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Review essay

Law Against Genocide: Cosmopolitan Trials
By David Hirsh. 208 pages. London: Glasshouse, Cavendish Press, 2003.
ISBN 1904385044. £26.00.

The Memory of Judgment, Making Law and History in the Trials of the Holocaust
By Lawrence Douglas. 384 pages. London and New Haven: Yale University Press, 2001.
ISBN 0300084366. £30.00.

Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory
By Donald Bloxham. 300 pages. Oxford: Oxford University Press, 2001.
ISBN 0198208723. £42.50.

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Punishment and memory

> 'His prosecution also constitutes a watershed event for a fledgling system of pro-active international justice that, if it can ever be perfected, will mark a crucial step in the necessary ascent of mankind beyond the quasi-barbaric constraints of ethnicity, race, tribalism, nationalism and the accidents of geography.' (*The Guardian* Leader Comment, 12 February 2002)

During the 1970s, the French Fifth Republic debated whether to continue applying the death penalty to the gravest crimes against the social order. In the end, the abolitionists prevailed, and the death penalty was removed from the statute books. The then French Minister of Justice, Robert Badinter, had been a prominent advocate of abolition; he had argued that there was no place in a modern France, a France dedicated to the project of modernity, for the barbarism of state execution.

Badinter's father, Simon, had been working in a welfare office in Lyon during the Second World War and had perished in a famous Gestapo raid on this office on Rue Sainte-Catherine; a raid instigated, organised and executed by Klaus Barbie. When Barbie was returned to France from Bolivia in 1983, cries for him to face death were stilled by the realisation that France had renounced capital punishment. Ted Morgan called this 'vengeance in reverse, where the son of one of Barbie's victims had saved him from the guillotine (Morgan, 1990, p. 24). But Badinter's civilised liberalism might be viewed, also, as the best possible 'revenge'; a vindication of law's majestic detachment in the face of profound evil. Indeed, the point of Barbie's trial may not have been punishment at all but instead the construction of edifying histories and the promotion of cosmopolitan values. Certainly, war crimes suspects have often favoured a sort of amnesia. Think of Alfredo Blandon, in El Salvador, calling for a little forgetting to be thrown on the past, Barbie himself declaring: 'It was wartime, and today the war is over' (Morgan, 1990, p. 26) and Himmler in 1945 calling for Jews and Nazis 'to bury the hatchet'. War crimes trials, it might be said, provide an antidote to such forgetfulness.

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* Gerry Simpson's latest books are *War Crimes Volumes I and II* (Aldershot: Ashgate, 2004) and *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004).

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It can be argued, too, that the creation of a cosmopolitan legal order is an implicit rejection of the regressive nationalist impulses underlying the commission of so many war crimes and crimes against humanity. So, Milosevic speaks for an atavistic Serb chauvinism while the International Criminal Tribunal in The Hague advances the cause of international justice and world order. In a further irony, Robert Badinter is part of this latter project, too. The Badinter Commission sought to apply the standards of international law both to the break-up of the Yugoslav state and the subsequent recognition of the new nation-states established as a consequence of this disintegration. But Badinter confirmed also the centrality of nationhood in international society. The procedure may have been cosmopolitan (arbitrators drawn from a number of different states impartially enacting international mores and norms) but the substance of the law was mired in statism. And this equivocation is surely the story of international tribunals in an anarchic order. With war crimes trials this is doubly true. Barbie's trial may have been a triumph of remembering ('I want to look him in the eye' as one of Barbie's victims said during the trial) but there was much to forget, too: notably France's collaborationist history in the 1940s and some unsavoury aspects of its colonial past.

This double movement between the cosmopolitan and the metropolitan, and between amnesia and recording, is surely part of the story of war crimes trials in history; and from the moment Saddam Hussein emerged from the hole in Tikrit, this process began again. The lines were drawn early on the question of whether the former President should be tried by an international or domestic tribunal. The idea of a domestic tribunal seems to have gained favour among those who are concerned not to interfere with Iraq's sovereignty by imposing a structure from the outside (Greenwood, 2003) or who worry about the colonial overtones of an international tribunal directed from the outside. Meanwhile, internationalists attacked the domestic trial model because the judges would be biased or because of a lack of 'international legitimacy' (Byers, 2003, p. 16). Curiously, many of those who had been supporters of the war, with its attendant effects on Iraqi sovereignty, were now highly attuned to concerns about domestic jurisdiction and sovereign prerogatives while opponents of the war and the internationalisation of Saddam's human rights abuses or weapons programmes now turned back to the international in the search for a just trial.

Harking back to the debate over Barbie, these groups divide, too, on the question of the death penalty. For internationalists, forgetting perhaps that international law does not forbid the application of the death penalty, the proposal that Saddam might potentially face execution is an insult to liberal internationalism. For them, the use of the death penalty will be the logical conclusion of a coalition war that was tainted with illegitimacy from the beginning. On the other side are localists, who would be happy for the Iraqis to make the decision to kill Saddam because they approve of capital punishment (George Bush called for 'ultimate justice' for Saddam on 16 December) (Byers, 2003) or because they have cast the whole invasion as a way of restoring Iraqi sovereignty even if this has some unsavoury side-effects (Prime Minister Tony Blair). Meanwhile, there are those who would rather forget Saddam and his crimes, and instead get on with the more important task of reconstructing Iraq.

