

The Hidden Histories of War Crimes Trials

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History of Histories

*Gerry Simpson**

It is one of the pleasures of organizing a conference and then editing the resulting book that an idea—and one that had appeared so capricious and odd—materializes in the hands of intelligent and alert speakers and writers. At the end of 2010, we convened a conference in Melbourne called ‘Untold Stories: The Hidden Histories of War Crimes Trials’.¹ This was the first of four conferences held under the auspices of an Australian Research Council (ARC) project on the history and theory of war crimes trials (the others were, in 2011, ‘Affective States’ and ‘Eichmann at 50’, and ‘The Passions of International Law’ in 2012).

The call for papers generated a surprisingly enthusiastic response from colleagues around the world. There were, it turned out, many stories to be told about war crimes trials that the discipline had either neglected or under-rehearsed. Sometimes, these were stories about familiar but under-explored and misunderstood landmarks in the conventional history of international criminal law. (For example, we had an instinct that there was more to Peter von Hagenbach than the pantomime cliché, but Greg Gordon has actually done the work, and enlivened the circumstances and legal culture around this iconic moment in the field.) Sometimes a trial, unknown even to the international criminal law cognoscenti, was positioned as a moment in the field’s pre-development, eg Benjamin Brockman-Hawe’s comprehensive account of the Franco-Siamese Tribunal and the trial of Kham Muon as an early example of complementarity enacted in the context of late-empire. Here, from his chapter (Chapter 3), is the French view of the original Siamese trial:

The authors of the assassination of [Kham Muon] shall be tried by the Siamese authorities. A representative of France shall be present at the trial and witness execution of the sentence pronounced. The French Government reserves the right to appreciate whether the punishment is sufficient and, where applicable, claim a new trial before a Mixed Court, whereof it shall determine the composition.²

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¹ Half the title has survived into print. The other, now missing, half was borrowed from the English playwright, Alan Bennett. See Alan Bennett, *Untold Stories* (London: Faber and Faber, 2001).

² Von Hagenbach’s trial, too, is understood as the first in which the interaction between local prerogative and international trial is played out. As Brockman-Hawe reminds us:

[The Kham Muon Trial] was only the second time that a supranational court had been accused of violating an individual’s right to be tried by a court of their home country (*jus de non evocando*) [the

Sometimes, the best-known trials (notably, the post-war trials in Germany) were subject to a re-reckoning (see Rosa Ana Alija-Fernández on the Spanish Kapos trials at Mauthausen, Chapter 5; and Grietje Baars on the trial and non-trial of industrialists after the war, Chapter 8). In one instance, an incident that had twice briefly touched my consciousness became fully illuminated. About ten years ago, I was travelling through a mid-size French town called Confolens in Limousin. Ten miles outside of town there was a road sign for the village of Oradour-sur-Glane. The name seemed familiar to me. I remembered, as a student, reading a novel in which this village had been the leading character.³ I drove into Oradour-sur-Glane. Here was a village that was now two villages: a fully visible, nondescript contemporary country exurb and a hidden place surrounded by a high fence and accessible only through a museum. The latter was the dead village of Oradour-sur-Glane preserved in its history or, one should say, a single day in its history—the day that the ‘3rd company of the 1st battalion of Panzergrenadier of the 4th SS-Panzer-Regiment “Der Führer” of the 2eSS-Panzer-Division “Das Reich” (Mégret)’ had entered the village and massacred the inhabitants. As Frédéric Mégret reminds us, there was a trial, too. This trial, held in Bordeaux in 1953, is, in a way, a hidden history of a dead village.

In offering a history of this book and its histories we must make all the usual apologies concerning selection, amnesia, and the temptations of mistellings and re-tellings. Nevertheless, we might reflect on at least four modes of historical work being done here: *Consolation*, *Recovery*, *Pedigree* and *Pedagogy*. In this collection, there are terrific examples of each of these four, but some chapters have been exercises in more than one of these modes while others have exploded the categories altogether.

(I) Consolation

Trial narratives console us just as newly exposed histories of the past can provide comfort.⁴ Some of the chapters here have rotated around the idea either that an obscure trial has provided a measure of consolation to the bereaved or the injured (Faedi Duramy, Chapter 10; Tiba, Chapter 15), or that a trial that might have done this has failed to do so (Balint, Chapter 4), or that a trial or series of trials that has consoled the victims has, at the same time, created a new cast of victims by misapplying legal procedure to the detriment of the accused (Fitzpatrick, Chapter 16).

