

## BOOK REVIEW

# THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST

Author: **Lawrence Douglas**

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Book Review: Awol K. Allo \*

Lawrence Douglas' book<sup>1</sup>, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* is a meticulously written and powerfully argued intellectual work on a pedagogic function and performance of a trial. Cutting through the major trials of the Holocaust from the Nuremberg, to the Eichmann and Demjanjuk trials in Jerusalem and to the Barbie and Zundel trials in France and Canada respectively, Douglas brings to life the behind-the-scene political struggles and melodramatic representation of traumatic history. With great erudition and industry, he exposes the disruptive strategies deployed by the prosecution and the defense to perform certain functions and therefore achieve purposes extraneous to the law. He examines the relevance of different forms of testimonials from unburdening survivor narratives to the screening of a film—a film that is not amenable to cross-examination—in a manner that advances his conception of the trial both as a tool of 'normative re-construction and historical instruction'.

*The Memory of Judgment* explores two categories of trials. The first category of trials, the Nuremberg, Eichmann, Demjanjuk and Barbie trials, deal with major Nazi criminals who perpetrated the crimes named under the Nuremberg Charter, the laws of France and Israel. The second category of trials is a trial aimed at policing institutionally-sanctioned memory through the criminal law by prosecuting those accused of publicly denying the 'truth' of the Holocaust—a 'truth' and memory the facticity of which is established and guarded by a law.

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<sup>1</sup> Lawrence Douglas (2001), *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press).

In this seminal scholarship that seeks to explore the ability of the law to comprehend incomprehensible atrocities through a legal judgment, Douglas unveils his conception of the criminal trial as a tool of didactic legality. At the heart of his conception of didactic legality lies the idea that calls for the use of the trial forum both for strictly juridical and broadly pedagogic purposes.<sup>2</sup> While the juridical use of the trial pertains to the conventional use of the trial as a tool of accountability and ‘normative-reconstruction’, the pedagogic end seeks to advance an innovative vision of a trial as a tool of ‘historical instruction’. Although Douglas recognizes the inherent incompatibility between the interests of didactic pedagogy and the pursuit of rule-based criminal justice, he nevertheless contends that the trials of the Holocaust—the Nuremberg, Eichmann, Demjanjuk, Barbie and the Zundel trials—have succeeded in securing justice to the accused on the one hand and to the history and memory of the Holocaust on the other.<sup>3</sup> His in-depth analysis of the trial and his conceptual understanding of the law’s obsession with its own ‘complex normativity and discursive neutrality’ notwithstanding, Douglas insists and posits the normative and performative purposes of the trial as mutually-reinforcing imperatives.

### **The Nuremberg and Eichmann Trials: From Modest to Radical Didacticism**

In the Nuremberg Trial, the Jewish catastrophe was not singled out as an independent juridical problem although the ‘greatest crime committed during the last [century] had been against the Jews’.<sup>4</sup> However, the argument that the Jewish were only ‘bystanders’ in Nuremberg, as Arendt argues, is ‘at best, a half truth’.<sup>5</sup> There is no doubt that the gruesome images captured in *Nazi Concentration Camps* played a central part in the innovative architecture of crimes against humanity. In fact, the fact that crimes against humanity in the Nuremberg Charter was tied to other crimes named under the Charter seems to have detracted attention from excavating the true character of the project of Judeo-cleansing already underway in Nazi Germany occupied countries.<sup>6</sup> A Roman historian, Tacit, once wrote that “The worst crimes are dared by a few,

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<sup>2</sup> *Id* at 257.

<sup>3</sup> *Id* at 3.

<sup>4</sup> Hannah Ardent (1963), *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Oxford University Press), p. 258. [Emphasis added]

<sup>5</sup> *Id.*

<sup>6</sup> See Eric Epstein, *The Legal Path to Judeocide*, available at: <http://www.millersville.edu/holocon/files/THE%20LEGAL%20PATH%20TO%20JUDEOCIDE.pdf>, (Last accessed 17 March 2010).