In Cambodia, too, the proposed trials of the Khmer Rouge are bogged down in a controversy about international involvement in the trials. Here, the 'nationalists', if this is the right word to describe those placed in power by foreign intervention, have, for some time, obstructed any possible involvement by the United Nations in the formation of war crimes courts. In addition, Hun Sen's regime has been keen to maintain control over the trials for the obvious reason that the Prime Minister himself and many of his associates were once members of Pol Pot's party. As of January 2004, the shape of the tribunal structure is in place but internal Cambodian politics have created an impasse which may further delay the trial of Ta Mok *et al.* Hun Sen has simply acknowledged a truth about war crimes trials, namely that even a commitment to the recording process is fraught. What after all is to be recorded? Whose history? What if the 'wrong' history is recorded?

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Three recent books might be expected to shed light on these conundrums. David Hirsh, in *Law Against Genocide: Cosmopolitan Trials*, takes a likeably broad view of international criminal law or war crimes trials. His 'cosmopolitan trials' include not just classic war crimes trials in the Nuremberg mode (e.g. the ICTY hearings in The Hague) but also domestic trials (*Sawoniuk* in the UK) and civil cases (the *Irving* defamation proceedings). Hirsh concedes that these cases are considered on the serendipitous grounds that the author happened to be around at the time but, paradoxically, the result of this accidental scholarship is a comprehensive theory about what these cases are about or add up to (they are part of cosmopolitan law). Hirsh takes the view that war crimes trials are cosmopolitan and didactic. They are part of the transformation of international law and the decentering of the state but they also educate and enlighten (these various effects are not fully in evidence in every trial, of course).

In *The Memory of Judgment*, Lawrence Douglas shares Hirsh's ecumenical approach to the subject of war crimes trials. He, too, includes, alongside Eichmann's and Demjanjuk's, a trial that was not strictly speaking a war crimes trial but rather a case involving Holocaust denial, that of Ernest Zundel, the Canadian reporter-historian (David Irving appears in the interstices of this story, too). But Douglas accomplishes something different with his material. Instead of constructing around these trials a theory of human community, he wants to work through the limits and possibilities of didacticism in war crimes proceedings. What do they show us? Can they illuminate the great tragedies of the past century? Of what would such an illumination consist? What is the relationship between evidence and truth, between the commitments of history-making and the procedures of law-making? This is work in the mode of people like Mark Osiel (1997) Shoshanna Felman (2001) Martha Minow (1999) and David Luban (1994) who want to know where war crimes trials stand in relation to something called 'collective memory'. And this, too, is part of Donald Bloxham's project, *Genocide on Trial*, though in Bloxham's case the primary concern is with the war crimes trials occurring in Germany in the immediate aftermath of the Second World War: the IMT trials of the Major War Criminals and the Control Council trials held between 1946 and 1949.

The title of David Hirsh's book is surely a curiosity: *Law against Genocide*. For Karl Jaspers[1], there was something rather measly about using law to confront the unspeakable horrors of the Shoah. Hannah Arendt famously pronounced that hanging Eichmann was necessary but totally inadequate (1994). Law seems to belong to an everyday of traffic violations and house sales. Can it help us in understanding the metaphysics of evil? Is this the way to punish very bad people? If, as Adorno[2] put it, poetry is barbaric after the Holocaust, what of law and remembrance?

Hirsh is a realist who wants to believe, and this quality makes for a strange, sometimes contradictory, read. The law is a flawed human creation but in the trials the author has witnessed, it often reaches for, and occasionally touches, justice. Better still, war crimes law is, along with the doctrine of humanitarian intervention, in the vanguard of a new project dedicated to establishing the conditions for a cosmopolitan legal order. Part of the excitement attending this cosmopolitan law (or, at least, Hirsh's take on it) is that it can no longer be confined to the projections of right-thinking visionaries but is now part of an observable social reality (Pinochet really was subject to extradition proceedings, Milosevic is on trial, NATO did intervene in Kosovo).

For David Hirsh, the cosmopolitan is not a place but an idea. Cosmopolitan politics are enacted at the local and the 'supra-national' level, at the official and unofficial level. This seems suitably open-minded but there is a clear animus against the state here. Human rights and national sovereignty are in constant opposition in the book so that while 'people-based' strategies and global institutionalism are viewed positively, the state tends to be tyrannical or totalitarian. Yet, the enforcement of

1 See discussion in Arendt, (1994, p. 271).

2 For a discussion see Gubar (2003).

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cosmopolitan law happens at the state level. It was the Great Powers that established the ICTY and ICTR while the trial of Sawoniuk and the defamation action brought by Irving are heard in the courts of the Great Powers. It is the Great Powers, too, who do the intervening in the name of humanity and it is this humanitarian intervention that represents, for Hirsh, the other limb of the cosmopolitan project. He who invokes humanity does not always cheat, seems to be Hirsh's message and this might be true. But how strange it is to extol the power of law in the courts as an antidote to violence while at the same time calling for international law to be by-passed when it fails to authorise intervention. 'Intervention is necessary if it is still possible to prevent a crime against humanity' (p. 154) argues Hirsh. That would surely entail a lot of intervening even if one were to take the narrowest possible view of crimes against humanity. (And what would Hirsh make of the intervention in Iraq? Are Bush and Blair to be prosecuted for war crimes under cosmopolitan law or congratulated for undertaking a cosmopolitan intervention? I am, genuinely, at a loss.) Indeed, the book loses direction in the final chapter. What ought to be a distillation of the argument in favour of war crimes trials becomes a rant against those who would oppose humanitarian intervention. It is not at all clear that this unconvincing polemic belongs here.