One sort of untold story, then, is derived from a form of identity politics or scholarship. Writing and practice in this genre might concern Japanese slave labour

first being the trial of von Hagenbach before a twenty-eight judge panel at Breisach over four hundred years before].

³ David Hughes, *The Pork Butcher* (London: Constable and Constable, 1984).

⁴ See Christine Schwobel on the idea of comfort in Gerry Simpson (ed), *The Passions of International Law* (forthcoming, 2014).

or the rape of ‘comfort women’.⁵ Telling these stories either in trial or in scholarship is sometimes derived from a wish to re-inscribe Narrelle Morris’s ‘numerous and unknown victims’ or ensure that they do not become what Lia Kent, in her paper at the original conference, called, ‘wandering ghosts’.⁶ Sometimes, this can be a demand for recognition, as in Jennifer Balint’s plea for an acknowledgement on the part of the Turkish state that the Armenian genocide took place and was not simply a series of deportations initiated because of ‘wartime necessity’. And it is Balint who makes the important point here that law will not always offer consolation. Indeed, law itself was complicit in these crimes, making them ‘allowable’, as she puts it.

In Benedetta Faedi Duramy’s chapter (Chapter 10) on German massacres in post-Mussolini Italy, she seeks to tell the untold story of a number of survivors (and, by implication, those that did not survive). In such instances legal proceedings (and here these include both the trials of those responsible and the civil proceedings brought in 2008 by the German state against Italy) occasion a narrative in which survivors speak directly. The proceedings themselves may be less important in this regard. No doubt the trial of Joseph Milde (the proximate untold story) and, to a greater extent the *Germany v Italy* proceedings at the International Court of Justice, were significant *as* legal events. But, for Faedi Duramy, their importance lies in the way in which such events provide a catalyst for story-telling and, perhaps more importantly, offer an audience for such stories. People *listen* to trial testimony and extracurial narratives around trials.

The demands of consolation, of course, might become something akin to a claim for compensation. We might think here of the class actions brought in California by the victims of slave labour, or civil society agitations on behalf of Korean women exploited by the Japanese Imperial Army. Yuki Tanaka’s graphic account of the killing of Nauran Lepers or Firew Kebede Tiba’s compelling chapter (Chapter 15) on the history of the Derg and its Red Terror in Ethiopia belong in this category. As Tiba argues, ‘[t]he full scale of atrocities committed in Ethiopia following the overthrow of the imperial regime in 1974 is yet to be fully told’.

Perhaps, though, there can never be a fully compensatory or truly consoling re-telling.

(II) Recovery

There is, of course, also a scholarly imperative to *recover* lost histories. Why should the field keep repeating the same narrative arc from ‘Tokyoberg’ to The Hague? Bringing in from the margins under-told trial histories helps to de-Europeanize

⁵ See Yuki Tanaka, ‘Japanese Atrocities on Nauru Island During the Pacific War’ (unpublished paper, on file with editors) and essays by Nicola Henry and Tina Dolgopoul on comfort women in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, (Leiden: Martinus Nijhoff, 2011).

⁶ See Lia Kent, ‘Special Panels in East Timor: Official Goals and Local Expectations’, (unpublished paper, on file with editors). See, too, Hannibal Travis’s treatment of the Biafran massacre and the Bengal killings in his fine-grained historical study, ‘Cold War Genocides: Failures of Global Justice in Nigeria and Pakistan’ (unpublished paper, on file with editors).

the history of war crimes trials by showing that trials were also occurring in ‘other places’. These can be national stories. Georgina Fitzpatrick and Narrelle Morris (Chapters 16 and 17) tell the story of Australia’s involvement in a series of hidden trials in the Asia-Pacific region. As Morris powerfully demonstrates, Asian victims—largely absent from the major trial in Tokyo—were much more visible in the 300-odd trials undertaken by the Australians in the Asia-Pacific region. That is not to say that ‘Asianness’ was not constructed in a certain way in those trials or that visibility was not also a fresh form of invisibility. Nonetheless, these are important trials, and the project (led by our colleague, Tim McCormack) to publish trial reports arising out of this period is to be greatly welcomed.