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willed by more, and tolerated by all”.<sup>7</sup> Although the height of the war culminated into the Final Solution (1941-1945) — extermination, the institutionalization of systematic cleansing of the Jewish have started with the tacit acquiescence of many. Although the Nuremberg Trial and especially the architecture of crimes against humanity is surely a response to the Holocaust, the Jewish tragedy was not dealt with as uniquely potent legal enterprise deserving a separate punishment.<sup>8</sup>

Overall, Nuremberg was staged as a demonstration of the potency of the rule of law, the justness of the cause of the Allies and the worth of their sacrifice. It was also meant to try those ‘major war criminals’ who perpetrated atrocities beyond ‘territorial limitations’ and therefore whose responsibilities “cannot be localized”.<sup>9</sup> Although this trial has played a substantial role in illuminating the true character of Nazi atrocities and edifying the historical record, it was designed and staged with the view to shaping the future project of a neo-liberal legalist world order envisioned by those who designed the ‘show’.

In spite of the problem of legality that occasioned the post-war punishment program of the Allies, the theater staged before the International Military Tribunal played a central role in redirecting the progressive development of international criminal law. Although the Nuremberg trial did not focus on the pedagogic end that advanced the political interests of the Jewish People as such, it certainly had a modest pedagogic agenda behind it. The American administration at the time believed that “The use of the judicial method will . . . make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.”<sup>10</sup> However, as Justice Robert Jackson famously noted, ‘establishing incredible events with credible evidence’ required the exclusion of testimonies, narratives and procedures repugnant to the rule of law and the administration of criminal justice. Although Douglas considers the Nuremberg as a didactic exercise in ways that are different from Eichmann’s [below], he does not seem as enthusiastic about the didactic functions of the Nuremberg Trial as that of Eichmann’s.

Douglas does not deny the fact that these trials were ‘show trials’— although he so refers to them in a positive sense within the liberal legalist understanding of a ‘show trial’. In distinguishing his capacious understanding of a ‘show trial’ from such critiques as Hannah Arendt’s, he wrote:

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<sup>7</sup> Tacitus, in Eric Epstein, *Ibid.*

<sup>8</sup> Only one of the 22 Nazi defendants, Julius Streicher, was convicted of crimes against humanity in Nuremberg.

<sup>9</sup> Hannah Arendt, *supra* note 4 at 258.

<sup>10</sup> See Douglas, *supra* note 1 at 18.

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Thus to call Holocaust trials show trials—the term used by Arendt to disparage the Eichmann proceeding—is to state the obvious. After all, that is what these trials were—orchestration designed to show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense. As dramas of didactic legality, the trials of the Holocaust blurred, then, the very boundary between the legal and extralegal upon which Arendt’s critique was based.<sup>11</sup>

The Eichmann and Demjanjuk trials (hereinafter the Jerusalem Trials), were staged with an eye towards serving a uniquely “Jewish” agenda. The Eichmann trial is by far the most dramatic in terms of its significance to national and international justice and the pursuit of didactic legality. From the prosecution’s point of view, the Eichmann trial was staged not only as strictly juridical business, but also as a proceeding meant to serve a broader ‘pedagogic end’. From the Court’s perspective, although the trial was understood in a conventional juridical sense, the prosecution’s tenacious insistence for a different understanding of the trial—“as a tool of historical instruction and normative re-construction”<sup>12</sup> — placed the court in a political limbo. For the Eichmann Court, survivor-narrative, though captivating and informative as a tool of historical instruction, remained a central source of contention between the prosecution’s didactic aim and the Court’s ‘rule-based-formalism’. Indeed, as Douglas notes, “no where was this disparity more visible than in the clash that erupted over the relevance and meaning of the testimony of survivors of the holocaust”. While the Nuremberg sought to serve a modest pedagogic ends without fundamentally departing from the traditional administration of criminal justice, the Eichmann trial reflected a deliberate and radical undertaking in pedagogy—the use of the medium of the court as a tool of ‘historical instruction’.

### **Trial Narratives: A Reflection on the Juridical Value of Testimonies**

From a juridical perspective, testimonies serve the end of clarifying the guilt or innocence of the accused and nothing more. On a grander scheme of things, when the trial deals with crimes beyond human imagination—a crime that lie beyond the law’s ability of comprehension—the trial will become a historical treasure. The task of recording the past for posterity and preserving memory would become a fundamental task of the state as “societies look back to understand how they lost their moral and political compass, failing to contain

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 134.

