juror was previously unaware. Asked after the trial whether s/he had learnt anything about the true nature of his town s/he would not say, 'No—the evidence was about the defendant and nothing else'. Of course not. For war crimes trials—indeed any large well publicised trial—the public generally, historians in particular, as well as international court judges are in no different a position from the domestic court juror: all are *educated* by the evidence presented and made public. It has always been difficult to understand how Arendt might have thought otherwise—perhaps she never really did.[7]

Assessing modern war crimes trials by what happened not *at* but *after* the Nuremberg and Tokyo trials invests them with the new international world order of values of open and fair justice. These values are to be found in the 1948 Declaration, however unenforceable and forgettable (as I have witnessed), they may

[7]Of note, in the Milošević case, the judges actively requested the assistance of a historian and got several, one from the prosecution, multiple from the defence. It would be absurd to suggest they could have eliminated any analysis of history from their judgement (Milošević died first—no judgement was given); and absurd to suggest that this part of the trial record should have been treated differently from other parts by those using the trial record to understand the history of the conflict. All parts of the trial record educated the court and are available to educate all of us. And see Tromp N (2016) Prosecuting Slobodan Milošević: The Unfinished Trial (Routledge), cited by Aldo, demonstrating just how powerful trial evidence can be in setting the historical record of some events.

initially have been. Those values, little though this may please lawyers earning lifetimes of fees for slow trials and judges doing the same and benefitting from international pensions and prestige, eventually condense to simple concepts, concerns and cries, attractive to those who waved anti-Vietnam War banners *and* to those who now turn to one another when they read of some mass atrocity in the world and say 'Send him to the Hague for trial'. In all cases the cries—of anguish from victims and bereaved, of anger from those who care about their fellow men though not themselves sufferers—to those with knowledge and power might be something like:

> 'For pity's sake, tell us the truth, those of you who know it. Confess if you can. Provide the records that you hold. Do not make us suffer, or suffer more, by having to peer through the darkened glass that protects you for a time from being seen and heard. Speak now so that we may live what is left of our lives with the prospect of emerging from the shadow of grief made heavier through ignorance of what happened. And do it swiftly'[8]

No self-respecting academic or lawyer would speak in such silly terms. Aldo might not—but, in this book, he touches the underlying anguish and anger with the precise language of the true academic.

I completed this Foreword between 11 and 12 July 2020—25 years after the start of the Srebrenica genocide for which no truly satisfactory verdicts have been returned at either the ICTY or the ICJ (for allegations of breach of the Genocide Convention by Bosnia against Serbia). When all these processes started it may be—from anecdotal material—that the bereaved (i.e. the *surviving* victims as opposed to those 8000 plus already murdered and for whom legal process may be little more than a mechanism of formal mourning) first thought how good it was to have top level lawyers work for them, respecting the profound sadness and distress of unseen farewell (Srebrenica executions were done after women and men had been separated). But as time passed, it could be seen that indictments did not cover as much of the history of events as they should have done and that some judgements seemed artificially narrow. And then Appeal Chambers occasionally overturned even partly 'satisfactory' judgements. The French judge who took ten years over the case of the man Seselj (see above) accused of hate speech, had his colleague on the bench for those ten years—Judge Lattanzi—say in a minority judgement the following, something that I have never seen or heard said in any other court:

> […] the majority sets aside all the rules of international humanitarian law that existed before the creation of the Tribunal and all the applicable law established since the inception of the Tribunal in order to acquit Vojislav Šešelj.

[8]The cry would also plead for retribution—but Aldo's book is not about that objective of criminal justice systems.

> On reading the majority's Judgment, I felt I was thrown back in time to a period in human history, centuries ago, when one said—and it was the Romans who used to say this to justify their bloody conquests and murders of their political opponents in civil wars: "silent enim leges inter arma" [In time of war the laws fall silent].[9]

Might the living Srebrenica victims—the only people who really count now—wonder at any system claiming it dispenses justice where judges hearing the same witnesses and knowing the same law could be that far apart…after ten years of trying? Might they more generally have wanted for decisions that were straightforward and quick and that reflected no political concerns—as some ICTY and ICJ judgements undoubtedly have. Might they have been enthused if it was accepted that trial records when accurate—and most at the ICTY were, only a few went off the rails—were allowed to be part of their history. And might those from the hundreds of thousands affected by the genocide of Srebrenica but who have died of natural causes in the last 25 years (so a good proportion of the total—may I guess at 33% assuming a 75-year average life span?) have cried out in anguish at the last closing of their eyes for the lack of knowledge of how their loved ones perished?

But perhaps the notional cry I set out above may point to what the law should achieve by the time you read this Foreword and Aldo's book; or, at least, to what it should seek to achieve. The argument about whether legal decisions can be used for the setting of historical narratives is part of a broader process whereby modern law is coming to be seen for what it is: as the *servant* of the people, not their distant master; and part of the servant's duty is indeed to help in the writing of better history.

Adisham, UK
July 2020

Geoffrey Nice

[9] *Prosecutor v Vojislav Šešelj* (Judgment (Partially Dissenting Opinion of Judge Lattanzi)).

Acknowledgements

The idea for this book originated from research on history at the International Criminal Tribunal for the former Yugoslavia that I undertook with Luigi Prosperi in 2017. I will remain grateful to Luigi for his encouragement in this regard. Luigi and I were subsequently invited by Moshe Hirsh to present on a panel at the Memory Studies Association Conference, in Copenhagen, in December 2017. I benefitted immensely from discussions at that Conference and am indebted to Moshe for that invitation. The research was eventually published as a book chapter in Carsten Stahn, Carmel Agius, Serge Brammertz, John Hocking and Colleen Rohan (eds.), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Account* (Oxford University Press 2020).

This book expands on some of the ideas and questions from that chapter. I was able to complete much of the writing thanks to a research sabbatical that I was awarded by my university, Anglia Ruskin University (ARU), in 2019. I will remain extremely grateful to colleagues at ARU (from the Faculty of Business and Law and beyond) for their support in this period. For part of my sabbatical, I was lucky enough to be able to visit Heidelberg, as a Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law. I am very grateful for that.

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Abbreviations

DRC	Democratic Republic of the Congo (formerly Zaire)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
HV	*Hrvatska Vojska*—Croatian Army
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTs	International Criminal Courts and Tribunals
ICTY	International Criminal Tribunal for the former Yugoslavia
LRT	Leadership Research Team of the ICTY
NATO	North Atlantic Treaty Organisation
OTP	Office of the Prosecutor at the ICC, ICTR, or ICTY
RPA	Rwanda Patriotic Army
RPE	Rules of Procedure and Evidence (ICC, ICTR, ICTY)
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
SDC	Supreme Defence Council of Serbia
TRC	Truth and Reconciliation Commission
UN	United Nations
UNSC	United Nations Security Council
UPDF	Uganda Patriotic Defense Force