

EVIDENCE, TRUTH, AND HISTORY IN ATROCITY TRIALS

FERGAL GAYNOR*

Abstract: This essay was delivered as the 2021 Holocaust and Human Rights Project Owen Kupferschmid Memorial Lecture. The Owen M. Kupferschmid Holocaust/Human Rights Project is named after its founder, a 1986 Boston College Law School graduate. Launched in 1984, the project's goal was to ensure that the precedential value of Holocaust-related law is fully realized and applied to state-sponsored human rights violations today.

2021 HOLOCAUST AND HUMAN RIGHTS PROJECT OWEN KUPFERSCHMID MEMORIAL LECTURE

Thank you for the enormous privilege of addressing you today in memory of Owen M. Kupferschmid. I want to speak today about the importance of international atrocity trials as a means of combatting revisionism, and contributing to an accurate record of atrocities.

So, what is the purpose of a trial about atrocities? “The purpose of a trial is to render justice, and nothing else”, wrote Hannah Arendt in the epilogue to her famous account of the trial of Adolf Eichmann in Jerusalem. She was skeptical of the notion of using the trial as a means of creating a historical record. she was particularly dismissive of the prosecutor’s claim that it was not Eichmann but “anti-Semitism throughout history” that was on trial. She described the prosecutor’s invocation, during his opening address, of the mass killings of Jews in ancient Egypt and Persia as “bad history and cheap rhetoric.” Delivering a verdict against Eichmann, she said, was “undeniably the sole task of the Jerusalem court.”

But was she right about that? Was the purpose of Eichmann’s trial really limited to establishing his criminal responsibility?

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* Working on international criminal justice since 2001, Fergal Gaynor has served on the teams that prosecuted crimes by leading members of the Bosnian Serb regime, the Khmer Rouge, and the Interim Government of Rwanda. He led an investigative team into major human rights abuses by the Assad regime in Syria, and represented Kenyan, Afghan and Palestinian victims at the International Criminal Court. He is now a judge at the Kosovo Specialist Chambers in The Hague. In March 2021, he joined the Owen M. Kupferschmid Holocaust/Human Rights Project at Boston College Law School to explore the future of international human rights trials. The views expressed are those of the author alone, and do not necessarily reflect the views of the United Nations or the Kosovo Specialist Chambers.

Before we answer that question, we should note that Hannah Arendt's writings about the trial reached a huge audience. They first appeared as a series of articles in the *New Yorker* magazine, and were later republished, in slightly abbreviated form, in her book. "Eichmann in Jerusalem." Her book soberly details the horror of the mass deportations and killings of Europe's Jews, and is based primarily on the trial transcripts, and many trial exhibits, including the 70-page transcript of Eichmann's interrogation, corrected in his own hand. Whatever the validity of criticisms that Arendt's account is incomplete, there is no doubt that the evidence tendered during Eichmann's trial forms an important part of our collective memory of the Holocaust. Arendt in 1963 brought much of that evidence, in an accessible way, to a large number of people. Surely many more have read her book than have read the judgement of the district court of Jerusalem in Eichmann's case. *She* was sceptical about the role of the trial as a means of contributing to the creation of a historical record. But the very *success* of her own book shows how *important* atrocity trials can be in creating a historical record, and combatting revisionism.

I'll look more closely at the limitations of atrocity trials as a means of establishing the truth, and the creation of a historical record.

But first, what do we mean by the truth? I worked for many years at the International Criminal Tribunal for the former Yugoslavia (ICTY), which was created in 1993 by the UN Security Council. Addressing the Council in May 1993, Madeleine Albright, the U.S. representative, said: "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."

This noble concept of truth as a healing balm continues to inform the work of international tribunals. The prosecutor of the International Criminal Court is required by the court's statute to "establish the truth." Witnesses declare that they will tell the "truth, the whole truth, and nothing but the truth." An ICTY judge said: "there is no peace without justice; there is no justice without truth, meaning the entire truth and nothing but the truth." Another ICTY trial chamber said that truth-finding is "one of the fundamental objectives of the International Tribunal."