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violence and uphold the values of tolerance and peace.”<sup>13</sup> In this sense, therefore, the relevance of survivor testimony, to the extent that it relates to the facts on trial and assists in clarifying the question under scrutiny, cannot be questioned. The ‘relevance’ and ‘reliability’ of a testimony in a juridical sense is governed by tight evidentiary rules. According to those rules, only what is relevant, competent and pertinent to the clarification of the record about the innocence or guilt of the accused should be admitted as evidence in the court of law.<sup>14</sup> Though survivor narrative and eyewitness testimonies can be seen as “living embodiments of the truth of the holocaust” or “offer a human dimension to the suffering caused by Nazi atrocity”, the admission of irrelevant and impertinent evidence in the courtroom interferes with the fairness of the proceeding and considerably implicates the integrity of the process. For Douglas, the pursuit of such a broad pedagogic enterprise through a criminal trial neither jeopardizes nor detracts attention from the central—the juridical—purpose of the trial. It is on this point that I will try to take issue and present a humble critique of his radical view of didactic legality.

Challenging the views of those who resent the dubious legality of the Nuremburg and the Eichmann trial, Douglas makes a powerful and passionate defense of the Holocaust trials. Responding to one of the ardent critics of an aspect of the Eichmann trial, Hannah Arendt, who labeled the Eichmann trial a ‘show trial’, Douglas speaks of ‘a crabbed and needlessly restrictive vision of the trial as legal form’.<sup>15</sup> Although he furnishes compelling material evidence to support his call for a broader construction of the purposes of a criminal trial predicated on the theory of narrative jurisprudence, he did not offer a nuanced normative theory of a trial or effectively rebut the strongest arguments against his vision of didactic legality at the systemic level. For the most part, he relies on the exceptional character of Nazi atrocity to justify a deviation from the conventional purposes of the criminal trial.

In what has become one of the most iconic and frequently cited statements of her book, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Arendt writes:

The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes— ‘the making of a record of the Hitler regime which would withstand the test of history’ . . . can only detract from the

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<sup>13</sup> Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar , Editors (2001), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford university Press).

<sup>14</sup> See Arendt, *supra* note 4.

<sup>15</sup> *Id* at 2.

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law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.<sup>16</sup>

This emblematic statement not only lucidly, although arguably insufficiently, captures what the function of a criminal trial is ought to be, but it also underpins her characterization of the Eichmann trial as a 'show trial'. Despite the presiding judge's effort, Arendt writes, the prosecution's urge for "showmanship" militated against the fairness of the trial and turned this historic trial, for complicity in what the Nazis called "The Final Solution", into a 'show trial'. As a Jew, Arendt understands incredibly well the Jewish mindset and the debates surrounding Jewish resistance and complicity in the Final Solution. However, it is this idea of bringing all that looked politically compelling into the trial of an individual, 'a man of blood and flesh' in the glass-booth, that contradicted with her conception of what justice demands and what a just trial ought to epitomize. She emphatically argues:

Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import—of "How could it happen?" and "why did it happen?", of "why the Jews?" and "why the Germans?", of "what was the role of other nations?", "what was the extent of co-responsibility on the side of the Allies?", of "How could the Jews through their own leaders cooperate in their own destruction?" and "why did they go to their death like lambs to the slaughter?"—be left in abeyance.<sup>17</sup>

Countering Arendt's dismissive approach to the Eichmann trial, Douglas contends that making "the sober authority of the rule of law" visible to the general public is itself one such pedagogic aim of a criminal trial insofar as the trial is staged "justly".<sup>18</sup> However, Arendt is not in disagreement with Douglas on this point for this is precisely what she conceives to be a normative foundation of a trial. She departs from Douglas's conception of a trial generally and the prosecution's case more specifically due to the prosecutor's deliberate and belligerent undertaking to engage in historical edification in the courtroom—a thesis that Douglas calls 'didactic'. So, the question here are two: (a) Is the juridical and pedagogic ends of the trial really not incompatible as Douglas suggests; and (b) Does the criminal trial and the canonical set of rules internal to the courtroom capable of simultaneously delivering on the promises of the juridical and pedagogic functions of a trial?

First, the primary purpose of the criminal trial is to provide a fact-finding forum that assists in the assessment of the question of guilt or innocence in an

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<sup>16</sup> Hannah Arendt, *supra* note 4 at 252.

<sup>17</sup> *Id* at 13.

<sup>18</sup> Lawrence Douglass, *supra* note 1 at 3.

