

HISTORIANS AS EXPERT WITNESSES IN THE AGE OF EXTREMES

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Abstract

The thesis *Historians as Expert Witnesses in the Age of Extremes* aims to contribute to the understanding of the role of historical expertise in diverse legal contexts of the 20th century. The thesis argues that current discussions on the topic are both burdened by a holistic approach and confined in particularized national and topical frames. Hence they barely grasp effectively the variety of manifestations of historians' courtroom performance, its connection towards the role of the experts in other branches of scholarship and the specific aspects of (in)compatibilities generated by the tangled relation between history and law. In order to contribute to the refocusing of the debate, on the basis of representative clusters of cases, the thesis aspires to reconfigure the field by replacing current perceptions of the practice with nuanced differentiations between the diversity of historical expertise during the course of the age of extremes. To that end, it searches for epistemological and genealogical *preconditions* of historians' appearance in the courtroom and scrutinizes the *institutionalization* of the practice in different jurisdictions in the postwar period. Dominant paradigms of institutionalized historical expert witnessing are examined, as well as *problematizations* surrounding their amalgamation. The complexities of contemporary historical expertise are further explored through examples which evade the debated paradigms by transgressing the boundaries of particular legal systems and pose the questions of universal relevance both to lawyers and historians in the process of the *internationalization* of historical expert witnessing.

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Introduction

Could historians perform the role of expert witnesses in legal proceedings? And should they? The issue is passionately discussed both within legal and historical scholarship. From the very beginnings, courtroom appearances by historians were triggering heated, albeit disconnected debates. Quick and decisive responses, affirmative as well as dismissive, were offered and elaborated with unusually dramatic wording, revealing the stakes and the level of urgency. Surprisingly enough, otherwise bitterly opposed protagonists mostly agree in treating the practice as a zero-sum issue: historians are usually either perceived as useful expert witnesses, or not. The persistence of such a counter-intuitive digital divide calls for scrutiny, as it defies the varieties of historians' courtroom performance over the century. The practice of historical expert witnessing needs to be treated neither as synthetic reunion, nor an irreparable clash, but as a sensitive junction of disciplines. As the question of whether historians can testify has already been answered by the judges, and the question of whether they should remains for individual practitioners to decide, this thesis aims to create the conditions necessary for grasping the range of historians' contributions to the rendering of justice. In doing so, it follows less belligerent, but no less interesting lines of questioning (such as since when which historians testify, what they say, under what conditions and with what result), in an overall effort to refocus the debate from the twofold confinement of the parochial and holistic approaches towards a more nuanced understanding of the phenomenon of a "forensic historian" and his shifting role in the 20th century.

The Topic and the Debate

“The first, but perhaps least appreciated fact about historians as expert witnesses is how often they assume the role. Although colleagues and even litigators presume that historians rarely enter the courtroom, in fact it has been a common occurrence for some fifty years” observes David J. Rothman, himself a historian of medicine and an expert witness in a number of trials.¹ Yet each and every manifestation of historical expert witnessing is still bound to provoke an outrage, either within the community of historians, or among the jurists, or both. Despite a respectable number of precedents, the practice never fully achieved legitimization. The more sensitive the topic, the more controversial was the debate, as noted by Erich Haberer: “Particularly controversial, and often poorly understood, is the role of historians in the trials of National Socialist perpetrators of genocide.”² The issue was consequently critically addressed both from the camp of historians and legal scholars. As early as 1964, the practice was furiously written off by German legal scholar Ernst Forsthoff, who treated the advent of historical experts in the courtroom as a harmful example of “forensischen Historismus.”³ On the other side of the Atlantic, similar voices could be heard, their dramatic thrust expressed well in the title of Reuel Schiller’s recent article *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*.

¹ David J. Rothman, “Serving Clio and the Client: The Historian as Expert Witness”, *Bulletin of the History of Medicine* 77 (2003): 25.

² Erich Haberer, “History and Justice: Paradigms of the prosecution of Nazi crimes”, *Holocaust and Genocide Studies* 19 (2005): 487-8.

³ Ernst Forsthoff, “Der Zeithistoriker als gerichtlicher Sachverständiger”, *Neue Juristische Wochenschrift* 13 (1965): 574–75.

Nonetheless, in the last century, historians participated in a number of prominent legal ventures tackled by this dissertation (the Dreyfus affair, Kriegsschuldfrage, Brown vs. Board of Education, Frankfurt Auschwitz trial, the Eichmann case, the Zündel case, Sears v. EEOC, Touvier and Papon case, David Irving v. Deborah Lipstadt, the Milošević trial), causing a set of disconnected, yet very telling debates about the merits of their work. Polarization is even more present as the debate usually resurfaces in response to a particular manifestation of the practice, frequently stirred either by scholars who participated in such ventures or declined to do so. One of the latter, prominent French contemporary historian Henry Rousso, set the prevailing tone in his letter of refusal to appear in the court as an expert in the Maurice Papon case: “In my soul and conscience, I believe that historians cannot be ‘witnesses’ and that a role as ‘expert witness’ rather poorly suits the rules and objective of the court trial. It is one thing to try to understand history in the context of a research project or course lesson, with the intellectual freedom that such activities presuppose: it is quite another to try to do so under oath when an individual’s fate hangs in the balance.”⁴ However, equally confident in the opposite are historians who took the stand: “Being an expert witness in a judicial case allows historians to use their historical training and historical judgment to benefit society. My own experience as expert witness illustrates this point”, wrote historian Charles Bolton, engaged in the Arkansas creationist cases. For Morgan Koussner, another veteran historian of the voting rights trials in USA, this was an opportunity to “do justice and scholarship at the same time.”⁵

⁴ Henry Rousso, *The Haunting Past* (Pennsylvania : University of Pennsylvania Press, 2002), 86.

⁵ Charles Bolton, “The Historians as Expert Witnesses: Creationism in Arkansas”, *The Public Historian* 4 (1982): 59; Morgan J. Koussner, “Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing,” *The Public Historian* 6 (1984): 18.

Some of the firsthand accounts are less clear cut. Zeal similar to Koussner's was initially expressed by Jonathan Steinberg. Appointed as historical consultant in the matter of the war crimes prosecution of Mikolay Ivanovich Berezowsky in Australia he "accepted at once and without hesitation. It seemed to me to be a call I could not refuse; it was a chance to offer what professional skill I had in an important public transaction." However, he soon grasped the complexities of the experience of historical expert witnessing: "The experience as an expert witness in court tested my professional skills to the limit and raised questions about the very practice of history itself. The methods, approaches, techniques and indeed, the stamina required of a historian who goes to court – I was in a witness box for six and a half hours – went well beyond any claims previously made on me in my professional career. Nothing I had done before nor anything since demanded so much of me. After all, most of the time what and academic historian says or does matters little. In the ... case I had to meet the demands of a court of law in which a man's life and freedom were at stake."⁶ Christopher Browning, expert witness in both Zündel case and Irving v. Lipstadt tackled similar tensions in a recent speech concerning his expert experiences.⁷ Deborah Lipstadt, who stood accused in the latter case, drew a conclusion that "history and forensic methodology are frequently not just incompatible. They can actually operate at cross purposes."⁸

⁶ Historians were deeply engaged in the Australian WWII related cases against Polykovich, Wagner and Berezowski (Raul Hilberg, Christopher Browning and Jonathan Steinberg receptively). Only the latter took the stand in the end. Jonathan Steinberg, "The Historian at Court: Expert Witness in an Australian War Crimes Trial" in Alain Wijffels, *History in Court. Historical Expertise and Methods in a Forensic Context*, (Leiden: Ius Deco Publications, 2001), 203-4.

⁷ Christopher Browning, "Holocaust Denial in the Courtroom: Historian as Expert Witness", Washington University in St.Louis, *Assembly Streaming Material*, accessed on November 25, 2008. <http://streaming.wustl.edu:8080/ramgen/assemblyseries/clips/2005-11-09-christopher-browning-aud.rm>

⁸ Deborah Lippstadt, "Perspectives from the British courtroom: My Struggle with Deception, Lies and David Irving", in John K.Roth, Elisabeth Maxwell (ed.) *Remembering for the Future: the Holocaust in an Age of Genocide* (London : Palgrave Macmillan, 2001), vol.I, 769.

Reflections from concerned non-participants followed, albeit from very different sources, undoubtedly because the topic itself is cutting through several disciplines and concerns diverse subject matters and even more diverse contexts. The most consistent intellectual dialogue on the issue is to be found in the Anglo-American legal literature, in connection with the wider discussion of the constantly shifting criteria of the admissibility of expert testimonies and the standard of proof, having the benefit of direct linkage with the practical side of historical expert witnessing.⁹ Such output is an indicator, as noticed by Robert Gordon, that “in the last twenty years there has been a remarkable revival of interest world-wide in history among lawyers and legal scholars and dramatically so in the United States, the country that Europeans like to accuse of lacking any consciousness of its past.”¹⁰

Continental contributions are echoing those concerns differently, largely through spasmodic exchanges over concrete cases, but contributing significantly in reframing the problem of historical expert witnessing within the general context of the relationship between history and the law. In the absence of general discussion among legal experts, there was an understanding for the topic to be viewed in a transdisciplinary and

⁹ Those debates are in constant shift from the times of the Frye criterion (1923) until the recent Daubert test (1993). Although they are primarily interested in limiting and specifying the role of scientific expert knowledge in the process of justice rendering, the latest contributions to the ever-expanding field of the industry of courtroom experts concerns exactly the (non)admissibility of historians’ testimonies. Examples of such integrated debates: Daniel A. Farber, “Adjudication of Things Past: Reflections on History as Evidence” and Reuel E. Schiler, “The Strawhorses of the Apocalypse: relativism and the historian as expert witness” in *Hastings Law Journal* 49 (1998): 1009-1026, 1169-1181; John A. Neuenschwander, “Historians as Expert Witnesses: The View from the Bench”, and Brian W. Martin, “Working with Lawyers: A Historian’s perspective”, *Organisation of American Historians*, www.oah.org/pubs/nl/2002aug/neuenschwander.html; Also see forums in journals *History and Theory* 41 (2002): 326-345 and *Law and History Review* 18 (2000): 559-626 centred around contributions of Richard Evans and Asher Maoz. Recent recapitulation of the debates in the American context in Jonathan D. Martin, “Historians at the Gate: Accommodating expert testimony in federal courts”, *New York University Law Review* 78 (2003): 1518-1543.

¹⁰ Robert W. Gordon, “The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument”, in Terrence J. McDonald (ed.), *The Historic Turn in the Human Sciences* (Ann Arbor : The University of Michigan Press, 1996), 339.

international setting. Such a tendency was reflected on a number of occasions - either through conferences and workshops, or through published volumes and specialized editions of journals.¹¹

Still the desired closure remained elusive, as the scholarly dialogue on the appropriateness of the role of expert witness for a historian remained largely polarized between the supporters and adversaries of the practice, or constrained by the boundaries of particular legal and historical contexts. Meanwhile, the reasons to address the issue grew, as the practice branched out. According to Hal Rothman, “historians are no longer an unusual sight in the courtroom. Since the 1950s, historians have been active in legal proceedings as experts and adversaries. Historians now function in a range of roles and cases, offering their expertise to prosecution and defense in civil, criminal, and administrative proceedings.” The range of such activity is visible both in the nascence of public history in the United States and its new role in Europe’s public memory creation, making observers like Carole Fink suggest the birth of “The New Historian”.¹² However, although the branching out of the practice did point out the relevance of the phenomenon, it did not necessarily contribute to its better understanding.

¹¹ For example: Michael Stolleis, “Der Historiker als Richter – der Richter als Historiker”, in Norbert Frei et alia (ed.), *Geschichte von Gericht, Historiker, Richter und die Suche nach Gerechtigkeit*, (München: Beck, 2000); Claudia Kurtsidis-Haider, “Überlegungen zu Justiz und Zeitgeschichte im europäischen Vergleich” in Winfried R.Garscha (ed.), *Keine “Abrechnung” NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945*, (Wien : Akad, Verl. Anst, 1998), 430-434, Carlo Ginzburg, *The judge and the historian : marginal notes on a late-twentieth-century miscarriage of justice* (London : Verso, 1999), Carlo Ginzburg, “Just One Witness” in: Saul Friedlander (ed.), *Probing the Limits of Representation: Nazism and the Final Solution*, (Cambridge, Mass: Harvard University Press, 1992); Also Ginzburg’s and other contributions in James Chandler (ed), *Questions of evidence: proof, practice and persuasion across the disciplines*, (University of Chicago Press : Chicago: 1984). For topics of roundtable discussions on the matter in France and for bibliography see the dossier of Annie Deperchin, Vérité historique - vérité judiciaire : http://www.enm.justice.fr/Centre_de_ressources/syntheses/verite_historique/demande.htm Also see the contributions in thematic volumes of *Rechtsgeschichte* 3 (2004), *Časopis za suvremenu povijest* 1 (2004) and *Ab Imperio* 3 (2007), all dedicated to relation between history and law.

¹² Hal K. Rothman, „Historian v. Historian: “, *Public Historian* 15 (1993): 39; Carole Fink, “A New Historian?”, *Contemporary European History* 14 (2005): 135-147.

In light of this increased importance, historiographical debate on the issue of historical expert witnessing is seriously lagging behind social reality. To be sure, no one would expect a consensus on such a sensitive and controversial topic, as there is no proscriptive answer for the question of individual understanding of the professional responsibility of a historian. As Peter Mandler reminds, “in a liberal profession in a liberal society, there can be no single definition of that responsibility, and no-one is entitled *ex officio* to decide upon it”.¹³ Still, as long as the challenge of expert witnessing is present, the need for practitioners to make informed choices should be obvious. In a recent interview entitled *Historical Judgment*, István Deák soberly answered a question regarding the appropriateness of the involvement of historians in legal disputes: “In the first instance, we are already involved.”¹⁴ However, the gap between manifestations and thematizations of historical expert witnessing is growing ever larger. In an attempt to bridge this gap, Richard Evans, who testified as an expert witness *Irving v Lipstadt*, discussed the practice of historical expert witnessing in the forum of the journal *History and Theory*. He questioned the applicability of Henry Rousso’s criticism of historical experts to the trial he himself got involved as an expert witness, and has drawn important inferences: “Does it apply to other cases in other jurisdictions?,” he asked, and he concluded that the trial he participated in “was not a criminal, but a civil action, in which the outcome rested not on proof of guilt, but – as in history – on the establishment of a case on the balance of probabilities.”¹⁵

¹³ Peter Mandler, “The Responsibility of the Historian”, in Harriet Jones, Kjell Oestberg, Nico Randeraad (ed.), *Contemporary History on Trial. Europe since 1989 and the Role of the Expert Historian*, (Manchester : Manchester University Press, 2007), 18.

¹⁴ “Historian’s Judgment: Reflections by Istvan Deak”, *Ab Imperio* 3 (2007): 89.

¹⁵ Richard J. Evans, “History, Memory, and the Law: The Historian as Expert Witness”, *History and Theory* 41 (2002): 340.

Evans was calling for a further differentiation in the research of historical expert witnessing as an important precondition for a serious scrutiny of its contribution. As historians indeed testify under very different circumstances, such a proposed research avenue promised a rich harvest. The role of experts is defined differently in various legal contexts in different stages of the process. Common law and continental law have a different take on the institution of expert, and within those great legal traditions there are further differentiations within national jurisdictions. This nuancing might be expanded in the direction of the distinction between the roles of expert witness in adversarial or inquisitorial procedures; for in the former experts are usually employed by the parties, while in the latter they are summoned by the judge. The purpose of expertise varies greatly not only in various national contexts but also has its particular place in international law. Its weight also changes considerably from civil to criminal proceedings, from military tribunals to civilian courts, from jury trials to bench trials. In fact, many of those considerations have been a subject of valid research in comparative legal studies, a realm of immense help in differentiating between the varieties of historical expert witnessing.¹⁶

¹⁶ Such studies rest on a solid and long-standing comparativist traditions in legal studies. See Ploscowe Morris, "The expert evidence in Criminal Cases in France, Germany and Italy", *Law and Contemporary Problems*, 2 (1935): 504-9; D.J. Gee, "The Expert Witness in the Criminal Trial" *Criminal Law Review* 25 (1987): 307-314; Ian R.Freckelton, *The Trial of the Experts. A study of expert evidence and forensic experts*, (Melbourne : Oxford University Press, 1987). This comparative aspect in legal studies grew significantly by the end of the 20th century: Robert F.Taylor, "A comparative study of expert testimony in France and the United States", *Texas International Law Journal* 31 (1996): 181-212; New England School of law, *War crimes prosecution project*: Sean P.Downing, "The use of expert witnesses in civil and common law jurisdictions", Kimberly M. Miles, *Memorandum for the Office of the Prosecutor, Issue: "Expert Witnesses"*, <http://www.nesl.edu/center/wcmemos/2001/miles.pdf>, Ian Freckelton, H.Selby, *The Law of Expert Evidence*. (Sydney: Law Book Co, 1999); Richard Lillich (ed.), *Fact-finding before international tribunals : Eleventh Sokol Colloquium* (Ardsley-on-Hudson, N.Y. : Transnational Publishers, 1992) ; Richard May Marieke Wierda, *International criminal evidence*, (Ardsely, New York: Transnational Publishers, 2002); J.F.Nijboer, C.R.Callen, N.Kwak, *Forensic expertise and the law of evidence*, Amsterdam : North Holland 1992).

However, historians ought not to stop where legal scholars would. Somewhat apart from the legal setting, the form and the content of the historian's contribution also offer important elements for differentiation. It can be given in written form or delivered orally or both. It can be concerned with the recent or quite distant past. It can be a summary of already published material or it can be composed solely for the sake of the trial. It can be an individual endeavor or a collective work. It can perform a fact-finding purpose or provide context. It can be central or peripheral to the proceedings. In short, historians' contributions come in all shapes and sizes. Even each and every trial is an event on its own, with very distinct circumstances. Hence every generalization holds an obvious risk, pushing the debate into an unhelpful holistic confinement, resulting in proscriptive blanket 'solutions' to the problem.

As if such complexity leads to the conclusion that the occurrences of historical expert testimony should be analyzed from case to case. Such considerations would indeed shift the debate from the question of whether historians can testify in court to the more case-sensitive analysis of the circumstances under which they testify and to the outcomes they produce, prior to elaborating on the scholarly appropriateness and legal relevance of historical expert testimony. However, this extreme position would prove equally unhelpful, and it has indeed already led to the fragmentation of the debate. Sidetracked into hasty overall conclusions drawn from a particular case but applied generally, isolated from similar discussions in other legal, historical and disciplinary contexts, this particularistic approach would at best lead to the creation of beautifully envisaged taxonomies of forms of historical expert witnessing that will not work in practice.

Taking therefore the tricky path between the Scylla of holism and Charybdis of particularism, this thesis presents a case for integrated research of the phenomenon of historical expert witnessing without losing its varieties from sight. The starting point for such an approach would be to refocus the discussion from the issue of the merits of the practice of historical expert witnessing to the issue of its genealogy. Surprisingly little has been written on this topic, keeping in mind the professional background of most of the participants in the debate. Duly noting that the practice originated in the 1950's, the majority of authors rarely go beyond this statement, usually focusing on the proliferation of historical expert witnessing connected to the 'explosion of memory' following the end of the Cold War: "The political consequences of the quite sudden collapse of Communism in 1989 have been far-reaching.", note the authors of the most recently published volume on historical expertise. Carole Fink agrees that "over the past two decades, the subjects of the Second World War and the Holocaust have newly thrust historians into the public limelight." Richard Evans concludes that "since the beginning of the 1990's there has been a widespread recovery of public memory" and Henry Rousso infers that "this judicialization of the past very much belongs to the 'age of memory'".¹⁷ While fully acknowledging the importance of the collapse of Communism in reshaping contemporary historical narratives, reengaging the scholars and recomposing the field of relations between history and law, the thesis maintains that there are still many good reasons to look back into the 20th century in search of the important elements of the history of the practice of historical expert witnessing.

¹⁷ Harriet Jones et alia, *op.cit.*, 2; Carole Fink, *op.cit.*, 136; Richard Evans, *op.cit.*, 326; Henry Rousso, *op.cit.*, 50. On legal and political consequences of this global change more in: Sorin Antohi, Vladimir Tismanenau (ed.) *Between Past and Future, The Revolutions of 1989 and their Aftermath* (Budapest : CEU Press, 2000); Adam Czarnota et alia, *Rethinking the Rule of Law after Communism*, (Budapest : CEU Press, 2005).

However, the chronological broadness, thematic fragmentation, transnational and interdisciplinary character of the topic present a mighty deterrent. There is no single monographic study dedicated to disentangling the intertwined past of historical expert witnessing. That is not to say that no research has been done. Valuable contributions are gathered in a number of recent collective volumes. At the time of writing this dissertation, the last such attempt is the volume *Contemporary History on Trial. Europe since 1989 and the role of the expert historian*. Edited by Harriet Jones, Kjell Östberg and Nico Randeraad, it provides for a number of interesting examples of the expert use of historians in Europe after the fall of the Berlin wall, but shies away from its historical precedents.¹⁸ This perspective is largely supplemented by the volume edited some years before by Norbert Frei, Dirk van Laak and Michael Stolleis, whose very title *Geschichte vor Gericht. Historiker, Richter und suche nach Gerechtigkeit* speaks of the rich contribution from the designated fields.¹⁹ Much more focused, and indeed indispensable for the study of historical expert witnessing is an excellent but not well-known collective volume *History in Court. Historical Expertise and Methods in a Forensic Context*. Edited by Alain Wijffels, it contains contributions which cut through different cases and different levels of experience of historical expert witnessing, thus satisfying many of the requirements of a nuanced approach. Furthermore, Wijffels' volume is accompanied with an illuminative introduction of the editor, who provided an elegant yet regrettably short account on the history of expert witnessing.²⁰

¹⁸ Harriet Jones, Kjell Östberg, Nico Randeraad (ed.), *Contemporary History on Trial. Europe since 1989 and the role of the expert historian*, (Manchester : Manchester University Press, 2007)

¹⁹ Norbert Frei, Dirk van Laak und Michael Stolleis (hg.), *Geschichte vor Gericht. Historiker, Richter und suche nach Gerechtigkeit*, (München : Verlag C.H.Beck, 2000)

²⁰ Alain Wijffels, "Introduction", in Alain Wijffels (ed.), *History in Court. Historical Expertise and Methods in a Forensic Context*, (Leiden : Ius Deco Publications, 2001), 13-36

Wijfells' insightful study is a true starting point for understanding the mutual influences which came together to shape what we now know as historical expert witnessing. Wijfells hints that observing *longue durée* structural developments in the relationship of history and law - and their reflection in the formation of historical expertise by the beginning of the 20th century - as well as tracking transnational influences is the among most rewarding research avenues. This avenue has been explored, albeit in a somewhat confined national context by a French historian, Olivier Dumoulin. His book, *Le rôle social de l'historien: De la chaire au prétoire*, provides an analysis of the changes in the public role of French historians in the course of the 20th century. Dumoulin discusses the century-long transformation of the forensic role of expert historians in France from Dreyfus case (1898) to the Papon trial (1998). He opened up the issue of the transnational genealogy of expert witnessing by stressing the importance of the influence of the United States on historical expertise in France. Tackling this transnational dimension was an important prompt towards differentiating between diverse blends of historical expertise, which I attempted to pursue by stressing the most important Continental facets in its transformation.²¹ However, that is merely the beginning. Morgan Koussner rightfully noted that "the literature on the use of social scientists and historians as expert witnesses is wider than it is deep."²² The appropriate approach strives to increase the depth without losing the necessary wideness of the approach.

²¹ Olivier Dumoulin, *Le rôle social de l'historien: De la chaire au prétoire*. (Paris : Albin Michel 2003); Vladimir Petrović, „Juridical Memory Making and the Transformation of Historical Expert Witnessing: Contextualizing the Eichmann Case and the Frankfurt Auschwitz Trial”, in: Oliver Brupbacher et alia, *Erinnern und Vergessen*, (München : Martin Meidenbauer, 2007), 326-347

²² Morgan Koussner, "Expert Witnesses, Rational Choice, and the Search for Intent," *Constitutional Commentary*, 5 (1988): 349

Relying on a somewhat old-fashioned academic wisdom of stating the obvious, this thesis attempts to approach contemporary historical expert witnessing through the lens of its rather neglected history. In doing so, the thesis abandons the hindering holistic treatment of the practice of historian's courtroom performance, as this passionate approach neglects the genealogical background and epistemological dimension of the topic. Instead, historical expertise is contextualized in the wider framework of the development of forensic sciences and the institution of expert witnessing at the turn of the century and tracked toward a set of postwar changes in global sensibilities. Prior to setting a cluster of cases designed to indicate the varieties of historical expert witnessing, the thesis revives somewhat forgotten question: How did the once unthinkable idea of historical expert testimony become a well established, if debatable, practice in so many different legal contexts? What happened during the 20th century to make it possible?

Interpretative framework and literature

Each interpretation of a given problem is a sort of professional and even personal journey. Socialized professionally as a historian in the environment of Belgrade University, which takes great pride in maintaining the Neo-Rankean paradigm of a strict division between history and politics, facts and values, and even stricter division between sources and literature, by attaching paramount importance to the experience of historical distance, I was quite disturbed by the practice of historical expert witnessing as I encountered it during my MA research on the *Historical narratives in the International Criminal Tribunal for the former Yugoslavia*, conducted in my second *alma mater*, Central European University in Budapest.

My intellectual “resocialisation” did not affect this preconceived negative standpoint, now induced not by historicism, but rather by the perspectivist urge to deconstruct historical narratives. From both angles, historians did not seem to me proper persons to testify about anything. I thought I had a clear case and an easy PhD dissertation with a strong thesis to write, treating historical expert witnessing as an “odd merger”, and was ready to detail all the incompatibilities between the historical and legal understanding of the concepts of truth, agency, causation, fact, evidence and judgment that make historical expert witnessing improper. However, delving deeper into that realm, I learned that things are not as near clear-cut as I presumed. Prompted by my supervisor to take as active a role as possible, and inspired by one of his *ad hoc* definitions of a historian as “a person who can credibly testify about past events exactly by the virtue of not being there”, I undertook research internships at the International Criminal Tribunal for the former Yugoslavia and in the Office of the War Crimes Prosecutor of the Republic of Serbia.

Communicating with both theoreticians and practitioners at the same time influenced my frame of research considerably. As the judgmental attitude evaporated, I consciously weakened my negative ‘armchair thesis’ through the acknowledgment of the need for differentiating and nuancing. Soon I came to realize that I had, like many before, initially fallen into the trap of the implicit, but powerful *theory of incompatibility* between history and law. I also came to believe that the mighty appeal of this theory of incompatibility is a major obstacle towards better understanding of historical expert witnessing.²³ In this process of ‘historicisation’ of my own position, the overall frame of

²³ Theories of incompatibility of historical and legal narratives are systematized in Richard Ashby Wilson, “Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia”,

interpretation emerged, flexible enough to counter the potential lapses into holism and particularism. I reconstructed and explicated this theory of incompatibility, which I discuss in the first chapter. This influential antagonistic scheme of relation between history and law, implicitly present in a number of works, was explicated and perhaps best summarized by Karl Friedrich, who concluded “that the specific task of the student of law, of the jurist, is antithetical to that of the historian. By the very nature of his enterprise he is dragged into an ahistorical position.”²⁴ Deriving from the long and intimate relations between the two disciplines, the incompatibility theory was slowing the process of the forensicization of historiography, and was keeping historians out of courtrooms at a time when the other branches of human sciences achieved their legal application. It took a catastrophe as great as the Second World War to shake the foundation of this theory. One of its first critics, yet another *émigré* from Germany, Leo Strauss, in his book on law and history lamented the “germanization” of legal theory in United States, arguing for the reintroduction of the notion of natural rights.²⁵ That is not to say that the incompatibility theory was succeeded by the compatibility theory. It accounts not just for the belated forensicization of historiography, but also for the constant struggles to maintain the legitimacy of the practice. This tension of (in)compatibility is a sort of a interpretative fiber which runs through the entire thesis.

Human Rights Quarterly 27 (2005): 908-925. Sets of similarities and differences between the tasks of a historian and a judge are enumerated in Michael Wildt, “Differierende Wahrheiten” in Norbert Frei et alia, op.cit, 51-57. The same issue is tackled by Carlo Ginzburg, *The Judge and the Historian*. (London : Verso 1999). On more specific issues Clarck Kitson, *The Critical Historian*. (New York : Prager 1967), 13-18 dwells on different standards of proof in historiography and in the court of law. Different understandings of causality in law and history are demonstrated in Judith Shklar, *Legalism : law, morals, and political trials*, (Cambridge, Mass. : Harvard University Press, 1986), 194-200. Lastly, even the difference between the temporal dimensions of history and justice underwent a recent scrutiny in Berber Bevernage, “Time, Presence and Historical Injustice”, *History and Theory*, 47 (2008), 149-167.

²⁴ Karl Joachim Friedrich, “Law and History”, *Vanderbilt Law Review*, 14 (1961), 1030.

²⁵ Leo Strauss, *Natural Rights and History*, (Chicago : Chicago University Press 1953), 35.

“To follow the story of the Western legal tradition”, writes Harold Berman, “is to confront implicit theories both of law and of history”.²⁶ Consequently, the exact gist of incompatibility is hard to explain, yet easy to spot. It was famously encapsulated by Hannah Arendt, on the example of the criminal trial of Adolf Eichmann: “Justice demands that the accused be prosecuted, defended and judged, and that all the other questions of seemingly greater importance ... be left in abeyance ... The purpose of the trial is to render justice, and nothing else.”²⁷ Michael Marrus commented recently that “this ‘something else’, of course, was a message about history”. He observed that despite the very particular circumstances in which Arendt made this statement, her dictum nonetheless gained global relevance strengthening the incompatibility thesis and opening the way for many accused to actually hide behind history.²⁸ As this was clearly not Arendt’s original intention, it made her clarify in a later addendum to *Eichmann in Jerusalem* that her concern was solely with “the inadequacy of the prevailing legal system and of current juridical concepts to deal with the facts of the administrative massacres organized by the state apparatus.”²⁹

Regardless, Arendt’s problematization of the mixture of the concepts of justice and history had quite unpredicted effects. Instead of reaffirming the positivist view on the strict division between law, history and politics, her criticism has undermined this distinction, already eroded in Otto Kirchheimer’s book *Political Justice* (1961). A good

²⁶ Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, Mass : Harvard University Press 1983), 10.

²⁷ Hannah Arendt, *Eichmann in Jerusalem*. (London : Faber and Faber 1963), 232.

²⁸ Michael Marrus, “Introduction” in Patricia Heberer, Jürgen Matthäus, *Atrocities on Trial. Historical Perspectives on the Politics of Prosecuting War Crimes*, (Lincoln/London : University of Nebraska Press, 2008), x. Marrus examines the relation between history and justice on the example of Arendt’s work on Eichmann case in contribution “Eichmann in Jerusalem” to Steven E. Aschheim, (ed.), *Hannah Arendt in Jerusalem, Justice and History*, (Berkeley : University of California Press, 2001), 205-213

²⁹ Hannah Arendt, *Eichmann in Jerusalem: Revised and Enlarged* (New York : Penguin Books 1997), 294.

example of this effect is shown in a critique of the Nuremberg trials produced by a legal realist, Judith Shklar, who concluded that in the Nuremberg Tribunal “history had to be tortured throughout in order to reduce the events to proportion similar to those of a model criminal trial within a municipal system ... The result was the confrontation of two entirely different and incompatible notions of causality, the historical and the legal.”³⁰ Shklar, however, draws quite different conclusions from Arendt: “It is not the political trial itself but the situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another.”³¹ Therefore, although the incompatibility theory survived, the concept of apolitical justice was shaken, as the idea of trials as agents in pursuing wider political and social agendas achieved modest legitimacy.

This concept gained strength in light of the burning issue of addressing wartime and postwar human rights abuses by the states. The urgency of dealing with such cases grew in the following decades. The Argentinean legal scholar, Carlos Santiago Nino, stepped into the field by rereading a Kantian term ‘radical evil’, exploited also by Hannah Arendt, to describe a legal challenge in processing endless sets of state-sponsored wrongdoings. He exposed the crucial aspect of the problem: “How shall we live with evil? How shall we respond to massive human rights violations committed either by state actors or by others with the consent and tolerance of their government?”³² His sombre

³⁰ The political aspect of criminal justice in democratic societies was thematized in Otto Kirchheimer, *Political Justice*. (Princeton : Princeton University Press 1961). The topic is further elaborated in Theodore L Becker. (ed.), *Political Trials*. (New York 1971); Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass. : Harvard University Press, 1986)

³¹ Shklar, op.cit, 194.

³² Carlos Santiago Nino, *Radical Evil on Trial*, (New Haven : Yale University Press, 1996), vii. The term itself is borrowed from Immanuel Kant, who seemingly used it to describe “the deep inherent blemish of our species that will not spare even the best of men.” See Edgard José Jorge Filho, *Radical Evil and the Possibility of the Conversion into Good*, <http://www.bu.edu/wcp/Papers/Mode/ModeFilh.htm>, 4.4.2005.

question was truly refreshing in what otherwise was a pregnant but somewhat impenetrable debate of émigrés from Germany and Central Europe (Friedrich, Arendt, Strauss, Kelsen, Shklar, Kirchheimer) who initially shaped the field. A new understanding of the urgency of phenomenon of state crimes had led to the development of new approaches in the study of the legal overcoming of such an atrocious legacy.

Rising on that current, two streams of literature emerged in the nineties, pressing the theory of incompatibility both from above and below. From below, pedestrian research on war crimes trials provided for copious information on historical processes and trials from 1945.³³ One of those, Donald Bloxham's, touched on the fundamentals with the very title of his book *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory*, for in the meanwhile a whole new field of studies in transitional justice had opened up the way towards a new understanding of the influence of law on social change. A huge incentive in this direction came with the collapse of Communism and the global transition towards democracy. Accompanied by the legal reaction to the crimes of past regimes, it placed the topic of juridical memory-making in the center of attention of the growing body of literature dealing with transitional justice, connecting theory with practice.

The term was widely popularised by Hannah Arendt in *The Origins of Totalitarianism*, (New York : Harcourt Brace Jovanovich, 1975), with a significantly different and more comprehensive meaning of. About the differences see Ričard Bernstin, "Refleksije o radikalnom zlu: Arent i Kant", in Daša Duhaček, Obrad Savić (ed.), *Zatočenici zla: zaveštanje Hane Arent*, (Beograd: Beogradski krug i ženske studije, 2002), 76-88. (Richard Bernstein, *Reflections about radical evil: Arendt and Kant*). Nino uses the term even more loosely in order to describe any repetitive criminal activity sponsored by the state.

³³ Donald Bloxham, *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory*, (Oxford : Oxford University Press, 2001). Another indirect attack on the theory of incompatibility was conducted by a thorough historiographical research on the war crimes trials, expressed symbolically in the title of William Bosch' study *From Judgment in Nuremberg to Judgment on Nuremberg*. Cf. Claudia Kurtsidis-Haider, Winfried R.Garscha (ed.), *Keine "Abrechnung" NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945*, (Leipzig/Wien : Akademische Verlanganstalt, 1998); Heberer Patricia, Matthäus, Jürgen (ed.), *Atrocities on Trial. Historical Perspectives on the Politics of Prosecuting War Crimes*, (University of Nebraska Press, Lincoln And London 2008).

From above, the trials were rediscovered as powerful ‘vectors of memory’.³⁴ As the first such studies emerged hastily after 1989, settling scores with the criminal past became not only a possibility, but a strong social demand, and it was apparent that the compatibility of history and law would be put to question. For example, Arendt’s view was directly challenged by Lawrence Douglas: “No one, I believe, would deny that the primary responsibility of a criminal trial is to resolve question of guilt in a procedurally fair manner. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice and nothing else presents a crabbed and needlessly restrictive vision of the trial as legal form.”³⁵ Other authors reframed the relation between history and law. Mark Osiel considered that “law-related activities of this sort contribute to the kind of social solidarity that is enhanced by shared historical memory”. For Ruti Teitel they are “long-standing ceremonial forms of collective history making that enable vivid representations of collective history through the recreation and dramatization of the criminal past.”³⁶

³⁴ The expression was coined by Henry Rousso. Trials were further thematized as important carriers of memories in Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe*. (New York : Berg 1999). Seminal readings on transitional justice Neil Kritz (ed.), *Transitional Justice*. (Washington, D.C : United Institute of Peace Press, 1995); John Borneman, *Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe*. (Princeton, N.J, Princeton University Press 1997); James McAdams (ed.): *Transitional Justice and the Rule of Law in New Democracies*. (Notre Dame, University of Notre Dame 1997); Ruti Teitel, *Transitional Justice*. (Oxford : Oxford University Press 2000); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*. (New York : Cambridge University Press, 2004) are all noting the paramount importance of trials in the transition towards the new societal consensus. Within this body of literature, the impact of legal actions on collective memory is empirically most extensively covered in Paluma Aigullar et al, *The Politics of Memory: Transitional Justice in Democratizing Societies*. (Oxford : Oxford University Press, 2001) and analyzed in depth by Mark Osiel, *Mass Atrocity, Collective Memory and the Law*. (Brunswick and London : Transaction publishers, 2000). Interdisciplinary contributions to the topic in Austin Sarat, Thomas Kearns, (eds.): *History, Memory and the Law*. (Ann Arbor : Univeristy of Michigan Press 2002); also in Jean-Pierre Bacot, (ed.), *Travail de mémoire 1914-1998*. (Paris : Autrement, 1999) and Denis Salas, „La Justice entre histoire et mémoire,, in: Jean-Paul Jean, Denis Salas (dir), *Barbie, Touvier, Papon. Des procès pour la mémoire*, (Paris : Autrement, 2002), 20-34. Issue of legal memory and forgetting is tackled in a number of contributions in Oliver Brupbacher et alia (hg.), *Erinnern und Vergessen*, (München : Martin Meidenbauer, 2007).