But this issue of the search for the truth raises one of the philosophical fault-lines which divide the inquisitorial and adversarial criminal justice systems. The core purpose of inquisitorial systems is to get as close to the *truth* as possible. But the Anglo-American party-driven adversarial system is more oriented to ensuring that the evidence submitted by the parties conforms with rules designed to preserve the *fairness* of the trial, and in particular to prevent a jury from seeing evidence which might result in an unfair conviction.

Two prominent international judges, Judge Cassese who was president of the ICTY, and Judge Roling, a judge at the international military tribunal at

Tokyo, noted that in an adversarial jury trial, “many rules have been adopted to protect the jury from misleading and untrustworthy evidence. The purpose and the result of such a trial is not the real truth, but the *trial* truth”.

And a related question concerns the historical record that international trials leave behind. The term “historical record” is itself unclear. Some understand the term to refer to the trial judgement, others to the evidence admitted during trial, and others to the totality of the material stored in a tribunal’s archives.

In any event, in the early days of the Yugoslavia Tribunal, there was great emphasis on this notion of establishing a historical record. The Tribunal’s President said that part of the Tribunal’s mission was to establish ‘an historical record of what occurred during the conflict thereby preventing historical “revisionism.”’ The ICTY’s 1998 Annual Report said:

Ensuring that history listens is a most important function of the Tribunal. Through our proceedings we strive to establish as judicial fact the full details of the madness that transpired in the former Yugoslavia. In the years and decades to come, no one will be able to deny the depths to which their brother and sister human beings sank. And by recording the capacity for the evil in all of us, it is hoped to recognise warning signs in the future.

But as time went on, this idea of the tribunal as a means of creating a historical record receded. Within a few years, the same court president, now a presiding judge in a trial of six defendants said: “The primary task of this Trial Chamber was *not* to construct a historical record of modern human horrors in Bosnia-Herzegovina. The principal duty of our Trial Chamber was simply to decide whether the six defendants standing trial were *guilty*.”

But in Bosnia itself, it was generally recognized that ICTY judgements from The Hague did play a key role in writing history. The OSCE in Bosnia noted: “In a country with a contested history such as BiH, criminal prosecution of war crimes serves an integral role in fact-finding and establishing historical truth. [. . .] It is important to note that verdicts need not be convictions to serve an important truth-telling function. They can establish beyond a reasonable doubt the existence of crimes and how those crimes manifested, even while ultimately finding that an accused is *not* criminally liable.”

But back in The Hague, as time went on, more and more judges expressed skepticism about the role of tribunals in creating a historical record, echoing Hannah Arendt’s sentiments in 1963. The first trial judgement of the International Criminal Court (ICC) ran to 593 pages. Just nine of those are devoted to describing the historical context in eastern Congo in which the crimes were committed.

And let’s reflect on the right of victims. There is an emerging acceptance of the right of victims to know the fate of relatives who have “disappeared”

under repressive dictatorships, and of a broader right of survivors to know the truth about the crimes committed against them, and the identities of those most responsible.

In addition, the memory of atrocity is important not only for those who survive. ICTY President Cassese said: "Forgetting means that victims are murdered twice: first, when they are exterminated physically, and thereafter when they are forgotten."

Even skeptics must acknowledge that an international criminal trial, in particular a major leadership trial, where the trial record incorporates thousands of documents issued by the very authorities that oversaw and directed the atrocities, and the testimony of hundreds of witnesses, both victims and perpetrators, can hardly avoid creating a historical record.

The most comprehensive archives in the world today about the conflicts which engulfed the former Yugoslavia in the 1990s, are those held by the ICTY in The Hague. The most comprehensive archives about the genocide in Rwanda in 1994 are those held by the International Criminal Tribunal for Rwanda (ICTR) in Arusha. And the most comprehensive archives about the Khmer Rouge period are those held by the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh. Each now holds a gigantic quantity of evidence, much of which is not accessible to the public.

