
Book Reviews

Smelser, Ronald (ed.), **Lessons and Legacies vol. V: The Holocaust and Justice**. Evanston, Ill.: Northwestern University Press, 2002. Pp. 400.

ISBN 0-8101-1916-1;

Douglas, Lawrence. **The Memory of Judgment: Making Law and History in the Trials of the Holocaust**. New Haven: Yale University Press, 2001. Pp. 318
ISBN 0-300-08436-6.

Since the late 1990s, when international criminal law and the International Criminal Court (ICC) turned from a noble dream into something approximating reality, international lawyers have been trying hard to remember what it was again that the ICC was supposed to accomplish. Having turned dream into reality, the time had come to analyse what that dream was all about, and whether international criminal law is more than a solution to a problem that never really existed.

Many of the standard justifications seem dishearteningly shallow.¹ Surely, while the ICC may help to strengthen the prohibition of war crimes, crimes against humanity and genocide, we do not (or should not) really need a court to remind us that those are not commendable activities. Surely, seeing that public justice gets done may help prevent some instances of vigilantism, but will be unlikely to completely quell the attempts at private justice, unless public justice is absolute and complete; and surely, while an individual may occasionally refrain from nasty activities by being vaguely aware of possible legal consequences, equally surely deterrence is not likely to prevent political crime altogether, or

even to any substantial degree.² Moreover, retribution for retribution's sake, while probably not considered unattractive by many, is difficult to reconcile with the liberal ideas underlying the ICC and international criminal law, and seems to have been rejected along with the rejection of the death penalty.

The most intuitively plausible argument, then, may well be that international criminal law and the ICC may be of use in the writing of history: a criminal trial is, in this view, at the very least an opportunity for stories to be told and history to be recorded. Yet this too is vulnerable to criticism: not only is there an inherent risk that such trials degenerate into show trials,³ but additionally historians seem not at all convinced that legal proceedings constitute an appropriate forum for discovering, uncovering and recording historical truths.

This becomes clear with the help of the collection of papers edited by Ronald Smelser. This volume is the outcome of a conference among historians held in 1998, the very year that witnessed such an outpouring of enthusiasm for the ICC. The remarkable thing about this collection is that the ICC is not mentioned, not even once. If the Smelser volume is anything to go by (and its contributors form a respectable group of Holocaust researchers), historians writing on and discussing the Holocaust and justice do not appear to be convinced about the possibilities of international justice as something courts can help achieve.

In his contribution to the Smelser collection, the eminent historian Michael Marrus provides a few reasons why trials are less than ideal

¹ See generally Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *EJIL* (2002) 561.

² On this latter point, see Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', 12 *Finnish Yearbook of International Law* (2001) 249.

³ See Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002) 1.

vehicles for writing history. Predominant among those are the difficulties inherent in the trial process itself: trials aim to do justice in individual cases and do not take account of the sort of titbits of evidence which would help the historian paint a picture of what really went on; hearsay, fragmentary testimony, comments about a general mood or atmosphere. All these would assist the historian, but would most likely be thrown out by a court. There is, in other words, a tension between conducting proper trials and writing proper history. Hence, as Marrus sums up, ‘we should not look to trials to validate our general understanding of the Holocaust or to provide a special platform for historical interpretations’.⁴ Or, as Robert Paxton puts it with some aplomb in his very brief contribution on France in the Smelser volume, ‘Pedagogy in France about the Holocaust depends henceforth on pedagogues, and that is perhaps as it should be.’⁵

It is this position that Lawrence Douglas, in his brilliant study *The Memory of Judgment*, takes issue with. Douglas aims to demonstrate that the tension between trials and the writing of history (the tension between trials and pedagogy) can be overcome, and he does so by looking in great depth and with a subtle eye for detail at past trials: Nuremberg, the Eichmann trial, the later trials of Barbie and Demjanjuk, and the trial of Holocaust denier Ernst Zundel. Curiously, for all their relevance, these trials singularly fail to make the point Douglas wants them to make: they were all (with one exception, to Douglas’s mind), to some extent, either pedagogical failures or legal failures, and Douglas is bright enough to concede as much (at 260).