Sometimes the conference and book have sought to decentre the major trials in general. Yuma Totani in her (unpublished) conference paper described the trials in Tokyo that followed the International Military Tribunal for the Far East, while Alija-Fernández brings to the light the experience of Spanish inmates in the camps and the way in which they moved back and forth themselves between nationality and statelessness. Finally, we have Roger Clark’s and Mark Drumbl’s chapters (Chapters 19 and 20), in which *Greiser* and *Sakai* are announced as major pre-Nuremberg, pre-Tokyo, national landmarks in the history of international criminal law.

National histories, of course, are often deliberately obscured by a diffident state. The Australians and Spanish might be keen to see the recovery of their lost histories of prosecution and trial, but what of the French? The trials of Laval and Pétain are hardly celebrated moments in French contemporary history, after all. And for good reason, according to Dov Jacobs in his Chapter 6. The Turkish authorities, too, have been reluctant to advertise the trials they convened after the mass killings of Armenians. Paradoxically, here is a state that did deliver—through a series of trials held after the Great War—what Jackson Maogoto (Chapter 14) claims is a ‘measure of justice’ for the victims but now would prefer to see that effort left in the archive.

Steve Vladeck’s forensic chapter (Chapter 9) also seeks to recover a hidden history, but one that is embedded in a larger much more visible history. During the US Supreme Court’s struggle over (and sometimes with) the Bush administration’s detention of individuals on Guantanamo Bay, a great deal turned on the extent to which foreign nationals were able to claim constitutional or statutory rights in US federal courts. The 1950 case of *Eisenstrager* was at the centre of this debate. Yet, as Vladeck notes, the decision was widely misread, and treated as a precedent for the view that aliens are not entitled to enjoy Fifth Amendment rights outside the sovereign territory of the United States. Vladeck’s re-reading of the case and his return to the military commission hearing that provoked the Supreme Court’s review is an exercise in carefully calibrated recovery.

The lost history recovered by Grietje Baars (Chapter 8) is that of international criminal law as a retributive structure to be imposed on economic actors guilty of encouraging, provoking or facilitating war or mass criminality. The ‘economic case’, as she calls it, has been largely hidden in subsequent accounts of the post-Nuremberg trials and was comprehensively elided in the West by the time the Cold War was in

train (though it remained potent in the East as a way of explaining culpability for Nazism). Indeed, the relationship between political economy and mass atrocity has remained obscure in international criminal law since that time. Baars captures this when she says: ‘As such, to paraphrase Miéville, the de facto immunity of business leaders, a necessary ingredient of economic imperialism, is ICL.’

War and atrocity can be attributed to many causes (race, religion, ethnicity), but ‘the “economic” has been removed from the narrative of war’. This is what Baars calls, in an expressive epigram, ‘capitalism’s victor’s justice’.

(III) Pedigree

Tom Franck, who died in 2009, employed the idea of “pedigree” to great effect in his *The Power of Legitimacy Among Nations*, and in international criminal law, there is an increasing tendency to identify a lineage or pedigree for what often looks like a departure from existing norms.⁷ Perhaps as a field matures the turn to history becomes more attractive. The general idea appears to be: ‘the present seems worked through, it’s time to do some archaeology’ (to use a loaded term) or ‘the system is built, let’s find out how it happened’. Pedigree also is partly about establishing that a new field has not simply engaged in bootstrapping (or ‘making it up as we go along’, as someone said at the conference). These histories suggest that instead someone in the past made it up.

Untold Stories took place a few months after the meeting of the International Criminal Court’s Assembly of States Parties in Kampala. One of the more significant outcomes of that meeting was an agreed definition of a crime of aggression. Of course, this crime was desperately short of pedigree when the Nazi and Japanese elites were placed on trial at Nuremberg and Tokyo. Kellogg-Briand and a passing reference in the Versailles Peace Treaty hardly constituted firm precedents. The position improved very little after 1949. In *R v Jones*, the House of Lords and, at an earlier stage, the Court of Appeal struggled to find post-war evidence of a robustly prosecuted crime of aggression.⁸ Had there been any prosecutions apart from those in the zonal trials? Roger Clark, (Chapter 19) with brisk authority, disinters the ‘suggestive’ trial of Takashi Sakai by a Chinese national court in 1946 and makes the tentative claim that Sakai was the first Japanese to be tried and executed for the crime of aggression. This would make him only the second person in history to be prosecuted for the crime of aggression. The first may well have been Arthur Greiser. His trial before the Supreme National Tribunal of Poland ended with him being sentenced to death on 9 July 1946 and then executed ‘in the early hours of the morning of July 21, 1946’. Mark Drumbl’s familiar combination of doctrinal sure-footedness and sensitivity to context (Chapter 20) illuminates this trial

⁷ Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990).