The argument for cosmopolitanism is far more convincing and, uncontaminated by humanitarian intervention advocacy, it possesses some strengths. There are two problems, though, with cosmopolitanism, generally. The first is that it can often seem like the view from nowhere. The communitarian critique (e.g. Walzer, 1996) has focused on this lack of embeddedness in the cosmopolitan project. The community of men or the *civitas humanis* is simply too thin to sustain a rich, progressive theory of global life. Worse, still, as Costas Douzinas has shown, the human rights movement (cosmopolitanism's closest living relative) atrophies when it embraces the pragmatic, the institutional, the international, the bureaucratic and the diplomatic and repudiates the ethical, the utopian and the local (Douzinas, 2000). In particular, human rights have to be fought for where they are breached: at the local and the national level (Alvarez, 1999).

A second problem might be described as the problem of legitimation. What if cosmopolitan values or human rights norms are simply a cover for Great Power primacy or pseudo-colonial interference or liberal hegemony? Do war crimes trials simply advance the ends of highly particularised political projects? Are they about friends and enemies rather than dispensing justice? For Hirsh this is too jaundiced a view. Cosmopolitan law may be legitimation but it ends up with a separate or, at least, institutional existence. It bites the hand that shapes it. Crimes against humanity are the exemplary case; brought into existence by the Great Powers but now subjecting those same Great Powers to its jurisdiction. Thus, the concept marks a 'recognition that there is no sovereign right to commit such crimes and that the claim made by cosmopolitan law, that it has jurisdiction within all sovereign states in relation to such crimes is legitimate' (p. 152). But Hirsh's choice of case law belies this claim. His focus on a civil case involving defamation in the UK (brought by one British national against a British company) a criminal case involving a UK resident and a couple of trials held in The Hague under a form of highly selective jurisdiction suggest that if this is cosmopolitan law, it is in a state of highly uneven development. It is true that international tribunals exist and that they are '. . . competent to prosecute crimes against humanity' (p. 152) but these tribunals surely are swallows failing to make a summer. The ICTY has limited temporal and territorial jurisdiction (and is beholden to the Great Powers for funding). Its failure to adequately investigate the NATO attack on Serbia was necessary to its survival. Other ad hoc tribunals are similarly selective. Meanwhile, the International Criminal Court may have jurisdiction over crimes against humanity but this is certainly not universal jurisdiction (universal jurisdiction was specifically rejected by the delegates in Rome). U.S. soldiers committing crimes against humanity in East Timor would not be subject to it, Russian special forces murdering and raping in Chechenya are not subject to it. Indeed, one might go further and say that after Resolution 1422 (and its progeny) and the Article 98 treaties, war criminals in most places most of the time will not fall within the jurisdiction of the ICC. (Unless the Security

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Council chooses to refer a matter to the Prosecutor, but then, of course, we are back in the world of the Great Powers.) Hirsh wants to show us that he is aware of all this while at the same time promoting the project of cosmopolitanism. This does not quite work.

And I think a larger problem is his insistence on relative autonomy. According to Hirsh the difference between institutional domination under bourgeois conditions and those under totalitarianism is that bourgeois forms allow for disagreement, independence and dissent. Thus, judges working in institutions established by the Great Powers are able to act autonomously or semi-autonomously despite the provenance of these institutions in *realpolitik*. While this might be true, relative autonomy does not penetrate the critical decisions about whether to establish these institutions in the first place or the permissible limits of jurisdiction enjoyed by these institutions. Hirsh argues that the ICTY indicted Milosevic, 'at a moment during the Kosovo conflict when it might have been inconvenient for NATO' (p. 156). Think how much more inconvenient it would have been if Clinton or Blair was indicted. When war crimes trials threaten to become too inconvenient they simply do not happen. Hirsh has converted a plausible argument about professional ethics into a project for cosmopolitan justice. One judge irritating the Great Powers in The Hague does not a system of universal justice make (in general Hirsh asks lot of cosmopolitan judges (impartial, professionally detached); they are deemed capable of transcending the myths of nationhood in order to write authoritative statements of judicial history).

The central argument concerning war crimes trials, themselves, is not unproblematic either. The Pinochet judgement does not stand for 'the principle of universal jurisdiction over crimes against humanity' (p. xi). In fact, this principle is still highly controversial and a single judgement of a domestic court (no matter how tectonic) is not capable of transforming this picture. In any case, most of the judges in the majority found against Pinochet on narrower grounds related to the jurisdiction established under the terms of the Torture Convention. This is why Pinochet could not stand trial for crimes such as hostage-taking, or torture committed pre-1988 (the date at which the U.K. ratified the Convention). Nor is it the case that Tokyo, Nuremberg or the ad hoc tribunals stand for universal jurisdiction. How could the Hague Tribunals do so when their territorial and temporal competence is so severely circumscribed by their own statutes? Nuremberg and Tokyo meanwhile established certain acts as crimes under international law but these tribunals neither specified the jurisdictional consequences of this nor were they, themselves, exercises of universal jurisdiction (indeed, there was something anti-cosmopolitan about Nuremberg (Luban, 1987, pp. 779–829)). The same goes for the Genocide Convention; it is lauded by Hirsh for giving universal jurisdiction over the crime of genocide but the Convention does no such thing. It provides for a form of territorial or international jurisdiction but not universal jurisdiction. These distinctions are confirmed in recent jurisprudence. The *Genocide Case*, recently heard by the Tribunale Supremo in Madrid, found that Spain could not exercise universal jurisdiction over alleged genocidaires in the absence of a special link with Spain. The Belgian war crimes legislation was amended in 2003 to dilute the principle of universal jurisdiction.