Nuremberg failed, so Douglas suggests, because it painted only part of the picture. Keen to secure convictions and to rely on documentary evidence rather than witness testimony, the prosecution focused on Germany’s

aggression and war crimes, paying scant attention to the Holocaust. Indeed, in a rather perverse move, the prosecution at Nuremberg, eager to connect Germany’s aggression with crimes against humanity, was prepared to take seriously the Nazi argument that the Jews had been a potential military foe, thereby contributing to a distorted picture of the Holocaust. In the end, ‘the understanding and meaning of history at Nuremberg was shaped by the legal idiom through which Nazi atrocity was filtered and judged’ (Douglas, at 89).

The trials of Barbie and Demjanjuk were likewise problematic. In *Barbie*, the French *Cour de Cassation* ended up exempting France (and, by extension, democratic states generally) from any possible complicity in crimes against humanity by linking such crimes to states practising ‘a hegemonic political ideology’; the *Demjanjuk* proceedings, in turn, were marred by the painful circumstance that the identity of the accused was in doubt but could not be questioned without at the same time putting the very use of survivors’ testimonies in question. The trial against Holocaust denier Zundel, finally, was also less than successful, partly due to the rules of evidence in criminal proceedings: any stipulation on the Court’s part that the Holocaust took place ‘would have been gravely prejudicial to the defense’, as the Ontario Court of Appeals put it (Douglas, at 243).

The only exception, according to Douglas, is the *Eichmann* trial, which was conceived explicitly as an exercise in didactics. Indeed, as Hannah Arendt famously suggested, the *Eichmann* trial was successful in placing the Holocaust in the spotlight, but this came at a price: in Arendt’s words, the case ‘was built on what the Jews had suffered, not on what Eichmann had done’.⁶ And this, so Arendt claimed, was not very felicitous, as the ‘purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes . . . can only detract from the law’s main business: to weigh the charges against the accused,

⁴ Marrus, ‘History and the Holocaust in the Courtroom’, in R. Smelser (ed.), *The Holocaust and Justice* (2002) 215, at 235.

⁵ Paxton, ‘The Trials of Holocaust Perpetrators in France’, in *ibid.*, 240, at 243.

⁶ See H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1965), at 6.

to render judgment, and to mete out due punishment'.⁷

In order to underline his position then, Douglas has to create some distance between himself and Arendt, and does so with great enthusiasm, so great perhaps as to occasionally distort Arendt's writings. Not surprisingly (and not unreasonably either, it should be added), Arendt's view on trials as being limited to doing justice is dismissed as being legalistic – perhaps, so Douglas hints, excessively so.⁸

At other times, Douglas is less sanguine. Thus, he chides Arendt for never offering a definition of normal criminal guilt, after citing her comments on the topic in a letter written to her mentor Karl Jaspers (at 39),⁹ and misrepresents Arendt's position in claiming that she argues that the Holocaust would be an 'offense beyond punishment' (at 40). Given her agreement with Eichmann being given the death penalty,¹⁰ this seems misleading. The better view then might be that Arendt did not consider the Holocaust beyond punishment, but rather beyond law: a different thing altogether. And by the same token, Douglas misconstrues Arendt's characterization of Eichmann as 'thoughtless' as Eichmann lacking intelligence (at 199).¹¹

If Douglas succeeds in creating some (contrived) distance between Arendt and himself, he does not fully succeed in demonstrating his main thesis. Reading *The Memory of Judgment* leaves one with the conclusion that legal proceedings are not terribly well suited to also serve as history classes. Douglas's claim to the contrary rests largely on the *Eichmann* trial,

distanced as it is from Arendt's famous (and, on the points of relevance here, reasonably accepted¹²) version. Indeed, it is perhaps no coincidence that Marrus, in the Smelser volume, approvingly quotes Douglas as being sceptical concerning the contribution of trials to memory.¹³

In one of the better contributions to the Smelser volume, Donald Schilling points out that it took a while before general histories of the Second World War included references to the Holocaust: it is a sobering realization that many simply did not address the Holocaust in any meaningful way. While this would seem to add yet another argument in favour of trials as pedagogical instruments, it also indicates the limits thereof, by suggesting that there is no such thing as a single, uncontested and uncontestable version of history. Writing history, even by professional historians, turns out to be subject to professional idiosyncrasies (military historians, who initially largely monopolized the writing about the Second World War, were at first simply not overly interested in addressing non-military matters) and even to power politics: the emergence of the Cold War necessitated a transformation of the Germans from 'villains to victims', something that an emphasis on the Holocaust would most likely have complicated.

While the Smelser volume contains a number of useful and stimulating contributions (most notably perhaps those by Marrus and Schilling, referred to above, as well as the contributions on the various bureaucrats

⁷ *Ibid.*, at 253.