⁸ *R v Jones and Milling* [2006] UKHL 16.

and establishes this mostly untold story as a genuine precursor to Nuremberg and Kampala.

The pedigree of international criminal law norms or procedures is often established through an account of a local history. Certainly, this book is greatly concerned with the recovery of those lost histories of the local that offer pedigree in a different idiom. Julia Selman-Ayete's chapter (Chapter 13) on Norway's universal jurisdiction laws and the case of Mirsad Repak does precisely this. Norway, it turns out, enacted a law of universal jurisdiction as far back as 1902. It is a modified version of this law that permitted Norwegian courts to assert jurisdiction over Mr Repak, a member of the Croatian Defence Forces ('HOS'), during the Bosnian wars. Mr Repak was sentenced to eight years in prison and was ordered to pay damages to some of his victims. Here, as in many other instances documented in the book, a domestic court was obliged to engage in an analysis of the nature of a particular armed conflict and the applicability of international norms in local settings. One theme that emerges, then, again and again (eg Tallgren) is the way in which international criminal justice is always hybridized or modified in its encounters with local jurisdiction before sometimes returning again to the cosmopolitan space (see Liivoja's discussion of the European Court of Human Rights cases arising out of the Baltic trials, Chapter 12). And here, too, there is a sense (discernible, as well, in the chapters by Maogoto and Tiba) that the future of international criminal law—like many of its recovered pasts—may lie not in the grand gesture of the international trial but in the modest strivings of local jurisdiction.⁹

(IV) Pedagogy

A final style that emerged in the volume was built around *pedagogy* and the problems of historiography. Laurence Douglas's phrase 'didactic legalism' floated around at the conference, as did the belief that lessons might be learnt or unlearnt from our untold trials. 'The past is a foreign country, they do things the same way there. At least sometimes. Peter von Hagenbach's trial was grisly in some respects, but in others, as Greg Gordon points out (Chapter 2), it compared favourably with the Military Commissions Acts in the US or the detention of Prisoner X. Georgina Fitzpatrick cautioned us not to simply condemn historical actors, and indeed there was very little of that in the presentations. In the end, there was genuine curiosity about how they, in that foreign country, had thought about collective guilt, about joint criminal enterprise, about complementarity and so on.

⁹ This combination of local and international justice takes us back to piracy of which Neville Sorab, at the conference, spoke when discussing some recent piracy trials (on file with the editors). But it is in war crimes trials in general that piracy is often invoked as a precedent for what would otherwise appear unprecedented (for example, the assertion of unusual forms of extra-territorial jurisdiction)—thus the description of Eichmann, at this trial, as a 'latter-day pirate'. Early piracy trials provide, in other words, the field's missing pedigree.

This book does not tell the story of unenlightened lawyers working in the darkness of history waiting to be redeemed in some great late-twentieth century leap forward. Instead, we read about acts of imagination and innovation going back to the nineteenth century, and we read about mistakes that we are familiar with from the contemporary scene.

In Fred Mégret's chapter (Chapter 7) we see lawyers themselves engage in pedagogic efforts. As he puts it:

As in previous and subsequent war crimes trials, both defendants and victim witnesses were tempted to make grand declarations about what they saw as the issues at stake rather than simply answer the judges' factual questions.

Dov Jacobs' chapter (Chapter 6)—also about the French reckoning with the past but this time involving the trials of Pétain and Laval—confronts head on the problem of history and truth-telling through trial. It is clear that the French state wanted a particular version of history to emerge from these trials: one that blamed a treacherous and superannuated elite for the collaboration and, at the same time, exonerated France. These narratives, then, 'shape' history, but the telling of hidden histories is also a way of reshaping that same history. Jacobs puts the point forcefully (whether one accepts his distinction between 'reasoned analysis' and 'illusory truth'):

Only a reasoned analysis of the importance of post-conflict narratives, with their ambiguities, rather than an over-reliance on an illusory objective truth, can help academics and practitioners advance in the direction of the desired reconciliation.