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open court of law. It is intended to require the state to prove its claims beyond a reasonable doubt in an open court while allowing the accused the right to contest any allegations of wrongdoing.<sup>19</sup> The idea of public trial, open justice, right of examination and cross-examination, the equality of arms between the parties etc are fundamental elements of fair trial standards essential to the conventional purpose of the trial—unveiling the truth and dispensing justice.<sup>20</sup> Douglas’s didactic thesis, however, makes the case for the criminal trial that serves purposes more robust and profound—the edification of history and memory—than the narrow pursuit of clarifying the guilt or innocence of the accused.

Though he recognizes the “potential tension” between the fundamental interests of criminal justice and his notion of “didactic legality”, he nevertheless debunks what he views as a monolithic conception of a criminal trial as ‘needlessly restrictive’ and “crucially flawed”<sup>21</sup>. In his article entitled: *Between Impunity and Show Trials*, Martti Koskenniemi, asks whether Arendt should have the final word on what constitutes the proper terrain of a criminal trial.<sup>22</sup> Although the wealth of archival and material evidence Douglas parades to advance his argument provides a degree of persuasion, Douglas stops short of delving into doctrinal or theoretical reflections to make a compelling case for his view of a trial that goes beyond establishing the guilt of the accused to the edification of traumatic history for all: “victors, the vanquished and posterity”.<sup>23</sup> For him, the extraordinary barbarity of the crimes and the limits of the criminal trial to comprehend traumatic history of such a magnitude legitimized deviation from the normal judicial process. Although this thesis could partly explain certain forms of trials conducted within a certain historical and political frame, it does not seem to explore and gauge complex political, cultural and legal questions that the quest for transition pivots.

At the factual level, this conception draws inspiration from typical trials such as the Nuremberg Trial in which “the record of the [perpetrators] may be so clear cut that the image produced in court could not but appear a reasonably

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<sup>19</sup> Andrew Ashworth (1995), *The Criminal Process: An Evaluative Study* (Oxford: Clarendon Press), p. 51.

<sup>20</sup> David Bentley and Richard Thomas “Fair Trial”, in Madeleine Colvin and Jonathan Cooper (2009), (ed.), *Human Rights in the Investigation and Prosecution of Crime* (Oxford University Press), p. 251.

<sup>21</sup> *Id* at 3.

<sup>22</sup> Martti Koskenniemi (2002), “Between Impunity and Show Trials”, 2 *Max Planck Year Book of United Nations Law*: 1, 7.

<sup>23</sup> Donald Bloxham (2005), *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press), p. vii.

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truthful replica of reality”.<sup>24</sup> On those terms, such a specific genius of a trial is simply unrepresentative and whatever didactic functions it served, it is not necessarily due to the criminal trial’s inherent ability to support a didactic paradigm but rather from the self-evident, astonishing crimes that constituted the facts of the Holocaust trials. If the validity of the didactic thesis of a trial is contingent on the agonizing and traumatizing nature of the crimes in the case, its utility as a general normative theory of the trial will be questionable at best.

Although Douglas fully endorses, and even radically advocates, the relevance of using the authority of a court and its space to stage a drama intended to commemorate victims of the Holocaust through ‘survivor narratives’, he seems to have a differing view of the trials of Holocaust deniers. Indeed, he considers the Zundel trial, brought against a Holocaust negationist in Canada, as destabilizing an affair and overwhelming to the official historical record. In his analysis of the Zundel trial, Douglas writes that “the interests of pedagogy and commemoration are overwhelming the pedagogy”<sup>25</sup>, due to the rebellious contestation by the defense counsel of the notion of didactic legality and commemoration before the court of law. Indeed, unlike the defense counsels of the Jerusalem trials, Zundel’s counsel, Christie, vigorously protested against the use of the trial as a forum for the clarification of history and the memorialization of survivors and Nazi atrocities against European Jewry.

In Douglas’ own words, Christie “succeeded in desecrating the courtroom as a space in which to defend claims of history and honor the memory of survivors”.<sup>26</sup> Douglas defies Zundel’s defense counsel, Christie, condemning her position as “peculiarly self-defeating” for “relying on the criminal law to insulate historical facts from profane infotainment industries”.<sup>27</sup> While he radically advocates the use of a criminal trial as a tool of historical instruction to establish “inviolable historical facts” in his discussion of the Jerusalem Trials, he seems to adopt a completely different standard when he comes to the trial of a Holocaust negationist (the Zundel trial).