Despite these criticisms, though, there remains something attractive about the Hirsh position. Clearly, Hirsh possesses some methodological advantages over lawyers. He observes these trials as a sociologist and, moments of socio-banality apart (do we really need to be told that '. . . it is always necessary to be conscious of the social setting in which the evidence is being presented (p. xxi)?) this offers us an alternative to the plethora of doctrinal analyses engaged in by international lawyers.

Substantively, cosmopolitan law may be too ambiguous or ambitious a term for what Hirsh has identified but *something* is happening in The Hague or in Sierra Leone or in Court 73 or at the unofficial comfort women trial in Tokyo. As Hirsh puts it: 'The most striking thing about the ICTY is that it exists" (p. xvii). Powerful men sleep less easily when these institutions are around. Henry Kissinger consults his lawyers when he travels abroad, Mladic and Karadizc fear surrender to the tribunals in The Hague and Pinochet continues to fight for immunity in the Chilean legal system.

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The Chomsky/Pilger scepticism is only partially warranted. Each war crimes trial operates at the behest or the sufferance of the Great Powers but each trial has the potential to shift social practice in a particular direction sometimes towards equality (Hirsh) sometimes in the direction of good history (Douglas) sometimes bad (Douglas). Surely the point is that these are moments of political contestation. The trial offers a sort of equality among the participants, and it constrains myth-making even in the moment of making new myths (Nuremberg sanctified the Western allies but it also made the job of Holocaust deniers so much harder).

This myth-making dimension to the trial is not ignored by Hirsh. In two enthralling chapters that, for me, are the heart of the book, he considers the relationship between memoir and evidence in the Sawoniuk Trial and the way in which truth and collective memory was managed in the defamation case brought by David Irving. In *Sawoniuk*, there was a tension between the truth-telling imperatives felt by the main witness, Ben-Zion Blustein, and the constraints on evidence imposed by the court. Meanwhile, in the Irving defamation case, the very subject matter of the legal proceedings was the nature of collective memory, historical truth and professional credibility. In each case, the courts produce compelling historical documents. They decided cases and at the same time made (perhaps, cosmopolitan) history.

Are these activities compatible? Hannah Arendt devoted much of *Eichmann in Jerusalem* to this question. The trial's integrity, she argued, was mortally wounded by an insistence in teaching the Holocaust when its job was the conviction of Eichmann. For her, the trial was rendered 'stinknormal, unworthy' by its association with Zionist myth-making. Georg Schwarzenberger, the accomplished mid-century international lawyer, disagreed. For him, there was no contradiction between teaching history and making justice. Indeed, one was an inevitable accompaniment to the other (Schwarzenberger, 1962).

Lawrence Douglas's *The Memory of Judgment* is a book-length treatment of some of these themes. Douglas wants to defend something he calls 'didactic legalism'; a sometimes productive union of the legal form and the historical imperative. Like Schwarzenberger, he sees no immediate contradiction between a trial's legal function and its larger historical effects. A war crimes trial can teach and punish (or acquit). This is the kernel of the argument but it is complicated by a number of subthemes pursued in the text. Douglas does not deny that some war crimes trials (I will include the trial of Holocaust denier, Ernest Zundel, as a war crimes trial for these purposes) do this better than others. Douglas, *pace* Arendt, sees *Eichmann* as a triumph, but is bitterly critical of the Demjanjuk proceedings and worries about the equivocal effects of *Zundel*. Nor does Douglas deny that the didactic aims of a trial can come into conflict with its judicial function. Indeed, the book's most dramatic moments come in the midst of such conflicts. These tensions themselves are part of what it means to make law and history. The Eichmann Trial, then, produces occasions of exquisite discomfort for the Bench but these moments are not failures of law or didacticism but rather triumphs for the trial's dual purpose. Legal proceedings can, of course, simply 'teach' (these are 'show' trials) and, equally, they can avoid history (witness the IMT's contortions around the subject of the Holocaust). Finally, Douglas traces a movement through the cases in the way history is recounted or interpolated in successive trials, from the documentary form preferred at the IMT to the testimonial histories heard in Jerusalem during the Eichmann Trial and then to the professional historians who occupied centre-stage during the Zundel Trial.