³⁵ Lawrence Douglas, *The memory of judgment. Making law and history in the trials of the holocaust*, (New Heaven., London: Yale University press, 2001), 27

³⁶ Mark Osiel, “Making Public Memory, Publicly”, in Carla Hesse, Robert C. Post (ed.) *Human Rights in Political Transitions*, (New York: NY Zone, 1999), Ruti Teitel, op.cit. 72-3.

This nexus between law and memory proved to be of much use in reconceptualizing the role of historians, as it provided a connection with the growing body of literature on history and memory.³⁷ This development was further prompted by deep global changes towards democratization, which were accompanied by the reassessment of the past, frequently by judicial means. This increasing interest was the product of the need to reflect on the recent authoritarian past, either through *ex post facto* criminal proceedings, or extralegal instruments, such as parliamentary inquiries, lustrations, governmental reports or truth commissions. These high-profile proceedings are now recognizably operating in a complex context in which law, politics, history and memory intertwine in an extraordinary media event. The ambiguities of those circumstances are well reflected in a confusing palette of interchangeable terms used to describe it: judicial reading of history, judicization of history, judging the past, verdict of history, retroactive justice, transitional justice, transformative justice, didactic legality, dealing with the past, working out the past, settling accounts, closing the book, facing the past or even policing the past. A strong attempt was made to make sense of the threefold “complicated relationship between transitional justice, truth and history”.³⁸

³⁷ Scholarly interest in collective memory grew fairly recently. It took more than six decades for the scattered works of Maurice Halbwachs (who coined the term in 1925) to find serious resonance in the social sciences. Seminal readings on the issue of collective memory and its making: Paul Connerton, *How Societies Remember*. (New York : Cambridge University Press 1989); Eric Hobsbawm, Terence Ranger, (eds.): *The Invention of Tradition*. (New York : Cambridge University Press 1992). The connection between collective memory, history and politics was dealt with at length in an ambitious project launched by Pierre Nora (ed.), *Les Lieux de mémoire* I-VII. (Paris : Galimard, 1984-1993); Pierre Nora, *Realms of Memory*, (New York : Columbia University Press, 1996-1998); Paul Ricoeur, *Memory, History, Forgetting*, (Chicago : University of Chicago Press, 2004), Paul Ricoeur, Sorin Antohi, “Memory, History, Forgiveness”, *Janus Head*, 8(1), 2005 : 8-25. Patrick H. Hutton, *History as an art of memory*, (Hanover and London: University Press of New England, 1993), Jacques LeGoff, *History and memory*, (New York: Columbia University Press 1992), Tzvetan Todorov, *Les abus de la Mémoire*, (Bruxele : Arlea 1992) Jeffrey Olick, *States of memory*, (London: Duke University Press, 2003). Harald Welzer, (ed.), *Der Krieg der Erinnerung. Holocaust, Kollaboration und Widerstand im europäishecn Gedächtnis*, (Frankfurt am Mein : FTV 2007).

³⁸ Ruti Teitel, „Transitional Justice Genealogy“. *Harvard Human Rights Journal* 16 (2003) : 86.

Hence the presumed incompatibility of the relationship between law and history was decisively changed from the time of Karl Friedrich's article. Two recent articles that bore the same title as his - *Law and History* - coming from two different parts of the world, acknowledge "certain dualism in its conceptual grasping", reflecting hence a certain dynamic standstill, recently described by Ian Buruma as an oscillation between performing "a moral history lesson cloaked in all the ceremonial trappings of due legal process" and assuring that "the terrible acts of individuals are lifted from their historical context."³⁹ The crux of this complicated problem of the relations between law and history was neatly captured by Garry Simpson on the example of criminal trials: "The performance of a war crimes trial is both situated in history and yet seeks to transcend it." He posed a crucial question: "Should law and legal processes lend themselves to these processes? Can they do so without compromising values central to law's integrity?"⁴⁰ Mark Osiel's answer would be affirmative: "The orchestration of criminal trials for pedagogical purposes ... is not inherently misguided or morally indefensible. The defensibility of the practice depends on the defensibility of the lessons being taught." Yet such a blunt embrace of what Osiel boldly calls "liberal show trials" is not the intellectual mainstream. The disturbing issue of the relationship between history and law is still perceived as one of the major stumbling blocks of the concept, and is considered even by Mark Osiel as "problematic in myriad ways".⁴¹

³⁹ Ian Buruma, *The Wages of Guilt*, (London : Vintage Books, c1994), 145, 153. For recent contributions on relation between history and law see John Phillip Read, "Law and History", *Loyola Los Angeles Review* 27 (1993): 193 and Csaba Varga, "Law and History" in *Law and Philosophy*. (Budapest 1994), 477-485. Varga concludes: "All this leads to a double conclusion: if the law is viewed in its entirety, and not in being stripped to instrumentality, it turns out to have its own history as well, and through this, it also acts as a shaping factor of the history of mankind."

⁴⁰ Garry Simpson, op.cit, 801.

⁴¹ Mark Osiel, op.cit, 65, 79.

In fact, the observers of the recent attempts to settle historical grievances in various courts frequently left them disillusioned. Tina Rosenberg concluded that “trials, in the end, are ill suited to deal with the subtleties of facing the past”.⁴² Ian Buruma similarly warned that “just as a belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics – though I have my doubts about this too. But good politics don’t necessarily serve the truth.”⁴³ Much blunter was a historian of the Holocaust, Michael Marrus: “My own view is that trials cannot and should not be expected to do the job of historians - to teach history.”⁴⁴ This problem is ever more present in Eastern and Central Europe, where political discontinuities were larger and hence the trust in the rule of law more shaken, not only through convicting the wrong people for wrong reasons, but also by paradoxically convicting the right people for wrong reasons or wrong people for right reasons.⁴⁵ Pierre Nora also warned that “memory and history, far from being synonymous, appear now to be in fundamental opposition.”⁴⁶ Occasionally, one can still hear warnings that “this does not mean, of course, that all attempts to arrive at the truth in criminal trials are doomed. It means rather that we must stop loading onto the shoulders of justice requirements it is not suited to meet.”⁴⁷ Hence, even after the astonishing developments in transitional justice, the theory of the incompatibility of history and law was not simply brushed aside.

⁴² Tina Rosenberg, *The Haunted Land*. (London : Vintage Books 1995), 258.

⁴³ Ian Buruma, op.cit, 142.

⁴⁴ Michael Marrus: „History and the Holocaust in the Courtroom“, in: Ronald Smelser, *Lessons and Legacies V. The Holocaust and Justice*. (Evanston : Northwestern University Press 2002), 216.

⁴⁵ Telling example of this phenomenon is the case of Mihály Francia Kiss, dragged through different political systems and legal regimes of Hungary from 1921 until 1994. Researched in István Rév, *Retroactive justice. Prehistory of Post-Communism* (Stanford: Stanford University Press 2005),

⁴⁶ Pierre Nora, “Between Memory and History: Les Lieux de Memoire”, *Representations* 26 (1989), 8.

⁴⁷ David Chuter *War Crimes*, (Boulder, Colo. : Lynne Rienner Publishers, 2003), 232-233

The last intellectual current which was adding to the existing confusion was in close connection with the postmodern challenge posed in different shapes by Michel Foucault, Roland Barthes and Jacques Derrida. It flowed to historiography through the work of Hayden White, Dominick LaCapra and Frank Ankersmith, but also to law, although less visibly, through studies by Stanley Fish, Costas Douzinas, Garry Minda and other representatives of postmodern jurisprudence. Not without consequences: transitional justice was vested in the transformation of society by establishing the judicial facts. This was exactly the reason that the Law was ready to accept help from historians. They were needed in order to substantiate the rendering of justice with solid facts. “But facts, in the field of history, come wrapped in words”, reminds István Rév.⁴⁸ As William Wiecek puts it, whereas the “non-historian assumes that historical facts are objectively knowable, ‘out there’, so to speak, and that they will disclose themselves to anyone who seeks diligently ... a first-year graduate student in History learns the fallacy of these assumptions in the first week of the methods seminar.”⁴⁹ Therefore, historical appearances in the courtroom exacerbated the pre-existing doubts. It became clear, as Harold Berman warned, that “if various schools of legal theory pose obstacles to an understanding of the story of legal tradition, far greater obstacles are posed by various theories of history.”⁵⁰ Such was the intellectual minefield into which historians and lawyers stepped, frequently unaware of its complexities. Such were also the necessary preconditions for their courtroom appearance. And such was the baggage of epistemological uncertainties they carried into the legal process.

⁴⁸ István Rév, op.cit, 2.

⁴⁹ William M. Wiecek, “Clio as Hostage: The United States Supreme Court and the Uses of History”, *California Western Law Review* 24 (1987), 266-7.

⁵⁰ Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, Mass : Harvard University Press 1983), 10.

The most alarming aspect of the challenge was the fragmentation of some of the key concepts of both historical scholarship and the legal process. Firstly, the notion of evidence and proof was at stake. Evidence had been at the centre of legal and historical attention for ages and was for a long time considered safe ground in both disciplines, as long as it was neatly checked in accordance with the established disciplinary requirements. Could they be safely transferred from history to law and back? For quite some time this alarming question was not even raised. However, brought under tight scrutiny across the disciplines, the concept started melting: “The facts which judges and historians take under examination are different, in part, chiefly because judges and historians have different attitudes concerning the issue of context – or perhaps we should say contexts.”, wrote Carlo Ginzburg.⁵¹ Ginzburg continued to tackle the more troublesome question lurking behind – the question of legal and historical truth(s). He listed a number of other differences between the judge and the historian in the book of the same title, guided by the belief that “law and history, it seems, have different rules and different epistemological foundations ... this is the reason why legal principles cannot be safely transferred into historical research.”⁵² Michael Wildt recently went further by enumerating four strong reasons for differentiating between the truths of historians from the truths of a prosecutor: (1) the knowledge interests of the prosecutor and historian are different, (2) the object of a prosecutor’s research, unlike a historian’s, is firmly defined, (3) the goals of their investigations differ, (4) historian and prosecutor present their truths with different modes of argumentation.⁵³

⁵¹ Carlo Ginzburg, *The Judge and the Historian* (London : Verso, c1999), 117-118.

⁵² The quote is taken from Carlo Ginzburg, “Just one Witness”, in Friedlander, *op.cit.*, 85.

⁵³ Michael Wildt, „Differierende Wahrheiten. Historiker und Staatsanwälte als Ermittler von NS-Verbrechen“, in Norbert Frei (ed.), *op.cit.*, 51-5.

Paradoxically, this development has once again put on the table a new version of the incompatibility theory. Among the different truths evolved from the fragmentation of the Truth, the evocation of differentiation between legal and historical truth is particularly frequent.⁵⁴ How to cope with this challenge? Different and disturbingly disparate accounts came from the field of scholars who were practicing either as witnesses or working with them. James Gow and Ivan Zverzhanovski maintained that, in spite of some doubts, “the same evidence serves two purposes: the quest for ‘truth’ by those involved in judicial process, on one side, and those engaged in academic historical interpretations on the other...The two frameworks for truth are neither necessarily competitive nor complementary, and the test of their validity may differ. But the raw material they use may be identical and the outcome of each may be parallel and consistent. And the two varieties of truth may reinforce one another in the quest to restore peace and security, to establish justice and to compile a broadly accepted account of contentious, awful events.”⁵⁵ On the other hand, M.C.Mirrow, who served as an historical expert witness, drew more the depressing conclusion that “Forensic truth is not the same as truth sought by academic historians ... Thus, there is an inherent incompatibility between the forensic goal of the best possible result given the time limits of a judicial proceedings and the ‘true’ result sought by the historian regardless of the time constraints.”⁵⁶

⁵⁴ On different notions of the truth in law and history see Leon Sheleff, “Four Thruths – Legal and Political, Judicial and Historical”. In: B. S. Jackson (ed.), *Legal Semiotics and Sociology of Law*. (The Onati International Institute for the Sociology of Law, Onati 1994), 73-88. More on legal truth in Ksenija Turković, “Historians in Search for Truth about Conflicts in the Territory of Former Yugoslavia as Expert Witnesses in front of the ICTY”, *Časopis za suvremenu povijest*, 36, (2004), 40-8. Also on differentiation between the ‘historical truth’ and ‘narrative truth’ in legal proceedings. Marianne Wesson, “Historical Truth, Narrative Truth and Expert Testimony” *Washington Law Review* 5 (1984): 331-354.

⁵⁵ James Gow, Ivan Zverzhanovski, “The Milošević Trial: Purpose and Performance”, *Nationalities papers*, 32 (2004) : 897

⁵⁶ M.C.Mirrow, Kennewick Man, Identity and the Failure of Forensic History, in: Alain Wijffels, op.cit, 243

How to move pass these seemingly irreconcilable positions? Without the ambition to further this puzzling debate, this thesis maintains that much of the confusion derives from the fetishization of the notion of the truth, present both among those who parcel the notion along the lines of different disciplines, and among those who wrestle to keep the notion intact. Important in its own right, this debate ought not necessarily to get exported into each and every epistemological discussion. Namely, if the truth is too important to be left to everyone for discussion, legal process and historiography are also too important to be at the mercy of epistemological debates. Many a practitioner came out of the witness box with a less rigid take, like Douglas Littlefield, who concluded that “undertaking historical research and writing for an academic purpose and pursuing those same endeavors in a legal setting are, of course, not mutually exclusive activities. Nonetheless, the practice of history in the legal arena operates on a set of basic assumptions and is guided by rules different from those characteristic of history in an academic environment.”⁵⁷ Summing up the remarks on the differing truths, Alain Wijffels observed that the “discussions on History and Law often tend to consider that both areas would seem to cultivate their own brand of truth: there would thus be a historical truth and a legal truth”. Still, he observed that “in spite of the acknowledged differences, the destinies of historical research and legal proceedings are not to such extent foreign to each other ... on the contrary, a great many human activities show that the two can meet, or at least come close to each other in a variety of circumstances.”⁵⁸ I was trying to substantiate this thin line in the work of several authors who helped me wrestle with the epistemological dimensions of the topic.

⁵⁷ Douglas R. Littlefield, “Field Notes, The Forensic Historian: Clio in Court”, *Western Historical Quarterly* 25 (1994): 507.

⁵⁸ Alain Wijffels, op.cit. 13-15.

To this end, I consciously take the risk of evoking the names of Richard Rorty, Paul Feyerabend and Bernard Williams in one sentence, aware that it might raise more than a few eyebrows. However, all of them contributed to forming my understanding of the task; hence I tended to tone down their differences with *O Freunde, nicht dieser Töne!*, as they gave me the tools to make a distinction between debates and pseudodebates (the latter very frequent in the field of my interest). They also convinced me that the issue of the cross-disciplinary understanding of truth is a central philosophical notion for my thesis, and provided me with the tools to approach it honestly, but without pretensions. Specifically, I was initially more than happy to find refuge in Rorty's concept of liberal irony, particularly as it squared well with Hayden White's understanding of history.⁵⁹ This skeptical line of argumentation seemed to favor my initial negative stance towards historical expert witnessing. However, I grew to understand that even such skeptics as Feyerabend were more merciful towards the practice of expert witnessing: "Testifying before the law, experts have to respond the laypersons and their representatives. True, this has led to excesses, but the fault lies in the manner of application, not in the principle."⁶⁰ Gradually I shifted towards the more proactive view, championed by Bernard Williams, particularly in his collection of essays on *Truth and Truthfulness*. At the very beginning of his study, regarding the "demand for truthfulness" as "reflex against deceptiveness", he emphasized that "suspicion fastens, for instance, on history. Accounts which have been offered as telling the truth about the past often turn out to be biased, ideological, or self-serving. But attempts to replace these distortions with 'the truth' may once more encounter the same kind of objection, and the

⁵⁹ Richard Rorty, *Objectivity, Relativism and Truth*, (Cambridge : Cambridge University Press, 1991), Details on his philosophy of history in Roy Jenkins, *On What is History* (London : Routledge 1995)

⁶⁰ Paul Feyerabend, *KillingTime*, (Chicago : University of Chicago Press 1995), 146.

question arises, whether any historical account can aim to be, simply, true ... Such arguments can merely be added to the problem, and, as has often happened in recent years, accelerate a deconstructive vortex .. We can see now how the demand for truthfulness and the rejection of truth can go together. However, this does not mean that they can happily coexist or that the situation is stable ... The tensions in our present culture that are generated by this problem, the tensions between truth and truthfulness, break out in several styles of conflict.”⁶¹ I grew quite convinced that the issue of historical expert witnessing is something of a practical example of such tensions. Therefore I subscribed to Williams’ argument that the issue of the truth is not to be mistaken for the issues of sincerity and accuracy, as well as to the general implication it makes that one does not need to know the truth in order to recognize a lie. Also, Williams added to the urgency of the topic, noting “that state of denial, and the politics that goes with it, offer a real risk of the humanities’ being alienated from the rest of the society, at least if the humanities are supposed to be regarded as a passionate and intelligent study.”⁶²

In the work of Thomas Haskell I found the operationalization of this urgency within the field of the practicing historian. I found his understanding that “objectivity is not neutrality” indispensable in my positioning toward the practice. Haskell’s balanced distrust towards experts – expert witnesses, but also lawyers, and historians who criticize expert witnessing alike, was quite helpful. In Haskell I found yet another cautious Rortean concerned about the “attack on truth, to which Rorty has sometimes given ambivalent encouragement. ... In the absence of truth, the moral difference between

⁶¹ Bernard Williams, *On Truth and Truthfulness, An Essay in Genealogy*, (Princeton and Oxford : Princeton University Press, 2002), 1-3.

⁶² *Ibid*, 10.

villains and victims collapses into nothing more than a clash of incommensurable perspectives, beyond a possibility of adjudication. Justice becomes an incoherent ideal...”⁶³ Haskell evokes the important notion of the *ethics of history*, by “calling attention to the intricate network of constraints that we professional historians tacitly rely on whenever we distinguish history from fiction, scholarship from propaganda, or good history from bad.”⁶⁴ This minimalistic approach that defines the role of the historian as sincere rather than truthful, accurate rather than objective, transparent rather than holistic, responsible towards his own methodology, squares well with my understanding of the profession. Haskell’s ability to apply his views concerning the relations of academic freedom and expert witnessing on the concrete example of one of the cases (*EEOC v. Sears*) also proved to be a proof that theoretical standpoints on expert witnessing could withstand reality checks.⁶⁵ On the basis of such insights, I was encouraged to write a thesis which is not just descriptive, but occasionally proscriptive; not just generalizing, but case sensitive; not just opinionated but also critical; not just research oriented but comparative as well. Such ambition echoes in many respects the both realistic and idealistic motto of Charles Maier: “There can be no one historical narrative that renders perfect justice, just as there is no judicial outcome that can capture the complexity of history... but the historian would like to do justice; the judge must establish some version of history. If good judges and historians shun these tasks, they will be taken on by prejudiced or triumphalist ones.”⁶⁶

⁶³ Thomas Haskell, *Objectivity is not Neutrality. Explanatory Schemes in History*, (Baltimore : Johns Hopkins University Press, 1998), 10.

⁶⁴ Thomas Haskell (ed.), *The Authority of Experts. Study in History and Theory* (Bloomington : Indiana University Press 1984) , 2.

⁶⁵ Thomas Haskell and Sanford Levinson, “Academic Freedom and Expert Witnessing: Historians and the Sears Case”, 66 *Texas Law Review* (1988): 1629-1655.

⁶⁶ Quoted in Austin Sarat, Thomas R.Kearns, op.cit, 1

Research Design and Sources

Both research design and content were influenced by the attempt to make plausible seemingly the paradoxical thesis that the disciplinary intimacy between history and law resulted in an implicit *theory of incompatibility* that has delayed the forensicisation of historiography and eventually made it more controversial. To such an end, the first chapter, *Preconditions*, returns to the general evolution of expert witnessing and its gradual shifting through the sciences at the turn of the century. Such an approach dismantles some of the exclusivity unjustly attributed to historical expert witnessing. Hence its sub-chapter, *The long path towards forensic historiography*, tracks the gradual shift in expert witnessing in various social sciences, but still makes a case for history as case-specific by taking into account its intimate and longstanding connection with law. It traces the developments in the realm of expert witnessing, emphasizing the importance of its nesting period in major legal systems by the end of the 19th century. It notes the shift from natural and applied sciences towards social sciences, alongside the heated debates on the applicability of ‘soft’ sciences in the courtroom by the time of the first attempts to do so with historiography in the Dreyfus and Friedjung cases. It argues that the forensicisation of history was substantially delayed as it was hindered by the close proximity of history and law, giving rise to a battle for primacy and tension expressed in the interwar period as the implicit theory of incompatibility. The second sub-chapter, *The Great shift: The concept of universal human rights* is an investigation of the currents that undermined this notion of incompatibility, and examines the impact of the dramatic

events of first half of the 20th century on the sensitive balance between history and law. The examination of the context which eventually dragged the past into the courtrooms, and made historians follow it is scrutinized. It furthers the existing interpretations of the genealogy of historical expert witnessing, relating it to the great paradigm shift that had occurred by the end of the Second World War. By locating the Nuremberg trials as the landmark for relations between history and law, the thesis is not introducing something dramatically new. However, the scope of this analysis surpasses Nuremberg and encompasses the creation of a global shift towards the concept of universal human rights, leading to a massive legal rereading of the past, which was, and still is, eroding the theory of the incompatibility of history and law.

The second chapter, *Institutionalizations*, traces the first postwar appearances of historians as experts in both Common and Continental law. It argues for the importance of varieties that have accompanied the institutionalization of expert witnessing in different legal contexts. It maintains that the shift towards universal human rights gained recognizably different features in the realm of Civil and Common law. Those two paradigms of the usage of historical expert witnessing revealed both the inherent closeness of historical and legal investigation of the past, and a bitter rivalry over the interpretation of the past in accordance with the respective disciplinary requirements of historical scholarship and standards of legal procedure. Therefore the chapter explores the extent to which the postwar trials have influenced the forensicization of historical expert witnessing in continental Europe. It is dealing with the set of Second World War-related cases which occurred in an unsteady stream in the immediate postwar period, just to reach its peak in the mid 60's with the Eichmann trial and the Frankfurt Auschwitz trial,

in both of which historians took a considerable role, frequently forgotten in the contemporary debates. This paradigm, characterized by criminal cases conducted in the Continental legal setting has led to the formation of a fairly distinctive brand of historical expert witnessing. The same chapter examines the origins of historical expert witnessing in the USA. The American paradigm of global shift was more related to the domestic reception of the change in sensibilities in regards to human rights. The slow and gradual admittance of historians into American courtrooms in antidiscrimination cases, from *Brown v. Board of Education* to the Indian claims cases is in a sense mirroring the pace of the developments in Continental law, but also pointing to the major differences deriving from the predominantly civil, rather than criminal character of the cases. That led to the branding of a different kind of expert witnessing, characterized by the adversarial character of those proceedings, as opposed to the inquisitorial type of the Continental trials.

The third chapter, *Problematizations*, deals with the junction of the two paradigms, understood by some as the merger of the two paradigms, and by others as a clash. It follows the arguments in current debates on historical expert witnessing, focused around the concept that expert witnessing has shifted from the USA to the continent, causing the tumults in contemporary debates. It therefore examines the proliferation of historical expert witnessing in the USA, accounting for the continuation of this practice in antidiscrimination cases, and in gender related cases, with the controversies that started raging over the issue, its legal regulation and the discussions, peaking with the Sears case. It is simultaneously tracking the renewal of interest in Second World War-related cases in Europe, and is testing the theory of transfer in the light of war crimes in France,

but also in the former Yugoslavia. It points out important variations of historical expert witnessing in differing legal settings, returning to the issue of Second World War- related proceedings which have reignited at the same time in Europe, in which historians stepped forward already burdened with all the controversial aspects. It also maintains that the binary opposition towards historical expert witnessing in Common law and Continental law is not necessarily the most functional approach, as a much more flexible and plausible explanation for differences in the expert witnessing of historians comes from the nature of legal proceedings and their positioning between various paradigms.

The fourth chapter, *Internationalizations*, aims to further the debate by examining the merger of different brands of expert witnessing. In the cases regarding the limits of legitimate historical interpretation, historical expert witnessing proved of utmost importance. Resting on defamation cases from Zündel's to David Irving's, the chapter compares those Criminal and Civil suits within the Common law and Continental law. The encounter with the phenomenon of the legal demarcation of proper historical writing about the dark side of the 20th century turned into cases in which historians have been charged, and others testified, often transgressing the borders of their states and national historiographical contexts. Apart from this horizontal internationalization, the chapter also dwells on the spreading of the phenomenon of historical expert witnessing on the global level after 1989. Examining briefly the events in Eastern Europe following the collapse of communism, strong emphasis is given to the new advent of international criminal law, closing therefore the circle from the International Military Tribunal of Nuremberg to the International Criminal Court of The Hague, and refocusing the 20th century debates into the ones belonging to the 21st.

It is apparent that the thesis opts for a generalist approach; such is the intention behind the selection of the cases, which are broadly set in a chronological order but at the same time clustered and chaptered in accordance with their thematic and epistemological proximity. This approach is applied in order to maintain the cohesion of the phenomenon, and yet to trace its different manifestations. Each of the chapters elaborate directly on historical expert witnessing, and at the same time grasp not only a particular period or region, but also an intellectual trend typical of certain types of historical courtroom appearance. It may be said that each of these chapters is a case study, in which trials are clustered, with a central role assumed by the paradigmatic case, accompanied with reflections on many auxiliary examples. Those cases are selected to reflect the range of different contexts in which historians are taking part. That is not to say that the thesis aims to explore the entire field of historical expert witnessing, which is at this point too great a task for the scope of this thesis, but it does follow a general orientation of balancing between the generalization and particularization of the phenomenon. Hopefully, it should lessen the reluctance of historians to position themselves towards historians as expert witnesses, as this practice is arguably their most visible contribution to the process of dealing with the past.

Although the cases are mostly presented in a diachronic fashion and chronological order, there are important exceptions. The bulk of the cases derive from the postwar period, in which historians became established experts. However, occasional ‘detours’ into an earlier period are not incidental. Many legal and historical trends that grew to visibility and prominence after Nuremberg were present from the beginning of the 20th century as powerful intellectual undercurrents. Hence, although the formal *terminus post*

quem in the initial subtitle of the dissertation (Historians as expert witnesses from Nuremberg to The Hague and beyond) was *Nuremberg*, and *terminus ante quem* was *The Hague*, the corollary *beyond* was meant to emphasize the importance of the neglected events predating the Second World War. As such occurrences multiplied, the subtitle was altered, in order to avoid chronological, but also structural misinterpretations. *From Nuremberg to The Hague* might mean that the dissertation is interested solely in historians' expert witnessing in international war crimes trials. That is, however, not the case. Although a significant number of the cases are related to the war crimes, many are not. As for the international character, many of the cases are derived from isolated national jurisdictions. Still, the bulk of the research concerns the period which starts with the 'birth' of international criminal law in Nuremberg, and ends with its new onset in the International Criminal Court in The Hague. In a sense, the overlap between international law and history is also traceable from the beginning of the 20th century, and continues throughout the period dubbed by Eric Hobsbawm as *The Age of Extremes*. Picking up this notion, the dissertation carries it even beyond the boundaries set by Hobsbawm. The age of extremes, marked with competition of national states and empires, fueled with ethnic and racial discrimination, was indeed in sight by the turn of the century, dragging the world into the sequence of intensive, murderous conflicts which characterized the 20th, and have continued in the 21st century. The extreme injustices brought about by this age, and the attempts to overcome them through legal means, eventually dragged the historians into that arena, for better or worse. The need to acknowledge this connection is expressed in what otherwise would be a rather pretentious title for the dissertation.

The traditional division between historical sources and literature becomes increasingly difficult to maintain in research which belongs to the field of contemporary history. This distinction is further complicated as the thesis is necessarily situated between the disciplines of legal and historical studies, with frequent reference to research in political science and the study of memory. Lastly, the ambitious design of tracking the broken traces of historical expert witnessing on a global scale took its toll, expressed in painful choices, both in terms of cases chosen and the attention I was able to allocate to them. Still, many criteria can be explained. Precedence was given to the cases whose prominence is evident, and which ignited the debate on expert witnessing. Additionally, more attention was given to the cases which were, in my opinion, wrongfully neglected, causing much confusion in discussing the practice. In both situations, I was guided by the same principle – to use as many of the original sources as obtainable. Original sources for the purpose of this thesis do not necessarily amount to the transcripts of the cases and the legal material deriving from them, or the legal documents which frame the role of the experts. They are also composed of the writings and recollections of historians who testified in different courts, and of the lawyers who were in contact with the practice. Further, the texts debating the merit of the practice are in fact frequently sources on their own, rather than accompanying literature. In fact, that is the spot where the dividing line between the sources and the literature becomes barely visible. To take a concrete example: the writings of Professor Richard Evans, who participated as an expert witness in the trials I discuss fall into both categories – the transcripts from the trial are clearly among the sources, as well as his book on David Irving’s method which in fact derived from his expert report. However, his study on historical knowledge, *In Defense of*

History, is also listed as a source, as it reflects my belief that the performances of expert witnesses are largely dependent on their philosophical understanding of their work. On the other hand, his article on historical expert witnessing is listed as literature. Although it does contain quite a lot of his personal recollections, it maintains a strong reflective element, which sets it into literature. A similar criterion was applied elsewhere, and leads to a division which is to a degree strange, but reflects the transdisciplinary character of the research. In fact, a more detailed explanation on why some authors are listed in sources and others in literature would call for a study on its own.

More importantly, among the sources, some remain conspicuously absent from the bibliography, as they belong to the realm of so-called ‘tacit knowledge’. They are composed of the conversations I had with numerous participants or interested observers of the studied phenomenon. Although I was at first inclined to formalize this approach by structuring a suitable questionnaire, this turned out not to be feasible and remains perhaps one of the avenues for a possible book project. The scholars who served as expert witnesses I talked to were John Allcock, Robert Hayden, Nicholas Miller, Mile Bjelajac, Tvrtko Jakovina, Bill Tomljanovic, Milan Koljanin, Kosta Nikolić and Srđan Cvetković. Among the ones who declined to testify and shared their reasoning with me were John Lampy, Dejan Jović, Nenad Dimitrijević and Henry Rousso. I discussed the merits of the practice with a number of judges, prosecutors and investigators, starting with Yves Beigbeder (International Military Tribunal in Nuremberg), Tomas Hennis, April Carter and Michael Hehn (International Criminal Tribunal for the former Yugoslavia), Judge Marijana Garotić and Prosecutor Bogdan Stanković (War Crimes Prosecutor’s Office and War Crimes Chamber of Serbia) and Ivana Ramić (District Court of Belgrade). I am also

indebted to the scholars who shared their published or unpublished works and ideas, among whom particularly helpful were Norbert Frei, Erich Haberer, Erick Ketelaar, Irmtrud Wojak, Ruti Teitel, Andrej Mitović, Sorin Antohi, Renata Uitz, Balázs Trencsenyi, Immanuel Geis, Xavier Bougarel, Garry Simpson, Irène Herrmann, Hannes Siegrist, Karl Hall, Ingo Loose, Rebecca Witmann, Avi Tucker, Christian Giordano, Richard Wilson and Diether Poll. Lastly, the amount of literature and sources needed for this dissertation could not have been gathered but with the courtesy of the Bibliotheque nationale de France, the British Library, the Library of the University of Fribourg, the Library of the University of Leiden, the Library of the Centre for Advanced Studies in Sofia, the Library of the Institute for Contemporary History in Belgrade, the Library of the Max Plank Institut für Rechtsgeschichte in Frankfurt am Mein, the Peace Palace Library in The Hague, the Library of the International Criminal Tribunal for the former Yugoslavia, the Library of the French Cultural Centre, Atelier de recherches internationales, the University Library Belgrade, the Open Society Archives, the Archives of Yugoslavia, the Archives of Serbia, the Library of the Central European University, the Library of the Research Station Petnica in Valjevo, the Bodleian Library and the Library of Magdalen College, Oxford.

Chapter I

PRECONDITIONS

This chapter explores the epistemological (I.1) and genealogical (I.2) prehistory of historical expert witnessing. The troubled forensicization of sciences is scrutinized in order to put the expert role of historians into a disciplinary comparative perspective, and the case is made for history as a specific case of delayed and questionable forensicization. The great shift induced by the Second World War is analyzed as a turning point of relations between history and law that enabled the appearance of historians as expert witnesses.

I.1 The Long Path to Forensic Historiography

The debate within the craft too frequently revolved around the question of whether a historian is an appropriate expert, neglecting hence that the process of forensicization is by no means restricted to historiography. However, it is rewarding to dwell on the development of the peculiar institution of expert in various legal traditions, and also to observe the conditions under which the expert role emerged in different disciplines, ranging from hard sciences to humanities and how it was absorbed into different legal contexts. Developments in forensic sciences deemed relevant for understanding the emergence of the courtroom role of historians create a background against which the forensicization of historiography appears by no means a unique phenomenon. It does resurface, however, as a complex case burdened with the specificities of the entangled, if implicit, relationship between history and law.

I.1.1 Transformations of Expert Evidence: Who Guards the Guardians?

It is surprisingly difficult to define generically the courtroom role of experts beyond the all-purpose truism that an expert is a person who assists the rendering of justice by providing specific knowledge for legal use. Historically, expert witnessing is a very complex legal institution. The type of knowledge, its content, the ways it was provided, the type of assistance and the legal contexts varied very significantly throughout history, and many of those differences persist in contemporary jurisdictions. Even terminologically, the label “expert witness”, customary in Common law, becomes misleading in the realm of Continental law, where the related institution is most frequently defined not as a witness, but solely as an expert, being therefore a *sui generis* means of proof.¹ This peculiar position is readily noted in the literature, but not furthered in the absence of thorough research on the topic, for the reasons summarized by Tal Golan: “Situated at the intersection between the two dominant institutions of science and law, scientific expert testimony has long been overlooked by both. Historians of science ignored it because they did not consider courts of law to be important sites of scientific activity before the twentieth century. Historians of law ignored it because they never considered science to be a significant factor of judicial practices and jurisprudence related to the evidence. As a result, there is relatively little scholarship about the history of the

¹ History of continental institute of expert is thoroughly researched in German legal literature. Cf. Konstantinos Kerameus, *Die Entwicklung des Sachverständigenbeveises im deutschen und griechischen Zivilprozessrecht*, (Cologne : Carl Heymanns Verlag 1963); Karlhans Dippel, *Die Stellung des Sachverständigen im Strafprozess*, (Heidelberg : Dekker 1986). A bold attempt to account for development of expert witnessing in common law: Robert Kargon, “Expert Testimony in Historical Perspective”, *Law and Human Behaviour*, 10 (1986), 15-27.

relations between the two most authoritative institutions in modern Western culture – science and the law.”²

Therefore it is not an easy task to provide a comprehensive account of the development of this peculiar institution, probably best understood through contrasting it with the institution of the eye-witness. An expert is a person whose contribution to the establishment of legally relevant facts is not based on their physical proximity to the case at stake.³ They usually do not testify about what they saw, heard or felt. On the contrary, they step forward as a bearer of specific general knowledge that can be applied to a given case, constructing hence an insight that might assist the rendering of justice. The historical variety of experts’ contribution derives exactly from such a highly contextual concept – the nature of courtroom expertise was largely dependent on the brand of knowledge favored by different cultures or needed in different circumstances. Such examples are a legion. Meticulous legal historians suggest there was no legal system that did not rely on some kind of expert assistance. Among the “founding fathers” of courtroom expertise one could therefore list Imhotep, Grand Vizier of the Pharaoh Zoser, but also biblical figures like Joseph and Daniel.⁴ Traces of experts’ contributions are

² Tal Golan, *Laws of Men and Laws of Nature, The history of scientific expert testimony in England and America*, (Cambridge : Harvard University Press, 2004), 1. However, these obstacles are somewhat alleviated by a trend in recent inquiries to scrutinize this nexus either in a localized context or through edited volumes: Cf. Roger Smith, Brian Wyanne (ed.), *Expert Evidence: Interpreting Science in the Law*, (London and New York : Routledge, 1989); Sheila Jasanoff, *Science at the Bar. Law, Science and Technology in America*, (Cambridge, Mass : Harvard University Press, 1997); Helen Reece (ed.), *Law and Science*, (Oxford : Oxford University Press, 1998);

³ This is a dangerous generalization, as it is not always easy to differentiate between the two. The scene is further complicated by experts who were also the eyewitnesses, and also by the growing presence of experts who testify on reliability of eyewitness account. More in Robert J Hallisey, “Experts on Eyewitness Testimony in Court – A Short Historical Perspective”, *Howard Law Journal*, 39 (1995/6). 237-286.