If we accept that atrocity trials before international courts are important for the victims' right to know, for remembering the murdered, and for our collective memory of mass atrocity, we must accept that international criminal courts bear a special responsibility to ensure that their contribution to the collective memory of atrocity is objective, clear and accessible.

And by special responsibility I mean one that is not usually borne by domestic criminal courts. Whether in Dublin or Boston, most domestic criminal trials concern non-fatal offences of little historical significance, if one sets aside their relevance to social history.

Let's turn now to the limitations of an international criminal court to create a comprehensive historical record and to establish the truth.

The first limitation is that of jurisdiction. All international tribunals are limited by their temporal, territorial, personal and subject-matter jurisdiction. Let's focus on temporal jurisdiction.

This can be limited to one calendar year (1994, in the case of ICTR). The ICTY's jurisdiction dates from 1 January 1991, and the ICC from 1 July 2002. The Special Panels in East Timor had exclusive jurisdiction only over crimes committed in the period 1 January 1999 to 25 October 1999, and not over the massive crimes committed in the previous 24 years. The ECCC's temporal jurisdiction extends to the period that the Khmer Rouge was in power, from 1975 to 1979.

And courts have territorial limitations. The ICTR's territorial jurisdiction includes crimes committed in Rwanda and in the states neighbouring Rwanda; the ICC's territorial jurisdiction is limited to the 123 states parties which are party to the Rome Statute, and those nonparty states that have accepted ICC jurisdiction.

This means that evidence concerning crimes which are outside the temporal or territorial jurisdiction might be historically relevant but legally irrelevant.

Relevance in a criminal trial has other facets. International criminal tribunals are focused on criminal campaigns. Incidents of unquestionable historical importance – such as legitimate combat not involving crimes, peace negotiations, preparations for NATO military intervention, efforts to ensure humanitarian relief – are often irrelevant to both the prosecution and the defense in a particular trial. Other issues may be of interest to a defendant, but are legally irrelevant and therefore scarcely appear in the trial record. The question of who shot down the aeroplane carrying Rwandan president Habyarimana on April 6, 1994, igniting the genocide, is historically interesting but of little legal relevance in respect of the criminal responsibility of those who committed the genocide. Further, it is not a defence to argue that the other side in the conflict was committing large-scale crimes against one's own side (*tu quoque*); while evidence of such crimes might be of great interest to a historian, it is generally inadmissible at trial.

The next limitation is prosecutorial discretion. Prosecutorial discretion limits the ability of an international tribunal to expose the full history, or any history, of a conflict. A former ICC prosecutor noted, "His mandate does not include production of comprehensive historical records for a given conflict." No member of the current ruling party in Rwanda, the Rwandan Patriotic Front (RPF), was indicted by the Prosecutor at the ICTR for serious RPF crimes committed during 1994. This was met with criticism. The ICTY Prosecutor declined to initiate any investigation in relation to NATO bombing campaign in 1999. The ICC Prosecutor in 2006 decided not to seek authorization to initiate an investigation in the situation in Iraq. His successor changed that decision, but then again decided not to proceed with an investigation into crimes in Iraq by UK nationals. Unlike some domestic jurisdictions, decisions by an international prosecutor not to prosecute are not generally subject to judicial review.

Even if an investigation is initiated, the prosecutor has discretion to determine who to prosecute and what charges to bring, which will greatly affect the evidence admitted at trial. For example, the prosecutor may decide to charge a crime requiring proof of an international armed conflict. This will require a trial-within-a-trial to prove that fact. Thus, in the *Blaskic* case at the ICTY, the prosecutor tendered evidence to prove that Croatia had militarily

intervened in the conflict in Bosnia. Naturally any evidence showing the involvement of one State in a war being fought in another State will be of high historical interest.

In other cases, the prosecutor might choose not to indict the accused for crimes requiring proof of an international armed conflict, and limit the charges to crimes committed in non-international armed conflict. The evidentiary record might therefore be deprived of historically fascinating material of one State's involvement in another State's affairs.