Like Hirsh, Douglas adopts an expansive view both of law's purpose and of his subject matter, and acclaims international criminal law as a force for good. So, while most of the book is devoted to the pedagogic effects of these trials, the initial chapter has much to say about law's capacity to develop and enrich in response to social phenomena. But does Douglas make his case for using law to respond to, and shape, traumatic history? Is law an appropriate idiom for the conveyance of such histories? There are really two separate problems here. On one hand, Douglas is responding to Hannah Arendt's indictment of the Eichmann Trial (and rather peculiar nostalgia for the Nuremberg

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Trial). Arendt famously argued that law and pedagogy were fundamentally incompatible (at least in the context of *Eichmann*) (Arendt, 1994). This is, in effect, 'the show trial' argument. (There are other ways to define show trials of course. Judith Shklar identified a show trial as a legal proceeding whose sole purpose was the elimination of a political rival or opponent (Shklar, 1964, p. 149) and the Soviet Prosecutor was not averse to transplanting this idea from the context of the Moscow Show Trials to the IMT. Robert Jackson[3] half rejected this notion when he said that the Nazis would be punished because the evidence proved wrong-doing and not because of some political declaration.[4]) Arendt's position was that a trial with one eye on educating the public was bound to fail in its judicial duties. Douglas's whole book is a, largely successful, response to this idea.

The second problem, though, is the obverse of the first. Perhaps these trials do not offer enough 'show'. What if these trials can indeed do justice to law but utterly fail in their duty to history? Critics have averred that war crimes trials are meagre tools for advancing the claims of traumatic history, being essentially reductive and individualistic. Can we understand the Shoah through the psychopathology or *mens rea* of one man, Adolf Eichmann? Give me Primo Levi over the District Court of Jerusalem, they might say. Or better still, if one insists on official sanction and form, give me the South African Truth and Reconciliation Commission over the International Criminal Tribunal for Rwanda. But do we need to choose? And if we did need to choose, would we necessarily reject war crimes trials? After all, *Nuremberg* is a historian's treasure-trove and the Eichmann Trial provided the dramatic context for some of the most shattering testimony by Holocaust survivors. Yes, this testimony is preserved in Yad Vashem, but the District Court provided a crucible for its moment as living history. As Alice Kaplan puts it, the Barbie Trial took history and transformed it into a contemporary event (1992, p. xxiii).

Lawrence Douglas's fine book corrals these examples together in order to conclude that law can be enlisted in the project of creating responsible memory, and to argue that the dramatic potential, social space and material resources enjoyed by legal proceedings can provide a sort of provisional closure. He amply refutes the proposition that didactic legalism is a self-cancelling idea. *The Memory of Judgment* is a sometimes moving and mostly well-written book (there is an occasionally strangulated passive voice) that demonstrates that law can do justice to The Holocaust. There is much to admire. Douglas shows us why Nuremberg is such a monument on the topography of international criminal law but he is aware of its flaws as political history and as international law. The conspiracy charge, for example, complicated the proceedings without providing the benefits of an extended reading of what constituted a breach of international law, the impact of the crimes against humanity charge (the great innovation of the hearings) was severely curtailed by the Charter's, and the Tribunal's, insistence that they be linked to the war of aggression or to the more conventional charge of war crimes, and the Holocaust itself was, for a large part of the proceedings, rendered incidental by legal obfuscation (the U.S.), national deformities (the French Chief Prosecutor's failure to mention the Jews at all in his opening statement on crimes against humanity) and the Soviets' implicit anti-semitism (Rudenko at one point spoke of 'excessive anti-semitism').

This relationship of Nuremberg and The Holocaust (wedded in the public mind as they are) is subjected to a re-examination in both the Douglas and Bloxham books. To put the matter in the terms employed by Hirsh, the Tribunal chose to see crimes against humanity as crimes against the cosmopolis rather than as crimes directed at the Jewish people. The Concentration Camp Film shown at Nuremberg was construed as evidence of atrocities committed against POWs and individuals of various nationalities rather than as a cinematic representation of the Holocaust. If there

3 See Marrus (1994, pp. 39–71).

4 'What, after all, is a political trial? It is a trial in which the prosecuting party, aided by a co-operative judiciary, tries to eliminate its political enemies' (Shklar, 1964, p. 149).

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were precursors to *Eichmann* at the IMT proceedings they were found in the testimony of the three Holocaust survivors, and in Hartley Shawcross's closing statement for the prosecution. In the end, Nuremberg was not about the Holocaust but was a project designed to anchor Nazi atrocities to international legal norms. In this, it was somewhat successful but as a pedagogic tool, its successes came to be realised retrospectively.

The Eichmann Trial redressed this feature of *Nuremberg* by focusing on 'crimes against the Jewish People' (as the legislation put it). But *Eichmann*, more importantly, offered up a testimonial rendering of the murder of the European Jews. In a series of devastating narrative accounts, survivor-heroes told their story about the terrible events of 1933–45. Some of these accounts were related tangentially to *Eichmann*, and some of the history was hearsay but the impact of these testimonies was profound. The Holocaust was established as the central fact of the war and, arguably, the twentieth century, and became the foundation for a national re-orientation of the Israeli state. Adolf Eichmann was perhaps the 'ideal' accused for these purposes: senior enough to be responsible for many aspects of the Holocaust, junior enough to pass as a representative of the anonymous state functionary. As a consequence, though, the trial gave rise to two somewhat contradictory images of Eichmann. On one hand, he has been represented as the epitome of the faceless, murderous bureaucrat of the twentieth century genocide (Arendt, 1994) taking orders from above, lacking the moral resources to resist these orders and carrying out these orders with efficiency and 'rationality'. The key anecdote here concerns the Eichmann who could not bear to witness the atrocities he was responsible for; 'the terrible things he had seen', as he put it himself. On the other hand, we have the Eichmann who is unapologetic, who does his job zealously and enthusiastically and who is fully cognisant of the terrible crimes he is committing. The most telling vignette featuring *this* Eichmann concerned his failure to obey the order from Himmler to cease the killing (the 'Stoppbehfel' of 1945). With Eichmann, it was personal *and* structural. The Trial could tell a story of human depravity and bureaucratic deformity.