⁴ Lirieka Meintjes-Van der Walt, *Expert Evidence in the Criminal Justice Process. A Comparative Approach, Series Criminal Sciences*, (Amsterdam: Rozenberg Publishers, 2001), 13; Robert F.Taylor, “A comparative study of expert testimony in France and the United States”, *Texas International Law Journal* 31 (1996), 184 Certainly, there are legal scholars who find these occurrences only as early manifestations, only anegdotically related to the institute of expert witnesses. Cf. Dippel, op.cit, 5.

present in Mesopotamia as well as in Ancient Greece. With Roman law the practice obtained its name – *forensics* – meaning “what is for the forum”. In the times of the Republic and Empire, “what was for the forum” were the state of sanity and various medical issues, as well as parentage, handwriting and other technical matters which the judges relegated to experts, known under different names in Latin (*aestimator, nummarius, peritus, disceptor, and expertus*).⁵

It is usually asserted that notion of forensics regressed after the collapse of the Roman Empire. However, it might also be noted that the practice was not extinguished, but shifted toward other realms of interest. The resort to the Church-driven Canon law, alongside with the blending of whatever remained of Roman law with various German and Celtic institutions produced new types of expertise. For instance, at the end of this long road, the 15th century *Malleus Maleficarium* offers a variety of means for an expert inquisitor to recognize witches and perform exorcism. Admitting the complexity of the cases at stake, the authors of this booklet leave the possibility of “lawful exorcism” conducted by laymen, in which “not only physicians and astronomers be the judges, but especially Theologians.”⁶ On the other hand, under the auspices of Humanism, a substantially different kind of expertise developed through the critical scrutiny of medieval texts for legal purposes, such as Lorenzo Valla’s debunking of the alleged Donation of Constantine in his work *De falso credita et ementita Constantini donatione declamation* which appeared in 1440.

⁵ Dippel, 6-8.

⁶ Jacobus Sprenger, Heinrich Kramer, *Malleus Maleficarum* [The Hammer of Witchcraft], (London : The Folio Society, 1968), 191-2. Cf. Manfred Hammes, *Hexenwahn und Hexenprozesse*, (Frankfurt am Mein : Fischer Taschenbuch Verlag 1977), destruction brought about by the experts of inquisition was a subject of interesting research of Carlo Ginzburg, *The Cheese and the Worms. The Cosmos of a Sixteenth-Century Miller*, (London : Routledge 1980) and Emmanuel Le Roy Ladurie, *Montaillou, village Occitan, de 1294 a 1324* (Paris: Gallimard, 1976).

However, as states all over Europe were gradually assuming monopoly over criminal prosecution, the institution of expert witnessing began to resemble its contemporary shape, and is explicitly mentioned as such in the *Constitutio Criminalis Carolina*, from 1532. Judicial process rested in the hands of professional judges who were controlling essentially secretive proceedings. At their discretion, judges could rely on whichever expertise they deemed necessary, but were by no means constrained by its findings. Although this difference did not amount to much in terms of courtroom expertise, it became significant as the rights of the defendants increased. Common law has gradually developed into an accusatorial system of fact-finding, in which the parties, rather than the judge, were supposed to supply the court with evidence. In Continental law, the inquisitorial system still presumed that the judge should hold an active investigative role. As the difference grew sharper, the impact on the position of experts became obvious. In Continental law, the experts were still summoned by the judges, but their actual impact was limited. The nature of their expertise was doubtful, and its probative value was not particularly respected. For instance, the Ordinance of Louis XIV from 1667 encouraged judges to seek expert opinion, but trust in this institution diminished, among other reasons, because the function of expert became a hereditary title. This decay was however changed during the early codifications of legal procedure, such as the *Constitutio Criminalis Theresiana* in German lands from 1765 and ultimately in Napoleon's *Code Civile*.⁷ In this legal setting, the experts were called by the court to submit reports or appear in front of the judges and answer their questions in the way judges were regulating and guiding.

⁷ *Constitutio Criminalis Carolina, Constitutio Criminalis Theresiana and the role of experts is commented in Enno Poppen, Die Geschichte de Sachverständigenbeweises im Strafprozess des deutsch-sprachigen Raumes, (Göttingen : Musterschmidt 1984), 58-63.*

At about the same time, the first clear differences could be observed between what would become Common law and legal practice in continental Europe. As trial by jury emerged in England, jurors were at this early stage considered not simply to be laymen, but helpers to the court, and therefore often chosen for their understanding of the dispute. They were expert jurors – “those were to be summoned who could best tell the fact.”⁸ Even beyond such practice, the court started to call upon skilled persons to provide insights into problems. As one English judge famously declared in 1554, “if matters arise in our law which concern other sciences and faculties, we commonly apply for the aid of that science and faculty, which it concerns.”⁹ Gradually, the jurors got increasingly de-expertised in the course of the 17th century, and experts were consulted by the judges, as in Europe. However, the system in Britain was leading towards a different understanding of expertise. The experts could be summoned by the judge, but also engaged by the parties. This principle was at work in the 1678 case of *Rex v. Pembroke*, a murder trial, in which both the prosecution and defense called physicians to testify to the causes of symptoms observed in the autopsy.¹⁰ This adversarial aspect eventually prevailed by the end of the 18th century. Its virtues were forcefully defended in the famous *Folkes v. Chadd* (1782), a case in which the judge, Lord Mansfield, declared: “For in matters of science the reasoning of men of science can only be answered by men of science.”¹¹ That had become the trait of Common law. As opposed to their colleagues from the continent, the men of science became “expert witnesses”, called upon by the party to testify in front of the jury of laymen. In their performance, a far stricter

⁸ Tal Golan, *op.cit.*, 19.

⁹ Donald Gormley, “The Role of the Expert Witness”, *Ethnohistory*, 2 (1955): 327

¹⁰ More in Lloyd L. Rosenthal, “The development of the use of Expert Testimony”, *Law and Contemporary Problems*, 2 (1935): 409.

¹¹ The case is studied at length in Tal Golan, 7-52.

difference was maintained between the notion of *fact* and the notion of *opinion*. The special role of expert witness was exactly induced because he was, unlike eye-witnesses, allowed to present his opinion on the matter, and the other side could juxtapose its own expert. This adversarial system, alongside with the other features of the Common law, prevailed in the British Empire, and therefore in the United States as well. Despite those differences, the institution of expert in both criminal and civil proceedings became customary in Common and Continental law by the beginning of the 19th century.

Although the developments in expert witnessing were very different, they had led to a similar problem, neatly expressed in Juvenal's mocking of the ideal character of Plato's ideal state, defended by its guardians. "But who guards the guardians?" exclaimed Juvenal, underpinning the basic problem of expert witnessing. The experts, as well as the expert witnesses were called upon because the court was in the need of information and unable to grasp a certain specialized problem. However, that meant that the court was growing dependant on the expert, as neither the judge nor the jury was able to form their own opinion on that issue. The question arose whether the trials might ultimately be decided by the experts, which naturally led to uneasiness and suspicion regarding the nature and purpose of their contribution. The old dictum, *da mihi facta, dabo tibi ius* (give me the facts, I'll give you the law), meant to reassert and confirm the role of the court in the process of rendering justice, was also revealing the dependency of the court on the providers of those facts, causing an apparent tension.

"Discontent with scientific expertise in the courts has existed as long as there have been scientific expert witnesses, and by the mid-nineteenth century, the debate over the meaning of these conflicts and the ways to resolve them had all the features that today

are assumed to be new”, remarks Tal Golan.¹² The problem emerged with the abrupt professionalization of scholarship in the 19th century, and with the increasing number of both criminal proceedings and civil cases appearing before the courts. It grew to particular prominence in the Common law countries. Expert witnessing became one of the most enigmatic parts of the Common law procedure, treated by legal scholars even as “anomalous in Anglo-Saxon law.”¹³ Unlike the continental countries, in which such tensions were regulated through civil and criminal codes, and the proceedings themselves were largely in the hands of the judges, the legal system was adversarial, meaning that the parties were the principle gatherers of evidence. They were finding, coaching and examining the witnesses, as well as the experts. There was a fear that the experts would be willing to be hired and testify on behalf of their side, setting aside scholarly criteria. Even if this partisan malpractice would be set aside, there was also a possibility that the experts might start dominating the proceedings by pulling the judges and jurors into the quagmire of their esoteric debates.

This concern appeared more or less simultaneously with the full institutionalization of expert witnessing by the end of the 19th century in the United States. Its early proliferation had many discontents, and led to a famous remark of Judge William Foster from 1897: “There are three kinds of liars: the common liar, the damned liar, and the scientific expert.”¹⁴ Learned Hand, one of the most famed American judges and jurists warned as early as 1900 that “no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only

¹² Golan, op.cit, 4.

¹³ Lee M.Friedman, “Expert Testimony. Its Abuse and Reformation”, *The Yale Law Journal*, 19 (1910): 247.

¹⁴ Golan, op.cit, 255.

question is as to how it can do so best.” He also noted with concern the danger that “expert becomes a hired champion of one side”. Finally, he asked “how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.”¹⁵ He called for the formation of an advisory board of neutral experts, which would be of assistance to the jury in scientific matters. Even sharper was Lee M. Friedman, who observed that “to the jury an expert is an expert – a kind of intellectual prostitute ready to sell his opinion and enlist in the services of the side that pays him.”¹⁶ In order to safeguard the legal process, but also to salvage the positive contribution of expert knowledge, a set of legal standards for its admissibility was gradually evolving, influencing the law of evidence and hence the position of an expert witness.

After some years of ambivalent courtroom practice, in 1923 in the case of *Frye v. United States* the judges came up with a judgment that has served as precedent for the use of expert knowledge. Hence the Appeals Court of the District of Columbia came to the influential conclusion, which came to be known as the Frye standard. It stated that “just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁷ The

¹⁵ Learned Hand, “Historical and Practical Considerations Regarding Expert Testimony”, *Harvard Law Review*, 15 (1901), 40, 53-4.

¹⁶ Lee M. Friedman, op.cit, 247.

¹⁷ *Frye v United States*, http://www.daubertontheweb.com/frye_opinion.htm. Cf. Golan, op.cit, 247-253.

principle of general acceptance of expert knowledge within its own fields was to guide American courts in decades to come. However, many questions remained unanswered: What is generally accepted knowledge in a particular field? How are the judges to recognize it? Furthermore, the Frye opinion was resting on a static view of the development of knowledge, and was therefore quite hostile towards spearheading up-to-date research. Not only were the fears of frauds among experts present, but deeper philosophical questions were at stake: “The contrasts between law and science are often described in binary terms: science seeks truth, while law does justice.”¹⁸

I.1.2 Varieties of Contemporary Expert Witnessing

However, despite this controversy, the Frye criterion remained a useful guide in the area of expert witnessing for decades. On the other hand, the debates were persistent, with various states in the USA regulating the issue differently, leading to a number of studies dedicated to expert witnessing, but also to the proliferation of the practice. Hence, the need to formulate a states-wide approach at least in criminal cases was expressed in the Federal Rules of Evidence from 1975, which have liberalized the field, proclaiming that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify hitherto in the form of opinion or otherwise.”¹⁹

¹⁸ Sheila Jasanoff (ed.), *Science at the Bar. Law, Science and Technology in America*, 7.

¹⁹ This aspect of *Federal Rules of Evidence* (articles 701-706) Kimberly S. Moore, “Exploring the inconsistencies of scrutinizing expert testimony under the Federal Rules of Evidence”, *Texas Tech Law Review* 22 (1991): 885-912.

Consequently, expert witnessing evolved to be a powerful industry, and popular guidelines for testifying in court are readily available.²⁰ Professional associations like the *American Academy of Forensic Sciences* and *AAAS-ABA National Conference of Lawyers and Scientists* mushroomed, as well as a number of organizations that aim to advertise and promote the work of experts and make them readily available for litigators. This variety is overwhelming: "One expert company advertises that it has 7,600 categories of experts available to assist in litigation, in areas including pit bulls, judo, legs and yarn."²¹ Proliferation has in turn provoked a number of problematic encounters in the courtroom, gave a new impetus to a public debate about the role of experts followed with the new wave of literature debunking the "junk science in American courtrooms."²² Various proposals were put forward as a solution to negligent and fraudulent expert witnesses, including the cross examination, legislation, peer review, imposition of sanctions, as well as restricting the function, admissibility and form of expert witnessing or even introducing special science courts in the cases requiring detailed forensic expertise.²³

²⁰ Stanley L. Brodsky, *Testifying in Court. Guidelines and maxims for the Expert Witness*, (Washington, DC : American Psychological Association, 1991); Stanley L. Brodsky, *The Expert Expert Witness. More Maxims and Guidelines for Testifying in Court*, (Washington, DC : American Psychological Association, 1999); Stanley L. Brodsky, *Coping with Cross-examination and other Pathways to Effective Testimony*, (Washington, DC : American Psychological Association, 2004). J.H. Phillips, J.K. Bowen, *Forensic Science and the Expert Witness*, (London : The Law Book Company Limited, 1985).

²¹ Cynthia H. Cwik, "Guarding the Gate: Expert Evidence Admissibility", *Litigations* 25 (1998): 6. Similar examples are evident at Expertpages, www.expertpages.com/all_top.htm. (accessed on November 26 2008). Cf. Expert Witness Institute of Australia, <http://www.ewia.org.au/>. (accessed on November 26 2008) The Expert Witness Institute, <http://www.ewi.org.uk/> and American Academy of Forensic Sciences, <http://www.aafs.org/> (accessed on November 26 2008)

²² Peter Huber, *Galileo's Revenge: Junk science in the courtroom*, (New York : Basic Books, 1991); David L. Faigman, Elise Poter, Michael J. Saks, "Check your crystal ball at the courthouse door, please: exploring the past, understanding the present and worrying about the future of scientific evidence", *Cardozo Law Review*, 15 (1994): 1799-1824; Kimberly S. Moore, "Exploring the inconsistencies of scrutinizing expert testimony under the federal rules of evidence", *Texas Law Review* 22 (1991): 870-895.

²³ Carol Henderson Garcia, "Expert Witness Malpractice a solution to the problem of the negligent expert witness", *Mississippi College Law Review* 12 (1991): 39-53; John William Strong, "Language and Logic in Expert Testimony", *Oregon Law Review*, 71 (1992): 359-372.

These attempts to further tighten the regulation in the USA were undoubtedly influenced by the similar developments in regulations of admissibility of expert testimony in other Common law countries. Its northern neighbor, Canada, was conditioning the admissibility of expert evidence with the fulfillment of the following criteria: (1) Relevance, (2) Necessity in assisting the trier of the fact, (3) The absence of any exclusionary rule, and (4) proper qualifications of experts. Within the British law of expert evidence, the judge acquired the discretion to exclude evidence which is more prejudicial than probative, or to disregard it if it concerns a topic on which the court is able to form its own judgment, or even if it concerns the ultimate issue on which the court should decide, or if the witness shows a lack of expertise.²⁴ Under such pressure, in which the tightening of courtroom expertise, the liberal era of expert witnessing in the USA came to an end in the beginning of 90s with the decisions the Supreme Court reached in *Daubert v. Merrell Dow* (1993) and widened in *Kumho Tire Company v. Carmichael* (1999). The Supreme Court used those cases to spell out its recommendations for admitting expert evidence, stating that it depends on five factors: testability, peer review, error rate, standardization and general acceptance. With this verdict, according to Faust Rossi, after the period of liberal admissibility, followed by the reaction, “this current stage may be called an era of uncertainty.”²⁵ The controversy regarding the admissibility of expert witnessing hence remains fluid to this day.

²⁴ Criteria for Canada and UK are listed and analysed in Paul Roberts, “Expert Evidence in Canadian Criminal Proceedings”, in: Helen Reece (ed.), *Law and Science*, (Oxford : Oxford University Press, 1998); 178-184. They are also commented in Mike Redmayne, op.cit, 96-139.

²⁵ *Daubert v. Merrell Dow* 509 U.S. 579 (1993) <http://supct.law.cornell.edu/supct/html/92-102.ZS.html>; *Kumho Tire Company v. Carmichael* (97-1709) 526 U.S. 137 (1999) 131 F.3d 1433, reversed. <http://supct.law.cornell.edu/supct/html/97-1709.ZS.html> Daubert is commented in Cynthia H.Cwik, op.cit, 6 and in Faust Rossi, *The Expert Witness in United States Courts: How the Law has Changed*, S.J.D. program, (CEU : Budapest 2002), 1.

Although expert witnessing was mostly debated in the USA and the other Common law countries, it is also a point of elaborate discussion elsewhere, as its functions vary considerably from jurisdictions to jurisdiction, from discipline to discipline, and even from case to case, making the changes more difficult to follow. There are, to be sure, some general inferences. The development of the debate was going in different directions in Common law and Continental law countries. “The civil law jurisdictions of France and Germany operate under inquisitorial legal systems. Matters are tried before a judge or panel of judges. Expert witnesses are enlisted by the courts when technical or disputed factual issues arise which are beyond the knowledge of the judge(s). Both jurisdictions maintain lists of experts from which the courts can choose their expert. Parties have limited power to object to the courts choice of an expert. Experts are qualified after meeting national qualifying standards or by certification in a particular field of expertise. The court dictates what questions the expert will address thereby assuring the relevance and controlling the scope of expert’s subject matter. Experts may be subjected to questioning by the parties, but the evidentiary value of the expert’s testimony is for the court to decide.”²⁶ In general, the continental expert is to be chosen by the judge, instructed about the requirements of the trial and submit the report to the judge. The parties do not play a role in the appointment of the expert, and could only attack the admissibility of the report and attempt to invalidate it. The final decision is in the hands of the judge, in accordance with the legal philosophy of free judicial belief in establishing the probative value of evidence.²⁷

²⁶ Sean P. Downing, “The use of expert witnesses in civil and common law jurisdictions” in New England School of Law, War crimes prosecution project, op.cit, 2.

²⁷ Morris Ploscowe, “The expert evidence in Criminal Cases in France, Germany and Italy”, *Law and Contemporary Problems*, 2 (1935), 504-9.

However, the judge is also not bound by the findings of the report and could make the ruling contrary to the expert's findings. The experts are usually chosen from the list drawn up by the courts or justice ministries. Such a legal context puts experts, judges and the parties in a very different situation than in the Common law countries, which makes comparative studies on the position of experts in those two great legal traditions scarce. This approach is not free of controversy either. In France, for instance, a relatively liberal take on judicial reliance on expert fact-finders granted by the *Code Napoléon* was transformed through the Law of 15 July 1944, in order to ensure that "recourse to expertise was limited to those issues clearly beyond the technical competence of the court. The legislature was concerned that the judge would abuse his fact-finding mission and therefore sought to ensure that the judge's duties could not be delegated to an expert."²⁸

There has been much success, however, in noting that Common versus Continental law is not the only relevant division in expert witnessing. No less important is the division between the civil and criminal law. Historically, "the scientific community and the increasingly irritated judges both remained relatively oblivious to the uncertainties of scientific evidence as long as these were limited to civil litigation. But by mid 19th century, the problems of expert testimony began to surface also in the criminal system, where not just property but life and liberty were at stake."²⁹ This shift in stakes was reflected in the development of different yardsticks for expert witnessing. In a civil

²⁸ Robert F.Taylor, "A comparative study of expert testimony in France and the United States", *Texas International Law Journal* 31 (1996):181, The situation is somewhat better in literature dealing with scrutinizing expert witnessing and comparing it within common law Ian R.Freckelton, *The Trial of the experts. A Study of Expert Evidence and Forensic Experts*, (Melbourne : Oxford University Press, 1987), 109-178.

²⁹ Tal Golan, *op.cit.*, 96.

case, the judgment is basically rendered on the balance of probabilities, whereas a criminal case requires a verdict which is beyond reasonable doubt. The observers were hence quick to notice that forensic evidence does not fit easily into this pattern, as its scientific contribution is necessarily based on probability models.³⁰ On the other hand, criminal trials would nowadays be quite unimaginable without the contribution of DNA analysis experts, dactyloscopy, document examination, firearms evidence, illicit drugs & toxicology, psychopharmacology, breath alcohol measurement, forensic pathology, clinical forensic medicine, forensic psychiatry, criminal issues in traffic accidents and others.³¹ Therefore a number of ways were devised in the Common law countries to overcome this tension, the customary rationale being that in a criminal case expert evidence cannot serve as the main proof (the so-called smoking gun), and has an auxiliary function to the ultimate reasoning. Different paths towards achieving this goal in Great Britain, South Africa and the Netherlands are the subject of an interesting comparative overview.³²

Apart from those differences there are others, concerning various peculiarities of the trials – if they are held in front of a jury or not, if they are held in a national or international context, if they are held under military or civilian courts, if the report is oral or written, etc. However, the true variety comes into play if the full plethora of sciences which contribute to the judicial proceeding is taken into account. The list of sciences with a forensic dimension seems as endless as the ability of human beings to engage in

³⁰ Those models and their relation to criminal trials are analyzed in Mike Redmayne, *Expert evidence and criminal justice*, op.cit, 125-174.

³¹ These are mentioned in Ian Freckelton, Selby (ed.), *Expert Evidence in Criminal Law*, (Melbourn : LBC Information Service 1994).

³² Lirieka Meintjes-Van der Walt, *Expert Evidence in the Criminal Justice Process. A Comparative Approach*, (Amsterdam : Rozenberg Publishers, 2001). Morris Ploscowe, “The expert evidence in Criminal Cases in France, Germany and Italy”, *Law and Contemporary Problems*, 2 (1935), 504-9.

different legal disputes. To be sure, there have always been realms of human experience more interesting to the courts than the others. Forensic aspects of medicine seem obvious, as well as of the other sciences, such as ballistics, that had formed the core of criminology.³³ However, the list is not exhausted by far, as practically every imaginable discipline could find its courtroom application. In fact, having a forensic aspect became quite a relevant test for the general usefulness and applicability of a given realm of scholarship.

Small wonder then, that in such a context the introduction of each and every branch of knowledge was accompanied by a lively debate. The uproar was particularly loud when the realm of forensics was about to embrace social sciences. This transition, starting with psychology at the beginning of the 20th century, at the time when it was gaining its undisputable academic stature, was a significant controversy. Around that time, the inclusion of experimental psychology was a hotly debated matter, and its application remains debated ever since.³⁴ Once opened by psychology, the doors of courtrooms remained open for other social sciences. Admittedly, more easily towards the „harder“ ones, such as statistics, economics and political science, but never without a fight and accompanying debates.³⁵

³³ Medicine is historically probably the best established among forensic sciences. Forensic contribution of doctors from the Antiquity are scrutinized in detail in Jay Siegel (ed.), *Encyclopedia of Forensic Sciences*, (London : Academic Press 2000), s.v. *Forensic medicine*

³⁴ On resistance to its introduction see Tal Golan, op.cit.211-253. On the recent assessments see more in Bruce A. Arrigo, *The Contours of Psychiatric Justice. A Postmodern Critique of Mental Illness, Criminal Insanity, and the Law*, (New York and London : Garland Publishing, 1996). On the role of expert witness Theodore H. Blay, *The psychologist as expert witness*. (New York : A Wiley-Interscience Publication, 1984).

³⁵ Paul Meier, “Damned Liars and Expert Witnesses”, *Journal of the ASA*, 81 (1986): 269-276. Joseph Van Matre, “The Statistician as Expert Witness”, *The American Statistician*, 30 (1976), 2-5; Stephen E. Feinberg, “Ethics and the Expert Witness: Statistics on Trial”, *Journal of the Royal Statistical Society*, 160 (1997): 321-331. Richard Posner, “The Law and Economics of the Economic Expert Witness”, *The Journal of Economic Perspectives*, 13, (1999): 91-99; Michael J. Mandel, “Going for the Gold: Economists as

However, important changes could be noticed. In the famous case *Muller v. Oregon*, argued in 1907 in front of the Supreme Court, the state of Oregon was defending the constitutionality of limiting working hours for women by hiring Louis D. Brandeis, who collected a number of statistics from medical and sociological journals in his brief that had a huge impact on the court.³⁶ Still, the specific character of social sciences, whose method is constantly questioned and burdened with epistemological, theoretical and ethical debates, was reflected in the bitter debates surrounding the advent of anthropology and linguistics in the courtrooms.³⁷ Their suitability for legal purposes was constantly questioned by the lawyers and legal scholars, but also from the practitioners who were wondering if such a role is legally useful and professionally justified and methodologically sound. However, the variety of cases and the variety of disciplines was preventing any generalized conclusions: “Assuming that the question of participation in a trial ultimately revolves on moral issues, one can certainly think of cases where academics should not be expert witnesses ... Equally, once can imagine cases where there is no question but that academics should be expert witnesses”, writes Michael Ruse.³⁸ Still, the debate was bound to rage in every new field which achieved its forensic component. In that respect, history was no exception.

Expert Witnesses”, *The Journal of Economic Perspectives*, 2 (1999): 113-120. Lawrence J. Leigh, “Political Scientists as Expert Witnesses”, *Political Science and Politics*, 24 (1991): 521-524.

³⁶ See *Muller v. State of Oregon*, 208 U.S. 412 (1908) <http://laws.findlaw.com/us/208/412.html>. Brandeis Brief and its profound impact is noted by at University of Louisville, *The Brandeis Brief*, <http://www.law.louisville.edu/library/collections/brandeis/node/235> Joseph E. Scott, “Social Scientists as Expert Witnesses: Their Use, Misuse, and Sometimes Abuse.” *Law & Policy Quarterly* (1983). 5: 181–214

³⁷ Lawrence Rosen, “The Anthropologist as Expert Witness”, *American Anthropologist*, 79 (1977): 555-578; Omer C. Stewart, “An Expert Witness Answers Rosen”, *American Anthropologist*, vol.81, no.1 (1979): 108-111; “Lawrence Rosen, Response to Stewart”, *American Anthropologist*, vol.81, no.1 (Mar, 1979), 111-2.; Sue Samuelson, “Folklore and the Legal System: The Expert Witness”, *Western Folklore*, 41, 139-144; Roger W Shuy, *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom*, (Cambridge, MA : Blackwell Publishers, 1993; Robert Rieber, *The Language Scientist as Expert in Legal Setting*, (New York : The New York Academy of Sciences, 1990)..

³⁸ M. Ruse, “The Academic as Expert Witness”, *Science, Technology and Human Values*, 11 (1986): 69

I.1.3 Historians in Court: From Dreyfus to Friedjung

History was an exception, however, in another respect. Unlike novel social sciences, history and law have a longstanding relationship. In an interesting book entitled *The Judge and the Historian*, Carlo Ginzburg noted that “the ties between history and law have always been close – they date back two thousand five hundred years, to their emergence in Greece.”³⁹ And indeed, even etymologically, a complex interdependence between historical and legal inquiry can be traced back to their emergence in Antiquity; the meaning of the Ancient Greek word ἱστωρ (historian) in different contexts denotes “the one who knows, the expert or the judge”. There was hardly a shortage of the authors noting this proximity between these modes of human experience. As early as 1814 Joseph von Hormayr was praising “history, that pure two-sided mirror of judgments past and judgments still to come, that inexhaustible source of universally beneficial experience, and incorruptible judge of those who have no other judge”.⁴⁰ A similarly powerful understanding was immortalized in Schiller’s and Hegel’s vision of *Weltgeschichte als Weltgericht*. This vision survived in frequent, if implicit metaphors of the tribunal of history or the judgment of history, as well as in comparisons of historians with judges, advocates, prosecutors or detectives. However, the analogy had its limitations. By the time history and law grew to become institutionalized social practices, powerful tensions between them had appeared.

³⁹ Carlo Ginzburg, *The Judge and the Historian*, (London : Verso, 1999), 12.

⁴⁰ Joseph von Hormayr, “Austria and Germany”, in: Balázs Trencsényi, Michal Kopeček, (ed.), *National Romanticism: The Formation of National Movements* (Budapest : Central European University Press, 2006), 30.

Among others, the core methodological assumptions of historical science, as laid down in the second half of the 19th century, were based on the meticulous investigation of the sources and on the creation of a balanced interpretation of past events, required by the founders of the most influential historical seminars in Europe – Leopold von Ranke at Frederick William University of Berlin, Fustel de Coulanges at École Normale Supérieure and Lord Acton in Cambridge. However, such impartiality was secured by a detachment created through the temporal remoteness between the researcher and the events researched. This theory of distance was creating a gap between historians and the legal and political concerns of contemporary society.⁴¹

Perhaps it does not come as a surprise that this gap was breached precisely in France. Legal historian Donald Kelley argues that French scholars played a pivotal role in the re-emergence of historical studies and legal scholarship of the Renaissance. Already in the 16th century, François Baudouin claimed that historical studies must be placed upon a solid foundation of law, and that jurisprudence should be joined to history. In the 18th century, none other than Montesquieu claimed that “one must illuminate history by laws and laws by history.”⁴² The impact of the French Revolution and its constant rereading took its toll, and by the end of the 19th century, such ambitions turned to reality in the most dramatic legal event which was shaking the French public and shaping its political and intellectual landscape – the Dreyfus affair. Launched in 1894 with the suspicion that confidential information from the French General Staff was leaked to the German military, the finger of accusation was pointed towards Captain Alfred Dreyfus, a

⁴¹ Classical account on this development is given by Friedrich Meinecke, *Die Entstehung des Historismus*, (München : R. Oldenbourg, 1965); Contextualized in Georg Iggers, *Historiography in the twentieth century : from scientific objectivity to the postmodern challenge* (Hanover, NH : Wesleyan University Press, 1997)

⁴² Donald R. Kelley, *Historians and the Law in Postrevolutionary France*, (Princeton : Princeton University Press 1984), 116, 139.

French artillery officer of Jewish origin. By the end of the year, he was tried for treason by a military tribunal and sentenced to life imprisonment.⁴³

However, such prompt rendering of justice, coupled with chauvinistic and anti-Semitic campaigning was raising suspicions. It was becoming apparent that Dreyfus was not convicted on solid evidence. Namely, in both the 1894 trial of Alfred Dreyfus and the 1898 trial of the other suspect, Major Ferdinand Esterhazy, much of the cases revolved around the authenticity of the documents allegedly written by the two officers (the infamous *bordereau* and the *petit bleu*). As graphology was still in the cradle, examination of those documents was conducted hastily by different experts – Alfred Gobert, graphological expert of the Bank of France, police investigator Alphonse Bertillon, and later by M.Chararay, A.Pelletier and M.Teyssonnières – but their findings were contradictory . On the other hand, the experts researching the Esterhazy note were in accord about its authorship, but were not considered to have sufficient authority or skills.⁴⁴ Hence the re-examination of their results was an important request of the group of intellectuals assembled around the newly formed *Ligue des droits de l'homme*, pursuing the revision of the case. When Émile Zola wrote his famous *J'accuse!* in the hope of being put on trial himself and hence reopening the Dreyfus case indirectly, he warned the French President that “France has this stain on its cheek. History will write that it is under your presidency that such social crime could be committed”.⁴⁵ He hoped

⁴³ On Dreyfus affair and on the documents on the surrounding trials see: Dreyfus Rehabilitated: France 1906, <http://www.dreyfus.culture.fr/en/> On the role of historians in the Dreyfus case see Olivier Dumoulin,: *Le rôle social de l'historien: De la chaire au prétoire*. Paris 2003, 163-175. and Vincent Duclert, ‘Histoire, historiographie et historiens de l’affaire Dreyfus’, in Michael Leymarie (dir), *La postérité de l’affaire Dreyfus*, (Lille : Septentrion, 1998), 151-239. Also see Jean-Noël Jeanneney, *La passé dans le prétoire*, (Paris : Seuil 1998), 13-33.

⁴⁴ Dreyfus Rehabilitated: France 1906, *Archives and Educational Resources* <http://www.dreyfus.culture.fr/en/>

⁴⁵ Émile Zola, ‘J’accuse’, *L’Aurore* 13 janvier 1898.

that not only history, but also some historians would support him. The issue of the authenticity of documents remained the only firm common ground between the disciplines of law and history. This stream of investigation had borne important fruit since the end of the Middle Ages in debunking forgeries. Ever since, historians were occasionally needed for services by using their skills to reveal false documents and to authenticate legal evidence. The question lay open – whether their methodology and skills are applicable to the challenges posed by the heated environment of a legal process.

And indeed, Zola's 1898 trial was an opportunity for a number of respected French historians to step forward and take up this challenge. Paul Viollet, Arthur Giry, Paul Meyer, Auguste and Émile Molinier applied the historical method of the critique of sources on the disputed documents. Arthur Giry testified in the Zola case about the authorship, using the opportunity to assert the authority of a historian over the documents: "The study and the composition of the text are naturally one important part in our branch of erudition; we teach our pupils to determine the age, the origin, and provenience, to discern between authentic, false, interpolated and sincere documents. The method is always the same. It does not vary, because we have such a particular education that gives habit to observe in a text the most detailed particularities we can as well apply this method to the contemporary text as much as to the Ancient text."⁴⁶ However, as persuasive as he was, he could not sway the court, whose judges were not necessarily as impressed as his students. With the development of criminology, many applied techniques came together in shaping forensics, and the traditional elements of historical science, such as the establishment of authenticity and authorship of the documents, came to be the field of research of graphology and other evolving forensic sciences,

⁴⁶ Dumoulin, op.cit, 165-6. Published in Edmond Haime, *Les Faits acquis a l'histoire*, Paris 1898.

undermining the authority and method of historians. Paul Meyer, the director of the *École des chartes* was attacked by the presiding judge for using notes: “I am not reading. Mr.President. I am just a professor, and as I have a poor memory, I am always obliged to write down, in a sentence or two, the ideas I am about to convey.”⁴⁷ At the very beginning of their expert role, historians were to learn an important lesson: the courtroom was no classroom. Zola was convicted, and had fled to England before the verdict was rendered on his appeal. However, this development aroused more public sympathy for the revisionists, and had opened up the avenue for their original goal – the review of the Dreyfus case.

Historians were even blunter during this review, held in 1899 in Rennes. *Émile Molinier* restated the arguments on the issue of authenticity of the disputed documents, claiming that they could not possibly have been written by Dreyfus on the basis of his professional authority: “I will allow myself to remind you on this topic that the rules of historical critique which I apply to the expertise of commander Esterhazy’s paper are the same rules that historians have been applying to all forms of historical memoirs during the previous centuries.” He was challenging the authority of previous experts: “You may perhaps tell me that I am not an expert. This is the third time that I had come to testify and the first in which I have offered my expertise in a case of writing. But if I allow myself to put this opinion in front of you with such a force, that is because it is a result of very long personal study.”⁴⁸ Still, the judges reconvicted Dreyfus, but lowered his sentence to 10 years. However, waging their war against official experts, historians were very persuasive. *Jean Jaurès* wrote: “These men, after conscious study, have come to

⁴⁷ Quoted from Jean-Noël Jeanneney, *op.cit*, (Paris : Seuil 1998), 16.

⁴⁸ Dumoulin, *op.cit*, 167

confirm that the bordereau is Esterhazy's and there is a lot there of what I would dare to call decisive... They were not divided as experts in the Dreyfus case, and they do not operate behind closed doors as did the experts in the Esterhazy case."⁴⁹ Their persistence contributed to further developments. Prompted by the investigation of Colonel Georges Picquart, more evidence on Dreyfus' innocence was coming to light. After fierce public pressure, Dreyfus was eventually pardoned by the French President, and was finally rehabilitated in 1906, knighted with the *Légion d'Honneur* and reintegrated into the French army.