The prosecutor might also choose to emphasise a specific aspect of a campaign, with consequences for the historical record. The *Lubanga* judgement at the ICC focused on the responsibility of the accused for the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. No charges of murder or sexual violence were brought. The result was that many other massive crimes committed in the relevant area (Ituri, eastern Congo) in the early years of this century go almost entirely unremarked in the *Lubanga* judgement.

A related limitation is the territorial and temporal extent of the indictment in a particular case. Saddam Hussein was tried, convicted and hanged for his role in the killing of 148 victims, and related crimes, following an attempted assassination at Dujail. His second trial, concerning the 1986-1989 *Anfal* campaign, in which perhaps 100,000 people were killed, was terminated due to his execution for the unrelated Dujail incident. Saddam was not tried for any war crimes allegedly committed by Iraqi forces during the 1980-88 Iran-Iraq war or during the 1991 invasion of Kuwait. Nor was he tried for the massive and indiscriminate suppression of a 1991 uprising in southern Iraq, in which up to 100,000 people were killed. The crimes for which Saddam was convicted represent a small fraction of the totality of his likely criminal conduct.

Moreover, an indictment is subject to judicial control, from judges who might not be sympathetic to arguments invoking the importance of history. For example, an ICTY Rule permits judges to reduce the number of crime sites or incidents in an indictment. One ICTY trial chamber expressly rejected the argument that the trial of two leading figures in Serbian state security could make up for the deficiency in the historical record created by the death of Slobodan Milošević before judgement, and declared that the creation of a historical record is not relevant to a decision to be taken under that rule.

A major barrier to access to historically significant evidence admitted by international tribunals is confidentiality. All international tribunals permit witnesses to testify with protective measures in appropriate circumstances, and, where the risk is particularly high, entirely in closed session. While the identity and evidence of the witness is known to the parties, it is not in the public domain. Documentary evidence which might identify the witness is usually admitted under seal. Evidence given in closed session of protected witnesses

comprises a significant proportion of the total evidence admitted in international trials and is rarely later released to the public. These protective measures are necessary and inevitable due to the nature of international criminal trials. Unlike domestic trials, proceedings are often broadcast by radio or television directly to the zone where conflict is in progress or has recently ended, and the risk of violent retaliation is real. But there are currently no time limits on protective measures: when testimonial or documentary evidence is admitted on a confidential basis, it remains confidential indefinitely unless a chamber orders that it may be released as a public document.

A related restriction concerns information provided by States. States may be under legal duties to disclose evidence to an international tribunal. However, application of this general principle is subject to the concept of originator control: a State may decline to disclose to the tribunal intelligence information belonging to a third State without the consent of the third State. Furthermore, States are permitted to provide information in such a manner that it never reaches the public domain, under rules designed to protect State security. For example, at the ICTY and ICTR, a State which volunteers material to a party may require that the material provided never be disclosed to another party, nor used at trial, without its consent. It is not required to justify the reasons for its confidentiality.

Declassification decisions will be taken in due course by the residual mechanism set up in part to deal with the ICTR/ICTY's evidence. These decisions will naturally be sensitive, and will have to take fully into account the security and privacy issues concerned, especially those relating to 'insider' witnesses and to victims of sexual violence. But it is ultimately in the interest of a complete historical record that as much as possible of the vast quantity of protected ICTY and ICTR evidence be declassified after an appropriate time period has passed.

The plea agreement procedure—as you will likely be aware—allows the prosecution and defence to agree to the removal of certain counts from the indictment, to recommend a certain sentencing range, and to agree that the defendant will testify as a prosecution witness, in exchange for a plea of guilty. The procedure has been subject to enormous debate, not least because the evidentiary record resulting from a guilty plea is much shorter than that resulting from a full trial. One Chamber noted: “A public trial, with the presentation of testimonial and documentary evidence by both parties, creates a more complete and detailed historical record than a guilty plea.”