On its own premises, and this is my second claim, the didactic proposition could not apply to the defendant’s side. Indeed, Douglas rejects the didactic use of a trial by the defendant because of the “destabilizing” consequences of such a partisan account for the official record, thus ignoring the very rationale that

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<sup>24</sup> Otto Kirchheimer (1961), *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press), p. 423.

<sup>25</sup> *Id* at 207.

<sup>26</sup> *Id* at 241.

<sup>27</sup> *Id* at 243.

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sought to maintain the equality of arms between unequal protagonists.<sup>28</sup> The state commands a considerable organizational and coercive power at its disposal. Some of the most settled principles of fair trial are there to protect the accused from this coercive authority of the state and limit the discretion of the state vis-à-vis citizens. For didactic legality to be an ethical theory of a criminal trial, it must justify its claims not only with reference to one side of the adversarial battle—the party cloaked with the authority of the state, but also with reference to the defendant’s side. A claim that is justified only with reference to the benefit it renders to one of the adversarial protagonists while ignoring the other cannot be sustained as a valid proposition of a trial. If one believes in the ability of criminal trials to establish what Douglas called “inviolable historical facts”, he cannot reasonably protest against certain forms of trials for deconstructing such “inviolable historical fact” for what is at stake is the ‘truth’<sup>29</sup> and “inviolable” truths, whether historical or otherwise, should always remain inviolable. Indeed, to argue that certain criminal trials can help to comprehend an atrocious past by establishing historical truths while some trials cannot is a remarkable piece of scholarly double standard at best, and a contradiction at worst.

### **Redressing Historical Wrongs in the Courtroom: Legal Truth and Historical Truth**

One of the central preoccupation of Douglas’s thesis of didactic legality concerns redressing historical wrongs by fixing history in a legal judgment. This is a problematic thesis not least because it raises several complex questions on the relationship between law and politics but also on our understanding of the relationship between law, a legal judgment and history. The attempt at ‘fixation’

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<sup>28</sup> Douglas seriously struggles to make sense of how the didactic use of the trial by the defendant can be prevented. “Dictating the terms of memory through an act of legal will is destined to fail’ argues Douglas referring to legislations that proscribe the denial of the Holocaust, . . . because trials of the deniers will fail to do justice to the memory of the Holocaust because the law ultimately will remain less interested in safeguarding history than preserving” its own integrity. In situations where the trial deals with Holocaust denier, the role of the trial participants will automatically change. In these trials, it is the defendant that seeks to hijack the proceeding to clarify and elucidate his own account of the Holocaust that is in contradistinction to the official record. As Douglas repeatedly argued, this is indeed a destabilizing affair for the established memory. However, his insistence for a didactic end only when it suits the end of the prosecution but a tenacious protest when the same strategy is deployed by the defense, severely ignores the idea that underpins the principle of equality of arms.

<sup>29</sup> *Id* at 242.

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of history in a legal judgment seeks to create a deliberate and politically-charged collective memory, an historical lens, upon which the nation's self-understanding for the future will be predicated. On this point, the argument against didactic legality turns not on the fact that the trial itself will have a historical significance of settling history, but rather on the deliberate undertaking and orchestration of the trial with the view to fixing or re-writing history.

A deliberate undertaking at fixing or re-writing history through communications that occur between trial participants and the attendant judgment is a very destabilizing affair for reckoning with the legacies of repression and brutality. It is destabilizing because first and foremost, legal truth is distinct from historical truth. As no human institution can claim to be error-free, the possibility of convicting and punishing innocent people and acquitting guilty criminals makes it all the more fitting that society maintains a distinction between legal truth and historical truth. Since legal truth is predicated on probabilities of evidence measured against subjective standards, legal truth may not be the equivalent of factual, personal or narrative truth. To the extent that historical truth must represent the facts of what actually happened, rather than what the court found to be legally true, the use of the trial forum to fix history seems to have a destabilizing ramification for history. In effect, whatever memory was established on the basis of partisan and counterfeit statements told at trial with the view to advancing a political agenda remains to be a selective memory that recognizes one truth while it ignores the other. Recognizing the inability of the legal judgment to do justice to wrongs beyond human understanding, the Eichmann Court asked itself, "Who are we to give it an adequate expression?" and transferred responsibility for the task of a complete excavation to "the great writers and poets".<sup>30</sup>

The trial of Radovan Karadžić, recently underway at The Hague, provides a captivating account of the partisan nature of trial narratives and their implication on the historical truth. The founder of Republika Srpska, now accused of acts of genocide and crimes against humanity before the ICTY, told that Tribunal that the war in which he was accused of bearing responsibility for the most violent crimes of international concern, was 'holy and just'.<sup>31</sup> For the accused, what many referred to as a siege (illegal under international humanitarian law) was a blockade (possibly justified on grounds of military necessity). He denies that

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<sup>30</sup> *Id* at 148.