In the Dreyfus affair, historians contributed to the undoing of a miscarriage of justice. In this great moment of the triumph of historical authority over forensic expertise, historians were acting upon the ideal set by Gabriel Monod, the founder of the *Revue historique*, inscribed in 1876 at the opening article of this venerable periodical: "It is in this manner that history, without assumptions to any profit apart of the one that we draw from the truth works in a discrete and certain manner toward the greatness of the nation, and at the same time towards the progress of the human race."⁵⁰ However, the triumph was at the same time marking the beginning of unfulfilled potentials and bitter disappointments. Undermining Monod's optimism, it soon turned out that serving "the greatness of the nation" and advancing "the progress of the human race" might well be at odds, and many historians, if compelled to choose, would give advantage to the former. As Harold Berman reminds us, "the emergence in the nineteenth century of the so-called scientific history, that is of systematic and painstaking research ... coincided with the emergence of the most intense nationalism that Europe had yet experienced. It was

⁴⁹ Dumoulin, *op.cit.*, 168

⁵⁰ Gabriel Monod, 'Du progrès des études historiques en France depuis le XVIIe siècle', *Revue historique* I (1876)

simply assumed that history meant national history”.⁵¹ Nationalist fervor of the period was threatening to compromise high standards of historical scholarship. In France, one of the aftereffects of the Dreyfus case was not only the engagement of historians for Dreyfus in the courtroom, but also their mobilization against his rehabilitation. Many historians were no strangers to *Action française*, a political movement of far right-wing intellectuals created in 1899, at the height of the affair, with the clear desire to prevent his rehabilitation. In fact, according to James McMillan, “historians were assigned a vital role by *Action française* in that the movement actively promoted a view on the French past which challenged the glorification of the French Revolution and the Republican tradition.”⁵²

France was by no means the only country whose historians were tempted to put their skills and credentials in the service of the cause. In late 1909, somewhat after Dreyfus got rehabilitated, a libel suit was brought against Austrian historian Heinrich Friedjung. Friedjung was one of the first contemporary historians, author of widely respected monographs on the recent history of Central Europe (*Der Kampf um die Vorherrschaft in Deutschland 1859-1866*, *Der Kriemkrieg und die österreichischen Politik* and *Österreich von 1848 bis 1860*). He entered political life as pan-German, but was excluded from the Greater German Party due to his Jewish origins. Eventually, he found a new cause in defending the Habsburg monarchy from the perceived Slavic danger. To that end, he joined the campaign fought by a number of Vienna journals, aiming to

⁵¹ Harold J. Berman, *Law and Revolution. The Formation of the Western legal Tradition*, (Cambridge, Mass : Harvard University Press 1983), 17.

⁵² More on the role of historians Jacques Bainville and Louis Dimier in this context in: James F. McMillan, *Twentieth-Century France: Politics and Society in France 1898-1991*, (New York : Arnold 1992), 32-40. On Dreyfus affair, historians and right-wing see Eugen Weber, *Action française. Royalism and Reaction in Twentieth-Century France*, (Stanford: Stanford University Press 1962), 3-6, 16-43

implicate Croatian and Serbian politicians in Austro-Hungary for treasonous connections with Serbia - receiving money from the Serbian government through the organization “Slovene South” with the ultimate purpose of dismembering the Dual Monarchy.

Such articles appeared by the beginning of 1909 in the daily *Reichpost*, and were backed by Friedjung’s article “Österreich-Ungarn und Serbien“, published in the *Neue Freie Presse* in March 1909. These essays presented an overview of contemporary foreign policy. Friedjung was analyzing the impact the change of Serbian dynasties and its implications for the region, stressing that this change marked the beginning of instabilities caused by constant conspiracies launched against the Habsburg monarchy, helped by insiders in the Monarchy, chiefly the presumably bought representatives of the Croato-Serbian coalition. His article was not only descriptive, but also prescriptive – “it would be a cultural deed of the highest value if Austrian weapon would be ordered to annihilate the conspiratorial centre in Belgrade and help the healthy elements of Serbian society.”⁵³ When asked to provide evidence for these accusations by the Parliamentarians of the Croato-Serbian coalition, Friedjung stated that his article was based on a scholarly scrutiny of the documents in his possession. Therefore 52 parliamentarians sued him and editors of *Reichpost* and *Neue Freie Presse* for libel.⁵⁴

At the very beginning of the trial, which started in Vienna in December 1909, Friedjung confidently explained his motivation, recorded by R.W.Seton-Watson: “Not being in position to defend his fatherland sword in hand, he conceived it to be his plain duty as a historian and publicist, to place his pen at the service of Austria, and in so doing

⁵³ Heinrich Friedjung, “Österreich-Ungarn und Serbien“, *Neue Freie Presse*, 25.3.1909, 2-4.

⁵⁴ Details in Ranka Gašić, *Novi kurs Srba u Hrvatskoj*, (Zagreb : Prosvjeta, 2001),52-4; More on the context in which this process was happening in Nicholas J.Miller, *Between Nation and State. Serbian Politics in Croatia before the First World War*, (Pittsburg : University of Pittsburg Press 1997), 125-134; Hodimir Sirotković, “Pravni i politički aspekti procesa Rundpost-Fridjung” *Starine JAZU*, knj.52, (1982);.

he was only continuing his lifework of strengthening the consciousness of his fellow citizens by an interpretation of their past history.” Although he claimed that “it is no business of the historian to reduce men’s words and deeds to the provisions of a penal code; his task is to examine documents, to establish facts and illustrate characters.”, he had put his professional reputation at stake, guaranteeing the professional quality of his interpretations and the reliability and authenticity of his sources.⁵⁵ It was exactly on this frontline that Friedjung was defeated. In the course of the trials it emerged that his essay was based on the material he got directly from the Austrian Foreign Office, from Count Ährenthal. Being unable to read Serbian Friedjung took them very much for granted. In the course of the trial, in which a number of linguistic and graphology experts (Dr Milan Rešetar, Dr Hans Übersberger) and officials from Serbia testified, as well as Tomáš Masaryk for whom this was yet another *cause célèbre*, it turned out that the primary material on which Friedjung was basing his claims was largely forged. Witness after witness appeared, challenging the authenticity of the documents which were used. Consequently, Friedjung and *Reichpost* lost the case through the settlement in which Friedjung publicly recognized the questionable nature of his sources. The libel was withdrawn, but Friedjung’s scholarly reputation was badly bruised, to the extent that even a pro-Slav observer such as Seton-Watson wrote to him after the trial: “As a fellow soldier in an army of historians, I wanted to convey to my General that in my view the process did not damage your stature of a man and historian at the least. That cannot be said for those who had put a historian in such a position in so a disgraceful manner.”⁵⁶

⁵⁵ Detailed contemporary account of the trial was given by its keen observer R.W.Seton-Watson, *The Southern Slav Question and the Habsburg Monarchy*, (New York : Howard Fertig, 1969), 211, 215.

⁵⁶ *Ibid*, 277-281. “R.W.Seton Watson to Heinrich Friedjung”, 25.December 1909, in: *R.W.Seton-Watson and the Yugoslavs. Correspondence 1906-1941*, (London-Zagreb 1976), vol.I, 65.

Historians entered the age of extremes with this heavy package, to be completely unfolded by the beginning of the First World War, which exacerbated these legal, historical and political tensions. “What is the proper ‘scientific’ history? By 1914 there had been two answers to that question”, concludes Ernst Breisach. “One saw the correct reconstruction of the past as dependent on the imitation of the natural sciences; the other called for an autonomous science of the humanities. Both, however, agreed that history was an endeavor with the purely theoretical interest of reconstructing the past and without any practical interests, be it lessons, devotion, entertainment, or propaganda. Yet since 1914 adherents of both answers have confronted problems.”⁵⁷ Historiography achieved a direct applicability, as many historians took part in the war either with weapons or pencils in their hands. The Enlightenment ideal of the impartial writing of the universal history of humankind was dramatically curbed through the implementation of historicist methods in much narrower national frameworks. The classical method of historical understanding was transformed along the lines of *tout comprendre est tout pardonner* into an interpretative model sympathetic to the national cause, and the theory of distance melted at the expense of impartiality.

Such tendencies outlasted the war, and indeed they were the driving force behind the spread of contemporary historiography in the interwar period. The wartime explosion of nationalist hysteria was followed by postwar resentment and bitterness. Its best expression in historiography was the debate over the responsibility for the outbreak of war. This debate was the true litmus test of the possibilities of the public utilization of historiography. Studied in greater details in the next chapter, it is still worthy to outline

⁵⁷ Ernst Breisach, *Historiography. Ancient, Medieval and Modern*, (Chicago and London : The University of Chicago Press, 1994), 323.

its importance for the development in relations between history and law. In one of the first contributions to the issue of the responsibility for war, Hermann Kantorowicz warned: “It is a great, but deeply rooted mistake to think that the essence of this question is historical, that it can be decided by “history” that in practice professors of history should be included in its solving. As historian can only establish the facts, the judgment on these facts is not his task ... At this court, historical science must appear as a witness, which helps the making of the judgment with relevant expert help, but does not sit in the court as a judge.”⁵⁸ However, this timely proposal for careful division of labor was frustrated. Working as extended arms of their foreign ministries, European historians were publishing sources and quarrelling over the revision of the Versailles treaty. Mixing historical with legal arguments in order to provide a sustainable explanation for the outbreak of the war led to the failure to resolve these differences on the heuristic and interpretative levels, and considerably added to frustration and *revanchism*. Instead of providing a critical reading of the crisis and outbreak of war, historians frequently followed this logic and remained confined by immediate political concerns, producing arguments favorable to “their” side or promoting large state-sponsored projects of publishing sources on foreign policies, conceived with the idea of legitimizing their national standpoints. Despite the international participation in the debate over the responsibility for the outbreak of war, its content was deeply nationalistic. The state intervention by creation of continental universities turned to be a good investment.

⁵⁸ Herman Kantorowicz, *Gutachten zur Kriegsschuldfrage 1914*, ed. Imanuel Geiss (Frankfurt: Europäische Verlagsanstalt, 1967). The overview of the debate in Klaus Grosse Kracht, *Kriegsschuldfrage und zeithistorische Forschung in Deutschland. Historiographische Nachwirkungen des Ersten Weltkriegs*, in: *Zeitgeschichte-online*, 2004. <http://www.zeitgeschichte-online.de/md=EKW-GKracht> (accessed on 20.20.3006).

1.1.4 Theorizing the Incompatibility of History and Law

These apologetic historiographical tendencies were confusing for many thinkers who emphasized the close proximity of history and law. The nature of this intimacy was well expressed by Karl Friedrich, who considered this “tie to intimate and too obvious too need laboring ... Law is frozen history. In an elementary sense, everything we study when we study law is the report of an event in history, and all history consists of such records or reports.” However, this observation had led Friedrich to the further reflections: “It would seem, then, that any reconsideration of ‘law and history’ is apt to be a string of commonplaces or the beating of the dead horse. Yet, both “What is law?” and “What is history” are questions which have not ceased to trouble the reflective students of both fields.”⁵⁹ Why? One of these students, Donald Kelley, concluded that there was a good reason that “the choice has fallen upon the field. In the first place, no other field is so closely tied to history with respect both to content and to method. Second, it was largely the influence of legal studies that revolutionized the theory of history, that is, the so-called art of history, in the sixteenth century. Third, it so happened that the lawyers contributed more than any other social or professional group to historical scholarship, and their preoccupations were decisive in shifting attention from drum-and-trumpet history to institutional, social and cultural studies. Finally, the marriage of legal and historical studies in the sixteenth century provided one of the most enduring elements in the continuity of historicism from that age down to the present.”⁶⁰

⁵⁹ Carl Joachim Friedrich, “Law and History”, *Vanderbilt Law Review*, 63 (1961): 220.

⁶⁰ Donald R Kelley, *Foundations of Modern Historical Scholarship. Language, Law, and History*. (New York : Columbia University Press 1970), 112.

For similar reasons, Judge Richard Posner concluded that “law is the most historically oriented, or if you like the most backward looking, the most ‘past dependant’, of the professions”.⁶¹ On a practical level, it was rather self-evident, as noted by Ksenija Turković, that “traditionally the relationship between law and history has been very close – judges as well as historians attempt to establish truth about past events with the help of evidence.” As an influential French historian Marc Bloch put it: “A document is a witness; and like most witnesses, it does not say much except under cross-examination.” This analogy was followed by others, such as Paul Connerton: “Historians ... proceed inferentially. They investigate evidence much as lawyers cross-question witnesses in a court of law, extracting from that evidence information which it does not explicitly contain”.⁶² These efforts were occasionally leading to a true fetishization of history; of which Judge Charles Wyzanski wrote: “I urge that there is in history a meaning, and a meaning that has value for law, as it has for the spirit of man in many other aspect History gives us another perspective or value against which to measure law. History teaches us the nature of legitimate authority.”⁶³ Historical arguments came in handy in many legal debates. “Intuitively, at least for lawyers, the record book of history appears as a treasury of very sound points of reference. Precisely due to this reputation, constitutional review fora have a tendency to rely on references to history and traditions”, observes Renata Uitz.⁶⁴

⁶¹ Richard A. Posner, “Past-Dependency, Pragmatism, and critique of History in Adjudication and Legal Scholarship”, *The University of Chicago Law Review*, 67 (2000), 573.

⁶² Ksenija Turković, op.cit, 42; Marc Bloch. “A Contribution towards a Comparative History of European Societies,” in *Land and Work in Medieval Europe*, (London : Routledge, 1967), 48; Paul Connerton, *How Societies Remember*, (Cambridge : Cambridge University Press 1989), 13.

⁶³ Charles Wyzanski, History and Law, *University of Chicago Law Review* 26 (1949) 1179-1197

⁶⁴ Renata Uitz, *Constitutions, Courts and History, Historical Narratives in Constitutional Adjudication*, (CEU Press, Budapest 2005), i

This intimacy, however, proved to be a mixed blessing. Undermining the seeming methodological resemblance, the question was wide open: do historians and lawyers see the same things when they look into the past? Their close relation assumed certain antagonistic aspects after the thorough professionalization of both practices in the course of the second half of the 19th century. The barriers of institutional webs and constitutive rules of those two types of inquiries into the past led to a recognizable division without much interaction outside of the subfield of legal history. Intimacy was succeeded by a certain implicit battle for primacy. “But what of history? Is history conceivable without law? Certainly not the history of our Western world”, exclaimed Karl Friedrich.⁶⁵ On the other hand, Lord Acton in his 1895 inaugural speech *On the Study of History* proclaimed that history based on documents would become a definite and impartial court of law.⁶⁶ The events of the 20th century brought the activities of history-writing and rendering justice back together, frequently on a collision course characterized by deep structural misunderstanding. In a strange battle for primacy, historians started commenting on legal affairs, which in turn spread to the fields traditionally explored by history. The first obvious example of such an overlap was the emergence of revisionist historiography as a reaction to the definition of responsibility for the First World War. During this debate, a blunt fact noted many years afterwards by Austin Sarat and Thomas Kearns became already too obvious: “While law lives in history, it has a history of its own. While law responds to history, it also makes history.”⁶⁷ It took years to get a grip on these complex relations.

⁶⁵ Carl Joachim Friedrich, “Law and History”, *Vanderbilt Law Review*, 63 (1961): 223

⁶⁶ Quoted from Carlo Ginzburg, *op.cit.*, 13.

⁶⁷ Austin Sarat, Thomas Kearns (ed.), *History, Memory and the Law*, (Ann Arbor : University of Michigan Press), 2002, 3.

Such a connection between them was by no means a guarantee of the beneficial outcome of the confluence between the disciplines, as demonstrated in Carlo Ginzburg's book *The Historian and the Judge*, an attempt to revisit the trial of his friend by the Milan Court of Assizes, and at the same dedicated to "emphasizing the divergences and convergences between historian and judge." Ginzburg explained the rationale of his endeavor: "The paths of judge and historian, which run side by side for a certain distance, eventually and inevitably diverge. If one attempts to reduce the role of the historian to that of a judge, one simplifies and impoverishes historiographical knowledge, but if one attempts to reduce the role of the judge to that of a historian, one contaminates – and irreparably so – the administration of justice."⁶⁸ Increasingly, it was exactly the divergences that were attracting the attention of the observers: "In many ways, the disciplines of law and history have a natural affinity", wrote Jonathan Martin. "This close relationship is nonetheless suffused with tension. Lawyers and historians are in many respects odd bedfellows."⁶⁹ Robert Gordon similarly concluded that "lawyers and historians have always cohabited in a relationship of intimate antagonism".⁷⁰ Although these contemporary insights were not readily at hand in the interwar period, the sensation prevailed that history was not the most appropriate tool to approach legal disputes from the past was implicitly present. In the midst of the controversy over the role of historians in the question of responsibility for the Great War, it was small wonder that the debate on expert witnessing in the humanities was not well received.

⁶⁸ Carlo Ginzburg, *The judge and the historian* (London : Verso, 1999), 19, 117-118.

⁶⁹ Martin, Jonathan D. "Historians at the Gate: Accommodating expert testimony in federal courts", *New York University Law Review* 78 (2003): 1523-4.

⁷⁰ Robert W. Gordon, 'The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument', in Terrence J. McDonald (ed.) *The Historic Turn in the Human Sciences*, (Ann Arbor, The University of Michigan Press, 1996), 339.

Namely, it went as a matter of course that a historian might help the proceedings by using some of his auxiliary faculties, for instance verifying the authenticity of the records. But that more could be done was strongly suspected, from both sides. The expert role of the historian seemed to contradict the very core self-understanding of the historian's craft. Historians were in a sense always indirectly engaged in the advancing of the cause of justice. The famous mottos of the craft, from Tacitus' *sine ira et studio* to Ranke's *wie es eigentlich gewesen* unmistakably echo the historian's commitment to a truthful and just interpretation of the past. The ideal position of the historian of the interwar period was summarized by Peter Novick: "The objective historian's role is that of a neutral, or disinterested, judge; it must never degenerate into that of advocate or, even worse, propagandist. The historian's conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with judiciary, these qualities are guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship or bias."⁷¹ Although this self-understanding of the craft seemed to suggest the inherent closeness between History and Law, it was in fact re-emphasizing the need for historians to act unrestrictedly in the legal system. Therefore, paradoxically, in the period in which the majority of sciences were assuming their forensic dimension, historians were held remote from actual expert witnessing, satisfied by reaching historical verdicts on their own right.

For the better, many observed. Historical judgment was to be reserved for the earlier periods whose predicaments were of no legal relevance any more. This concept is echoed in an influential book of Robin Collingwood's, *The Idea of History*: "The student

⁷¹ Peter Novick, *That noble dream : the "objectivity question" and the American historical profession* (Cambridge : Cambridge University Press, 1993), 2.

of historical method would hardly find it worth his while, therefore, to go closely into the rules of evidence, as these are recognized in courts of law. For historian is under no obligation to make up his mind within any stated time.”⁷² This advantage was welcomed in Michael Oakeshott’s elegant concept of the differing modes of experience, and furthered into outright separation. His distinction between the historical, scientific and practical realm of experience did not leave much space for historical expertise, which would stand as an exact example of scientific-historical- practical activity. Oakeshott cautioned that “each world of those abstract ideas ... so long as it is content to mind its own business, is unassailable. None but historical thinking can achieve historical truth. And in this respect every mode of experience is free from the relevant interference both of every other mode and of the concrete totality itself ... Actual error, then appears, and appears only when what is asserted in a mode is asserted also beyond the mode, is asserted absolutely and without qualification”.⁷³ Oakeshott was challenging the compatibility of modes of experience, being particularly suspicious of the ability of historians to create sustainable, objective, practical and applicable knowledge: “Since history is an experience, it is presence ... What historian does when he imagines it, is that since he is the only one knowing the past events as they really happened, in reality is only the self explication of his present consciousness.” Oakeshott also strongly warned that “unless these forms of experience were separated and kept separate, our experience would be unprotected against the most insidious and crippling of all forms of error – irrelevance.”⁷⁴

⁷² Robin Collingwood, *The idea of history*, (Oxford : Oxford University Press 1993), 268.

⁷³ Michael Oakeshott, *Experience and its Modes*, (Cambridge : Cambridge University Press 1933), 329-330.

⁷⁴ *Ibid*, 94, 4-5

The definite shape of this theory of the incompatibility of law and history was finally crystallized by Karl Friedrich, the admirer of both disciplines. In the article *Law and History* he promptly admitted the close connection between history and law. Praising the importance of both of the realms for the existence of Western civilization, he strongly advised keeping them separate, and was warning of the dangers of proceeding otherwise: “To put it hortatively: the dogmatic and conceptual foundation of the law needs the softening impact of an inquiry into the past in order to free itself for the future. But such historical ‘softening’ must not be carried too far, or the legal fabric is dissolved and with it the society which it sustains.” Friedrich emphasized that “the jurist is not concerned with the same dimension of interpretation as is the historian”, and therefore argued for the necessity to “go a step further now and to advance the argument that the specific task of the student of law, of the jurist, is antithetical to that of the historian. By the very nature of his enterprise he is dragged into a ahistorical position.”⁷⁵ Defined in such a manner, under the presumption that History and Law are immutable categories of human thinking and acting, the theory of incompatibility was powerful enough to delay the forensicization of history for quite some time. The idea that a historian and a judge look into the past, but see different things for different reasons was so strongly embedded that it took a global shift to make cooperation between the disciplines possible, and the courtroom appearance of a historian imaginable.

⁷⁵ Carl Joachim Friedrich, *Law and History*, *Vanderbilt Law Review*, 63 (1961): 249.

I.2 The Great Shift: The Concept of Universal Human Rights

The global shift in sensibilities induced by the outcome of the Second World War, its impact on the relationship between History and Law, and its importance for the development of forensic historiography is emphasized, starting from Nuremberg as a formative moment in the sequence of postwar trials leading to a global re-reading of history, to the shift towards the institutionalization of historical expert witnessing.

I.2.1 “Dragging the past before the court of justice”

In order for historians to reappear in court as experts, their field of expertise had to become an undisputed matter of legal interest. As many others, this development was also anticipated by Friedrich Nietzsche, who wrote *On the Use and Abuse of History for Life* as early as 1873: “A person must have the power and from time to time use it to break a past and to dissolve it, in order to be able to live. He manages to do this by dragging the past before the court of justice, investigating it meticulously, and finally condemning it.”⁷⁶ Nietzsche’s concept materialized in the aftermath of WWII in ways the author would probably have found much too literal. At least since Nuremberg, dubbed as “the greatest historical classroom ever”, quite substantial elements of the past have been “dragged before the court of justice”, as courtrooms are being increasingly perceived as the places to right the wrongs of the past by addressing historical injustices.

⁷⁶ It seems that Nietzsche’s book resonated better with legal scholars than historians. Inspired by this essay, Judge Richard A. Posner offered an interesting reading of role of history in legal process: “Past-Dependency, Pragmatism, and critique of History in Adjudication and Legal Scholarship”, *The University of Chicago Law Review*, 67 (2000): 573-605. His ideas are also reflected upon by Roger Berkowitz, “History and the Noble Art of Lying”, *Rechtsgeschichte* 4 (2004): 22-7.

There were, to be sure, a number of good reasons preceding the Second World War. The concept of human rights was one of the earliest threads of human political thinking, and as early as the Enlightenment, a very strong case was made for their universalization.⁷⁷ However, the discrepancy between political theory and practice was painfully obvious. Obtaining basic human rights proved to be a complex struggle even within the framework of a single state. Establishing the legal foundations of human rights through the landmark documents of the *Habeas Corpus Act* (1679), the *Bill of Rights* (1689), the *Declaration of Independence* (1776) or the *Declaration of Rights of Man and Citizen* (1789) was a matter of ongoing social combat.⁷⁸ Elevation of those standards on a global level seemed to be almost a Utopian endeavor. Despite the proclaimed liberty and equality of men, strongly inscribed in those documents from the end of the 18th century, much of the 19th century was spent in documenting their inequality. Inequalities in regard to descent, class, gender or race was an inseparable vehicle of European and world politics. Emerging social science had an important role in providing their legitimating through “the establishment of good, reliable facts”, as phrased in 1863 by James Hunt, founder of the Anthropological Society of London.⁷⁹ Rampaging modernism was coupled with racism, and the emerging social theories were increasingly moving away from the notion of universalism.⁸⁰ This precarious connection was creating a strong ambivalence, as one of the main traits of the turn of the century.

⁷⁷ This development is analyzed in Theodor Meron, *War Crimes Law Comes of Age*, (New York : Oxford University Press, 1998).

⁷⁸ Text of those documents are reproduced, and the historical contexts in which they emerged is analyzed in University of Minnesota, *Human Rights Library*, <http://www1.umn.edu/humanrts/>

⁷⁹ James Hunt, “Introductory Address on the Study of Anthropology”, *Anthropological Review*, 1 (1863) : 4.

⁸⁰ George L. Mosse, *Towards the Final Solution. A History of European Racism* (New York : Howards Fertig 1978); 7-164; Richard Weikart. *From Darwin to Hitler, Evolutionary Ethics, Eugenics and Racism in Germany*, (New York : Palgrave Macmillan 2004)

The other significant realm of disappointment was the failed humanization and prevention, if not the abolition of warfare. Although there was no shortage of intellectual output proposing a global community of peace, such as the 1713 *Projet Pour Rendre La Paix Perpetuelle En Europe* of the Abbé Saint-Pierre, or Immanuel Kant's 1795 essay *Zum ewigen Frieden*, the realities of the 19th century were unable to reflect their concepts. Nation states resumed being hostile to one another at least as much as their predecessors, and international law which came to be known as "the gentle civilizer of nations", did not actually fulfill even the concept set by Hugo Grotius in his 1625 *De Jure Belli ac Pacis* (Concerning the Laws of War and Peace).⁸¹ Furthermore, the changes brought about by the French Revolution, with concept of *levée en masse*, and equally important mass uprisings against Napoleon's troops, resulted in wars of widened scope and destructiveness.⁸²

Significant change appeared in the second half of the 19th century. As the attempt to unite Europe under the hegemony of Napoleon's France failed, it was succeeded by the attempt of European states to maintain order on the continent through the system of alliances kept together through periodic congresses. A number of European states strove to create an international order that would not rest solely on bilateral and multilateral treaties between states, but would also universally safeguard individual rights. This development started with the Paris Declaration on Naval Warfare (1856) and the First Geneva Convention in 1864, concerned with the treatment of the wounded, as well as the Petersburg Declarations of 1868, which regulated some war practices. By the turn of the centuries, the declarative willingness of the signatories to widen those treaties was

⁸¹ More in Marti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and the Fall of the International Law 1870-1960*, (Cambridge : Cambridge University Press 2001).

⁸² Michael Howard, *War in European History* (London : Oxford University Press 1993), 120-154.

expressed. In 1899 the *Regulations Respecting the Laws and Customs of War on Land* were signed in The Hague, and in 1906 the Geneva conventions were reviewed and extended. Several other conventions and declarations were added to these achievements. Those two streams came to be known as “The Geneva law” and “The Hague law” and to be regarded as foundations of both international humanitarian law and human rights law.⁸³

Such treaties were giving hopes that wars are about to be abolished as means of conducting international relations, or at the very least that they would be conducted in a more humane manner. They also became a tool of legitimization, as the adherence to the laws and customs of warfare was supposed to be a trait of civilisation of the European countries. Nowhere was the trust of the representatives of those countries seen better than in the report of the international commission set up in 1913 by the Carnegie Endowment to investigate the crimes committed in the course of the Balkan wars.⁸⁴ The report on horrendous crimes was intoned full of indignation, and the hope was expressed that such crimes would never be repeated. The disappointment was ever greater as the ink was not yet dry on the report, and Europe stepped into a war whose magnitude and death toll surpassed the Balkan conflict. Instead of executing the third conference in The Hague, which was planned for 1915, European powers were executing their populations, frequently in a criminal manner, breaching the majority of the signed conventions and dragging the world into its first war.

⁸³ Lyal S. Sunga, *Individual Responsibility in International law*, (Dordrecht : M. Nijhoff, c1992), 16-17. Teodor Meron, *War Crimes Law Comes of Age* (New York : Oxford University Press 1998). Cherif Bassiouni, *Crimes against humanity in International Criminal Law*. (The Hague : Kluwer Law International, 1999).

⁸⁴ Carnegie Endowment for International Peace, *Report of the international commission, to inquire into the causes and conduct of the Balkan wars*, (Washington DC : Carnegie Endowment, 1914). Reprinted in *The other Balkan wars : a 1913 Carnegie Endowment inquiry in retrospect* (Washington, D.C. : Brookings Institution Press, 1993)

Consequently, the frustration brought about by the First World War could not have been greater. Just after regulating the rules of warfare and in the aftermath of the expressed desire never to go to war, European states plunged in the deadliest conflict ever seen. The devastation of the war brought about new initiatives, expressed through establishing the League of Nations and signing the Second Geneva Convention in 1929 regulating the treatment of prisoners of war. Another step forward was taken, not to humanize warfare but to abolish it, expressed in the unanimous vote of the Assembly of the League of Nations for the *Protocol for the Peaceful Settlement of International Disputes* in 1924 and through the multilateral treaty named the Briand-Kellogg pact 1928. Signed by a number of states, the treaty originally conceived by US Secretary of State Frank Kellogg and French Prime Minister Aristide Briand intended to exclude aggressive war from international relations.⁸⁵ The treaty was in many ways in correlation with other documents of the League of Nations, attempting to renounce war, but it failed to produce tangible sanctions for its breaches and could not force states to sign it.

In contrast to this forward-looking activity, there was far less success in punishing war crimes from the past. The attempt to drag history in front of the court of law, and bring those responsible for bloodshed before justice was largely unsuccessful. Not that there was no enthusiasm for such a venture. Already with the beginning of warfare, experts and authorities on all sides were engaged in drafting reports on atrocities committed by the other side.⁸⁶ Those reports were an important segment of wartime

⁸⁵ Briand-Kellogg's pact 1928 <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>

⁸⁶ See the example from Serbia, who called upon a Swiss criminologist Archibald Reiss to conduct and independent inquiry into the crimes committed by Austrian troops in Serbia in 1914. His initial report grew into the war of confronting reports with Austrian authorities: R.A.Reiss, « Les balles explosibles autrichiennes », *Archives d'anthropologie criminelle, de médecine légale et de psychologie normale et pathologique*, 252, (15.décembre 1914); R.A.Reiss, "Comment les Austro-hongrois ont fait la guerre en Serbe", in *Etudes et documents sur la guerre*, (Paris : Libraire Armand Colin, 1915); *Réponses aux*

propaganda, which was calling for the punishment of the culprits of war and the perpetrators of crimes. However, once war ended, such trials were anything but certain. In the *Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties* which assembled in Paris to give recommendations for a pending peace treaty, there was a readiness to set up tribunals for war crimes, but not unanimous support for trying crimes against peace. Its Majority Report concluded that “the premeditation of a war of aggression ... is conduct which the public conscience reproves and which history will condemn, but ... a war of aggression may not be considered as an act directly contrary to positive law ... we therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.”⁸⁷ Although the famous Articles 227-231 of the Versailles Treaty relegated responsibility for the outbreak of war to Germany, and its representatives, such as the Kaiser and the German High Command, were recommended to stand trial, no such readiness existed among the Entente powers.⁸⁸ Much of this reluctance was politically induced, but some of it also derived from the perceived discrepancy between the historical and legal interpretations of the phenomenon, which was casting uneasiness about criminalizing major political actors of the defeated side.

accusation austro-hongroises contre les Serbes continues dans les deux recueils de témoignages concernant les actes de violation du droit des gens commis par les états en guerre avec l'Autriche-Hongrie, (Paris Libraire Payot, 1918). Finally, the results of his research were compiled for the needs of Serbian government in the upcoming peace conference: *Rapport sur les atrocités commises par les troupes austro-hongroises pendant miere invasion de la Serbie preesente au Gouvernement Serbe*, (Paris : Libraire Bernard Grasset, 1919).

⁸⁷ “Commission of Responsibilities, Majority Report, March 29, 1919”, In Michael Marrus, *The Nuremberg War Crimes Trial 1945-6. A Documentary History*, (Boston : Bedford Books, 1997), 6.

⁸⁸ Article 231 and related parts of the Versailles treaty, based on the findings of the Commission, published in *American Journal of International Law* 14, (1920): 95-154. On disagreeing between lawyers and politicians on the matter of prosecuting war crimes and crimes against the peace after the First World War see Jackson Nyamura Maogoto, *War Crimes and Realpolitik. International Justice from World War I to the 21st century*, (London : Lynne Rienner Publishers, 2004).

And indeed, there were reasons for such concerns. Although the international tribunal was never convened, the clauses of the treaty placing the responsibility for war on Germany were the subject of open rejection by the German intellectual elite; and historians were in the forefront of this venture. Assembled around the journal *Kriegsschuldfrage* (the Question of War Guilt), aided with the creation of Zentralstelle für Erforschung der Kriegursachen by the German ministry of Foreign Affairs, supplemented with the growing collection of published primary sources (*Die Große Politik der Europäischen Kabinette 1871-1914*), those historians, led by Justus Hashagen, Alfred von Wegerer and Hans Delbrück fuelled a debate which was raging throughout the interwar period. They were challenging the wording of the Article in attempt to show that this decision rested on a highly selective and misguided historical interpretation. The issue was picked up by non-German authors as well (Sidney Fay, Harry Elmer Barnes, Charles Beard, Pierre Renouvin...), leading to a scholarly debate which is in fact still open and remains a subject for research.⁸⁹

However, it was impossible not to notice the intention behind such research. Although one of the first appeals of the journal *Kriegsschuldfrage* was voiced by Harris Aaal, who was arguing for *die neutral Erforschung der Kriegsursachen*, and although the

⁸⁹ The overview of the debate in Klaus Grosse Kracht, *Kriegsschuldfrage und zeithistorische Forschung in Deutschland. Historiographische Nachwirkungen des Ersten Weltkriegs*, in: *Zeitgeschichte-online*, 2004. <http://www.zeitgeschichte-online.de/md=EKW-GKracht> (accessed on 20.20.3006). For more details about the impact of this debate, see D'Agostino, Anthony. "The Revisionist Tradition in European Diplomatic History", *The Journal of The Historical Society*, 2 (2004): 255-287. An account on the early activity in Germany by one of the protagonists in August Bach, Zentralstelle für Erforschung der Kriegursachen, *Berliner Monatshefte* 1 (März 1937) : 272-283. The complex web of interdependency between such scholarly attempts and predominant political moods is revealed in contributions by Holger H. Herwig, Herman Witthens, Ellen L. Evans and Joseph O. Bazlen, collected in: Keith Wilson, (ed.) *Forging the Collective Memory. Government and International Historians through Two World Wars* (Providence, Oxford : Bergham Books, 1996), 87-177. More on influence of legal context of the aftermath of the Second World War on German interwar historiography in Peter Schöttler, *Geschichtsschreibung als Legitimation wissenschaft*. (Frankfurt am Mein : Suhrkamp, 1999), particularly the contribution of Bernd Faulenbach, „Nach der Niederlage. Zeitgeschichtliche Fragen und apologetische Tendenzen in der Historiographie der Weimarer Zeit“, 31-51.

journal published an appropriate multilingual *Appel aux Consciences* and was declaratively open for contributions from all over Europe, even an overview of the titles of contributions suffices to conclude that one of its important tasks was to create an atmosphere in which both Germany and Germans would be exonerated of guilt. Such apologetic strategies were pursued, more or less vehemently, by the other interwar historiographies as well.⁹⁰

The contested issue of responsibility for the outbreak of war has clouded in large part the issue of responsibility for war crimes. The first list of such perpetrators that the Entente drafted contained 3000 names, only to be cut by themselves to 854 suspects, including the wartime German Chancellor Bethmann-Hollweg and the military commanders Ludendorff and Hindenburg. After new protests in Germany this list dwindled to 45 persons of lower rank, who were indeed tried in front of the German Supreme Court in Leipzig in 1921. However, the actual trials started only for twelve people, six of whom were convicted, and sentenced to shorter prison terms, two of whom even escaped from prison with the help of guards and to the delight of the German public.⁹¹

The fiasco of the Leipzig trials was just among the most visible failures which showed cleavages between universal standards and local application. The realities of the interwar period, filled with racism, anti-Semitism, discrimination or even persecution on

⁹⁰ Kriegsschuldfrage: *Inhaltsverzeichnis. Jahrgang 1925*, Berlin 1926.

⁹¹ Due to such pressure, the trials in interwar Germany held in Leipzig were neither numerous, nor enthusiastically pursued. The example of such conduct in German War Trials: "Judgment in case Lieutenants Dithmar and Boldt", *The American Journal of International Law*, 16 (1922): 708-724. This case was one of the most vehemently pursued in postwar Germany, and yet ended with 4 years prison sentence to the officers, who fled their respective prisons in late 1921 and early 1922. The assessment of the effects of the trials in Jürgen Matthaes, *The Lessons of Leipzig*, Heberer Patricia, Jürgen Matthaes (ed.), *Atrocities on Trial. Historical Perspectives on the Politics of Prosecuting War Crimes*, (Lincoln /London : University of Nebraska Press, 2008), 3-24.

the basis of religion, political beliefs, gender, race, class or ethnicity, strengthened with economic difficulties, closures behind national borders and the building of authoritarian and totalitarian systems, were actually contributing to the growing autarchy. The early promise of the possibility of bringing the past to trial, as augmented in the Dreyfus case, and as promised after the First World War, turned out not to be possible. It took another war and even worse atrocities committed during its course in order to create a global consensus on the necessity to face the evil past, and finally drag history before the courts of justice.