Another Chamber said that a plea agreement deprives the public of the fuller historical record which would emerge in a trial, but, on the other hand, provides “insights into previously undiscovered areas.” The “factual basis” which accompanies a plea agreement, signed by the accused, often provides a compelling and detailed description of the logistical preparations preceding a

massacre, for example, which is evidence that neither the prosecutor nor the historian might be able to obtain otherwise.

The contribution of an accused to a historical record, judges have found, “intrinsically falls within the value given to a guilty plea. Indeed, such a contribution to help establish the truth is one of several reasons which have been given in the jurisprudence of the International Tribunal and the ICTR for the mitigating effect of a guilty plea.” Those who plead guilty sometimes emphasise the importance of creating a historical record.

And there are other reasons for exclusion of relevant evidence tendered by a party. “Evidence is the basis of justice: to exclude evidence is to exclude justice,” said Jeremy Bentham. He was no supporter of the exclusionary rules (which regulate the admission of hearsay evidence and exclude from admission other kinds of evidence) once prevalent in criminal trials in common law jurisdictions. International tribunals have not generally adopted those rules. But a trial chamber will not admit evidence if its probative value is substantially outweighed by the need to ensure a fair trial. For this reason, judges have declined to admit items in evidence on grounds which a historian would probably dismiss as technical: for example, that it was not tendered during the prosecution case; that it should have been shown to a witness who might have been in a position to comment on it during the prosecution case; that it was not disclosed on time to the opposing party; that it has not been tendered through a witness who can speak to its authenticity; that it is the record of a person who was not advised of his rights as a suspect before questioning; or for more mundane reasons, such as a failure to specify which pages of a long document are sought for admission, to upload the document into the court’s electronic system.

Furthermore, a relatively large proportion of evidence tendered by the parties and admitted by the trial chamber will focus on the accused, rather than, for example, other participants in the criminal campaign who are not on trial.

Therefore, even if the rules of procedure and evidence at international tribunals generally favour admission and disfavour exclusion of relevant evidence on technical grounds, the body of evidence ultimately admitted by judges will inevitably differ from the body of evidence that a historian would choose. The historian may well want to have access not only to the entire trial record, including exhibits admitted under seal and testimony heard in closed session, but also to documents that the parties did *not* tender because they were not directly relevant to the case.

The archives of international tribunals are replete with thousands of contemporaneous records and communications produced by the parties to the conflict, including letters, minutes, parliamentary speeches, maps, decrees, combat reports and internal communications created by political, military, police and

administrative bodies at the local, regional and national level. They contain vast quantities of intercepts of radio and telephone calls, videos and photos. All these, whether admitted in evidence or not, should be liberally made available to historians, unless a compelling case is made for keeping them confidential.

Robert Jackson, a U.S. Supreme Court associate justice and famously the chief U.S. prosecutor at Nuremberg, said that ‘Judges often are not thorough or objective historians.’ The same could be said about prosecutors and defence counsel. Their objective is not to write history, even though they might well have a strong belief in the historical importance of their case. The primary objective of the prosecutor is to select the charges, incidents and modes of liability which most accurately reflect the facts arising from the material collected, and to select from that material only those items which most concisely and compellingly prove those facts. In accordance with extensive disclosure rules, a prosecutor will disclose far more material to the defence than he or she will submit to the court, and will not submit to the court evidence that does not support the prosecution case, however historically significant it might be.

The defence lawyer is not particularly interested in allowing the whole truth to be told, and is not ethically required to seek out the truth. Her first loyalty must be to her client, and she will be expected to pursue whatever legal avenues are available to her to exclude damaging evidence from the trial record, and to have admitted whatever evidence is available to help her client. Writing history is not part of a defence lawyer’s remit.