<sup>31</sup> Al Jazeera News, Karadzic calls war 'just and holy', available <<http://english.aljazeera.net/news/europe/2010/03/20103194824561962.html>>, 01 March 2010, (accessed 13 March 2009).

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Srebrenica had been the United Nations Safe Heaven Zone, and contested the number of casualties and the causes behind the ethnic cleansing at Srebrenica.<sup>32</sup> The man at the center of the ‘theatre’ denied every major allegations of wrongdoing which his victims and the rest of the world struggling to confront and settle the haunting ones and for all.

In terms of ‘truth games’, this is Karadžić’s side of the story, his truth which is truly partisan and political to the core. He made a pure nationalist and political rhetoric that was powerfully-appealing to his constituency—Serb nationalists in Serbia and Republika Srpska. He told the Tribunal: “I stand here before you not to defend the mere mortal that I am, but to defend the greatness of a small nation in Bosnia Herzegovina, which for 500 years has had to suffer and has demonstrated a great deal of modesty and perseverance to survive in freedom.”<sup>33</sup> In this catastrophic war that claimed the lives of over 100,000 persons, the prosecution’s allegations and the defense’s account of the truth are the anti-thesis of one another.

At the end of the day, the Tribunal will have two options—a binary option which the criminal trial presents—of either acquitting or convicting the defendant on the basis of evidence. From the ‘stage battle of partisans committed to distortion’ such as this one, didactic legality seeks to create history and memory upon which the nation’s history will be predicated. The question then is: should history be founded, fixed and closed by a legal judgment deductively derived from a legal battle between political foes with conflicting political agendas? Should a legal judgment which operates on different assumptions and understandings of ‘truth’ be allowed to frame and close a political dispute in the sense of fixing history and memory? Even worse, should history be extrapolated from courtroom communications between trial participants with antithetical and irreconcilable differences about the past? If we have to accept the Court’s version of the truth, as Douglas seems to say, on what terms can we automatically subscribe to the judicial version of the truth when in fact legal truth is far from an absolute certainty?

There is an important parallel between the trials of the Holocaust perpetrators and the Holocaust negationists which potentially implicates the coherence of Douglas’s thesis of didactic legality. He argues that the trial of the perpetrators reached both the national and international audience and played a significant role not only in clarifying the true character of Nazi atrocity against European Jewry but also in commemorating the heroic resistance of the dead. Although one could argue that the atrocities committed against the European

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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Jewry are so dreadful as to shock the conscience of human imagination so that they do have to be clarified in a court of law, one could certainly agree with Douglas that the trials played a significant role in educating the general public about the Holocaust. As Justice Jackson famously put it, “Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events with credible evidence”.<sup>34</sup> However, the question that still begs an answer is this: did the Eichmann trial achieve the didactic ends it achieved because of the peculiarity of the Holocaust and the relaxed evidentiary rules that governed it or because all perpetrator proceedings, in principle, are capable of producing that same result?

If some criminal trials have the capacity to question the veracity of these “inviolable historical facts”, the facts themselves cease to be inviolable. If their inviolability can be challenged before a court of law and a criminal trial has the capacity to set a different record of the past, the memory established in the first place was made possible by the existence of certain set of conditions that made it possible. Simply put, if a criminal trial can deconstruct “inviolable historical facts”, the inviolability of those facts and the integrity of the trial which in the first place established those facts, is questionable at best.

Douglas draws a contrast between the courts before which these dramas (trials) are staged. In the Zundel trial, he argues, “the gallery was filled with a sizable contingent of supporters of the defendant” whereas in the Jerusalem Trials, a court of law was made to serve as “sacred commemorative space” where the “spectators came prepared to draw the proper lesson from the legal drama” staged before their own court, in their own country by their own judges against foreign perpetrators of atrocity crimes. The expectation which the Trial of Eichmann epitomized in domestic Israeli political setting tested the Court’s ability to intervene in the grotesque narrative even in the face of their dubious legal potency. As one witness noted, the narrative of heroic memory by survivors brought to light “a version of Holocaust reality more necessary than true”<sup>35</sup>. Although Douglas points to these unique circumstances that clouded the legal proceedings, he stops short of affirming whether these spectacle-trials have achieved their intended pedagogic purpose because they were staged in defined political settings—before an audience that came prepared to observe the courtroom as a classroom—or because trials, of themselves, have the potential to serve such a radical end in pedagogy.