I.2.2 Legal Reckoning with the Second World War

Never before has the world seen the amount of devastation and human misery as in the period of the Second World War, regarded by Shoshanna Felman and Dori Laub as “a trauma we consider as the watershed of our times ... not as an event encapsulated in the past, but as a history which is essentially not over, a history whose repercussions are not simply omnipresent in all our cultural practices, but whose traumatic consequences are still actively evolving”.⁹² It was a total war in many respects – from the geographical aspect of the global theatre of warfare, through the totality of the means of warfare regardless of their lethality and criminality, to the political level of the confrontation of mutually exclusive ideologies.⁹³ This meant that for the Allies, unconditional surrender

⁹² Shoshanna Felman and Dori Laub *Testimony. Crises of witnessing in literature, psychoanalysis, and history*, (New York : Routledge, 1992), xiv.

⁹³ The expression total war, used by Goebbels during the war, was overtaken by analysts of its aftermath: See Peter Calvocoressi, Guy Wint, *Total war. Causes and Courses of the Second World War*, (London : Penguin Press, 1972). For the irreconcilable participants see Andrej Mitrović, *Vreme netrpeljivih* [The Times of the Intolerant], (Podgorica : CID 2000). On the devastating death toll see Niall Ferguson, *The War of the World* (London : Penguin, 2007), 450-465,

was the only acceptable outcome of war, and when it happened in 1945, it was accompanied by a global shift in sensibilities. The defeat over Nazi Germany was to symbolize the defeat over the ideology of exterminationist nationalism embedded in ‘scientific racism’. One of the most important avenues through which this change was expressed in the aftermath of the Second World War was hectic legal activity in every country in Europe.

The dynamics and outlook of the proceedings differed greatly, particularly in the countries which had been the members of the Tripartite pact (Germany, Hungary, Romania, Bulgaria, Albania), countries conquered by the Axis powers (France, Belgium, The Netherlands, Czechoslovakia, Poland) and countries characterized by a civil war experience in addition to the occupation (Yugoslavia and Greece). The very scope of postwar retribution is telling. Although the quantitative evidence on legal and extralegal punishments could be unreliable, it was visible. Of 7037 death sentences issued in France, 791 were executed. This is followed by Bulgaria (2618 issued, 1576 executed), Belgium (2940 issued, 242 executed), Czechoslovakia (788 issued, 713 executed) and Hungary (475 issued, 189 executed).⁹⁴ Additionally, many of the perpetrators were tried by the Soviets, in the USSR as well as in the occupied territories.⁹⁵ All of the postwar regimes were organizing trials with “didactic aims of illustrating to the conquered peoples the benefits of the due legal process, whilst simultaneously creating a historical record for the edification of the victors, vanquished, and posterity alike.”⁹⁶

⁹⁴ Cf. Benjamin Frommer, *National Cleansing, Retribution against Nazi Collaborators in Postwar Czechoslovakia*, (Cambridge : Cambridge University Press 2005), 91

⁹⁵ Andreas Hilger, „Sowjetische Justiz und Kriegsverbrechen“, *Vierteljahrshefte für Zeitgeschichte* 3 (2006), 461-515.

⁹⁶ Donald Bloxham, *Genocide on Trial. War Crimes Trials and the Formation of the Holocaust History and Memory*, (Oxford : Oxford University Press 2001), vii.

Less clear was the success of such a venture, as various instances were interested in sending different educational messages. “In the wake of the Second World War, political trials and administrative purges swept through regions of Europe that had been under German occupation. Why did these trials and purges become such a vast and seemingly all encompassing event, affecting, as defendants, between five and ten percent of the adult male population in formerly German ruled Europe?”, asks István Deák, and proposes that it was a consequence of the continental shift leftwards.⁹⁷ This shift, however, differed significantly in Eastern and Western Europe, influencing the outlook of the postwar trials. According to István Rév, “one of the important goals of the Eastern European war-crimes tribunals was to prove that, as a rule, anti-Communists became Fascists: anyone who was an anti-Communist is a Fascist. But the trials and Communist history writing had another aim as well – to prove the truth of historical trivialism that all Fascists were anti-Communists.”⁹⁸ The legal framework was frequently bending under the weight of such aspirations: “In order for history to have resolved itself in this convenient way, it was necessary for memory to confirm” wrote Tony Judt on the postwar trials.⁹⁹

Still, the initiatives to punish the perpetrators of war crimes started already during the war, on the insistence of the exiled representatives of the occupied European countries, who formed the Inter-Allied Conference on war crimes. In addition to these national promptings, the Allies very early on expressed a commitment to prosecute

⁹⁷ István Deák, „Post-world war II political justice in a historical perspective“, Claudia Kurtsidis-Haider, Winfried R.Garscha (ed.), *Keine “Abrechnung” NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945*, (Leipzig-Wien : Akademische Verlansanstalt 1998), 389

⁹⁸ István Rév, *Retroactive Justice*, 234.

⁹⁹ Tony Judt, “Preface”, in István Deák, Jan Tomasz Gross, Tony Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath*, (Princeton : Princeton University Press 2000), vii.

jointly those responsible both for the outbreak of war and of war crimes. This commitment was expressed in mid-1943 through the creation of the United Nations War Crimes Commission that was drafting the lists of potential indictments and negotiating the ways they should be held accountable even during the war. Its efforts were reaffirmed through the war aim of the Allies to restore global order through the creation of an alliance of free countries, as expressed in the Atlantic Charter and restated in the attempt to create the United Nations. There was therefore a wide consensus that the leadership of the Axis should be held responsible, although numerous debates arose in regards to how exactly to do so. The fate of the German leadership was debated from 1941, with different twists and ideas, the possibility of a trial being just one among several options taken into deliberation.¹⁰⁰ Eventually, the representatives of the United States, United Kingdom and Soviet Union specified in the Moscow declaration of November 1943 the obligations regarding investigations into war crimes and their punishment.¹⁰¹ Once Allied troops reached Germany, it became apparent that the scope of the crimes committed in occupied Europe transgressed even the most pessimistic expectations, and it was equally clear that each and every means available would be employed in order to conduct a visible reckoning with the scares of the Second World War, even if it would go against the prevailing sensibilities. “After the end of World War II both the perpetrators and the victims wanted to forget – to leave the terrible memories of their past behind.”¹⁰² In an attempt to prevent that, in addition to the legal reaction in the resurrected European

¹⁰⁰ There was a great deal of confusion about the nature of the penal process to be used, in the absence of a suitable procedure for international judgement for individuals. In different phases both Soviets and British even preferred summary executions to prolonged trials. Suggestions for extralegal settlements came also from Henry Morgenthau. Those dilemmas are analyzed in details in Arieh Kohavi, *Prelude to Nuremberg : allied war crimes policy and the question of punishment*, (Chapel Hill, N.C. : University of North Carolina Press, 1998), 63-89. See also the correspondence in Michael Marrus, op.cit, 22-34.

¹⁰¹ “Moscow declaration”. In Marrus, op.cit, 20-21

¹⁰² István Rév, *Retroactive Justice*, 231.

countries, the occupying powers started a hectic activity – in mid-1945 British occupying powers in Germany prosecuted Josef Krammer and 45 of his SS subordinates of the camp Bergen-Belsen. The American authorities did the same with the staff of the Hadamar sanatorium, and with General Yamashita in Manila, on the other side of the globe.¹⁰³ The Soviets also started an unprecedented number of trials on the territory they occupied. This activity was an outcome of the Moscow declaration, agreeing that all the war criminals will be punished on the territory on which they committed the gravest crimes. However, the declaration made an exception for the major war criminals, whose crimes were considered to be of universal grievance and hence deserving a universal approach.

In deliberating the details of this approach, particularly vivid were the debates on the possibility of the creation of an international tribunal. On the one hand, there was no convincing historical precedent for such an endeavor, and the amount of potential legal and political complications was vast. On the other hand, in the face of the horror seen in liberated Europe, such reservations withdrew: “Who didn’t know that it was illegal to murder a million innocent people, including hundreds of thousands of women and children, helpless people, because of their color, their race, or their religion? Who didn’t know that such conduct was illegal? It was not ex post facto, but was putting into positive international law fundamental principles of humanity and of morality, and national law, and making them legally binding through international law”, exclaimed Benjamin Ferencz, one of the prosecutors in the subsequent Nazi war crimes trials.¹⁰⁴

¹⁰³ See Patricia Heberer, Jürgen Matthäus, *Atrocities on trial*, 25-73; Claudia Kurtsidis-Haider, Winfried R.Garscha (ed.), *Keine “Abrechnung” NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945*, (Leipzig /Wien : Akademische Verlansanstalt, 1998), 122-150.

¹⁰⁴ Benjamin Ferencz, “The experience of Nuremberg”, in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights. The role of the International Criminal Court*, (New York: Transnational publishers, 2000, 8-9.

Eventually, “officials in Washington recognized that they have to deviate from conservative legal procedures and the than-existing but inadequate international law”, noted Ariel Kohavi.¹⁰⁵ Rather than leaving the punishment to paralegal retribution, the United States submitted an elaborate proposal to the British and Soviet representatives in San Francisco in April 1945, setting the stage for a due process for those accused of war crimes. After some negotiations, officials in Moscow, London and Paris agreed on the details, and with the signing of the *London Agreement on the Punishment of the Major War Criminals of the European Axis* on the 8. August 1945, the basis for the International Military Tribunal was set.¹⁰⁶

Once the political decision was made, a legion of procedural questions emerged. The Allied representatives had very different ideas on the question of whom to prosecute and for which crimes. As for the choice of defendants, with Hitler and other important members of the Nazi elite already dead (Himmler, Göbbels), different proposals were made. The general idea was clear – the individuals would symbolize different agencies of the Nazi regime. The Americans, who had already detained the largest number of alleged war criminals, insisted: “Whom will we accuse and put to their defence? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial and economic life of Germany who by all civilized standards are provable to be common criminals.”, wrote Robert Jackson to the US President.¹⁰⁷ However, such a list had to be negotiated. For example, the British objected to putting the Navy commanders on the

¹⁰⁵ Kohavi, op.cit, 241

¹⁰⁶ Pursuant to the London Agreement, which contained the Tribunal’s Charter in one of the chapters a legal basis of the proceedings was set. The Charter is reproduced in: The Avalon Project, *Charter of the International Military Tribunal*, <http://avalon.law.yale.edu/imt/imtconst.asp>

¹⁰⁷ Michael Marrus, op.cit, 41.

stand (having in mind that naval combat was traditionally not the area of warfare Great Britain wanted to see being criminalized). The Soviets however insisted on indicting both Dönitz and Roeder, and, most probably out of reasons of prestige, added several people from their prison cells on the list.¹⁰⁸

Consequently, the 24 indicted were high-ranking officials of various branches of the Nazi government. Headed by Herman Göring, among them one could see party officials (Rudolf Hess, Martin Bormann, Baldur von Schirach), ideologues and propagators (Alfred Rosenberg, Julius Streicher, Hans Fritzsche), diplomats (Joachim von Ribbentrop, Konstantin von Neurath, Franz von Papen) economists (Robert Ley, Hans Frank, Wilhelm Frick, Walter Funk, Albert Speer, Hjalmar Schacht) occupation enforcers (Arthur Seyss-Inquart, Hans Frank, Fritz Saukel, Ernst Kaltenbrunner) and officers (Wilhelm Keitel, Karl Dönitz, Erich Raeder, Alfred Jodl). The Allied prosecutors had chosen the accused with a clear intention to organize a trial for the most responsible leaders. Although this was not always achieved, and although some of the choices were strange, *mutatis mutandis* they did present an attempt to create a mirror image of the wartime Nazi elite and did stand as symbols of different pillars of a defeated regime.¹⁰⁹ Additionally, several organisations (Reich Cabinet, Leadership Corps of the Nazi Party, SS, SD, Gestapo, SA and the German General Staff) also stood accused. In the middle of the unprecedented media attention, what was to follow were in the view of Judith Shklar, “the two great Trials at Nuremberg and Tokyo where the past was being judged.”¹¹⁰

¹⁰⁸ Telford Taylor, *The Anatomy of the Nuremberg Trials*, (New York : Alfred A. Knopf, 1992), 8.

¹⁰⁹ Complicated bargaining over the choice of defendants is well described in Taylor, *op.cit.*, 79-82, 86-95.

¹¹⁰ Judit Shklar, *Legalism: law, morals, and political trials*, (Cambridge : Harvard University Press, 1986), 200.

I.2.3 History on Trial: Nuremberg

The key architects of the International Military Tribunal in Nuremberg were well aware of the historical significance of the proceedings in the case which came to be known as the Trial of Major War Criminals. “It is important that the trial not become an inquiry into the causes of war...the question of causation is important and will be discussed for many years, but it has no place in this trial, which must rather stick rigorously to the doctrine that planning and launching an aggressive war is illegal, whatever may be the factors that caused the defendants to plan and to launch. Contributing causes may be pleaded by the defendants before the bar of history, but not before the tribunal”, wrote prosecutor Telford Taylor to Chief Prosecutor Robert Jackson on the eve of the trial.¹¹¹ Still, Jackson himself seemed equally concerned about similar issues, as he maintained in his opening statement in front of the Tribunal that “we must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.”¹¹² The bench he was addressing, composed of four judges, seemed keen on this approach. The British Judge who was to sit on the panel as an alternate, Sir Norman Birkett, did not hesitate to consider Nuremberg “a very great landmark in the history of International Law. There will be a precedent for all successive generations ... The world must be patient (and so must I) for what is being done now assuredly belongs to history.”¹¹³

¹¹¹ Taylor, *op.cit.*, 52-53

¹¹² Robert Jackson, “Opening Address for the United States”, in Michael Marrus, *op.cit.*, 81

¹¹³ Quoted in Ann Tusa, John Tusa, *The Nuremberg Trial*, (London : BBC Books, 1995), 205.

The very magnitude of the legal undertaking in Nuremberg was underpinning its historical dimension. These bold expectations were not based only on the scope of the proceedings, impressive as it was (403 open sessions during one year of activity, 33 prosecution witnesses and 61 defense witnesses and thousands of affidavits), but also on the elements of the indictment.¹¹⁴ Nazi leaders stood accused for crimes of conspiracy, crimes against peace, crimes against humanity and war crimes. Establishing their criminal responsibility at that level proved to be a legal novelty, as the indicted persons were not necessarily directly engaged in the wrongdoings they were accused of. It was obvious that they did not physically kill anybody, and in most of the cases did not order anybody to be killed. Their individual responsibility was of a different kind, and this legal revolution required serious adjustments and mechanisms of stretching the limits of individual criminal responsibility in order to make the indictments plausible and judgement compatible to crimes committed during the war.¹¹⁵ As well as establishing the individual responsibility of each defendant, connecting the accused person in a plausible manner with a particular crime, the prosecution went one step further, producing a charge of conspiracy, well-known in Anglo-Saxon law, but unknown in Continental legal traditions. Such a complex setting was bound to create a complex legal argument and trigger a particular historical narrative.

¹¹⁴ Michael Marrus, *The Nuremberg War Crimes Trial 1945-6. A Documentary History*, Bedford Books, Boston 1997, V. Ann Tusa, John Tusa, *The Nuremberg Trial*, (London : BBC Books, 1995), 16-9.

¹¹⁵ Elies van Sliedregt, *The criminal responsibility of individuals for violations of international humanitarian law* (The Hague : T.M.C. Asser Press, c2003). Lyal Sunga, *Individual responsibility in international law for serious human rights violations*, (Dordrecht : M. Nijhoff, c1992). This approach developed further in Tokyo trials and famous Yamashita case. General Yamashita was held accountable according to the supreme (or command) responsibility, which meant that by the virtue of their position within the army hierarchy he was obliged to know and able to prevent those crimes from happening. Detailed in: Stuart A Hendin, "Command Responsibility and Superior Orders in the Twentieth Century – a century of evolution", *E LAW / Murdoch University Electronic Journal of Law*, 10 (2003), <http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>, 29.5.2005.

According to the historical gist of the indictment, “in 1921 Adolf Hitler became the supreme leader or Fuehrer of the Nationalsozialistische Deutsche Arbeiterpartei, also known as the Nazi Party, which had been founded in Germany in 1920. He continued as such throughout the period covered by this Indictment. The Nazi Party, together with certain of its subsidiary organizations, became the instrument of cohesion among the defendants and their co-conspirators and an instrument for the carrying out of the aims and purposes of their conspiracy. Each defendant became a member of the Nazi Party and of the conspiracy, with knowledge of their aims and purposes, or, with such knowledge, became an accessory to their aims and purposes at some stage of the development of the conspiracy ... All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity”¹¹⁶ In effect, Adolph Hitler and his collaborators (24 indicted among many others) were accused of a conspiracy with a criminal purpose, in an attempt to seize power in Germany and to lead an aggressive war in Europe, pursuing which the indicted officials committed war crimes and crimes against humanity.¹¹⁷ It was indeed a unique indictment. “Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.”, said Jackson in his opening address to the Tribunal.¹¹⁸

¹¹⁶ Avalon Project, *Nuremberg Trial Proceeding* v.1 Indictment, <http://avalon.law.yale.edu/imt/count.asp>

¹¹⁷ Stanislaw Pomorski, “Conspiracy and Criminal Organisation”, in: George Ginsburgs, V.N.Kudriavtsev, *The Nuremberg trial and international law*, (Dordrecht : Kluwer Academic Publishers, 1990), 213-248

¹¹⁸ Robert Jackson, in Marrus, op,cit, 80.

Hence the trial was to be memorable, persuasive and plausible at the same time, which was a task of the utmost complexity. The courtroom of the city of Nuremberg, one of the rare undemolished buildings in the city, was to host not just the legal staff, but also a number of journalists and writers, eager to see law and history in the making. In order to offer a plausible account of the crimes against the peace charge, the prosecutors launched an indictment impregnated by the elements of historical narrative. The overarching argument of the indictment was a conspiracy charge. Jackson was well aware of the precariousness of such approach: “It also is true that proceedings against organisations are closely akin to the conspiracy charge, which is the great dragnet of the law and rightly watched by courts lest it be abused.”¹¹⁹ Still, there was no real other means of exposing the unique criminal nature of the Nazi regime. The prosecution was aware that the defendants were creating history, and was determined to prove that they were doing it in a criminal way. In order to substantiate the indictment, the prosecution offered a very influential historical sketch of the development of interwar Germany, as well as of the Second World War, producing a historical narrative starting from 1919, and ending in 1945. In such a setting, there was no turning back. Nuremberg was to become, in the words of the subsequent prosecutor Robert Kempner, “the greatest historical seminar ever held in the history of the world”.¹²⁰ His colleague, Talford Taylor, was even blunter about the overall intent of the prosecution insofar the relations between history and law were concerned: “We cannot here make history over again. But we can see that it is written true.”¹²¹

¹¹⁹ The Nizkor Project, *Nazi Conspiracy and Aggression*, vol. 8, 28 February 1946, 361.

¹²⁰ Lawrence Douglas, *The memory of judgement. Making law and history in the trials of the holocaust*, (New Heaven., London: Yale University press, 2001), 2.

¹²¹ Quoted from Robert E. Connot, *Justice at Nuremberg*, (New York : Carroll & Graf 1988), xiii

As the indictment was read on the 20th November 1945, the Prosecution continued presenting the case until the 4th March 1946. In a creation of this historical account, historical facts found in the captured archives of the Third Reich and elsewhere had been of enormous aid. As the war was reaching its end, the Allies were in possession of one of the greatest archival remnants in the world. Certainly, there were enormous lacunas in these holdings, as they were destroyed or hidden or simply lost in the chaos of the ending of the war. Still, contrary to the orders received, the majority of German archivists did not destroy their holdings, out of, as Tusa observes, “understanding of the professional psychology of archivists, who would rather eviscerate their own children than destroy the material entrusted to their charge.”¹²² Consequently, the documents of the OKV, OKL, Ministry of the Foreign Affairs and the Navy were captured in different locations, from Schloss Marburg to Berchtesgaden.

The bureaucratic nature of the Third Reich left more than enough of a paper trail to begin the investigation and launch a prosecution. “There is no parallel in history to this baring of contemporary official papers to the public eye and expert scrutiny”, wrote Peter Calvocoressi, one of the participant historians.¹²³ The Presiding Judge from Great Britain, Geoffrey Lawrence noted that “an enormous number of German orders and documents of all sorts had been discovered hidden away in salt mines, behind brick walls and in other places, and the task of selection among these documents naturally took the prosecution many months and continued long after the case had begun.”¹²⁴

¹²² AnnTusa, John Tusa, *op.cit*, 96.

¹²³ Peter Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* (London: Chatto and Windus 1947), 125.

¹²⁴ Lord Justice Lawrence, “The Nuremberg Trial”, in: Guenael Mettraux, *Perspectives on the Nuremberg trial* (Oxford: Oxford University Press 2008), 291.

In the course of the preparations, and in light of the massing evidence on atrocities which were shocking even for the investigators, more ambitious concepts on the overall purpose of the proceedings evolved. They were announced publicly on the very opening of the trial by prosecutor Jackson's spokesman: "One of the primary purposes of the trial of the major war criminals is to document and dramatize for contemporary consumption and for history the means and methods employed by the leading Nazis in their plan to dominate the world and to wage an aggressive war."¹²⁵ This statement was echoed by Telford Taylor, who expressed the hope that "the documents and testimony of the Nuremberg record can be of the greatest value showing the Germans the truth about the recent past."

During more than seventy days the bench was faced with piles of documents on the four distinctive groups of crimes (conspiracy, crimes against humanity, war crimes, and crimes against peace). Although the roles of the prosecutors had been previously divided exactly along those lines, in order to minimize the overlaps, in the courtroom they did not resist the temptation to widen their approach. The majority of the prosecution case was, on Jackson's decision, conducted through the documents from the captured archives, rather than through the use of witnesses and affidavits. Still, submitted documents were supported with the testimonies of 33 eyewitnesses, including highly ranked insiders such as Erwin Lahousen, Otton Ohlendorf, Walter Schellenberg, Dieter Wisliceny, Erich von dem Bach Zelewski and Friedrich Paulus. Many eyewitnesses and victims were to follow, giving a direct insight into the horrors of the Third Reich.¹²⁶

¹²⁵ Gordon Dean, Spokesman to Prosecutor Robert Jackson, 11. August 1945 Quoted from Donald Bloxham, *op.cit.*, 17.

¹²⁶ Detailed sequence of events during the trial in *The Nuremberg Trials: Chronology*, <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergChronology.html>

If the prosecution came to an understanding of the historical importance of the proceedings, so did many of the accused. Although they challenged the legality and legitimacy of the proceedings, as well as the basis for the crime of conspiracy and crimes against the peace, the accused did not even contest the existence of war crimes, but rather attempted to evade their individual responsibility for them by relegating the blame to Hitler and Himmler. Defendants also attempted to present their cases, presenting 61 witnesses. Although several highly ranked Luftwaffe officers and Ministry of Foreign Affairs officials did step forward in defence of Göring and Ribbentrop, generally the accused testified on mutual behalf, which opened them to a thorough cross-examination. Still, this presented the accused with the opportunity to state their case and to send a message not just to the bench, but to history as well. Some, as Albert Speer, used this opportunity to improve their position, assume a limited amount of responsibility and transmit a message of universal relevance.¹²⁷ The same opportunity was perceived, but used for quite different purposes by unrepentant defendants, such as Rudolf Hess, whose bizarre attitude during the trial was once coloured with the remark that he defends solely “for the sake of the future judgment of my people and of history.” Hermann Göring also attempted to influence posterity with a final appeal to history, evaluating the trial in his closing statement as “an erroneous conception which is entirely devoid of logic, and which will be rectified some day by history.”¹²⁸ By end of August both sides were heard, and deliberation begun between the judges nominated by the victorious powers.

¹²⁷ The Speer case was, and still is a matter of a lively debate, fueled by his memoirs. Albert Speer, *Erinnerungen* (Frankfurt am Mein : Propyläen Verlag 1969), and furthered by Gitta Sereny, *Albert Speer: his battle with truth*, (London : Picador 1996) and more recently by Joachim Fest, *Speer. The Final Verdict* (London : Harcourt 2001)

¹²⁸ Michael Marrus, op.cit, 223, 219.

The Judgement of the International Military Tribunal, rendered on September 30 1946 was an encompassing account of the evidence presented. The judges were aware of the uniqueness of their role, and were scrutinizing the evidence offered thoroughly. “The judges were not keen to become the targets of historians”, observed Taylor.¹²⁹ They were also aware of the expectations, expressed well by Rebecca West during the deliberation days: “The Judgment of the Nuremberg Tribunal may be one of the most important events in the history of civilization.”¹³⁰ Hence they rigorously scrutinized both applicable laws and evidence. Taking to heart Prosecutor Jackson’s remark that history will judge them by the way they judge the accused, they were particularly cautious in parts of the judgment related to historical events predating the war. Whereas the judgment is clearly following the proven elements of the indictment in parts related to war crimes and crimes against humanity, the prosecution’s motion to admit as a judicial notice the historical account of 1921-1939 as a period of nesting of a conspiracy to commit crimes against peace was declined. Instead, the judgment opted for a restrictive take on the conspiracy: “The planning, to be criminal, must not rest merely on the declarations of a party program ... that plans were made to wage war, as early as 5 November 1937, and probably before that, is apparent ...but the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all.”¹³¹

¹²⁹ Taylor, op.cit, 554

¹³⁰ Ann Tusa, John Tusa, *The Nuremberg Trial*, p.14

¹³¹ *Judgment of the International Military Tribunal*, in Marrus, op.cit, 232-3. Through this restrictive reading of the conspiracy charge, the choice was again made in the light of a historical consideration – judges were persuaded by the content of the Hossbach memorandum that this meeting is a plausible *terminus post quem* for the materialization of a fixed German plan for aggressive war. Arguably, Hossbach memo was the single most important document for the charge of crimes against peace, and it is consisted of the notes taken by one of the officers present at the meeting in November 1937 in which Hitler was discussing the plans for war in the near future. Regrettably, the original of the document was lost during the trial. Details in Ann Tusa, John Tusa, op.cit, 99-100.

Still, these reservation withstanding, the judges were very much impressed by the evidence, concluding that “the case against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.” They delved readily into “reviewing some of the events that followed the first world war, and in particular, tracing the growth of the Nazi Party under Hitler's leadership to a position of supreme power from which it controlled the destiny of the whole German people, and paved the way for the alleged commission of all the crimes charged against the defendants.”¹³² What followed was a lengthy account of *Machtergreifung*, descriptions of sets of violations of international treaties by Germany culminating in waging a series of wars of aggression characterized by war crimes and crimes against humanity. Regarding responsibility, out of seven accused organizations, four were found criminal (Gestapo, Sicherheitsdienst - SD, Schutzstaffel - SS and Nazi party leadership). As for the individually accused, twelve death penalties were rendered, seven accused got life sentences or long-term imprisonment and three were acquitted. Once rendered, the judgments immediately drew considerable attention, were translated into numerous languages and circulated in a large number of volumes. Many shared the belief that they sent a message of significant global importance, perhaps best expressed by Hartley Shawcross, British Chief Prosecutor at the International Military Tribunal: “This Tribunal will provide a contemporaneous touchstone and authoritative and impartial record to which future historians may turn for truth and future politicians for warning.”¹³³

¹³² The Avalon Project, *Judgment of the International Military Tribunal*, <http://avalon.law.yale.edu/imt/judprov.asp>

¹³³ Michael Marrus, “History of Holocaust in the Courtroom” in Ronald M. Smelser (ed.), *Lessons and Legacies*. Vol. 5 - *The Holocaust and Justice*, (Evanston, IL: Northwestern University Press, 2002), 216

I.2.4 The Impact of Nuremberg on the Relation between History and Law

Nuremberg was an important segment among numerous political and legal undertakings of the immediate postwar period aimed towards reckoning with the recent past and establishing a new global web of international relations. Best expressed through the creation of the United Nations, this universal shift towards human rights was well reflected in a number of Resolutions of its General Assembly, which were regulating the issues of war crimes, affirming the principles of international law as applied in the Charter of the Nuremberg tribunal and setting the stage for the creation of the permanent international criminal court through the activity of the International Law Commission which had by 1950 recommended *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*.¹³⁴ Principles of universal human rights, inbuilt in the Charter of United Nations, were also specified in the 1948 *Declaration of Universal Human Rights*. The operationalization of those principles was to be secured by the revision and expansion of the Geneva Conventions during the same year, and particularly through the *Convention on the Prevention and Punishment of the Crime of Genocide* which was adopted by the General Assembly in December 1948 and came into effect in January 1951.¹³⁵

¹³⁴ See United Nations General Assembly Resolutions 3, 19, 20, 21 (1946) and particularly resolution 95 from December 14 entitled Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. Also UNGA resolutions 169-177 from 1947, regulating the work of International Law Commission. United Nations General Assembly Resolutions, <http://www.un.org/documents/resga.htm> See also the 1950 ILC Report containing Nuremberg principles: *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf

¹³⁵ UNGA Resolution 180 (1947), and 260 (1948). See also OHCHR, *Convention on the Prevention and Punishment of the Crime of Genocide*, http://www.unhchr.ch/html/menu3/b/p_genoci.htm

However, although some of those legal instruments were voted for unanimously and were speedily ratified by the member states, their content, and particularly their application, became a matter of complex negotiations. In a world which was undergoing abrupt polarization, usually referred to as a Cold War, it soon became clear that the concept of WWII as ‘waging a war to end all wars’ amounted to utopia. The atmosphere was steadily worsening, and it did not take long for the powers that crushed the Nazi project to openly collide. Propaganda from the East was directly accusing Western democracies for shielding the remnants of the Nazi regime, reviving the 1930’s Comintern notion of “fascism as the last stage of capitalism”. In the West, theories of totalitarianism which were comparing Stalinism with Hitlerism emerged.¹³⁶ Fragile systems of international relations soon came to a paralysis, as sets of crises such as those over Trieste or Berlin were on the verge of triggering a global confrontation. Worse still, the escalation of war in Korea and the issue of China’s membership in the Security Council had shown that the concept of the United Nations was no guarantee for peaceful settling of international disputes. To complicate things further, it was not only the confrontation between the East and the West, but also the tensions connected to the process of decolonization and destabilization in the Middle East which were compromising the envisaged legal order. Disagreements between the Security Council member states over the nature of commitments taken, followed by mutual accusations on hypocrisy, were shrinking the space for interiorization of ambitious legal devices.¹³⁷

¹³⁶ Cf. Hannah Arendt in *The Origins of Totalitarianism*, (New York : Harcourt Brace Jovanovich, 1951, 1975), Zbigniew Brzezinski, Karl J. Friedrich, *Totalitarian Dictatorship and Autocracy*, (Cambridge: Harvard University Press 1956)

¹³⁷ The struggle of the system to overcome the strains was obvious during the twin crisis over Hungary and Suez in late 1956. More on the role of UN in this Vladimir Petrović, *Jugoslavija stupa na Bliski istok* [Yugoslavia steps on the Middle East], (Beograd : Institut za savremenu istoriju 2007), 166-174.

It became clear that what was in 1945 regarded as the dawn of the new era of stability was not much more than the beginning of the new era, with potentials of launching an even deadlier confrontation.¹³⁸ Inability to reach political consensus had closed the doors for negotiating the permanent international criminal court, which remained a distant and unlikely possibility. Against the background of this bitter disappointment, the Nuremberg experience remained hanging in the air. As an example of a joint undertaking of the victorious powers, its achievements could not have been untouched by the arising global conflict. The military tribunal continued working, this time conducted by Americans in occupied Germany. In 12 subsequent cases (medical abuses, SS officials, industrialists, judges, government officials, military leaders), 185 persons were indicted, and 177 stood trial. 142 were convicted, 23 sentenced to death, 20 to life sentences and the rest to prison terms.¹³⁹ However, the publicity those cases got did not match the initial trial, which soon became a subject of many discussions. As the Nuremberg proceedings represent one of the crucial legal, historical, political, even cultural references of the contemporary world, their contributions and effects are being constantly debated. One need not to be more postmodern than Telford Taylor himself to realize that “today Nuremberg is both what actually happened there and what people think happened, and the second is more important than the first.”¹⁴⁰

¹³⁸ To no wonder the authors as different as Niall Fergusson and Martin Gilbert and take 1952 as the actual watershed of the postwar period, the former ending his synthetic account with that year, and the latter beginning there his ending equally encompassing overview. Cf. Martin Gilbert, *Challenge to Civilization. A History of the Twentieth Century, vol.III 1952-1999* (London : Harper Collins 1999); Niall Fergusson, *The War of the World. History's Age of Hatred* (London : Penguin books 2007)

¹³⁹ Jonathan Friedman, “Law and Politics in the subsequent Nuremberg trials”, in: Patricia Heberer, op.cit, 88-89. As a total of juridical reckoning with the Nazi past in the immediate postwar period in West Germany more than 13 million people was screened. 3,2 million were brought to trial, out of which 800,000 were processed: 9,000 were convicted on prison terms, 22,000 was removed from public offices, and more than 500,000 was sentenced to financial penalties.

¹⁴⁰ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, (Toronto: Bantam 1971), 13-14..

The protagonists of the trial correctly concluded that their work will be a subject of detailed scrutiny. The records of the trial itself are contained in two sets of books known as the *Red Series* and the *Blue Series* due to the color of the bindings. They contain full transcripts from the trial as well as the bulk of the related documents.¹⁴¹ However, the hope that mere quantity and availability of sources would secure the historical accomplishments of the trial proved unfounded. It seems that the proliferation of easily available piles of documents, which are only a part of the entire corpus of resources required for an in-depth analysis of the proceedings, is a more of a discouraging factor. Not that there is a shortage of literature on Nuremberg. A steady stream of monographs on the topic was readily available since 1946. Over time, interest was increasing, perhaps exactly due to the absence of the creation of a permanent international tribunal, and was followed with yet another tide of literature triggered by the revival of this idea through the troubled creation of International Criminal Court in the beginning of the 21st century.¹⁴² However, throughout this period, battles over the interpretation of Nuremberg became a topic on their own.

¹⁴¹ The Avalon Project at Yale Law School. The *Nuremberg War Crimes Trial* <http://www.yale.edu/lawweb/avalon/imt/imt.htm> See The *Holocaust History Project*, <http://www.holocaust-history.org>; Harvard Law School Library, *Nuremberg Trials Project, A digital documents collection*, http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview; visited on 18.12.2008. Major documents in Michael R Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*. (Boston: Bedford Books, 1997)

¹⁴² Seminal introductory readings into the Nuremberg proceedings are still the account given by Telford Taylor, and the study by Ann and John Tusa, written quite some time ago Telford Taylor, *The anatomy of the Nuremberg trials : a personal memoir* (New York : Alfred A. Knopf, 1992); Ann Tusa, John Tusa, op.cit. A number of more recent studies provide overviews of the entire process, but are hardly putting it in a different perspective. Eugene Davidson, *The Trial of the Germans*. (University of Missouri Press, 1966); Robert E. Connot, *Justice at Nuremberg*, (New York : Carroll & Graf 1988), Joseph E. Persico, *Nuremberg: Infamy on Trial*. (London : Viking, 1994); Earle Rice Jr. *The Nuremberg Trials*. (New York : Lucent Books, 1997); There was much more success in scholarship focusing on particular aspects of the trial, Bradley F. Smith, *The Road to Nuremberg* (New York : Basic Books, 1981); Arieh Kohavi, *Prelude to Nuremberg : allied war crimes policy and the question of punishment*, (Chapel Hill, N.C. : University of North Carolina Press, 1998) , R.J. Overy, *Interrogations : the Nazi elite in Allied hands, 1945* (London : Penguin Books, 2001).