So, the Eichmann case was about the prosecution of Adolf Eichmann according to fairly high standards of Anglo-American procedural justice, and the valorisation of heroic memory. The three central chapters of Douglas's book are devoted to the sometimes problematic relationship between these two achievements. Douglas's final chapters are devoted to a derivative and unsatisfactory re-telling of the history of the Barbie Trial (there is little sense that the Barbie trial was related to later French (Papon, Touvier) and Italian (Priebke) cases, and Alain Finkielkraut does this better in his *Remembering in Vain*, 1992), a salutary critique of law's limits in the Demjanjuk Trial and, finally, an epilogue of sorts in which Douglas discusses the value of prosecuting Holocaust deniers such as Zundel and Irving. *Barbie* and *Demjanjuk* are read as trials in which the Holocaust was relativised (*Barbie*) and volatised (*Demjanjuk*). In *Barbie*, Jacques Verges (later to act for the Democratic Republic of the Congo in the successful challenge to the legality, in international law, of the Belgian war crimes legislation of 1993 and 1999) situated the Holocaust among dozens of crimes of colonialism before and since as well as linking it to the collaborationist history of the Vichy regime. In *Demjanjuk*, the failing memory of living witnesses began to affect the credibility (or at least utility) of their testimony. The effects of these two trials are not unconnected to the problem of Holocaust denial, which, after all, seeks both to question the authenticity of the testimonial evidence for the existence of the Holocaust and produce a version of the persecution of Europe's Jewish population that significantly underplays its severity and consequences; it didn't happen and if it did, worse things have happened, for example to Germans in the U.S.S.R. (paradoxically one of the early Holocaust denial statutes in Germany played into the hands of the very revisionism it sought to prevent by making it an offence either to deny the existence of the Holocaust *or the forced migration of ethnic Germans from Silesia*).

The *Zundel* proceedings (there were two trials resulting in convictions, and a constitutional appeal resulting in an acquittal) end the book on a rather distressing note. In the two trials, Zundel's lawyer, Douglas Christie, managed to convert the proceedings into a quest to prove whether the

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Holocaust had in fact occurred. This turned out to be more awkward than one might assume. Survivor testimonies could be discounted as unreliable *because* traumatic, films were challenged as hearsay (indeed, much of the testimony fell into this category as well; hearsay rules had been relaxed at Nuremberg) and professional histories were relativised. Thus, even giants of Holocaust scholarship such as Raul Hilberg, were subjected to demoralising cross-examination and were themselves positioned as mere expert *opinions* (along with those of Holocaust deniers such as Robert Faurisson). Interestingly, Christie adopted a cynical version of radical hermeneutics to suggest that Holocaust history was in the process of constant revision and reinvention, and that the work of Holocaust deniers was a respectable part of this professional ferment. Initially, this did not succeed in the legal sense (Christie was convicted) but it prompted headlines in the *Toronto Globe and Mail* ('No gas chambers in Nazi Germany, Expert Witness Testifies' (Douglas, p. 242). In the end, the Supreme Court of Canada decided that the statute under which Zundel was prosecuted was itself unconstitutional because it breached rights to freedom of expression protected in the Canadian Charter of Rights and Freedoms. The law in the court, and in the Constitution, in different ways elevated Holocaust denial into a position of equivalence with other histories of the mid-twentieth century. The courtroom proceedings treated each party impartially and each view was subject to a degree of neutrality. The Charter meanwhile, protected the rights of deniers (along with the rights of those who asserted the existence of the Holocaust). The legal domain was, if one reads Douglas correctly, the one place where Holocaust denial was treated as a legitimate player.

Zundel, then, was something of a disaster for didactic legalism but Douglas remains persuaded that the law can achieve greatness (in Jerusalem in 1961, episodically at Nuremberg in 1945–46). War crimes trials are fraught and should be embarked upon with some care but when undertaken with vigilance and honesty, they provide telling, instructive and just outcomes. What are we to make of this upbeat conclusion? Douglas writes with such grace and intelligence that one wants to be convinced, and yet... There is surely as much to dislike about *Nuremberg* as there is to value. *Eichmann* may be counted a success but, it remains jurisdictionally questionable. Meanwhile, the other cases Douglas considers have been disappointments from the legal and from the didactic perspective. Certainly, moments of didactic clarity can be salvaged from these proceedings but enough to sustain a thesis about didactic legalism? More seriously, there is a failure to distinguish pedagogic ends from political ones. *Eichmann* was prejudiced not by teaching history but by using history to buttress myths about Zionist identity. And, Douglas does not dwell on the dissident effects of trials (but I am pushing my own barrow here).[5] In these supercharged moments of the political, can a trial work? Perhaps when Douglas applies his understanding to a broader world of international criminal law we can see better whether his thesis has the necessary purchase.