⁸ Douglas, at 110–112, 174, dismissing Arendt's critique that the Eichmann trial did not establish a very viable precedent as 'classically formalist'.

⁹ Surely though, what would be viable criticism if it concerned an academic paper is less viable when it concerns a private letter, published posthumously.

¹⁰ Arendt, *supra* note 6, at 279.

¹¹ Note also that it has been argued that precisely this thoughtlessness is Arendt's key concept for understanding what she called the banality of evil. See R. J. Bernstein, *Hannah Arendt and the Jewish Question* (1996), at 152.

¹² Arendt is often chided for historical inaccuracies and her portrayal of the role of the Jewish councils, but not for her analysis of Eichmann's character or her understanding of the criminal process. Sympathetic commentators include M. J. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (2001) and D. Barnouw, *Visible Spaces: Hannah Arendt and the German-Jewish Experience* (1990).

¹³ See Marrus, *supra* note 4, at 231. This referred to a 1996 article written by Douglas under the title 'The Memory of Judgment: The Law, the Holocaust, and Denial'.

involved in the Holocaust¹⁴), it suffers to some extent from being a conference book: it is a little uneven in many respects. Some contributions (such as Saul Friedländer's thesis on Hitler's 'redemptive anti-semitism') would warrant treatment in greater detail; others, while sensible, seem to have been written during a short break between presentations (Paxton's four pages on France stand out), and yet others, especially those dealing with the plight of second-generation victims, are written in an unpleasant writing style that turns nouns such as 'question mark' into verbs. On the other hand, the volume ends with a delightful, sensitive story (clearly not general history, but of historical relevance and as such a nice illustration of how story and history can be related) by Robert Melson on the acquisition of false papers by the author's parents.

Douglas's *The Memory of Judgment*, on the other hand, is a brilliant study, and should be required reading for anyone even remotely interested in the subject. While his central thesis may not be as persuasive as he had hoped it to be (perhaps against his own better judgment), the work is extremely rich in detail, and Douglas is particularly good on outlining and analysing litigation strategies.

At the end of the day, both books leave the reader – this reader, at any rate – with the conclusion that for all their utility, trials are not the most appropriate setting for the recording of history, at least not if by that is meant the rendition of a single, paradigmatic version of the truth of what happened. That is not, in and of itself, a sufficient reason to discard trials though: while Arendt had a point in suggesting that trials ought to do justice and nothing else, Douglas also has a point in suggesting (although it is implicit in his study and never highlighted) that trials will end up writing history no matter what. The question then is, of course, whose history they will record, and in this light it might not be such a

bad thing to use trials so as to give a voice to liberal reason.¹⁵

In addition, even if trials cannot lay down the truth, they may be able, as Arendt suggested in a post-Eichmann piece, to establish moments of truth.¹⁶ And it is in collecting and recollecting such fleeting moments of truth – the nine-year old writing that 'he won't learn anymore'; the teenager writing his name in blood on barrack walls and adding 'lived sixteen years' – that suffering becomes visible. Collecting and recollecting such moments of truth may well provide its own justification.

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Chandler, David. ***From Kosovo to Kabul: Human Rights and International Intervention***. London, Sterling: Pluto Press. 2002.

Pp. Xv + 268;

Österdahl, Inger (ed.). ***Is Intervention Humanitarian? Protecting Human Rights and Democracy Abroad***.

Department of Peace and Conflict Research, Uppsala University, Report No. 62. Stockholm: Elanders Gotab. 2002. Pp. 98.

Humanitarian intervention, despite its description by one of the authors reviewed here as a 'new principle' (Chandler, at 131), is an ancient phenomenon, although it has always been subject to only intermittent theo-

¹⁵ Of some relevance, however, is Arendt's suggestion that political truth (typically the type of truth one would hope to uncover during war crimes trials) is itself potentially dictatorial, accepting no alternative versions of history and foreclosing any discussion. This might be difficult to reconcile with the liberal premises often underlying the pro-trials argument. See Arendt, 'Truth and Politics', reproduced in H. Arendt, *Between Past and Future* (1968) 227.

¹⁶ See Arendt, 'Auschwitz on Trial', reproduced in H. Arendt, *Responsibility and Judgment* (2003, Kohn ed.) 227, esp. at 255–256 (first published in 1966).

¹⁴ Various authors sketch in some detail the biographies of some of those doing the dirty work on the ground: camp administrators, engineers, etc.