The evident contrast between the limited scope of research-oriented scholarship and abundant interpretative works is not surprising, bearing in mind the sensitivity of the topic. No sooner was the judgment rendered, the main participants of the trial explained their legal historical takes on the venture. However, complex legal arguments were soon employed for the sake of the revision of the judgment, and particularly of its parts perceived as a verdict on German history.¹⁴³ Remaining a discontinued precedent in international criminal law, Nuremberg was an obvious target for such criticism, based on different variations of its understanding as justice of the victors. No less vocal were the guardians of the Nuremberg legacy as legal, but also ethical and political watershed of the second half of the 20th century. Hence this debate is no less lively today as it was in the immediate aftermath of the trial, if not even more so. Despite the undeniable progress of factual knowledge on Nuremberg, the main bone of contention remains much the same, as neatly expressed in one of the latest and most authoritative edited volumes on the topic, entitled *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*¹⁴⁴

¹⁴³ Many accounts of participants are recollected in Guenael Mettraux, *Perspectives on the Nuremberg Trial*, (Oxford : Oxford University Press 2008). On the IMT and German environment see Christopher Burchard, “The Nuremberg Trial and its Impact on Germany”, *Journal of International Criminal Justice* 4 (2006), 800-829; also Suzanne Karstedt, “The Nuremberg Tribunal and German Society”, in David A. Blumenthal, op.cit, 13-32. For USA, this impact was analyzed by William J. Bosch, *Judgment on Nuremberg, American Attitudes Towards the Major German War Crimes Trials* (Durham, NC: North Carolina University Press, 1970). Shifting importance of Nuremberg in wider context is problematized in Donald Bloxham, Milestones and Mythologies. The Impact of Nuremberg, in Patricia Heberer, *Atrocities on trial*, 263-282, and for example in the case of Ukraine by Johan Dietsch, Struggling with a „Nuremberg historiography“ of the Holodomor, *Ab Imperio* 3 (2007), 139-160. Typically German revisionist view on the trial is to be found in the work of one of the defendants in the subsequent trials, Graf Schwerin von Krosigk, *Die grossen Schauprozesse. Politische Justiz von der Antike bis zur Gegenwart*, (München : Bastei Lübbe, 1981), 356-397. However, revision was by no means limited to Germany. One of its early cornerstones was Maurice Bardèche’s book *Nuremberg or the Promised Land* (1947), and one of its latest outputs was is the work of British historian David Irving, whose other similar ventures led him straight into the Austrian prison on the charge of Holocaust denial. See David Irving, *Nuremberg: The Last Battle*, (London: Focal Point, 1996)

¹⁴⁴ David Blumenthal, Timothy McCormack (ed.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden/Boston : Martinus Nijhoff 2007).

More importantly for the purpose of this study, Nuremberg as a sight of ‘dragging the past in front of the court of justice’ deserves a special place in tipping the balance between history and law and making a first definite, if controversial breach in the theory of incompatibility between history and law: “The confluence of two distinct disciplines – history and justice – in the investigation and prosecution of Nazi war crimes and crimes against humanity has been the subject of controversy since Nuremberg international Military Tribunal.”, writes Erich Haberer.¹⁴⁵ And indeed, the strong intrusion of the idea that high-profile trials might be utilized to influence the collective memory and history was bound to provoke controversy, whose intellectual background is not necessarily related to the political context of the Second World War, but is rather reflecting uneasiness about its legal reading, embedded in the theory of incompatibility between history and law.

The greatest concerns over the possible distortions in this process were expressed early on by Judith Shklar. Shklar was not merely questioning the issue of political utilization of the Nuremberg trials. As a legal realist, she would probably agree with Alfred Rubin that “the use of the forms of law to achieve a necessary political aim regardless of legal principle and consistency has demeaned the law more that it has strengthened it. But in some cases, as at Nuremberg, it has also achieved its political and some moral purposes, so perhaps was the best course available to the victors.”¹⁴⁶ Her fears were based on the presumed tension between law and history: “These considerations of the nature of responsibility for war and for crimes against humanity do not, however, bring one closer to one of the problems presented by the trials – that of

¹⁴⁵ Erich Haberer, *op.cit.*, 487.

¹⁴⁶ Alfred P.Rubin, *Ethic and Authority in International Law*, Cambridge : Cambridge University Press 1997), 183.

historic causality. This issue emerged both at Nuremberg and at Tokyo because the crime-of-waging-aggressive-war charge inevitably produced discussions of the causes of war, a discussion that would probably never have arisen if crimes against humanity had been the central charge. The result was the confrontation of two entirely different and incompatible notions of causality, the historical and the legal. What is really involved is not the difference between the historic origins of war and of the atrocities, but between the meaning of causality as it is used in historical discourse and in the course of the juridical process, especially in criminal cases.’¹⁴⁷ Shklar had an overall impression that in the Nuremberg proceedings “history had to be tortured throughout in order to reduce the events to proportion similar to those of a model criminal trial within a municipal system.”¹⁴⁸ Charges for conspiracy to wage an aggressive war presented a particular strain: “A criminal trial for waging aggressive war inevitably involves an interpretation of past which makes it possible to point to specific persons making specific decisions which caused a war. In the case of the Nazis this did not, in fact, create any difficulty. However, the conspiratorial view of history, in its penchant for unearthing plots and secret machinations, is the very essence of the classical political trial with its simple aim of rooting out all opposition – real, fancied, potential or improbable.”¹⁴⁹ By stressing the differences related to historical and legal logic, Shklar was sending a clear warning against the danger of maintaining the legal and historical account of the mass atrocities of a recent past in which crimes against peace overshadow crimes against humanity and therefore restrict the responsibility to a small circle of top perpetrators. Shklar’s criticism

¹⁴⁷ Judith N. Shklar, *Legalism. Law, Morals, and Political trials*, (Cambridge : Harvard University Press, 1986), 194.

¹⁴⁸ *Ibid*, 147

¹⁴⁹ *Ibid*, 172.

regarding the conspiratorial view of history resonated well with the alarming historical evidence of regarding the scope of the policies of extermination conducted during the Second World War. “The Nuremberg view”, as noted by Christopher Browning, promoted “the initial representation of the Holocaust perpetrators as that of criminal minds, infected with racism and anti-Semitism, carrying out criminal policies through criminal organisations.”¹⁵⁰ Be that as it may, consequently, “the trials succeeded quite well in fixing the public mind that the sole responsibility for the war rested with Hitler.” writes Bradley Smith.¹⁵¹ István Rév emphasized the distortions of the recent past deriving from this approach: “In the West – allegedly – only certain well-defined and marginalized figures and groups collaborated with the Nazis – that is, with the Germans – who, in this tale born not long after 1945, were primarily and almost solely responsible for the horrible crimes committed in World War II. Germans stood accused by the court at the Nuremberg Trials, and the prosecution proved German responsibility. Thus the outcome supported this view of history. The Germans started World War II, and they robbed and murdered throughout Europe. The guilty were to be found among the citizens of Germany – a slowly disappearing country that effectively no longer existed.”¹⁵² István Deák gave an insight on the reasons for the appeal of this message, which “helped the peoples of Europe to believe that once the leading German Nazis and their foremost local helpers had been punished, they themselves could feel free of all guilt for their own wartime behavior.”¹⁵³

¹⁵⁰ Christopher Browning, “German Memory, Judicial Interrogation, Historical Reconstruction”, in Friedlander, *op.cit.*, 26. Introduction to various aspects of the related debate between intentionalists and functionalists in Ian Kershaw, *The Nazi Dictatorship, Problems and Perspectives*. (Oxford : Oxford University Press 2000).

¹⁵¹ Bradley, F. Smith, *The Road to Nuremberg*. (New York : Basic Books 1981), 251.

¹⁵² István Rév, *Retroactive Justice*, 225-6

¹⁵³ Historian’s Judgment: Reflection by István Deák, *Ab Imperio* 3 (2007): 85.

No wonder then, that Nuremberg has recently been criticized as a sort of a legal and historical straightjacket, particularly by the authors involved in exploring the importance of the impact of trials on collective memory, such as Michael Osiel. For Osiel, who notes that “in the last half century, criminal law has increasingly been used in several countries with a view to teaching a particular interpretation of the country’s history”, such attempts might “distort historical understanding of the nation’s recent past”. In his view, through overemphasizing the conspiracy charge and consequent downplaying of crimes against humanity, Nuremberg “appears to have been both boring and illiberal at once, on many accounts.”¹⁵⁴ Thus mis-focus, in his view, made Nuremberg stress on the responsibility of a handful of accused top Nazi leaders, and therefore fall short of the potential benefits displayed in subsequent legal attempts to come to terms with collective overcoming of consequences of mass atrocities.

However, despite such words of caution and harsh criticism, it would be fair to pose the question, would such other opportunities appear if it were not for Nuremberg? In subsequent trials which have drawn heavily upon the Nuremberg legacy, whether they operated in the national or international framework, whether their subject matter was concerned with war crimes, crimes against humanity or different types of gross human rights violations, the nexus between historical narrative and legal interpretation was acknowledged as unavoidable or even a desirable element of rendering justice. Hence preconditions were created employ history, and eventually even historians, in order to determine the legal difference between what had happened, and what ought to have happened in the past. In that respect, Michael Marrus considers Nuremberg a turning

¹⁵⁴ Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Brunswick and London : Transaction publishers, 2000). 6-9, 91, 97-100. Reargued in Mark Osiel, “In Defense of Liberal Show Trials – Nuremberg and Beyond”, in Mettraux (ed.), *Perspectives on the Nuremberg Trial*, 704-728.

point which “at its best moments, set an example for a kind of historical judgment – impartial, but not necessarily dispassionate; fair-minded, but not without moral compass; searching in quest of truth, while recognizing the formal limitations that attend to the endeavor in an adversarial proceeding. Nuremberg was not perfect, by any means, and it is possible to believe that its warts and blemishes – or even his structural faults – may be the most important things to discuss today. But most would agree that there are other dimensions too and that some of these speak to our efforts to understand the history of our time.”¹⁵⁵

Tipping off the sensitive balance between history and law by breaching their presumed incompatibility stands out among those dimensions, as observed by Shoshana Felman: “Trials have always been contextualized in – and affected by – a general relation between history and justice. But they have not always been judicially concerned with this relationship. Until the middle of the twentieth century, a radical division between history and justice was in principle maintained. The law perceived itself either as ahistorical or expressing a specific stage in society’s historical development. But law and history were separate. The courts sometimes acknowledged they were part of history, but they did not judge history as such. This state of affairs has changed since the constitution of the Nuremberg tribunal, which for the first time called history itself into a court of justice ... In the wake of Nuremberg, a displacement has occurred in relationship between history and trials. Not only has it become thinkable to put history on trial, it has become judicially necessary to do so.”¹⁵⁶

¹⁵⁵ Michael Marrus, *op.cit.*, 254. Cf. Michael Marrus, “Nuremberg as ‘a turning point’. The Holocaust at Nuremberg”, *Yad Vashem Studies* 26 (1998), 6.

¹⁵⁶ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*. (Cambridge : Harvard University Press 2002), 11-12.

The nesting of historical expert witnessing took over half a century. Those eventful five decades brought about important changes. On the wave of the forensicisation of different sciences around the turn of the century, historians testified in a number of prominent trials. Their sporadic appearances however revealed many conceptual tensions between history and law. A number of problems in the legal use of historical expertise came to light. The advent of nationalism and its impact on the fragile historical method in the interwar period delivered a further blow to historical expertise. It deepened the divide between history and law and had given rise to the theory of their complete incompatibility. However, the ambiguities of the period were also reflected in the tendency to induce social change by righting the wrongs of the past. Such aspirations were particularly exacerbated by the Second World War. The defeat of the Tripartite Pact was reflected in the creation of sets of institutions proclaiming the shift towards universal human rights. This attempt to make a discontinuity opened up a wave of legal activity for dismantling the exterminationist nationalism embedded in 'scientific racism'. In the aftermath of the Nuremberg trial, this setting reopened the way for the institutionalization of historical expert witnessing.

Chapter Two

INSTITUTIONALIZATIONS

But what of historians? How did they fit into a postwar landscape changed by shifting relations between history and law? This chapter aims to contribute to the understanding of historical expert witnessing by examining the dramatic transformation in the role of historians in the postwar period. It tracks two simultaneous streams of developments, one appearing in the inquisitorial legal setting of continental Europe (II.1), and the other in the adversarial legal system in the USA (II.2). Noting the important differences between those contexts, this chapter analyzes the change in the relationship between law and history in the aftermath of the Second World War as a neglected, yet important, influence on the institutionalization of historical expert witnessing.

II.1 Inquisitorial Paradigm

Historical Expert Witnessing in the Shadow of Nazism

In continental Europe, Nuremberg did not stand for the definite showdown with the crimes of the Second World War, but was intended as one of the steps toward their investigation and prosecution. In the process which was anything but linear, national judiciaries of continental Europe were picking up this task, establishing specific statutory clauses and different procedural elements, but also introducing new forensic elements in an attempt to struggle with the scope of the state sponsored atrocities that occurred in the occupied Europe. Not only lawyers, but politicians and scholars took part in this massive and complex endeavour, which later came to be known as *Aufarbeitung der Geschichte*,

or *Vergangenheitsbewältigung*, or facing the past, or dealing with the past. However, in the immediate postwar period both actions, intentions and outcomes were much more confused and ambivalent, reflecting the need to do something, but not necessarily emitting clear awareness on what is to be done.

II.1.1 Historiography after Nuremberg

The Nuremberg trial evolved from this shifting ground to become a landmark in juridical memory making. Its importance for the reconfiguration of relationship between history and law was observed by Shoshana Felman: “Nuremberg did not intend, but has in fact produced, this conceptual evolution that implicitly affects all later trials, and not only the tradition of war crimes and of international criminal law. In the second half of the twentieth century, it has become part of the function of trials to repair judicially not only private but also collective historical injustices.”¹ And yet, the Nuremberg trial, that “greatest historical seminar ever held” – was a seminar held in the absence of historians. In spite of the obvious desire of the prosecution to put history to trial, the tension between legal and historiographical take on the past was still implicitly understood as incompatibility strong enough to make the expert role for historians inconceivable. In Nuremberg, the desire of Chief Prosecutor Robert Jackson to base the indictment on documents, rather than on witness accounts had resulted in avoiding expert witnessing almost altogether, let alone expert witnessing which might be considered legally problematic or methodologically unsound. With much lingering, as David Bloxman

¹ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*. (Cambridge : Harvard University Press 2002), 12.

observes, “Jackson was prepared to admit Chaim Weizmann, the later President of Israel, as an expert witness for the prosecution on the murder of Jews, but only on the condition of prior presentation of a carefully prepared statement; Weizmann demurred.”² After his decline, no other experts were even considered.

Historians have therefore played an auxiliary role in Nuremberg, assisting occasionally in the preparation of the cases with their language skills and familiarity with the archival material. Important preliminary research for the Nuremberg trial was conducted by Colonel Tommy Thomson, Librarian in the British Foreign Office and Dr W.R.Perkins from the State Department, editor of *Foreign Relations of United States*, who were rushing through the abundance of captured German papers, checking their authenticity and sorting the documents of evidentiary value for the trial with the aid of a number of younger historians. Particularly important in this respect were young experts on Germany from the Anglo-Saxon area. Some of them were professionally shaped by the Nuremberg experience, as Peter Calvocoressi. Only on extraordinary occasions were historians part of larger forensic undertakes, such as the pursuit for Hitler’s corps, conducted by British historian Hugh Trevor-Roper, who subsequently published an important book about the last days of Adolph Hitler.³

² David Bloxham, op.cit, 67. The deliberation on Weizmann was described by Michael Marrus: “In August, Jackson apparently agreed to call Chaim Weizmann, the venerable president of the World Zionist Organization, to testify at Nuremberg. Weizmann, it was hoped, would prepare a 15,000-word statement and would address the tribunal for about three hours. Ultimately, the idea was dropped. The British, apparently, objected to Weizmann’s testifying, fearing that the Zionist leader would embarrass them with reference to the White Paper on Palestine. Weizmann, too, was uncertain about the wisdom of an appearance ... Aged and frail, the Jewish statesman was unhappy with the material that had been prepared for him ... and was unwilling to subject himself to cross-examination “without being adequately prepared.” In contrast to David Ben-Gurion who was enthusiastic about the idea, Weizmann hesitated. He wanted to bring to bear additional research and sought to put off an appearance before the tribunal.” Michael R. Marrus, *The Holocaust at Nuremberg*, 9.

http://www1.yadvashem.org/download/about_holocaust/studies/marrus_full.pdf

³ Peter Calvocoressi, *Nuremberg The facts, the law and the consequences* (New York: MacMillan, 1948); Hugh Trevor-Roper, *The Last Days of Hitler* (London : Pan Books, 2002). This is the last of numerous

Could historians contribute more? The experience with the role historians had played in the *Kriegsschuldfrage* spoke against their involvement. However, the immediate postwar years brought about an unprecedented change in the institutional setting, methodology, heuristics and the basic sensibility on which historical studies were based. According to Harold Berman, the creed that the “history was to be objective, but it was to be national history”, was getting increasingly obsolete: “In the twentieth century there has been some change in this respect ... Even European legal history came to be treated in transnational terms.”⁴ Important stride was made to get out of the constraints of the framework of national historiographies, which were increasingly seen as straight-jackets that prompt xenophobia and chauvinism. “The years following the Second World War saw a return to forms of cooperation and communication between historians from countries previously at war with each other.”⁵ Such initiatives were backed by UNESCO already at its first sitting in 1946 in Paris, which urged to collect the documents regarding writing new history textbooks. Council of Europe motivated similar ventures. Bilateral cooperation was encouraged, and some degree of multilateral activity was reestablished with the continuation of the International Commission for Historical Studies.⁶ More importantly, the atrocities of the Second World War prompted certain remoralization of historiography and have contributed to the erosion of both theory of distance and strict value/fact division in historical scholarship. In the light of an unprecedented horror of the

editions of the study based on Roper’s report published firstly in 1947. Recent article analyses the role of Roper as a young historian and officer of the Intelligence service given the assignment to compile an account confirming Hitler’s death. D.Marchetti et alia, “The Death of Adolph Hitler : forensic aspects”, *Journal of forensic sciences*, 50 (2005): 178-212.

⁴ Harold J.Berman, *Law and Revolution. The Formation of the Western legal Tradition*, Harvard Unvieristy Press, Cambridge, Mass, 17.

⁵ Martina Cattaruzza, Sacha Zala, “Negotiated history? Bilateral historical commission in the 20th century Europe”, in Harriet Jones, op.cit, 125.

⁶ George Ioan Bratianu, *L'organisation de la paix dans l'histoire universelle : des origines a 1945* (Bucureşti : Editura Enciclopedica, 1997)

Second World War, the responsibility of the historian was getting redefined. The great European defeat caused prominent historians to write about the drama of their own times, such as Marc Bloch's *Strange defeat* (1940) or Friedrich Meinecke's *German Catastrophe* (1946). The tone of those writings was dramatic, and the wording occasionally judicial: "Many a German reader who agreed with me in condemning Hitlerism will find too severe my criticism of the German bourgeoisie and Prussian-German militarism, and will want to plead 'extenuating circumstances' for both. As if I had not always weighed such considerations in my mind!", wrote Friedrich Meinecke.⁷ In vain - the role of historians as producers of 'mitigating circumstances' for failed national projects their respective states was beginning its slow end.

The change also came from the craft, with the definite establishment of contemporary historiography. The idea that historians could legitimately explore their own epoch was preconditioned by the unprecedented availability of historical sources, disclosed on the Nuremberg trial, published in various government-sponsored editions, printed in memoirs of the protagonists or seized and made available by the victorious Allied forces. Alan Bullock systematized this "combination of circumstances powerful enough to overcome these drawbacks and the doubts and inhibitions they create and to attract men and women, who could perfectly well have made a reputation in the study of other periods of history, to work in a field so full of pitfalls." All of those circumstances were in connection to the Second World War: "First, interest. The events through which we have lived since 1914 seem to me to exceed in sheer magnitude, pace and intensity those of all but a few periods of history ... Second, a sense of urgency – a conviction that

⁷ Friedrich Meinecke, *The German Catastrophe: Reflections and Recollections*, (Boston : Beacon Press, 1963), xi.

there were facts to be revealed (the facts about the concentration camps, for instance) and lessons to be drawn (such as the price of appeasing the Nazis) ... Third, luck. The capture of the archives of the German Government and the evidence brought to light in the war crimes trials opened up, as never before so soon after the event, the secret history of twelve of the most dramatic years of European history ... Fourth, experience. The war brought many academics out of their university environment and involved them, whether in the forces, in intelligence or propaganda work, government departments, or in the Resistance, in events which they have later gone back to study and write about ... Fifth demand ... for accounts of the history of our own time and the events of which have powerfully influenced the lives of all of us.”⁸ All those factors contributed to this enormous change.

There were strong heuristic facilitators of this interest. The governmental practice of publishing selected sources, established in the course and immediate aftermath of the First World War, was continued with greater zeal, leading to large collections such as *Foreign Relations of United States*, *Documents diplomatiques français* and *Documents on British Foreign Policy*. More importantly, the pressure to lift the customary ban on access to archival sources was growing. In some states, 50 years ban was introduced. In others, it was lowered on 30 years for ordinary, and 50 years for sensitive documents.⁹ Additionally, substantial parts of the captured German archives soon became available in

⁸ Alan Bullock, “Introduction”, in: Donald Cameron Watt (ed.), *Contemporary History in Europe*. (London : George Allen and Unwin Ltd. 1969), 11-3.

⁹ For the overview of official publishing of documents in France see Monique Constant, *Documents diplomatiques français*, <http://www.diplomatie.gouv.fr/fr/IMG/pdf/ECfrance.pdf> The struggle over the time barrier of the holdings of the Public Record Office in Great Britain in L.J. Buttlar, Anthony Gorst, *Modern British History*, (London : I.B. Tauris, 1997), 35-9. In Britain the access was regulated with the Public Record Act of 1958, which introduced 50 years ban, but was amended in 1967 to accommodate the 30 year ban. On challenges in the less regulated research environments of continental Europe see Leo Kahn, Some problems of research in European Archives, in Cameron Watt, op.cit, 339-345.

the holdings of the Public Record Office of Great Britain and in United States National Archives.

Creation of new historical institutions to support this interest provided the necessary infrastructure for the new role of historians. In France, that was the Committee for the History of the Second World War, with its *Revue d'histoire de la deuxième guerre mondiale*. The committee was internationalized in 1960 with the help of the International Committee of Historical Sciences. In Italy, there was Istituto Italiano per gli Studi Storici 'Benedetto Croce' (1947), in The Netherlands Institute for War Documentation (1945). In Germany, 'Franco-German Agreement on Controversial Issues in European History' from 1951 led to the creation of Georg Eckert Institut in Braunschweig. Similar motivations led to the creation of the Institut für Europäische Geschichte in Mainz (1950) and Institut für Zeitgeschichte in Munich. The latter was formed already in 1948, and its first name "Deutsches Institut zur Erforschung der nationalsozialistischen Zeit" was clearly addressing its purpose in researching the totalitarian experience of recent German history. The Institute was the most active in plethora of new institutions such as Research Institute for the History of National Socialism at Hamburg, The Commission for the History of Parliamentary and Political parties in Bonn, The Office for Research into Contemporary Military history in Freiburg and others. One might agree with Olivier Dumoulin that Europe was experiencing nothing less than the emergence of "a combatant historiography after 1945."¹⁰

¹⁰ Olivier Dumoulin, op.cit, 306-312. Among surprisingly rare overviews of this development: Cameron Watt, op.cit; Anthony Seldon, (ed.), *Contemporary History. Practice and Method*. (New York : Blackwell, 1988); More in Gabriele Metzler, *Einführung in das Studium der Zeitgeschichte*. (Paderborn : Ferdinand Schöningh 2004), 22-4. More about the self-understanding of the role of Institut für Zeitgeschichte, *Selbstverständnis, Aufgaben und Methoden der Zeitgeschichte*, (München : Institut für Zeitgeschichte 1972). More on Central Station in Erich Haberer, "History and Justice: Paradigms of the prosecution of Nazi crimes", *Holocaust and Genocide Studies* 19 (2005): 487-512.

But was there any relevance of this change for legal reckoning with the Nazi past? In Germany, which was in the forefront of this institutional reshuffling, the transformation came at the time when legal dealing with the past was withering away. The statistics of war crimes related judgments in postwar Germany were telling: 23 (1945), 238 (1946), 816 (1947), 1819 (1948), 1523 (1949), 809 (1950), 259 (1951), 123 (1952), 123 (1953), 44 (1954), and in 1955, as a consequence of the Adenauer's policy of clemency only 21 verdicts appeared.¹¹ To the degree, history was struggling to pick up where courts were reluctant. "The common assumption was that the court cases would soon come to an end" but "plans for larger research projects on these topics, which had been developed at the new Munich Institut für Zeitgeschichte from 1951 onwards, finally did not succeed.", writes Diether Pohl.¹²

However, historiography was by no means in accord on the shape of its involvement in legal process. In the subsequent Nuremberg trials, only one historian submitted his expert report for the defense. It was Hans-Günther Seraphim, lecturer in Göttingen, who testified for the defense in the Nuremberg Einsatzgruppe case (United States v Otto Ohlendorf and others) in 1947-8.¹³ However, as far as the trials conducted in German courts are concerned, "it is difficult to establish the first *criminal* court case on Nazi crimes, in which a historian was asked to testify."¹⁴ It might be that it was Seraphim himself. He was one of the first German historians to address the implications of the war crimes trials for research of contemporary history, though in a rather apologetic way.

¹¹ The statistics Adalbert Rückerl, *NS-Verbrechen vor Gericht*, (Heidelberg : Müller Juristischer Verlag 1982), 329.-332; Norbert Frei, *Adenauer's Germany and the Nazi past : the politics of amnesty and integration*, (New York : Columbia University Press, 2002)

¹² Diether Pohl, *Prosecutors and Historians. Holocaust Investigations and Historiography in the Federal Republic 1955-*, manuscript of the paper presented at the conference "Justice and the Holocaust" at Yad Vashem in Jerusalem in December 2006, 1.

¹³ Rebecca Wittmann. *Beyond Justice*, (Cambridge: Harvard University Press, 2005), 80.

¹⁴ Diether Pohl, *op.cit.*, 1.

Seraphim was engaged in late 1948 by the Düsseldorf public prosecutor's office for a trial against the former Gauleitung which took place in Wuppertal in 1950, as well as in the 1952 Remer trial, giving the background of Remer's activities in crushing the July 20th plot in 1944.¹⁵ Seraphim continued testifying and writing about the post-war cases as well, being particularly critical at the Nuremberg trials. He was also engaged in a public debate over the nature of Hitler's attack on Soviet Union, which he considered to be a preventive measure. This made him an expert in high demand with the defence in the German postwar cases, and an author of a number of expert reports and affidavits. Yet, the situation changed in the second half of the 1950's. Investigations of prosecutor Erwin Schüle, leading eventually to the famous Ulm Einsatzgruppen trial, made him contact the deputy director of the Institut für Zeitgeschichte, Helmut Krausnick, who testified in this case alongside with Seraphim in 1958.¹⁶ Diether Pohl gives an account of this extraordinary development: "The Ulm trial was an outstanding case, considering the situation in the Bundesrepublik at the time. It has been termed the turnaround in legal investigations, since it contributed to the establishment of the Zentrale Stelle (German Central Investigative Agency for War Crimes formed in Ludwigsburg in 1958) soon afterwards. This institution paved the way for a new kind of cooperation between historians and prosecutors. During the first days of 1959, the newly appointed prosecutors in Ludwigsburg, under the leadership of the Ulm chief investigator Schüle, started

¹⁵ Details in Dieter Pohl, 2-3. See also Hans-Günther Seraphim, "Nachkriegsprozesse und zeitgeschichtliche Forschung", in: Hans Kruse and Hans-Gunther Seraphim, *Mensch und Staat in Recht und Geschichte: Festschrift für Herbert Kraus*, (Kitzingen/Main: Holzner-Verlag, 1954), 436-455

¹⁶ Hans-Günther Seraphim, Expert testimony on "Special Treatment" and 14f13 (10 May 1960), *Generalstaatsanwaltschaft Frankfurt/M.*, JS 20/61, vol. I/3 (44). Also Hans-Günther Seraphim, Expert Report on the duty of obedience of SS leaders, particularity with regard to orders to murder (1960), Wiener Library 650, www.wienerlibrary.co.uk/archivearhchive650html Krausnick's contribution is published in *Gutachten des Institutes für Zeitgeschichte*, (München : IFZ 1958). On the differences in approaches of Krausnick and Seraphim see Witmann, op.cit, 78-82

systematic investigations on all Nazi crimes, an enormous task with very little information available Since no historian was employed at Ludwigsburg, the small group of prosecutors had to start as Schüle had done three years before, namely with the historical basics like the published Nuremberg Trial proceedings and documents. In addition, they reviewed the files of older Nazi Crimes cases. But soon the situation began to change. Since the late 1950s, the majority of German documents which had been captured by the Western Allies were transferred to the Bundesarchiv and its military branch. And due to the arrest of Adolf Eichmann, public interest in Nazi Crimes rose enormously.”¹⁷

Among the less observed aspects of the advent of juridical memory making was a visible transformation in the realm of historical expert witnessing. It took about fifteen years after the Nuremberg trials for it to occur, as historians stepped out of the traditional role of authentication of documents and assumed the much wider function of contextualization of the cases. Due to the desire of prosecutors to reenact the spectacular setting of the Nuremberg trial, and due to the span of time that allowed contemporary history to get a grip on the events of the Second World War, historians have finally fully entered the courtroom. The definite debut of the new type of historical expert witnessing could hardly have happened in a more dramatic legal context. It occurred in two generically similar and practically coinciding proceedings paradigmatic for the practice of juridical memory making – the Eichmann trial and the Frankfurt Auschwitz trial.

¹⁷ Dieter Pohl, op.cit, 3. On the history of Central Station see Eberhard Rundholz, „Die Ludwigsburger Zentrale Stelle zur Aufklärung des nationalsozialistischen Verbrechen“, *Kritische Justiz* 20 (1987), 207-213; Alfred Streim, „Zur Grundung, Tätigkeit und Zukunft der Zentralen Stelle der Landesjustizverwaltungen zur Aufklärung von NS Verbrechen“, in Claudia Kurtsidis-Haider, Winfried R.Garscha (ed.), *Keine „Abrechnung“ NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945*, (Leipzig/Wien : Akademische Verlangsanstalt, 1998), 130-143. Firsthand account of a longstaning director: Adalbert Rüeckerl, *NS-Verbrechen vor Gericht*, (Heidelberg: c.f.Müller Juristischer Verlag 1982), 329.-332.

II.1.2 The Eichmann Trial

In March 1961, in a Jerusalem courtroom, Adolf Eichmann was read 15 counts of indictment, including crimes against Jewish people, crimes against humanity and membership in criminal Nazi organizations. In effect, he stood accused of organizing, overseeing and perpetrating the Holocaust. The importance of the trial, and particularly its educational potential, was publicly announced by the Israeli Prime Minister, David Ben Gurion, who considered it an indispensable opportunity “that our youth remember what happened to the Jewish people”. The prosecutor, Gideon Hausner, shared this outlook by preparing a trial that would “bring the youth closer to the nation’s past”.¹⁸ The trial was indeed meant to repeat the Nuremberg judicial memory making venture, but also to revise much of it by stressing the uniqueness of the Holocaust as the crime of crimes of the Nazi regime.

To such an end, the prosecution, in the course of this single criminal trial, embarked on the large task of revealing the development of the anti-Semitic policies in Germany and the mechanism of the annihilation of the Jews. Israeli criminal procedure was leaving the space for doing so through the introduction of expert testimony.¹⁹ A prominent place in this venture was reserved for a historian from University of Columbia,

¹⁸ Ben Gurion quoted in: Hannah Arendt, *Eichmann in Jerusalem*, 8; Hausner quoted in Lawrence Douglas, *The Memory of Judgment*, 3. Pedagogical and theatrical aspects of the Eichmann trial are discussed in Shoshana Felman, “Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust”. *Critical Inquiry* 27 (2001), 201-240.

¹⁹ Being a mixture of common and continental law, Israeli criminal procedure allowed for the expert witness to be recommended by the prosecution, which is an adversarial trait. However, once in court, he testified as a witness to the court, which is inquisitorial. Eliahu Harnon, “Criminal Procedure and Evidence”, *Israel Law Review* 24 (1990), 592-621.

Professor Salo Baron, the founder of Jewish studies in the United States.²⁰ This choice was made in consultations among Ben Gurion, Hausner, foreign minister Golda Meir and other high ranking government officials, which is very indicative of the importance attached to Baron's intended role.²¹ This role was very different from the historians' customary function as authenticators. Baron was contacted and advised to compile in secrecy no less than the report on the state of European Jewry before and after the Second World War. He came to Jerusalem from his university in an equally secretive manner, waiting for the trial to commence. Baron appeared among the first witnesses for the prosecution, testifying through two lengthy sessions. Being aware of the uniqueness of his role, he began his testimony with a methodological justification of his position:

“I appear here as a witness, not an eye-witness or a jurist, but as a historian. It is known that a historian who studies contemporary history is always confronted with a double problem. The first problem is: Does one already have a historical perspective? Generally, one does not, until the passing of several decades, at least. The second problem is: Does one have documents? These are usually locked away and not available and one does not know about events that happened until 50 years later or more. It seems to me that precisely in this regard, there is a difference. The period before the Second

²⁰ More on Baron's life in Robert Liberles, *Salo Wittmayer Baron: Architect of Jewish History*. (New York : NYU Press 1995). His activity on the trial: *ibid*, 322-337.

²¹ The choice was complex and painful. In fact, the Israeli government contacted a number of other scholars as well, but could not reach an agreement. The choice of Baron was bold as his approaches to Jewish history were known as innovative and nonconformist: Ismar Schorsch, 'Chancellor's Parashah Commentary', <<http://www.jtsa.edu/community/parashah/archives/5757/behukkotai.shtml>> (accessed on 30.6.2006) After several failures, in December 1960, Minister of justice Pinchas Rosen instructed the Israeli consul general in New York to approach Baron and ask him to prepare the primary evidence on the effects of the Holocaust on Jewish life in Europe. Baron accepted, as he was both interested and informed, During the late interwar period and wartime, he had coordinated the efforts to document the scope of the damage to the European Jewish communities. Liberles, 318-323. Although he was an undisputed authority, Ben Gurion noted his concerns in a diary entry: "Concerned about his testimony. I told him that it is important to show to the younger generation (and also to the rest of the world) how great was the qualitative loss in the destruction of six millions...", Quoted in Liberles, 330.

World War is so remote from this generation, and sometimes so forgotten even by people who lived through it, that already, it seems to me, we have a historic perspective which usually is lacking in such cases. And with regard to documents, perhaps we are fortunate in that many of the German archives were captured by the Allies and many of them have already been published. Also many of the participants in these events wrote diaries, autobiographies and so on and the material accumulated at such a pace that there is perhaps need for a vast bibliography, merely to have on record the large number of these manifestations.”²²

This statement of methodological optimism regarding both the heuristic problems and the issue of scholarly distance was followed by the first session of his testimony dedicated to the milieu in which the interwar European Jewry lived. Baron testified with respect to economic conditions, demographical tendencies, cultural contribution and political diversity in various Jewish communities in Europe, underlining “the exceptionally vital and creative force of the Jewish world in Europe of that time”.²³ He was also testifying about the pressure under which European Jewry was at the time, providing historical examples of the development of anti-Semitism in Europe, with special emphasis on the extreme emanations of hatred in Germany in the thirties. He emphasized the continuity of the anti-Semitic sentiments in European culture, but had stressed the murderous novelties brought about by Nazism. In the second session, Baron contrasted the previous account with the chilling description of the destruction of the

²² Transcripts of Baron’s testimony are available at The Nizkor Project, The Trial of Adolf Eichmann, Session 12 and Session 13, <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-012-03.html>> (accessed on 26.6.2006). They were subsequently published in Salo W Baron, “European Jewry before and after Hitler, Responses at the Eichmann Trial”. In: *American Jewish Yearbook* 63 (1962). It was reprinted as a book entitled *From a Historian's Notebook: European Jewry before and after Hitler* (New York: American Jewish Committee, 1970).

²³ The Nizkor Project, The Trial of Adolf Eichmann, Session 12, Part 4.

European Jewish communities. He calculated both the factual and the demographic loss in the course of the Holocaust (the factual loss estimated to be 6-7 million and the demographic 8 million people), dramatically claiming that “the Jewish people would have now totaled about 20,000,000 souls or more. Instead of 20,000,000 there are 12,000,000.”²⁴ He concluded the testimony by tracking the dynamics of the Nazi conquest of much of Europe and the consequent spillover of their policy of extermination. He also warned in dramatic tone that if Hitler’s movement appeared in the age of Bismarck, before the great Jewish migration, “the genocide of the Jewish people would have been almost total.” Eichmann’s name was not mentioned in Baron’s account. His purpose was to provide the general context in which the individual criminal responsibility of the accused was to be situated. This prompted one of the observers of the trial, the Dutch writer Hary Mulisch, to comment: “It was longwinded and interesting and professor-like, but I fail to see what does it have to do with Eichmann.”²⁵ The other, more elaborate critical account was offered by no other than Hannah Arendt, otherwise Baron’s junior colleague and long-lasting friend.²⁶ It was given within the overall frame of her criticism of the trial in which, according to her, “it was history that, as far as the prosecution was concerned, stood in the center of the trial”. She deplored this for, in her view, it was “bad history and cheap rhetoric. Worse, it was clearly at cross-purposes with putting Eichmann on trial...” She concluded that the prosecution misused Baron by

²⁴ The Nizkor Project, The Trial of Adolf Eichmann, Session 13, Part 1

²⁵ Harry Mulisch, *Criminal Case 40/61, The Trial of Adolf Eichmann: An Eyewitness Account*. (Philadelphia : University of Pennsylvania Press 2005), 63-64. More favorable eyewitness account: Moshe Pearlman, *The Capture and Trial of Adolf Eichmann*. (New York : Simon and Schuster 1963), 227-233.