Whatever the effects of pedagogy, the law itself comes out of this tale rather well. For all its failures of didacticism, the law (and most lawyers and judges) are presented as heroic in their fealty to rule of law ideals and their sensitivity. But more than this, international law is presented as dynamic and responsive; capable of leaps of imagination. These leaps are akin to those celebrated by Hirsh: the formulation of crimes against humanity and unmooring of this crime from the 'spatio-temporal' limits of most international law. Like Hirsh, though, Douglas has credited international law with too much. As I suggested at the beginning of this article, the battle over crimes against humanity has hardly been won. Ed Morgan's fine 1988 article, 'Retributory Theater' traced a similar trajectory to Douglas's but is more equivocal in its judgements (its non-appearance in the bibliography is regrettable) while Jose Alvarez's incisive criticisms of the rush to closure in contemporary war crimes trials (1999) might have provided a useful counter-example for Douglas to consider.

5 See Simpson (1999); Simpson (forthcoming 2005).

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Where Hirsh ranged across cases involving the Holocaust and other mass atrocities and Douglas restricted himself to Holocaust-related trials from different parts of history, Donald Bloxham, comparatively-speaking, is a miniaturist. His material is drawn entirely from the 1940s and concerns only trials held in Germany during that period. But if Hirsh and Douglas focus on what the trials produced in the way of history or politics, Bloxham devotes a large part of this book to study of what went into them. Whose politics decided the shape of the trials? What did this mean for the organisation and structure of the trial?

Bloxham's thesis remains attentive, like Douglas's, to the question of didactic legalism, or, what Bloxham, calls 'judicial memory' (p. 2) but the palette is quite different. *Genocide on Trial* is an empirical counterpart to Hirsh's sociology and Douglas's legal historiography; this is work that is intensely archival and detailed. For example, rather than speculating on the effects of trials from a literary perspective, Bloxham does the leg work, and seeks to discover what Germans thought of the Nuremberg Trials or how the British undermined the post-Nuremberg efforts of the Americans to internationalise the lower-level trials. And it is the study of these post-IMT trials that makes this book a genuine contribution to the literature. There has been a tendency to allow the IMT at Nuremberg to dwarf or obscure other trials in post-war Germany. Bloxham resuscitates the American trials under Control Council Law No. 10 and the various zonal trials held by the Allies in Occupied Germany, helping us understand how significant were, in particular, the 12 Nuremberg Trials that followed the original trial (given the appellation, 'Goring's Trial', in the book). Bloxham has delved deep into the archives in the Public Record Office at Kew and in various locations in the U.S. to tell us what the principals imagined they were doing in establishing the trials and how the political environment shaped those trials. To this extent the work resembles that of Gary Bass's *Stay the Hand of Vengeance* (2000) a recent publication in which the author goes behind war crimes trials and delineates the political motivations and controversies underlying them. Bloxham is armed with a theory of war crimes trials that is neither as original nor as contrived as Bass's (Bass's liberal theory of war crimes trials is both a strength (it anchors the book) and a weakness (it lacks explanatory power) of his text).[6] But while Bloxham's book is more scholastic than either the Bass book (an occasionally journalistic account of the field) or the Douglas book (with its high-faluting jurisprudence) it also lacks readability at times. A former doctoral thesis that never quite escapes its leather-bound provenance, *Genocide on Trial* has a catchier title than its source PhD but the writing reveals a determination to tell the reader absolutely everything there is to know about the post-war trials. As a consequence, there are a few too many sentences like the following:

> 'The Krupp-Farben group was divided and the contingent parts enlarged into Trial Teams III and I, respectively, and the other group came to focus specifically on Flick and his associates, as Team II, while retaining responsibilities for other economic concerns.' (p. 39)

It may be self-improving to do so but it is awfully hard to read a lot of this sort of prose. In a similar vein, there is also too much to absorb on the distinction between concentration camps and extermination camps. The difference between Treblinka and, say, Belsen or Dachau is not popularly appreciated, and Bloxham does good work showing how *Nuremberg* and its progeny created much of the confusion, but the emphasis on correcting this error becomes tedious and repetitious at times. Still, Bloxham has done so much work in dusty libraries and repositories, and, impressively, in the German literature, that it is worth wading through such sentences in order to uncover the frequent gems of information.

So, what does Bloxham tell us about the case for didactic legalism (Douglas) or cosmopolitan memory (Hirsh)? *Genocide on Trial* shares with the other two books under review a belief in the