Rain Liivoja's chapter (Chapter 12) also negotiates a tension in the didactic trial, between what he calls 'the historical record produced by such trials [and] existing historical paradigms'. In the case of the Soviet trials held in the Baltic Republics, the trial record is deeply unreliable. Here we have what Liivoja calls a 'conscious falsification of evidence' (as he notes, the notorious Soviet Prosecutor Andrey Vyshinsky, who turns up at Nuremberg as well, had engaged in doctoring the medical reports produced by the Extraordinary State Commission established as early as 1942 to investigate alleged Nazi atrocities in the Baltic states). But even in the case of the investigations undertaken into Soviet offences, the tension between histories is palpable. In particular, there is the sharp divergence between the still-persistent Russian 'myth of war' and the judicial correction of that myth. Sometimes this tension becomes explicit:

The trials and tribulations of Mr Kononov had probably something to do with the fact that on 15 May 2009, Mr Dmitry Medvedev, President of the Russian Federation, established a Commission to Counter Attempts to Falsify History to the Detriment of Russia's Interests. Reportedly, legislation is being prepared that would make it a criminal offence to diverge from the official line of history as determined by the commission. On 30 September 2009, the Parliament of Lithuania fired back by amending the Criminal Code, criminalising the denial or justification of crimes against humanity committed by the Soviet Union or Nazi Germany. The battle of histories continues.

Tamás Hoffmann, traversing similar territory, wonders if international criminal law is really capable of coming to terms with something we might think of as 'the

past'. In his chapter (Chapter 11), he explores the use and misuse of international criminal law's categorizations and tropes in the context of Hungary's investigation and prosecution of those responsible for communist repression in the period immediately following the 1956 uprising. This is another story of a local court either getting the (international) law wrong somehow or creating a distinctively local rendering of that law (a great deal in the field turns on the difference between these two positions). But it is also a story about the limits of international justice in recounting a certain kind of past. Not every hidden history has to have a moral, but as Hoffman puts it:

If there is any moral in the story—apart from the necessity of reforming the education of judges—it is that international criminal law cannot in itself substitute for the ultimately political project of confronting past wrongs and trying to achieve national reconciliation.

This sort of reckoning is elusive. Perhaps it is not even desirable. In his chapter (Chapter 18), our colleague at Melbourne Law School, Peter Rush, pivots around the film *El secreto de sus ojos* in a series of gestures at the ineffability of pain and suffering, and the genres of representation that seek to work round that ineffability and establish what he calls a 'memorial jurisdiction' in relation to Argentina's Dirty War between 1976 and 1983. This war—a war of terror conducted in official and clandestine keys—has been the subject of a highly visible campaign of national reckoning. It has bequeathed a name—the disappeared (or *desaparecidos*)—and a politics of memory. Law, of course, a 'producer' of truth and memory, is (sometimes) central to all of this. Indeed, it is a hidden history of Rush's chapter that the trial processes have intensified in recent years. Yet Rush is as uneasy as Hoffmann at the idea that law could provide a definitive accounting or any sort of stable representation of atrocity or trauma. In a life lived with law, there is always 'slippage and complexity' (Rush).

What might 'we' do in the face of all of this? On one hand, the Finnish War Responsibility cases are early examples of trials in which the crime of aggression is given a local re-interpretation. In this sense, Immi Tallgren's chapter (Chapter 21) belongs in the tradition of, say, Roger Clark's recovery of the *Sakai* Trial. Tallgren's chapter though—inquisitorial, forthright *and* tentative—is also about the (im)possibility of a law that writes history. In this case, law is recruited to comprehend and read the relations between Finland, Nazi Germany and the Soviet Union during the 1940s. But that law, too, had to negotiate Allied demands that the Finnish leadership during the war with the Soviet Union (the Continuation War) be held to account, as well as outrage within Finland that wartime leaders 'who had tried their best for the nation' (Soini, quoted by Tallgren) should be prosecuted at all. The trial proceeded and some important Finnish leaders were convicted and jailed. The questions then arise: can this juristic history be re-written or unwritten by law? Should they be? By whom? Told stories can certainly be retold. But in the act of re-telling, it seems, many other stories emerge from new contexts at different times.

In the end, this book features a series of untold or under-told stories about trials and histories that have, in some respect or other, been hidden or obscured by the

imperatives of an official or semi-official disciplinary history. Yet, while acknowledging the expressive value of trial, the scholarly value of recovery, the human value of consolation and the doctrinal value of pedigree, the contributors have, at the same time, kept their eyes fixed on the problem of history itself and the boundaries of the knowable.

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