²⁶ Baron helped Arendt’s intellectual socialization in the United States, and despite their differences in interpretation of Jewish history, they remained close friends. Liberles, *op.cit*, 8-11.

putting him on the stand, and allowing the defense to redirect the attention from Eichmann's individual responsibility to the murky issues of philosophy of history.²⁷

And indeed, such a broad contextualization opened up a space for unpleasant lines of questioning in cross-examination, carefully used by Eichmann's lawyer, Dr Robert Servatius.²⁸ In a protracted conversation with Baron, not deprived of scholarly overtones, filled with references to authors such as Hegel, Spengler, Marx and others, Servatius was dwelling on the subject of agency in history. He attempted to point out, and on occasions even got Baron's support for his views, that large historical events such as the Second World War or genocide cannot be seen exclusively through the lenses of human agency. He was even trying to put forward the idea that, in phenomena such as anti-Semitism, "irrational motives are at the root of the fate of this people, something beyond the understanding of a human being".²⁹ By implication he also asserted that no single human (not even Eichmann) can bear full responsibility for such dramatic, all-comprising events which are to be seen as history at work. Baron's response exemplified the (in)compatible division of labor between the judges and historians:

Witness Baron: "This is not a historical question, but more a legal question. To what extent an individual person who is not a leader is also responsible in the historical sense - there is no doubt that sometimes insignificant people have much more influence on the course of history than their importance to the state warrants."

Presiding Judge: "Why do you refer to this as a legal problem? This is not clear to me."

²⁷ Arendt, op.cit, 16. Arendt's views are examined in details in Steven E. Ascheim, *Hannah Arendt in Jerusalem*, (Berkeley : University of California Press, 1999). She was particularly suspicious of the deterministic peril inherent to linear view on history: "It is true that in retrospect – that is, in historical perspective – every sequence of events looks as though it could not have happened otherwise, but this is an optical, or rather, an existential illusion. Quoted from Barry Sharpe, *Modesty and Arrogance in Judgment. Hannah Arendt's Eichmann in Jerusalem*, (Westport : Praeger 1999), 53

²⁸ Criminal law of Israel attaches great importance to "cross-examination as an invaluable tool for the discovery of the truth ... in the criminal trial ... viewed as one of the fundamental rights of a defendant." Harnon, op.cit, 604.

²⁹ The Nizkor Project, The Trial of Adolf Eichmann, Session 13, Part 2.

Witness Baron: “I thought that here there was a question whether there is a distinction between a leader and an ordinary person as to whether he is responsible for changes in history or not.”

Presiding Judge: “Let us perhaps leave that to the jurists.”

Witness Baron: “Quite right.”³⁰

Although such intervention was of no great relevance for Eichmann’s verdict (he was sentenced to death), it did point out the dangers of the broad contextualization of the case against an individual perpetrator, and on the necessity of balancing the need for a background of the case with the issue of legal relevance. Judgment was echoing this confusion, as it was reflecting the need of the judges to maintain a clear borderline between the tasks of historians and jurists, mixed with the awareness of the exceptionality of the case at stake: “The desire was felt – understandable in itself – to give, within the trial, a comprehensive and exhaustive historical description of events which occurred during the Holocaust ... There are also those who sought to regard this trial as a forum for the clarification of questions of great import ... In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves.”³¹

However, despite these restraints, and despite barely mentioning Baron by name, the judgment did introduce much of the context he brought into the courtroom,

³⁰ Ibid.

³¹ The Nizkor Project, The Trial of Adolf Eichmann, Judgment, <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-001.html>>

particularly his findings on the scope of the genocide. His expose was, however, used selectively, as the judges could not have been expected to consciously subscribe to the memory making. However, even if his report was to be omitted completely, having in mind the publicity the trial gained, its didactic impact would be secured by his mere appearance and the delivery of the testimony.

In a similar gist, the judges of the Supreme Court to which the decision was appealed refused the request of the defense to hear additional witnesses, among others a historian, Hans-Günther Seraphim. Dr Servatius wanted him to testify «that according to his findings as a historian of the Nazi period in Germany (a) applications for transfers from one post to another were not allowed as a matter of principle and involved the risk of disciplinary penalties. (b) that any open refusal to obey orders was punished by death, and that therefore no resistance was offered to unlawful orders. The examination of the Witnesses is relevant, inter alia, as against the statement made by Witness Six, who was examined in the Court of First Instance and stated that if the Accused had refused to obey orders, he would not have risked life and limb.»³²

In a hearing, Servatius mentioned that «Mr. Serafim (sic!), lecturer at Göttingen University ... has testified in many trials, and according to reports in newspapers, he gave information about executions by shooting which actually took place.»³³ At the rebuttal, Prosecutor Hausner mentioned that he himself intended to «hear Dr. Serafim as a witness on Eichmann's possibilities of being relieved of his duties and to submit Dr. Serafim's

³² The Nizkor Project, The Trial of Adolf Eichmann, Judgment, Additional Written Pleadings Submitted to the Supreme Court by the Attoreny for the Appellant Adolf Eichmann <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Pleading-02-01>

³³ Appeals Session www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Appeal//Appeal-Session-02-02

expert opinion, which was prepared for a German court on this matter ... And I even said that I was prepared to bring him to Israel to testify. At the time Counsel for the Defence objected to this, inter alia, arguing that Serafim was only a lecturer, and not a university professor”.³⁴ Persuaded, the Supreme Court ruled that it «saw no reason to grant the Appellant's application to hear the witness at this stage.»³⁵ In fact, it was exactly the prolific nature of Seraphim's expertise which discredited him as a potential witness.

In the last instance on the 25 May 1962, the judges of the Supreme Court concluded that «when, in 1950, the Israel legislature provided the maximum penalty laid down in the law, it could not have envisaged a criminal greater than Adolf Eichmann, and if we are not to frustrate the will of the legislature, we must impose on Eichmann the maximum penalty provided in Section 1 of the Law, which is them penalty of death. The fact that the Appellant - by a variety of ruses, escape, hiding, false papers, etc. - succeeded in evading the gallows that awaited him, together with his comrades, at Nuremberg, also cannot afford him relief here, when at long last he stands his trial before an Israeli Court of Justice. We have therefore decided to dismiss the appeal both as to the conviction and the sentence, and to affirm the judgment and the sentence of the District Court.»³⁶ Concluding that the accused was given a fair trial, both of the instances confirmed the death sentence which was duly executed, aided with the sentiment that justice was rendered not only to Eichmann, but also for the countless victims of the Holocaust. It was exactly such outcome that was feared by Hannah Arendt, who

³⁴ Appeals Session www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-05-02

³⁵ Appeals Session www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Appeal//Appeal-Session-07-08 See more on this decision in Elihu Lauterpacht, *International Law Reports*, (Cambridge : Cambridge University Press 1963) , vol 36, 319-321.

³⁶ Appeals Session www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Appeal//Appeal-Session-07-09

famously noted that the “justice demands that the accused be prosecuted, defended and judged, and that all the other questions of seemingly greater importance – of ‘How could it happen?’ and ‘Why did it happen?’, of ‘Why the Jews?’ and ‘Why the Germans?’ ... be left in abeyance”.³⁷

II.1.3 The Frankfurt Auschwitz Trial

Arendt’s critical account of the Eichmann trial was published in 1963, which was too late for the Attorney General of Hessen, Fritz Bauer, to read it, as in that year a team working under his supervision completed investigations and presented an indictment against 22 officers and guards of the infamous Auschwitz concentration camp. However, even if he had had that chance, he would hardly be influenced by her standpoint, as exactly those questions Arendt was wishing be to be left in abeyance were at the centre of his attention. Dissatisfied with a stalemate in legal reactions to the crimes against humanity committed in Nazi Germany, he was for some time launching a set of initiatives towards the prosecution of Nazi war criminals. Bauer was not only a persistent promoter of the Eichmann trial in Germany, but he also provided the Israeli government with information on his whereabouts in and requested from the government to demand his extradition to Germany.³⁸ Much like Erwin Schüle in the Ulm trial, he was trying to undermine the culture of impunity in West Germany.

³⁷ Arendt, *op.cit.*, 232.

³⁸ Irmtrud Wojak, *Fritz Bauer: Stationen eines Lebens*, <http://www.fritz-bauer-institut.de/texte/essay/07-98_wojak.htm> (accessed on 26.6.2006). Bauer’s own recollections are gathered in Fritz Bauer, *Die Humanität als Rechtsordnung. Ausgewählte Schriften*, (Frankfurt am Main : Campus Verlag, 1998). More on Bauer: Matthias Meusch, *Von der Diktatur zur Demokratie. Fritz Bauer und die Aufarbeitung der NS-Verbrechen in Hessen (1956-1968)*, (Wiesbaden: Historische Kommission für Nassau, 2001). The memoirs of participating prosecutors are collected by Thomas Horstmann, Heike Litzinger *An den Grenzen des Rechts. Gespräche mit Juristen über die Verfolgung von NS-Verbrechen* (Campus Verlag, Frankfurt am Main 2007)

As those initiatives were stumbling over the unwillingness of Adenauer's government to open a debate about the recent past, he grew determined to reopen it through a trial, which came to be known as the Frankfurt Auschwitz trial.³⁹ "Bauer's intentions were not strictly judicial but more broadly historical as well. Quite explicitly, beyond his concern with individual cases, Bauer wanted to bring to task a whole era, an entire ideology.", comments Rebecca Wittmann.⁴⁰ Such a motivation, being similar to the ones of Ben Gurion and Hausner, brought about a similar result – the prosecution commissioned expert reports, as early as 1961, from historians of the Institute for Contemporary History in Munich.⁴¹ Not by chance, as the Institute was among the new scholarly institutions dedicated exactly to the research of the Nazi period. Its leadership was at the time attempting to increase its public impact, leading to the "clear coincidence of interests between the historians from the Institute and Fritz Bauer, in that both were hoping to use this historical testimony for broader, public pedagogical purposes."⁴²

³⁹ Basic details about the trial in: Werner Renz, *40 Jahre Auschwitz-Prozess: Ein unerwünschtes Verfahren*, <http://www.fritz-bauer-institut.de/texte/essay/12-03_renz.htm> (accessed on 26.6.2006); Rebecca Wittmann, *Beyond Justice. The Auschwitz Trial*. (Cambridge, Mass : Harvard University Press 2005); Devin Pendas, *Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*. (New York : Cambridge University Press, 2006); Bernd Naumann, *Auschwitz, A Report on the Proceedings against Robert Karl Ludwig Mulka and the others before the Court at Frankfurt*, (New York : Frederick Praeger, 1965). Full transcript also on DVD: Fritz Bauer Institut und Staatliches Museum Auschwitz-Birkenau (ed.), *Der Auschwitz-Prozess. Tonbandmitschnitte, Protokolle und Dokumente*, (Berlin: Digitale Bibliothek 2004).

⁴⁰ Wittmann, op.cit, 64-65. Although Bauer was not the prosecutor in this case, which was led by Dr. Hanns Großmann his role in it cannot be underestimated. The full list of the judges, prosecutors, advocates, accused and witnesses in: Fritz Bauer Institute: [Register zum Frankfurter Auschwitz-Prozess](http://www.fritz-bauer-institut.de/auschwitz-prozess/pdf/auschwitz-prozess.pdf), <<http://www.fritz-bauer-institut.de/auschwitz-prozess/pdf/auschwitz-prozess.pdf>> (accessed on 26.6.2006). On forensic expertise and the law of evidence in Germany (criminal cases) in: J.F.Nijboer, C.R.Callen, N.Kwak *Forensic Expertise and the Law of Evidence* (Amsterdam/New York : North-Holland, 1993).

⁴¹ It remains to be confirmed whether Baron's performance at the Eichmann trial gave Bauer this idea. The chronology opens up the possibility that it might have been the other way around. It is also possible that there was no direct influence and that the outcome was directly conditioned by the pedagogical purposes set by both prosecutors. Also, Bauer could have been influenced by a less noted precedence to the practice in Germany.

⁴² Pendas, op.cit, 142-3.

According to the arranged plan, the reports for the Frankfurt Auschwitz trial were prepared by Helmut Krausnick (*The Persecution of the Jews*), Hans Buchheim (*The SS – Instrument of domination and Command and Compliance*), Martin Broszat (*The Concentration Camps 1933-1945 and National-socialist Policy towards the Poles*) and Hans-Adolf Jacobsen (*The Commissionars Order and Mass Executions of Soviet Russian prisoners of war*).⁴³ Apart of Hans-Adolf Jacobsen, all of the experts came from Institute for Contemporary History in München and were historians by vocation. In another analogy with Baron’s testimony, the reports did not mention the accused persons. In the introduction to the subsequent volume, the authors accounted for this absence, by defining the role of a historian as an expert witness in the following way: “The case of an accused who took part in these crimes can only be judged rightly if the whole moral, political and organizational background leading to his actions is surveyed. The task of historical expert is to assist the Court by painting as clearly as possible a picture of this background. He is not there to concern himself with the case of any particular accused...It is for the expert to provide a picture of the historical and political landscape in which each individual occurrence took place ...”⁴⁴ All of the reports were subsequently published came to present a seminal historiographical reading on the *Anatomy of the SS state*, which has had quite visible impact in the field of contemporary history.⁴⁵

⁴³ Reports were firstly published together in *Gutachten des Instituts für Zeitgeschichte*, (Stuttgart : Verlags Anstalt 1966) and soon reprinted in Hans Buchheim et al., *Anatomie des SS-Staates*, I-II. (München : Deutscher Taschenbuch Verlag 1967), Quotations are taken from the English version: Helmut Krausnick et al.: *Anatomy of the SS State*. New York : Walker 1968)

⁴⁴ Helmut Krausnick, et al.: *Anatomy of the SS State*. (New York : Walker 1968), xiii.

⁴⁵ On historians’ contribution in the Auschwitz trial: Irmtrud Wojak, “Die Verschmelzung von Geschichte und Kriminologie. Historische Gutachten im ersten Frankfurter Auschwitz-Prozess”, in Norbert Frei (ed.), op.cit. 29-45; Werner Renz, Der erste Frankfurter Auschwitz-Process. Völkermord als Strafsache, *Zeitschrift für Sozialgeschichte des 20. Und 21. Jahrhunderts*, 15 (2000), 11-47. Norbert Frei, Der

Hence, similar to the Eichmann trial, the historians assumed the role of providing the context as “the courts could evaluate only the evidence formally presented to them - unless commonly known facts were entered into the record, the court could not take them into account.”⁴⁶ The experts were well aware of this role, as they write in a preface to the printed version of their collected reports: “For this reason during these trials of the National Socialist criminals, it has been thought advisable, contrary to normal Court procedure, to hear experts *before* the witnesses.” They justified such a perspective by maintaining methodological caution: “When presenting the history of National Socialist period to the Court of Justice, a special effort must be made to do so rationally and dispassionately, for the facts presented are not merely the subject of an historical analysis which commits no one, but may have a decisive influence on the fate of the accused.”⁴⁷

The trial commenced on December 20, 1963. Historians started testifying on February 16, and in the midst of their exposes, they were joined by a colleague from the DDR. Karl Kaul, representative of the victims from East Germany insisted on including the notable economic historian from Humboldt University, Jürgen Kuczynski. He was to testify on the economic basis of the camps in the gist of dogmatic Marxism.⁴⁸ In another analogy to the Eichmann case, the broadness of approach chosen by the prosecution showed potential for backlash. Kuczynski was unwillingly admitted as an expert, and his testimony had a clear purpose of demonstrating, *inter alia*, that fascism is a last and the most deadly stage of capitalism.

Frankfurter Auschwitz-Prozess und die deutsche Zeitgeschichtsforschung, in: *Auschwitz. Geschichte, Rezeption, Wirkung*, (Frankfurt am Mein : Campus Verlag, 1996), 123-138; Irntrud Wojak, Herrschaft der Sachverständigen? Zum ersten Franfurter Auschwitz Prozess, *Kritische Justiz*, 32 (1999), 605-615

⁴⁶ Pendas, op.cit, 143-144.

⁴⁷ Helmut Krausnick, op.cit, xiii-xv.

⁴⁸ His report was entitled „The Intergation of Security Police and Economic Interests in the Establishment and Operations of KZ Auschwitz and its Sub-Camps“, Details in Pendas, op.cit, 147-153.

Despite this last minute attempt of instrumentalization, the Frankfurt court, just as the Jerusalem one, opted to balance the broadness of the historical approach, no matter how desired by the prosecution, with the duty to render justice to individual perpetrators. The court took the middle way, admitting and commending all the reports as “well-founded and convincing” but not reflecting much on them in the core of the judgment.⁴⁹ More general reports, as Broszat’s *The Concentration Camps* and Buchheim’s *The SS – Instrument of domination*, served as a basis for the short opening part of the judgment. The elements of other reports were sporadically used in its second part, related to the Auschwitz extermination camp. However, the degree of the responsibility of the individual accused, dealt with in the central, third part of the judgment, was assessed in the light of material evidence and the testimonies of eye-witnesses. In the light of these findings, out of 22 defendants, 6 were sentenced to imprisonment for life, 4 were released and 12 were given sentences between 4 and 14 years of imprisonment.⁵⁰

How relevant than was historical expertise in this case? The issue of the relevance of the historical contribution reappeared in a dilemma summarized by Rebecca Wittman: “One could argue that the entire historical background given in the indictment was irrelevant to the charges, and in many ways, it was; however, it makes sense that the courts decided that some form of explanatory overview was necessary for trying crimes of this nature.”⁵¹ It might be argued, and indeed was argued, that the court could have reached the similar verdict without this historical detour. Why were they involved then in such visible manner?

⁴⁹ Werner Renz, (hg.). *Das Urteil im Frankfurter Auschwitz Prozess*, (Frankfurt : Pahl-Rugenstein, 2005).

⁵⁰ Auschwitz-Prozess – Urteil, <<http://www.idgr.de/texte/dokumente/justiz/auschwitz-urteil.php>> (accessed on 30.6.2006).

⁵¹ Wittmann, op.cit, 108.

Prompt answer was given by Hannah Arendt, keen observer of legal attempts to come to term with the Nazi past. “The verdict here is not deemed to be the last word of either history or justice”, noted Hannah Arendt on “the Frankfurt trial, which in many respects reads like a much-needed supplement to the Jerusalem trial”. Importantly, Arendt again refrained from criticizing historians who took part in the proceedings, but has rather, as in Eichmann case, criticized the legal setting as ill-suited to deal with the German bad past. According to her, the trial had no significant impact on German public opinion, as “the court tried hard to exclude all political questions ... and to conduct the truly extraordinary proceedings as ‘an ordinary criminal trial, regardless of its background. But the political background of both past and present ... made itself factually and judicially in very single session ... As the prosecution had indicted for mass murder, the assumption of the court ... simply did not square with the facts ... It was the indictment ... that was bound to call forth for the troublesome ‘background’ of unsolved legal questions.”⁵²

Arendt understood that, despite generic semblances, two courts were in fact telling the horrible tale from two different ends – striving to reach its top in Jerusalem and struggling to reveal its bottom in Frankfurt. Therefore, the risk of broadness she criticized in the Eichmann case transformed in the risk of narrowness in the Frankfurt courtroom. Similar concern was raised in Germany by Fritz Bauer himself, who was criticizing the lack of connection of the accused to the mass murder, and Eugen Kogon, who commented on the lack of public readiness to plunge into the contemporary history of Germany.⁵³

⁵² Hannah Arendt, *Auschwitz on trial, Responsibility and Judgment*, (New York : Schocken 2005), 231-246

⁵³ Reactions on the verdict in Wittmann, op,cit, 323-325.

In such a context, historical expert appearances were crucial in igniting a public debate over the meaning of the committed crimes. And indeed it did. Although, in the German legal context, some of Arendt's Jerusalem concerns were irrelevant, as there was no cross-examination of witnesses which might challenge the views or findings of the experts, the exposure of this group of historians brought their work to the attention of the public. Some of the reports were crushing entrenched myths of postwar German society. The murderous mechanism of the concentration camps and the diabolic role of the SS was exposed in Broszat's and Buchheim's report, restating much of what was already known and accepted in German public, presented in Nuremberg, in Eugen Kogon's book *The SS State* and in other works.⁵⁴ However, some of the reports were presenting new findings: Krausnick's report outlined the scope, extent and uniqueness of the Nazi extermination campaign against the Jews. Jacobsen's report was tracking the practice of the killing of prisoners of war by the Wehrmacht as well as by the SS. The other Buchheim report was delivering the decisive blow to the "obeying orders" defense, by stressing the readiness of soldiers to comply with criminal commands. In a recent assessment of Diether Pohl, "The historians were not investigating individual crimes or individual defendants, but were asked to demonstrate the background of mass murder, the development of Nazi ideology, the measures of anti-Jewish persecution, the structure and function of German institutions in the Third Reich. As Fritz Bauer had proposed in advance, most of these expert opinions were published as paperbacks soon after the trial, and thus constituted *the* major German book on Nazi crimes for a long time, of which more than 50,000 copies have been sold until today."⁵⁵

⁵⁴ Eugen Kogon, *Der SS Staat*. (Stockholm : Bermann-Fischer Verlag 1947)

⁵⁵ Diether Pohl, op.cit, 5.

Such spotlight was prone to attract criticism in which methodological concerns were hard to disentangle from political disapproval. Legal scholar and jurist Ernst Forsthoff particularly addressed the issue, critically labeling historical expert witnessing as an example of “forensic historicism”. He asserted that, as the historiography is subject to changes introduced by new research, it is unsuitable for the courtroom purposes. Forsthoff claimed that such utilization of contemporary historiography amounts to its politization.⁵⁶ Interestingly enough, his criticism was methodologically echoing Arendt’s concerns with a completely different political agenda in mind. In effect, the courtroom appearance of historians remains controversial until today. In one of the recent reassessments, on the contrary, the reports have been criticized exactly for shielding behind scholarly objectivity. Nicolas Berg was examining, among other things, the political standpoints of the experts themselves, suggesting that the reports were lacking sensitivity towards the uniqueness of the program of annihilation of the Jews. Particularly under attack was Krausnick, whose affiliation with the Nazi Party dated back to 1932. Nicolas Berg also entered into an interesting debate with Hans Buchheim, one of the experts in Frankfurt, over the ways to approach the crimes against humanity and the relationship between historical research and legal remembrance.⁵⁷ The debate was pointing out to important limitations of both legal process and historical research in the face of mass violations of human rights.

⁵⁶ Ernst Forsthoff, *Der Zeithistoriker als gerichtlicher Sachverständiger*, *Neue Juristische Wochenschrift* 13 (1965): 574–75. On Forsthoff’s position and motivation Dirk Van Laak: *Widerstand gegen die Geschichtsgewalt*. In: Norbert Frei et al. (eds.), *op.cit.*, 16-25.

⁵⁷ Nicolas Berg, *Der Holocaust und die westdeutschen Historiker: Erforschung und Erinnerung*. Göttingen 2003. Buchheim, Hans: [Zur öffentlichen Auseinandersetzung mit dem Verbrechen gegen die Menschheit](http://www.fritz-bauer-institut.de/texte/essay/10-02_buchheim.htm), <http://www.fritz-bauer-institut.de/texte/essay/10-02_buchheim.htm> Berg, Nicolas: *Gedächtnis und Perspektivität. Auch das Nachdenken über Nationalsozialismus und Holocaust ist nicht anders als historisch zu verstehen* Eine Antwort auf Hans Buchheim, http://www.fritz-bauer-institut.de/texte/essay/04-03_berg.htm (accessed on 30.6.2006). On the connection between German historians and Nazism see Konrad Jarausch, Rüdiger Hohls, *Versäumte Fragen*, (Stuttgart : Deutsche Verlags-Anstalt, 2000).

However, despite the criticism, reports exceeded their courtroom purpose and still stand for seminal readings on the history of the Third Reich, most probably because they were more limited and targeted than Salo Baron's forensic contribution to the Eichmann trial. It is doubtful though if they have had much impact on the contemporaries. However, they have undoubtedly encouraged similar ventures. Erich Haberer notes: "As expert witnesses participating in every stage of the judicial process, historians contributed to the explanation of hitherto little-known or vaguely understood crime complexes .. Both factually and conceptually, they charted the structural, organizational, and ideological factors that ushered in the Holocaust. Unsurpassed in this respect are the historians Helmut Krausnik, Hans Buchheim, Martin Broszat and Wolfgang Scheffler, whose expert reports represent the pioneering contributions of their profession to the history of the Third Reich."⁵⁸ Hence despite Arendt's caution in both Eichmann and Frankfurt Auschwitz cases, and despite much of the legal criticism directed towards those proceedings, it must be noted that raising awareness of the scope of Nazi criminality, induced both top-down and bottom-up played a crucial role in maintaining the Europe-wide consensus that such crimes ought not to be kept unpunished. Such consensus was reflected in excluding war crimes and crimes against humanity of this period from the statute of limitations proscribed for capital offences in many European countries. Their condemnation became an important yardstick for the level of decency of a given society. In this gradual and hesitant evolution towards human rights sensitive culture of memory, the two trials of the 60's and the expert role of historians had an important role.

⁵⁸ Haberer, op.cit, 505.

II.1.4 Historical Expert Witnessing from Authentication to Contextualization and Beyond

Resemblances between the engagement of historians in the Eichmann trial and the Frankfurt Auschwitz trial are striking. In both cases the prosecution was striving towards a landmark historical trial supposed to send a powerful message to the world. In both cases, such a task was calling for a wide assessment of the political context in which the crimes of the accused occurred – in effect, for a comprehensive history of the policies of annihilation of the Third Reich. Both prosecutors estimated that the appropriate way to provide such a context was an expert opinion, and they called upon historical scholarship to produce it. In both cases reputed historians came forth with expert reports, providing the overall background for the case, leaving out entirely the activities of the accused. In both cases, the reports were taken as evidence and were selectively incorporated into the judgments. Finally, in both cases this practice drew considerable attention as well as sharp criticism from different positions. Historians left their auxiliary role of authenticators of documents and moved into the spotlight of the courtroom.

How can this transformation be interpreted? Going back to the entangled relationship between law and history offers a promising avenue. The transformation occurred in a sensitive junction between the postwar advent of juridical memory making and the developments in contemporary historiography. Whereas the Nuremberg trials were held in the absence of historians, two decades after the start of the Second World War, there were already solid results of historical scholarship on the issue. Pursuing the pedagogical effect of the trials, but at the same time gathering valuable evidence, the prosecutors in Jerusalem and Frankfurt were reaching out for the historical context provided by specialists.

Why was this aid institutionalized in the form of the expertise about the general context? In a recent assessment of this activity, Erich Haberer writes: “The historian is equally important in establishing context. His expertise is needed because the narrow judicial conception of case-specific circumstances is insufficient for, and usually not applicable to crimes committed many years or even decades prior to their investigation. What is required instead is a broader conception of both the context of the crime itself and the larger historical framework that informs on the culpability of the defendants. In short, expert opinion (the historian) is called upon to provide the historical context that will meet these novel ‘legal’ requirements. Thus, in the post-World War Two war crimes trials, history was reintroduced into what was supposed to be a purely legal sphere of activity.”⁵⁹

This reintroduction, however, was neither linear nor unquestionable. It would be convenient to conclude that the merger was an instant success. Incompatibility was still the dominant trend of the time in terms of conceptualizing the relations between history and law. Hence, it was quite imaginable to question the appropriateness of the combination of legal and historical logic, as George Kitson Clark did in his 1967 book *Critical Historian*. One of the chapters of the monograph was entitled *History and the Law Courts: Two standards of Proof*. Although admitting a certain resemblance between the criminal investigation and the historical scrutiny, Clark was warning on the important differences that might jeopardize both the legality of the proceedings and the authority of historical scholarship.⁶⁰ This was adding a generalist tone to the particular criticism Arendt and Forsthoff were emitting.

⁵⁹ Haberer, op.cit, 491.

⁶⁰ George K.Clark, *Critical Historian*, (New York : Basic Books, 1967), 17-33.

“In general, where historians work, debate arises.” writes Diether Pohl, and assesses that in the long run, the debates did not put a stop to cooperation between jurists and historians. “In German courtrooms, however, these debates were more or less restricted: the historians rather presented a picture which was considered common sense during the post-war era. On the other hand, the legal proceedings affected the course of historiography only to a very limited extent. Research on contemporary history developed rapidly during the 1960s, focussing on the Weimar Republic and on the Third Reich. At the end of the decade, the first major syntheses on the history of Nazi Germany were published by Karl-Dietrich Bracher and Martin Broszat. Already during the 1970s, hundreds early verdicts were published in the Amsterdam-based collection *Justiz und NS-Verbrechen*. After the *Anatomy of the SS-State*, only very few expert opinions were made public. ... So the impact of the trials on German historiography was rather indirect, through the experts and their networks. More and more historians made their way to Ludwigsburg, which is now common practice in the field.”⁶¹

Ludwigsburg was hosting Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen (Central Agency of the State Judicial Administration for the Investigation of National Socialist Crimes) formed in 1958. This institution was chaired by prosecutor Erwin Schüle until 1966, when he resigned in the face of revelation of his earlier membership in SA and NSDAP. For the next two decades, Zentrale Stelle was led by Adalbert Rückerl, the director of from 1966 to 1986, who maintained that the task of courts was “to conduct historical research or provide historical documentation”, and has consequently encouraged wide cooperation with

⁶¹ Diether Pohl, *op.cit.*, 10.

scholars.⁶² Specializing in the crimes of Nazi period, soon it became an important repository of indispensable value for historians. Martin Broszat commented in 1987 that “with their capabilities of establishing historical evidence, prosecutors and judges have accomplished systematically many times more in the last thirty years than the historians alone, with their limited resources, would have been able to accomplish.”⁶³ Under the leadership of Alfred Streim (1986-1996), Willi Dreßen (1996-2000) and Kurt Schrimm (2000-), this paradigm was maintained in the time of the European revival of interest in legal dealing with the Second World War atrocities. For example, Streim testified as an expert in 1987 trial to Klaus Barbie in Lyons. As years rolled, Ludwigsburg continued its mission with an increased vigor. In 1990, Josef Schwammberger, SS officer serving in Poland during the war was extradited from Argentina to Germany. The trial to the 80 years old commenced in Stuttgart, where was held responsible for deaths of more than 3000 Jews as a commander of the slave camp and then the commander of the Psemisl ghetto. He was sentenced to life in 1992 for personally murdering 25 persons and complicity in murder of 641 persons.⁶⁴ By that time, more than 7000 completed investigations have been forwarded to German judiciary from Ludwigsburg, adding greatly to the local proceedings of war criminals, out of which more than 6500 have been sentenced in Germany from the Second World War until today, with an enormous contribution of Zentrale Stelle.⁶⁵

⁶² Adalbert Rückerl, *NS-Verbrechen vor Gericht*, (Heidelberg: Muller Juristischer Verlag, 1982), 126.

⁶³ Martin Broszat, "Juristische und zeitgeschichtliche Bewältigung der Vergangenheit," in Hermann Graml and Klaus-Dietmar Henke, *Nach Hitler: Der schwierige Umgang mit unserer Geschichte. Beiträge von Martin Broszat*, ed. (München: Oldenburg, 1986), 187.

⁶⁴ Details in Ian Buruma, *Wages of guilt*, 135-9.

⁶⁵ Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen <http://www.zentrale-stelle.de/>

Although Schwammberger trial was promptly dubbed by the media as “the last one”, that was not the case. In the time of writing of this thesis, on the 15 September 2008 the trial in Munich begun to Josef Scheungraber (90) for war crimes committed in 1944 in Toscana. He was already sentenced in absence to lifelong prison in Italy 2006. German investigation led to a criminal trial which is currently under way.⁶⁶ Additionally, under the leadership of the current head of the Zentrale Stelle, prosecutor Kurt Schrimm, Germany has made all the preparations for the possible trial of John Demjanjuk, Ukrainian born citizen of United States accused of war crimes in extermination camp Treblinka. Demjanjuk was put to trial in Israel in 1988, and sentenced to death under the same law Eichmann was prosecuted, but he was acquitted on appeal due to the uncertainty over the identity of the accused. Twenty years later, Germany tries Demjanjuk, holding him responsible for mass killings in Sobibor extermination camp. Fifty years after its foundation, Ludwigsburg presents, as one journalist sums up “an example of successful cooperation between history and law.” In this interview, Kurt Schrimm underlined that “the goal and satisfaction for us is to clarify what really happened ... we see our work as a contribution to history and justice for the victims.” And as this epoch is coming to a close, the historical dimension is becoming more relevant. In the wording of Carlo Gentile from the University of Cologne, from the same interview ‘you can start a trial only with the accused alive and witnesses alive that you can call to testify. If you don’t have the witnesses and perpetrators, then you can only work as a historian.’⁶⁷

⁶⁶ Alexander Krug, Übernehmen Sie endlich Verantwortung, *Süddeutsche Zeitung*, 15.09.2008. On global legal showdown: BBC News *The hunt for the last Nazis*, http://news.bbc.co.uk/1/hi/in_depth/7857753.stm

⁶⁷ Laurie Goering, Despite challenges of prosecuting Nazi war crimes, German office keeps fishing for justice, *Chicago Tribune*, October 20, 2008; Kurt Schrimm, Joachim Riedel, “50 Jahre Zentrale Stelle in

Gradual maturing of both postwar historiography and judiciary in perhaps best described by Erich Haberer as transition from “Nuremberg paradigm” toward “Ludwigsburg paradigm”, characterized by opening up an avenue for local interiorization of international criminal norms and domestication of war crimes prosecution. In the absence of solid historical research, prosecutors in Nuremberg were forced to subsume both legal and historical function in their approach. Two decades later, they could rely on expert historians for general findings on broad context in which the crimes were committed. More sources were becoming available or generated by the courts and by historians, and new generation of specialists, both historians and lawyers, grew versed in highly specific area of mass atrocities.⁶⁸ As noted by Christopher Browning: “The historian and lawyer often ask different questions and meet different levels of proof ... Nonetheless, the historical study and judicial investigation of the Holocaust have been inextricably intertwined, as historians and lawyers have used the fruits of one another’s labors.”⁶⁹ With all the differences posed by the disciplinary requirements, this important synergic effect came to represent a setting typical for inquisitorial processing of criminal cases. As controversial as it proved to be, it presented a breach into the theory of incompatibility between history and law and offered a stable paradigm of historical expert witnessing.

Ludwigsburg. Ein Erfahrungsbericht über die letzten zweieinhalb Jahrzehnte”, *Vierteljahrshefte für Zeitgeschichte*, 56 (2008): 525-555.

⁶⁸ Erich Haberer, *op.cit.*, 510-2.

⁶⁹ Christopher Browning, *German Memory, Judicial Interrogation, Historical Reconstruction*, in Saul Friedländer (ed.), *Probing the Limits of Representation*, (Cambridge, Mass: Harvard University Press, 1992), 34

II.2 Adversarial Paradigm

Historical Expert Witnessing in the Shadow of Racism

In about the same time, historians entered the courtroom on the other side of the Atlantic. Although legal and political context in the USA was considerably different, a number of legal proceedings gave space to historical expert witnessing as well. Those proceedings were significantly different in outlook and have eventually shown much more variety, but had a similar motivation - to put bad past on trial, and were met with similarly stiff resistance to such purpose. This version of the incompatibility theory in the USA was influenced by the adversarial and partisan character of the common law system. An American scholar Ben Palmer, addressing the American Bar Association in 1946, was summarizing those traits: “Lawyers and historians face common problems: The analysis of documents and of evidence, the choice and arrangements of material to make a convincing case. The lawyer’s purpose is frankly partisan; the historian’s professedly impartial.” However, his address, which was otherwise praise to the theory of incompatibility, also contained an almost prophetic corollary: “And yet there is a ceaseless drift as unperceived without history as the movements of the stars to the naked eye. And we cannot contribute, however humbly, to that vision without which the people perish unless we are aware of the drift and, if possible, can determine its direction. But alas, many of us, whose responsibilities cannot be gainsaid, are oblivious of the distant drum.”⁷⁰ The distant drum that undermined the incompatibility theory in the USA was the issue of racially motivated discrimination.