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<sup>34</sup> Telford Taylor (1992), *The Anatomy of the Nuremberg Trials* (New York: Little, Brown & Co.), p. 54.

<sup>35</sup> See Langer in Douglass, *supra* note 1 at 128.

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### Concluding Remarks

The failure of the Zundel trial as a pedagogic spectacle stands as an overwhelming testament to the inherent inability of classical criminal trials to serve the ends of radical pedagogy. Had it not been for the relaxed evidentiary rules and the venue where the trials were staged, the Eichmann Trial could not have produced an official record of such a commemorative and instructional value. The role of the survivors to narrate their traumatic past was limited by the dictate of standard procedural rules. The Eichmann trial has created a very emotive sense of vindication for Israel because it offered the State an opportunity to tell the rest of the world that they have been subjected to atrocities unparalleled in human history.

The urge to educate posterity, counter tales of Jewish complicity in the Holocaust and establish an institutionally sanctioned heroic memory, created an overwhelming legal and political moment for all who participated in the trial process (judges, prosecutors, defense, the accused, witnesses and the State). It is not merely a judgment according to a new law (in violation of the principle against retroactivity) that is the identifying mark of these trials, but also the unparalleled anguish and shock they caused, the venues in which they were staged and the purposes attributed to them. They were extraordinary in the sense that they were judgments on *ex post facto* legislations.<sup>36</sup> They were also extraordinary in the sense that the trials moved beyond the juridical to assess, validate and ritualize the extralegal—the political. Indeed, the Court itself held in its judgment, “We are charged with the duty to determine . . . historical truth” through the medium of a courtroom”.

*The Memory of Judgment* also illuminates on the normative grounding of the trials and the role played by those who had a leading role in staging the trial. However, it does not particularly ask the question of how the portrayal of the acts of the tried by those who presided over the trial, affected the outcome of these trials. If the accuser who judges the accused for genocide or crimes against humanity is also its perpetrator, “its legitimacy to judge them is withdrawn and its attempt to monopolise them can be nothing but a political-ideological move”.<sup>37</sup> For example, the criminal responsibility of the USSR during the war

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<sup>36</sup> In defense of the retroactive application of the Nuremberg and Israeli laws, Arendt writes: “Its retroactivity, one may add, violates only formally, not substantially, the principle *nullum crimen, nulla poena sine lege*, since this applies meaningfully only to acts known to the legislator; if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law”, at 254.

<sup>37</sup> Emiliios Christodoulidis, *The Strategies of Rupture*, 20(3) *Law Critique* (2009), (2 December 2008), p. 8.

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for massive crimes against humanity and its previous convergence with the Nazi aggression was simply ignored, not even publicly regretted, at Nuremberg. Despite all these, Douglas agrees with Justice Jackson—that the Nuremberg trial ‘unveiled incredible events with credible evidence’—ignoring the *tu-quoque* argument and the relaxed evidentiary rules that governed it. Nuremberg was governed by tighter evidentiary rules than the Jerusalem Trials. In the Eichmann trial, the radical pedagogic end pursued by Israel through the trial of a Nazi bureaucrat—“a man of blood and flesh”—through whom the entire history of anti-Semitism from the Dispersion to the Final Solution were to be comprehended, significantly deviated from Nuremberg.

If trials, of themselves, can intrinsically achieve a purpose of extrapolating factual truth, as opposed to legal truth, which Douglas strongly contends they do, the trial of the Holocaust negationists should have equally unraveled a factual truth that buttresses the already established memory—the ‘inviolable historical facts’ rather than bulldoze them. If there is any ‘truth’ that can coexist with the adjective ‘inviolable’, it seems that it cannot be easily demolished through the trial of negationists unless the truth in question is a different kind of truth, dictated by extralegal considerations. Douglas is right in his analysis of the inability of the law in safeguarding memory. At the same time, the claim to competing ‘truths’, the nature of trial narratives and the urge for political performativity in the court of public opinion inevitably renders the criminal trial not only an inadequate but also a dangerous tool for establishing and safeguarding memory. \_\_\_\_\_■

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