A fair and balanced historian is not similarly constrained. The historian will adopt an inference from the evidence which appears to most fairly reflect the reality on the ground. The principles for the assessment of evidence set out in the classic texts on historical method differ in significant aspects to the principles which apply to the assessment of evidence by judges. In particular, judges will only convict if it is satisfied of the criminal responsibility of the accused beyond reasonable doubt, on the basis of the entirety of the evidence admitted. If another reasonable inference is available on that body of evidence which favours the accused, the trial chamber must accept that inference. For example, an ICTR trial chamber acquitted Colonel Bagosora, often depicted in the media as the architect of Rwanda’s genocide, and his co-accused of the charge of conspiracy to commit genocide. It said:

The Chamber certainly accepts that there are indications which may be construed as evidence of a plan to commit genocide . . . However, the evidence is also consistent with preparations for a political or military power struggle and measures adopted in the context of an on-going war with the RPF . . . Consequently, the Prosecution has not proven beyond reasonable doubt that the only reasonable inference to be drawn from the evidence is that the four Accused con-

spired amongst themselves or with others to commit genocide. The Chamber has acquitted them of the count of conspiracy.

This analysis illustrates the core problem which arises when relying on a trial judgment as an objective account of history: the standard of proof of 'beyond reasonable doubt'. A conscientious historian analysing the same evidence might well have concluded that there had been a conspiracy to commit genocide in Rwanda before it unfolded.

Thus a historian must tread carefully before relying upon the judgements of international tribunals, especially on an event where the trial chamber states that it is not satisfied 'beyond reasonable doubt', as the last word or as an exhaustive historical account of that event. Truth and Reconciliation Commissions (TRCs) generally adopt a standard of proof of 'balance of probabilities' or 'preponderance of the evidence', which is much closer to that used by historians. For this reason, TRC reports, in particular those of TRCs which permit the testing of evidence through cross-examination, may well be better as first drafts of history than trial judgements.

Another difficulty with judgments is their general readability. They are aimed at lawyers, rather than the general public, and are not widely consumed, it appears, where the crimes took place. This may be because many are written in a flat, formulaic style, relatively clear to legal practitioners, but not particularly attractive to the lay reader. Trial judgements are focused on identifying the evidentiary and legal basis for their conclusions, rather than producing a compelling narrative. Appeal judgements are usually devoted to legal issues which are obscure to the non-lawyer, or to contested factual issues discussed in isolation from the general facts of the case.

Long accounts of terrible events can be accessible and readable. The final report of Argentina's National Commission on the Disappearance of Persons, *Nunca Más*, was published in 1985 and sold 40,000 copies on the day of its release. It went on to sell 300,000 copies, and was read on Argentina's beaches. The 9/11 Commission Report was another bestseller, praised for its clarity and selected as a finalist for the U.S. National Book Award in nonfiction.

Trial judgments issued by international courts are long and appear to be getting longer. The *Charles Taylor* trial judgement, runs to 2,500 pages.

We must accept that trial and appeal judgements at international criminal courts could be written in a manner which brings their factual findings to the victims, and to the public at large, in a more accessible way, thus enhancing reconciliation, deterrence and understanding of international criminal justice.

In conclusion, I believe that international criminal courts bear a special responsibility to ensure that their contribution to the collective memory is clear and accessible. The ICC and all the *ad hoc* and hybrid tribunals have already amassed archives of enormous historical importance. Conscientious historians

will no doubt seek access to the archives of all international tribunals, and their use of them, to the fullest extent possible, should be encouraged. Yet historians must consider the jurisdictional principles and evidentiary rules which aim to ensure a fair trial but significantly limit the extent to which a trial record or a trial judgement can be considered to be a comprehensive historical account. Judges and practitioners should strive to ensure that judgements and briefs are cogent, readable and enlightening. And all of us must do what we can to support these processes. The greatest respect we can show to the victims of atrocities is to support the rule of law, and to allow the truth to emerge in dignity.

Preferred citation: Fergal Gaynor, *Evidence, Truth, and History in Atrocity Trials*, 63 B.C. L. REV. E. SUPP. I.-37 (2022), <http://lawdigitalcommons.bc.edu/bclr/vol63/iss9/4/>.

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