6 See Megret (2002).

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narrative power of law but is more chary about making sweeping claims in that direction. The book, usefully, distinguishes among the different audiences in respect of collective memory (the establishment, the public, lawyers and historians) and, like *Memory of Judgment*, does not shy away from showing how unsatisfactory these memories can be. In this sense, Arendt, Douglas and Bloxham are closer than they might assume. Each of them is critical of the tendency of law to skew history or legitimise odious structures of authority. Arendt's target was, of course, the Israeli state and Jewish exceptionalism in the Eichmann Trial while Douglas reserves his ire for the misplaced didacticism of *Barbie* and *Demjanjuk*. Bloxham shares some of Douglas's concerns about *Nuremberg* (its failure to make central the Holocaust, its awkward imported American legalese, its reliance on a rather muddy theory of conspiracy) but he offers, too, some intriguing elaborations of the jurisprudential efforts to exculpate the Wehrmacht, the domestic political shenanigans that influenced attempts to try industrialists (U.S. capitalists were uneasy) the British focus on crimes committed against their own personnel (confirming Bass's (2000) theory of self-interested prosecution) the anti-Bolshevism and anti-Semitism that undermined some initiatives (Rudenko's warning about excessive anti-semitism comes to mind again) and the breakdown of international criminal law with the onset of the Cold War. He recognises then that the Nuremberg Trials created a big story about international law (Luban, 1987) i.e. the establishment of a new category of crimes, crimes against humanity, but he realises also that an even bigger story, the criminalisation of aggression, undermined the crimes against humanity initiative. It was not just that *Nuremberg* down-graded The Holocaust (while at the same time gathering the evidence that would enlarge its status in the public imagination via history and via *Eichmann* and other trials) but that the American focus on structural guilt (a curiously Marxist idea, after all) led to a trial in which a large-scale conspiracy to commit an aggressive war became the primary motif of the trial. The conspiracy charge framed the Nazi experience as an attempt at world conquest, with ancillary human rights violations, directed from above with the reluctant or unthinking support of a mass population. The Nazi elite had directed the war and their subordinate organisations did the killing at their behest (the SS, SD, Gestapo, Einstazzgrupen).

This historical method had the effect of exonerating or, at last mitigating, the responsibility of the German people as a whole (ignorant about the Holocaust and incapable of resisting the structures of National Socialism) the Wehrmacht (fighting the war under orders and uninvolved in atrocity) and the individuals active in the mobile killing units and concentration camps (cogs in a large machine). Both Bloxham's study and Daniel Goldhagen's recent book, *Hitler's Willing Executioners* (1997) suggest that this was a misrepresentation of the 1933–45 period, which was marked not by passive obedience but, often, rabid hatred and intense individual cruelty.

Most of all, though, Bloxham shows how weary Germans themselves had become with the war guilt issue. The paradox here is that just as the scale and depth of Nazi depravity was being revealed, with the possibility of presenting a truer judicial memory of the era, political imperatives made such a judicial reconstruction impossible. This is one of the important ways in which Bloxham has given us the politics behind the war crimes trials (in a more systematic but less fluent manner than Bass (2000)) and has supplied some of the evidence for the arguments both he and Douglas make about the complications of didactic legalism. On the way, he makes it clear that a cosmopolitan law might be long way off. There are simply too many constituencies, too many prejudices and too many conflicting instincts to satisfy.

On 2 February 2004, Paul Bremer, the U.S. proconsul in Iraq, announced that Saddam Hussein would be charged with embarking on illegal wars and sundry violations of human rights. This returns us full circle to the trials at Nuremberg (whose norms no doubt will be subject to expropriation by the Americans and their new Iraqi Allies). If Saddam is to be charged with wars of aggression he will be the first person to have suffered this fate since Von Leeb et al in the *High Command Case* and Goering et al at the IMT. There are risks. Bloxham shows us how the need to reconstruct the German Army and be responsive to German democracy led, at Nuremberg, to a skewed historical and

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judicial record (the elision of Order Police atrocities in the East, the rehabilitation of Werhmacht officers) while both Douglas and Bloxham demonstrate how whole racial groups can be erased from the judicial record through a combination of ignorance, legal strategy and political necessity. Lawrence Douglas reveals, too, the risks of using judicial tools to enforce collective memory (the debacle of the Demjanjuk Trial and the Holocaust denial cases in Canada). David Hirsh's optimism about war crimes trials, meanwhile, is tempered by a historical record of prosecutorial insensitivity and professional blindness. What these books most reveal, though, in the end, is that the effects of war crimes trials cannot be entirely controlled or predicted by the instigators. *Nuremberg* created a record of The Holocaust almost despite itself, David Irving's law suit left his own historical method in further disrepute and even 'failures' such as *Barbie* or *Demjanjuk* forced states to confront uncomfortable truths. The whole may not add up to cosmopolitan law but it is clear that law has a role to play in the investigation and punishment of war criminals and perpetrators of crimes against humanity. It also has a role in exposing the hypocrisies of the victors and the masters in such proceedings.

With good luck and better management, the trial of Saddam Hussein will offer some sort of vindication for the invisible thousands who suffered under his rule. But the trial may also create less predictable histories. The Soviets were terrified that *Nuremberg* would expose their close relationship with Nazi Germany as well as their own crimes against humanity and war crimes (at Katyn, for example) and, to an extent, this occurred. The Soviet Prosecutor was embarrassed on more than one occasion by his Nazi interlocutors. The Allies, too, invented a category of criminality, crimes against humanity, that they worked hard to fetter. Jackson was worried that the Allies themselves might be exposed to litigation if crimes against humanity were not entwined with the war of aggression. The Charter does make that link but crimes against humanity returned unencumbered in later trials and provided a partial inspiration for the anti-colonial movement. The Trial of Saddam may be rather interesting if the invasion of Iran and the use of chemical weapons against the Kurds are part of the prosecution's case. As Austen Chamberlain said of the plan to prosecute the Kaiser in 1919: 'His defence might be our trial'.

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