⁷⁰ Ben Palmer, “The Historian and the Lawyer”, *American Bar Association Journal*, 32 (1946): 530, 535

II.2.1 Racism in the USA as Legal and Historical Problem

The issue of racial inequalities in the USA came on the agenda through the concept of voicing the needs of legally unprotected people without history. From the times of the first explorers who came from the Old into the New World, the tensions between the colonizers and the native population were looming high. New political structures, evolving in both Americas, were formed on the basis of the claims of superiority of the newcomers. In the South, Spanish conquistadors were enslaving and putting to death and misery the indigenous population, exploiting their work in the gold and silver mines. In the North, English and French colonists were pushing Native American tribes increasingly towards the West in the pursuit of fertile land. Further, in both North and South, slave trade was flourishing. Blacks captured in Africa were transported across Atlantic and sold as workforce. Consequently, by the time of the formation of the United States, there were over 3 million Black slaves on its territory.⁷¹

Such situation was, to be sure, in collision with the moral foundations of those evolving societies. Many members of the Catholic Church were forcefully protesting over the atrocious policies of Spaniards in America. Even more famously, the Declaration of Independence of the United States proclaimed that “all men were created equal”, opening hence immediately the issue of Black slaves as constitutionally dubious.⁷² Some years afterwards, in 1808, the Congress banned slave import, and slave trade was altogether abolished in Europe through the decision of the Vienna Congress in the name of “the

⁷¹ General information on slavery, inequality and discrimination in the Americas in: M.Jones, *The Limits of Liberty: American History 1607-1980*, (Oxford : Oxford University Press 1983); John H. Franklin, A.Moss, *From Slavery to Freedom: A History of African Americans I-II*, (New York : Knopf 2000)

⁷² Bartolomé de Las Casas, *Short Account of the Destruction of the Indies*, (London: Penguin, 1999)

principles of humanity and universal moral". The idea was that slavery would be soon extinguished and that over one million of Black slaves would be emancipated, which even happened in some states. However, the strive to abolish slavery on a federal level failed, largely due to the excessive profits drawn by slave work in tobacco industry, and particularly in cotton production in the Southern states which rose after 1820. Under such conditions, owners were in fact encouraging procreation between the slaves, and by 1860 their number rose to 4 million, mostly in the South. Hence the states got divided between the ones in which slavery was abolished and the ones in which it was maintained.

This division was furthering the already existing constitutional tensions between North and South, which had led into an open conflict and a civil war that lasted from 1861 to 1865. In an attempt to bring the Southern states, joined in the Confederate States of America, to their knees, Abraham Lincoln, President of the United States of America took an unprecedented step and had liberated the slaves through his 1863 Emancipation Act. Emancipation had helped in undermining the wartime effort of the South. It also allowed for the refurbishing of the Northern army with Black conscripts, which in turn, as Frederic Douglas remarked, boosted their self-esteem: "Once you let the Black man get upon his person the brass letters, US; let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket, and there is no power on earth which can deny that he has earned the right to citizenship."⁷³ Consequently, in the aftermath of the war, Congress promulgated important amendments to the constitution (13th, 14th and 15th), aimed at granting political rights to citizens irrespectable of color.⁷⁴ The success was

⁷³ David Paterson et alia, *Civil Rights in the USA 1863-1980*, (Oxford : Heinemann educational publishers, 2001), 28.

⁷⁴ Declaration of Independence Emancipation Act, Reconstruction amendments in Thomas .R.Frazier (ed.), *Afro-American History. Primary Sources* (Belmont, Calif.: Wadsworth Publishing Company, 1988)

immediate: out of 3 million emancipated slaves, by 1870 more than 700,000 obtained a right to vote.

However, even after the abolishing of slavery, deep and visible scars of division were cutting through the American society. White elites of many Southern states responded to the Constitutional amendments by promoting legislation that was rendering equality meaningless, keeping the Blacks away from the political process and disabling any further social integration. Federal government was for some time attempting to counter such policies, but the gloomy reality was soon to be discovered – although there were many proponents of eradication of slavery in the USA, it was hard to find such strong support for promotion of equality of Whites with Blacks. Considered inferior, they were subjects to discrimination on the basis of the color of their skin.⁷⁵ Justification for the cleavage between the proclaimed rights and gloomy reality was found in the scholarly production of the late 19th century, which was providing legitimization for such policies. This ‘scientific racism’ was fashioned in Europe in the mid-19th century in the works of Count Arthur Gobineau (*Essay on the Inequality of Human Races*) and Huston Stewart Chamberlain (*Foundations of the 19th Century*), which were gaining currency as the emergence of Social Darwinism and the advent of philosophy of survival of the fittest squared with the imperialism of the European powers.⁷⁶ Similar philosophy fell on very fertile ground in the United States, as it promised to form a base for the white supremacy. One of the early transmitters of those tendencies was Josiah C.Nott (1804-1873), a

⁷⁵ Michael Tadman, “Class and the Construction of ‘Race’: White Racism in the American South”, in: Melvyn Stokes (ed.), *The State of U.S. History* (Oxford : Berg 2002), 327-346; David Turley, “By Ways of DuBois: The Question of Black Initiative in the Civil War and Reconstruction”, in: Stokes, op.cit, 407-424.

⁷⁶ For survey of the development of ‘scientific racism’ and its connection to Social Darwinism and politics see George L. Mosse, *Towards the Final Solution. A History of European Racism* (New York : Howards Fertig 1978); 7-164; Richard Weikart. *From Darwin to Hitler. Evolutionary Ethics, Eugenics and Racism in Germany* (New York : Palgrave Macmillan 2004)

surgeon and self-styled ethnologist, who translated Gobineau and other European racist authors as early as 1856, but also contributed to ‘scientific racism’ in his own writings.⁷⁷

One of the most direct consequences of the philosophy of inequality of races was the fear of their mixing, particularly expressed in American writing as the scare of miscegenation. Already in 1850 Robert Knox published *The Races of Man*, criticizing heavily the “amalgamation of races”, and its product, ‘mulatto...a monstrosity of nature.’ Such notions persisted both in the North and South, and interestingly enough, Civil war did not affect nor disrupt those tendencies. During the 1863 preparations for the abolishment of slavery, Harvard Professor Jean Louis Agassiz, Nott’s disciple, was warning the American Freedmen’s Inquiry Commission “to put every possible obstacle to the crossing of races, and the increase of half-breeds” whose “production is as much a sin against nature, as incest in a civilized community is a sin against the purity of character.” He feared the USA “inhabited by the effeminate progeny of mixed races, half Indian, half Negro, sprinkled with white blood ... How shall we eradicate the stigma of a lower race when its blood has once been allowed to flow freely into that of our children?”⁷⁸

The response to this question came through the legislation of the states, as discrimination was furthered not only through the popular sentiments and prejudices, but also through the laws separating Black and White Americans. The most immediate fear

⁷⁷ Count Arthur Gobineau, *Essay on the Inequality of Human Races*, was translated into English in the United States already in 1856, three years after the French original. For the sake of comparison, German edition did not appear until 1898. Its translator, Josiah Clark Nott began his career as a skilful doctor and innovatory epidemiologist with *Sketch of the Epidemic of Yellow Fever of 1847, in Mobile*. (1848). In the same year he gave *Two Lectures on the Connection between the Biblical and Physical History of Man*, and in 1851 he wrote *An Essay on the Natural History of Mankind, Viewed in Connection with Negro Slavery*. In the years prior to the Civil War he disseminated his ideas with the group of collaborators: Josiah Clark Nott, George R. Gliddon, Samuel George Morton, Louis Agassiz, William Usher, and Henry S. Patterson: *Types of Mankind: Or, Ethnological Researches : Based Upon the Ancient Monuments, Paintings, Sculptures, and Crania of Races, and Upon Their Natural, Geographical, Philological and Biblical History* (1854) and Josiah Clark Nott, George Robins Gliddon, and Louis Ferdinand Alfred Maury. *Indigenous Races of the Earth; New Chapters of Ethnological Inquiry* (1857)

⁷⁸ Quoted from Niall Ferguson, *The War of the World* (London : Penguin Books 2007), 21-2.

of racial mixing was expressed in the laws prohibiting interracial marriages, existing in 28 states by the end of the century. It was furthered by legislation providing for avoiding contact between Black and Whites in transportation, eating facilities or in fact, wherever possible. Such laws, known by the generic title Jim Crow laws, were mushrooming in Southern states in the two last decades of the 19th century, and the attempt to challenge their constitutionality in the light of the 14th amendment equality provisions utterly failed in 1896, when the Supreme Court reasoned in *Fergusson v. Plessey* that segregation is constitutional, as separate status is not *per se* unequal.⁷⁹ Similarly, the provisions of the 15th amendment, introduced to secure the access to voting rights regardless of the color, were sidetracked through sets of laws known as Black Codes, aimed at limiting the political participation of ex-slaves through posing difficulties in voting, serving on jury or carrying arms. The ones brave enough to confront this unfavorable context were facing direct danger, most obvious in the activity of organizations such as the Ku Klux Klan.

Such reversal of policies was a major setback for the Black community. After a brief period of limited political participation in the immediate postwar period, their presence was diminished. The record in the first half of the 20th century was hardly better. Segregation was deepened in a number of states as interracial marriages ban was all but lifted, and almost imposed on a federal level. The past was readily reread to suit those purposes – one of the first American blockbusters, D.W.Griffith's *The Birth of the Nation* (a.k.a *Klansman*) presented a Civil War as a tragic and unnecessary struggle between two White parts of the nation, accompanied with a racist ridicule of a presumably inferior Black minority. However, a countermovement was strengthening, and forceful protest

⁷⁹ United States Supreme Court, *Plessey v. Ferguson*, 163 U.S. 537 (1896) <http://laws.findlaw.com/us/163/537.html> Jim Crow laws discussed in C.Vann Woodward. *The Strange Career of Jim Crow* (Oxford : Oxford University Press 1974)

against screening of the movie was made by the National Association for the Advancement of Colored People, an organization founded in 1909 by Oswald Garrison Villard and William Edward Burghardt Du Bois. NAACP based its foundation on the enforcement of the 14th and 15th amendments particularly in regards to abolition of segregation, equal voting rights and raising educational opportunities.⁸⁰ The fate of those initiatives was far from certain in an economically volatile and socially uncertain interwar period. It took a global shift induced by the Second World War to provide an adequate context for their success. The postwar period brought about many issues of inequalities that were on the agenda for decades, but were exacerbated by the war. The collective wartime effort of American society was calling for a collective reward. Black Americans, Latin American and Indian Americans were drafted in the military alongside the whites, were dying alongside the whites and could rightfully expect to be treated like whites. During the Second World War the United States were fighting a global war against blatantly racist regimes. Victory meant that those principles were to be implemented back home as well, as humiliations were causing obvious outrage: during the war, American Red Cross was still segregating the blood of black and white people, in order not to mix it through transfusions. It happened so that in some of the American states, German prisoners of war were allowed in pubs from which black people were bared. To no wonder that human right campaigners were dubbing the war aim as ‘Double V’ - victory over racism abroad and home. Decades-long struggle of black Americans to obtain equal treatment was entering a new phase.⁸¹

⁸⁰ Aldon Morris, *The Origins of the Civil Rights Movement* (London : Macmillan 1984). Backs and forths of the racial policies of the period are analyzed in G.Gerstle, E.Rosenberg, N.Rosenberg, *America Transformed: A History of the US since 1900* (New York : Harcourt Brace 1999), 22-130.

⁸¹ Neil A.Wynn, *The Afro-American and the Second World War* (New York : Holmes and Meier, 1993)

First steps in this direction, such as President Truman's Committee on Civil Rights, were however inefficient as its recommendations did not force reluctant Congress to pass related legislation. It was difficult to substantially change the long-standing mental habits, as the opposition was not coming only from politics, but also from the academia. For instance, American Eugenics Society, formed in 1922, presided by influential academics attempted to dissociate itself from Hitler-style racism. The wind of change brought in by the Second World War was felt even in such quarters. Ellsworth Huntington, a Yale scholar and one of the interwar presidents of the Society, wrote his capital book *Mainsprings of Civilization* in January 1945 made important concessions in his attempt to find 'a middle way' between anthropologists of "passionate fight against racism which encourages anti-Semitism, slavery, exploitation of 'natives' and prejudice against Negroes" and German and Japanese "claims to racial superiority." Still, although it maintained the existence of a single human race, this middle way was also calling for acknowledging social and political consequences of the influence of heredity and environment on different social groups.⁸² Not only was the wartime contribution advancing the fight for racial inequality, but also the postwar international setting. As the Cold War was beginning the USA had to prove itself a true bearer of antifascist legacy. Dean Acheson claimed in 1946: "The existence of discrimination against minority groups in this country has an adverse effect on our relations with other countries."⁸³ This impetus of the immediate postwar period is well summarized by Harvey Wish: "By this time, various intellectual, social, and political pressures were at work – the influence of the ideology of a war against Nazism, the growing effect of Negro voting power in the

⁸² Ellsworth Huntington, *Mainsprings of Civilization*, (New York : A Mentor Book 1945), 49-55. Cf. *American Eugenics Society* <http://www.amphilsoc.org/library/exhibits/treasures/aes.htm>;

⁸³ David Paterson, op.cit, 107.

North, as an incident of a new wave of internal migrations, the taunts of Communist diplomats who used the facts (and myths) of racial discrimination to hamper America's leadership abroad, and the challenge of the national liberation movements in the non-white states, especially in Africa, all contributed to the attitude of this time."⁸⁴ America was to prove itself as a land of equal opportunities, and where the reality did not mirror the ideal, legal issues were bound to forcefully erupt.

As late as 1951, "the state of Texas did not allow interracial boxing matches. Florida did not permit white and black students to use the same editions of some textbooks. In Arkansas, white and black voters could not enter a polling place in the company of one another. North Carolina required racially separate washrooms in its factories. South Carolina required them in cotton mills. Four states required them in their mines. In six states, white and black prisoners could not be chained together. In seven states, tuberculosis patients were separated by race. In eight states, parks, playgrounds, bathing and fishing facilities, amusement parks, racetracks, pool halls, circuses, theaters and public halls were all segregated. Ten states required separate waiting rooms for bus and train travelers. Eleven states required Negro passengers to ride in the back of the buses and streetcars. Eleven states operated separate schools for blind. Fourteen states segregated railroad passengers on trains within their borders. Fourteen states segregated mental patients. Seventeen states required segregation of public schools, four others permitted the practice if the local communities wished it, and in the District of Columbia the custom has prevailed for nearly ninety years."⁸⁵ Hence, Black Americans

⁸⁴ Harvey Wish, "A Historian Looks at School Segregation", *California Western Law Review* 55, (1964-5) 569.

⁸⁵ Listed in Robert Kluger, *Simple Justice, The History of Brown v. Board of Education and Black America's Struggle for Equality*. (New York : Vintage, 2004), 327

turned to courts. As Peter Lau notices, famous *Brown vs. Board of Education, Topeka* “is often understood as an event that sparked the mass civil rights movement of the 1950s and 1960s, but it is better understood in light of a broader social movement that had achieved heightened form by the early years of the Second World War.”⁸⁶

II.2.2 Solving “an American Dilemma”: Social Scientists in *Brown v Board of Education*

The difference between the proclaimed and real, between what *is* and what *ought to be* in their everyday life turned Black Americans to the courts in an attempt to challenge the segregation laws. The nationwide initiative, coordinated through National Association for the Advancement of Colored People was particularly aimed at dismantling the laws that were segregating public schooling.⁸⁷ Education was one of the strongholds of Southern segregation, indirectly constitutionally recognized through *Plessy v Ferguson* (1896), and particularly through 1899 *Cumming v. School Board*.⁸⁸ However, shocking empirical findings emerged meanwhile – black teachers were generally receiving half the salaries of their white colleagues, expenditures on a black child in schooling in South Carolina, e.g., were four times less than on a white child, schools for Black children were not only fewer, but also understaffed, underfurnished and overcrowded.

⁸⁶ Peter F. Lau (ed.), *From the Grassroots to the Supreme Court. Brown vs Board of Education and American Democracy*, (Durham and London : Duke University Press, 2004), 105

⁸⁷ Significant changes in the strategy of postwar Black civil rights activist are described in Adam Fairclough, “Segregation and Civil Rights: African American Freedom Strategies in the 20th century”, in Stokes (ed), *op.cit*, 155-75

⁸⁸ *Joseph W. Cumming v. School Board of Richmond County*, 175 US 528 was an application of ‘separate but equal’ standard into public education. Its segregationist base was described in details by Morgan Koussner, “Separate but *not* Equal? The Supreme Court’s First Decision on Racial Discrimination in Schools”, *The Journal of Southern History* 44 (1980): 17-44.

Education was the obvious example that the constitutional doctrine of ‘separate but equal’ could not be maintained in practice, which is why the Legal Defense and Educational Fund of the NAACP particularly stimulated the filing of such claims. Segregation claims in education from Kansas, Delaware, District of Columbia, Clarendon County of South Carolina, and Prince Edward County, Virginia were denied. However, they were merged by the NAACP and appealed to the Supreme Court in 1951.⁸⁹ The merger of cases was named for Black girl, Linda Brown, unable to get enrolled in the public school in Topeka, Kansas, just around the corner, and being forced to attend an all-Black school a mile away. The District Court ruled in favor of the Board of Education, claiming that the schooling system of Topeka is satisfying the „separate but equal“ standard set by the U.S. Supreme Court in 1896. It was now for the Supreme Court to have a say in the case which included a number of plaintiffs, but went down to history as *Brown v Board of Education*.⁹⁰

The case did not fall on deaf ears in the Supreme Court, which was for quite some time preparing to take on this issue. Many Justices privately referred to segregation as “Nazi creed”. Not without a reason: “I have studied with great interest the laws of several American states concerning prevention of reproduction of people whose progeny would, in all the probability, be of no value or injurious to the racial stock”, wrote Adolf Hitler to

⁸⁹ On the merger of the cases see Kluger, op.cit, 515. The opinions in lower instances and federal courts are available *Brown v Board of Education of Topeka* <http://brownvboard.org/research/opinions/opinions.htm>

⁹⁰ US Supreme Court, *Brown v Board of Education*, 347 U.S. 483 (1954), <http://laws.findlaw.com/us/347/483.html>. Seminal reading on the case: Richard Kluger, op.cit; Lau, op.cit. Cf. *Brown Bibliography* <http://65.36.189.169/iecme/hardfiles/pubs/SelectedBibliography24AnnvMTW.pdf> Electronic Resources available at various databases: *With all Deliberate Speed. The Legacy of Brown v Board*, <http://www.brownvboard.info/index.htm>; Kansas State Historical Society: *Brown v Board* <http://www.kshs.org/research/topics/cultural/brown/index.htm>, The Eisenhower Archives. *Digital Documentation* http://eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_BrownvsBoE The National Archives of the United States: *Documents Related to Brown v Board of Education* <http://www.archives.gov/education/lessons/brown-v-board/>,

Otto Wagner, SA Chief of Staff. In fact, according to Niall Ferguson, “it was the Southern states whose legal prohibitions on interracial sex and marriage provided the Nazis with templates when they sought to ban relationships between ‘Aryans’ and Jews.”⁹¹

During the negotiations that had led to the foundation of the International Military Tribunal, Justice Robert Jackson was visibly embarrassed when the issue of punishing German elite for things done to the German citizens was raised: “We have some regrettable circumstances at times in our own country in which minorities are unfairly treated”, he exclaimed, thinking of segregation and realizing that while it exists, the USA would be vulnerable for accusations of maintaining double standards.⁹² “You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies”, wrote Jackson to a friend once he got back from the Nuremberg where he was a Chief Prosecutor, and has resumed his post in the Supreme Court on which he had served since 1940.⁹³ He, as well as a number of his colleagues in the Supreme Court, was well aware of the injustices brought about by segregation. Still, “Brown was hard for many of the justices because it posed a conflict between their legal views and their personal values. The sources of constitutional interpretation to which they ordinarily looked for guidance - text, original understanding, precedent - seemed to indicate that school segregation was permissible.”⁹⁴

Be as it is, for some time after the Second World War the Supreme Court was gaining momentum to hear a case regarding segregation, and was about to give a benefit

⁹¹ Niall Ferguson, *op.cit.*, 221, 225.

⁹² Minutes of the London Conference for the preparation of the trial, in Michael Marrus, *The Nuremberg War Crimes Trial 1945-6. A Documentary History*, (Boston : Bedford Books, 1997) 45.

⁹³ Michael J.Klarman, “Brown v Board 50 years Later”, *Humanities* 3 (2004): 2

⁹⁴ *Ibid*, 1, www.neh.gov/humanities/2004-03/brown.html

of a doubt to the plaintiffs that they have the case. However, when the case was initially put in front of the Supreme Court, at the time presided by the Justice Fred Vinson, it was by no means certain that the ruling would be in favor of the plaintiffs, let alone that such decision would be unanimous. Namely, the case was not about the morality of segregation in public schooling, but of its constitutionality. And insofar as the relation between Brown and the 14th amendment and the issue of segregation was concerned, even Jackson could only lament: “Nothing in the text says it’s unconstitutional. Nothing in the opinions of the courts that says it’s unconstitutional. Nothing in the history of the 14th amendment ... on the basis of precedent segregation is ok.”⁹⁵ As far as history was concerned, at first glance not much could be said about the need to reverse that practice, and the Justices were eager to hear the arguments of plaintiffs.

Brown was initially argued in front of the Supreme Court on December 9, 1952 by the NAACP legal team headed by its chief legal strategist, Thurgood Marshall. He framed the claim of the case in a wider context of racial inequalities. The claim was that the leading doctrine in educational systems of many American states, condensed in the phrase ‘separate but equal’ was leading to segregation and *de facto* unequal treatment of Black children, constituting segregation and violated the principle of equality. A number of the states were maintaining segregated public school system, hence lowering the educational potentials of Black Americans, influencing their self-esteem and keeping them at the margins of society. In summation, separate education was therefore in the breach of the 14th amendment of US Constitution from 1868, providing that “no state shall ... deny to any person ... the equal protection of the laws”.⁹⁶

⁹⁵ Michael J. Klarman, “Brown vs Board of Education Law or Politics?”, in Peter F. Lau (ed.), *op.cit.*, 203.

⁹⁶ The United States Constitution, 14th Amendment <http://www.usconstitution.net/const.html>

How to substantiate those claims? Thurgood Marshall decided that substantial parts of the case should be fought on the ground of findings of social sciences. Those were by that time abundant. By the beginning of the 50s, the litigants in *Brown v Board* could rightfully claim that their bundle of cases submitted to the Supreme Court's review is supported by "the benefit of a half-century evolution in the social sciences that declared segregation to be both a cause and a result of the victimization of black."⁹⁷ Already in the beginning of the 20th century, Franz Boas, a German-born American anthropologist undermined the scientific basis for the perpetuation of racial inequalities. New studies appeared, peaking with Ashley Montagu's voluminous debunking of racial theory *Man's most dangerous myth* (1942), and Gunnar Myrdal's book *An American Dilemma* (1944), which was clearly outlining the disastrous effect of the subordinated status of the Black in the USA. As an aftereffect of the Second World War, 'race' became a suspected word, both as a political concept and an analytical tool, and its debunking became scholarly mainstream. Such an agenda was strongly promoted in the UNESCO's statement "The Race Question", signed by authorities such as Claude Levi-Strauss, Morris Ginsberg, Ashley Montagu, Franklin Frazier and others. The statement was calling to "drop the term 'race' altogether and speak of ethnic groups" A lively debate that followed was devastating for eugenicists and racial supremacists, debunked in the steady stream of scholarly production.⁹⁸

No wonder this development quickly influenced litigations. UNESCO's program stated: "Concern for human dignity demands that all citizens be equal before the law, and

⁹⁷ Richard Kluger, *Simple Justice*, 314.

⁹⁸ UNESCO, *The Race Question*, 3-6, 31 <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf> Expert reports on the issue commissioned by UNESCO from 1950, 1951, 1964 and 1967 are assembled in *Four statements on the race question*, (Paris : UNESCO, 1969).

that they share equally in the advantages assured them by law, no matter what their physical or intellectual differences may be. The law sees in each person only a human being who has the right to the same consideration and to equal respect.”⁹⁹ Certainly, the recommendations of UNESCO would not suffice insofar American courts were concerned, particularly the Supreme Court, whose rigid judicial review is well captured by Justice Jackson himself: “When the day arrives, shut out all the influences that might distract your mind ... hear nothing but your case, see nothing but your case, talk nothing but your case.”¹⁰⁰ As the Justices were supposed to deliberate on the cases of segregation in schooling, they were to set aside all their opinions and inclinations in order to follow clearly outlined legal arguments. With the issue at stake, however, it seemed that law was seriously lagging behind both social science and the demands of American society.

How to bridge this gap? Marshall devised an avenue through which the results of scholarly research could be conveyed to the Supreme Court: expert reports. Social scientists, psychologists and educationalists compiled and filed accounts on the disastrous effects of segregated educational system upon the self-esteem of young Black Americans. They drafted reports, collective briefs and testimonies employed to back the claim of the detrimental effect of separate schooling on Black children.¹⁰¹ Social scientists were at the forefront of such initiatives, which were inducing an important reconceptualization of the relationship between science and law. The abundance of such findings was presented to the Supreme Court in the condensed form, that of the briefs. Their authors were psychologists (such as Kenneth Clark, assistant professor at City College, New York, the

⁹⁹ UNESCO, *The Race Question*, p.3.

¹⁰⁰ Richard Kluger, *Simple Justice*, 563.

¹⁰¹ Details in Mark Chesler, Joseph Sanders, Debra Kalmuss, *Social Science in Court: Mobilizing Experts in the School Desegregation Cases*, (Madison : University of Wisconsin Press, 1989). Herbert Garfinkel, “Social science evidence and the school segregation cases”, *The Journal of Politics* 21, (1959), 37-59.

author of the controversial experiment with dolls) and educationalists (such as associate professor at Howard University, Mathew J. Whitehead, who accepted the call after several refusals, with a blunt explanation: “Somebody had to do it.”¹⁰²). The others academics were to follow, with contributions of different shapes and sizes, but on the similar topic.

However, the impact of social scientists on the Justices in the first instance was all but decisive. Although expert evidence was persuasive insofar the immorality and detrimental effects of segregation were concerned, the question of questions – the issue of its constitutionality – was still a matter of doubt. As Jackson puts it, NAACP’s brief was more sociology than law, and the Justices actually did not want to be seen as “sociologists”. Consequently, by the end of 1952 they were divided on that matter.¹⁰³ The states, represented by skillful attorneys, the most prominent being John W. Davis, former Democrat candidate for the presidency, made considerable effort to show they had made an honest attempt to create educational equality in the separate facilities. They admitted there had been a differentiation of quality of education, but purported to show that there had been no intent to discriminate Blacks. Fearing that divided opinions could aggravate the already heated atmosphere, in June 1953 the Supreme Court accepted the proposal of Justice Felix Frankfurter to ask for additional evidence. His reasoning was blunt: “However passionately any of us may hold egalitarian views, however fiercely any of us may believe that such a policy of segregation as undoubtedly expresses the tenacious convictions of Southern States is both unjust and shortsighted, he travels outside his

¹⁰² Kluger, *op.cit.*, 331. More on Clark’s role in Ellaine Woo, “Kenneth Clark, 90. His Studies Influenced Ban on Segregation”, *LA Times*, May 3, 2005

¹⁰³ Detailed description on the standpoints of the Justices and their biographies is provided by Michael J. Klarman: ‘Brown vs Board of Education. Law or Politics?’, in: Peter Lau, *op.cit.*, 200-208

judicial authority if for this private reason alone he declares unconstitutional policy of segregation.”¹⁰⁴

“Confronted with this difficulty ... the Court was tempted by a new resort to the rewriting of history as a means of creating the rationale for this proposed operation in precedent-breaking“, recalls Alfred Kelly, one of the experts of NAACP. “After hearing initial arguments by counsel, the Court, in June, 1953 instructed counsel for both sides to reargue *Brown* and its companion cases in terms of the original intent of Congress in submitting, and the state legislatures in ratifying, the Fourteenth Amendment, with respect to state legislation imposing racial school segregation. Has Congress and the states, the Court asked, submitting and ratifying the Fourteenth Amendment, intended to outlaw racially based state schools segregation statutes?”¹⁰⁵ Consequently, the sides were asked to take another look at the history of the 14th amendment, draw the conclusions relevant for their case and present them to the Supreme Court by the end of that year.

Supreme Court asked the parties in litigation to discuss “the following questions insofar as they are relevant to the respective cases: What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”¹⁰⁶ According to Michael J. Klarman, this historical detour was a matter of buying time, as “worried about the ‘catastrophic’ impact of a divided decision, Frankfurter suggested having the cases

¹⁰⁴ Ibid, 211.

¹⁰⁵ Alfred Kelly, ‘Clio and the Court: An Illicit Love Affair’, *Supreme Court Review* 65 (1965): 144

¹⁰⁶ This demand was followed by four other questions related to the first, and the entire document is reproduced in Richard Kluger, *op.cit.*, 618-9.

reargued on the pretense that the justices required further briefing on issues such as the original understanding of the Fourteenth Amendment and the remedial options available should they invalidate segregation. The justices were less interested in answers than in securing additional time to resolve their differences.”¹⁰⁷ However, it is uncertain that all the Justices shared Frankfurter’s intention. As early as 1945, Justice Robert Jackson noted that he is “not confident that the effort of Justices to restate the early law as it appeared to the forefathers is either complete or accurate. Judges often are not thorough or objective historians.”¹⁰⁸ He and the others could as well genuinely be interested in historical findings.

II.2.3 Historians and the Analysis of Original Intent

Regardless of the reason, the parties were supposed to look into history, in an attempt to reconstruct the original intent of the creators of the 14th amendment. Whatever the reasoning behind this request, both appellants and appellees took it very seriously. The Supreme Court, as a very peculiar institution in American legal and political system, had its own complex relation to history, mitigating between the realities of the present and the constitutional provisions from the past. Assigned to maintain the constitutionality of the state laws and judgments, the Supreme Court was frequently in position to call upon history, and its opinions were frequently famously packed with historical analysis as a resort to impartiality.¹⁰⁹ Justice Oliver Wendell Holmes, one of the most prominent legal

¹⁰⁷ Klarman, *op.cit.*, 208.

¹⁰⁸ Robert Jackson, “Full Faith and Credit”, *Columbia Law Review* 45 (1945): 6.

¹⁰⁹ See also Terence Ball, “Interpretation, Intention and the Law: The Case against ‘Original Intent’”, *Ab Imperio*, 3/2007, 19-34; Renata Uitz, *Constitutions, Courts and History, Historical Narratives in*

figures of the late 19th century, expressed this philosophy in a nutshell: “upon this point a page of history is worth a volume in logic”, as he asserted that “rational study of law is still to a large extent the study of history.”¹¹⁰ Renata Uitz observes that “intuitively, at least for lawyers, the record book of history appears as a treasury of very sound points of reference. Precisely due to this reputation, constitutional review fora have a tendency to rely on references to history and traditions.”¹¹¹ This was probably most obvious in the reasoning of the United States Supreme Court, which was particularly keen on using historical arguments as a tool of legitimating for the decisions. However, in practice history could rarely secure such a neutral point of reference. The adversarial setting typical for Anglo-Saxon proceedings was prone to produce diverging readings of the past, tailored to suit the needs of the sides in the process. In *Brown* as well, the parties took a look into the past in quest for the arguments substantiating their case. Hence, when the Supreme Court reconvened in late 1953, the Justices were confronted with findings that diverged significantly. The representatives for the appellees prepared a brief, stating that neither the text of the 14th Amendment, nor the circumstances surrounding the Congressional sessions on which it was brought about, were revealing the intent to prevent segregation as such.¹¹² In order to prove otherwise, the plaintiffs embarked on “a mammoth research job loomed, without much time to do it.”¹¹³

Constitutional Adjudication, (Budapest : CEU Press Budapest 2005), 3-4, 7. Special relationship between the US Supreme Court and history is analyzed in Charles Miller, *The Supreme Court and the Uses of History* (Cambridge, Mass. : Harvard University Press, 1969);

¹¹⁰ William M. Wiecek, “Clio as Hostage: The United States Supreme Court and the Uses of History”, *California Western Law Review* 24 (1987): 236-7.

¹¹¹ Uitz, op.cit, i.

¹¹² On the making of the brief see the article of one of his authors, Sydnor Thompson, “John W. Davis and his role in the public school segregation cases - A personal memoir” [Washington and Lee Law Review](#), 52 (1996) 1679-1695. The text of the brief: *Brief for Appellees on Reargument*, 8 (Oct. Term, 1953), 2.

¹¹³ Richard Kluger, op.cit, 622

To that end they engaged three historians, Alfred Kelly, C. Vann Woodward and John Hope Franklin, whose field of expertise was in the realm of Reconstruction, in order to prove that the intent of the makers of the amendments was not to allow segregation. That was not an easy task. They were in fact in a paradoxical situation. There was abundant factual evidence of racial discrimination and segregation in the time of the making of the 14th amendment. "The evidence with respect to original intent is so clear that it discouraged even Alfred Kelly, who observed that the problem was not the historian's discovery of the truth . . . the problem instead was the formulation of an adequate gloss to convince the Court that we had something of a historical case."¹¹⁴

Kelly's colleagues were of the same mind: "At the outset, the Black historian John Hope Franklin noted 'the difference between scholarship and advocacy' and expressed concern about 'the temptation to pollute...scholarship with polemics.' So did the White historian C. Vann Woodward. But Franklin and Woodward nevertheless prepared papers which maintained that segregation undermined the egalitarian intent of the Fourteenth Amendment. In 1963, Franklin felt that he had "deliberately transformed the objective data provided by historical research into an urgent plea for justice."¹¹⁵ According to Kelly, they produced a "law-office history. It presented, indeed, a great deal of perfectly valid constitutional history. But it also manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence on the contrary, either by suppressing it when that seemed plausible, or by distorting it when

¹¹⁴ Sam Francis, *Fifty Years of Brown Blunder: Ruling Class Learns Nothing* <http://www.vdare.com/francis/brown.htm>

¹¹⁵ Raymond Walters, Constitutional History, "Social Science and Brown vs. Board of Education 1953-4", *The Occidental Quarterly* 5 (2005) <http://theoccidentalquarterly.com/archives/vol5no1/rw-browni.html>

suppression was not possible. The brief submitted for the respondent southern school boards was no less law-office history. It, too doctored, distorted, twisted, and suppressed historical evidence in as competent a fashion as did the NAACP.”¹¹⁶ Consequently, the process of rearranging the historical expert evidence in order to accommodate the needs of lawyers was by no means easy.¹¹⁷

However, the Court anticipated such disagreement between the parties. “While Kelly and other historians were working for the NAACP, Justice Felix Frankfurter asked Alexander Bickel, then a law clerk at the Supreme Court, to undertake yet another examination of historical records. Bickel concluded that the Congress discussing the Fourteenth Amendment neither intended that segregation be abolished nor foresaw that, under the language they were adopting, it might be. The most that could be said for the NAACP, Bickel later wrote, was that the framers of the Fourteenth Amendment realized that they were writing a *constitution*, and understood that constitutional language always contains a certain *elasticity* that allows for reinterpretation to satisfy the requirements of future times. Like some modern ‘deconstructionists’, Bickel argued that, through wordplay, constitutions can (and should) be interpreted without regard to original intent to mean whatever the interpreters want them to mean”¹¹⁸ Spiting his intimate beliefs on racial relations, Bickel was forced to report that “it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting.”¹¹⁹

¹¹⁶ Alfred Kelly, *op.cit*, 142.

¹¹⁷ This process is described in details by Paul Soifer, “The Litigation Historian: Objectivity, Responsibility and the Sources”, *The Public Historian*, 5 (1983): 47-62.

¹¹⁸ Raymond Walters, *op.cit*.

¹¹⁹ Cf. Klarman, *Law or Politics*, 211. Bickel’s recollections on the drafting can be found in Alexander Bickel, “The Original Understanding of the Segregation” *Harvard Law Review* 69 (1955): 1-65.

Once the case was reargued in front of the Supreme Court, the Justices were distributed the Bickel report which had quite an impact on them. Consequently, attorney for the NAACP, Spotswood Robinson, who summarized the historical evidence on December 7, was met with the skepticism.¹²⁰ He maintained that “historical evidence which we submit demonstrates that the Congress that submitted it and the legislatures and conventions that ratified the Fourteenth Amendment contemplated and understood that it would abolish segregation.” He noted “considerable evidence of the intention of the framers to broadly provide for the complete legal equality of all men, irrespective of race.” However, he had to admit that in the “debates proper, we find only one specific reference to school segregation.”¹²¹ The best that NAACP could prove was a loose, overall intent of the legislators to end the segregation. Therefore the appellees were seizing upon these uncertainties. John Davis presented the argument that “the overwhelming preponderance of the evidence demonstrates that the Congress ... did not contemplate and did not understand that it would abolish segregation in public schools.” He stressed that “our friends the appellants take an entirely contrary view, and they take it, in part, on the same historical testimony.” He summed up with a dose of humor: “Now, your Honors then are presented with this: We say there is no warrant for the assertion that the 14th Amendment dealt with the school question. The appellants sat from the debates in Congress it is perfectly clear that the Congress wanted to deal with the school question; and the Attorney General, as a friend of the Court, says he d does not know which is correct. So your Honors are afforded the reasonable field for selection/”¹²²

¹²⁰ The University of Michigan Library, Digital Archive Brown v Board of Education, *Oral Arguments*, <http://www.lib.umich.edu/exhibits/brownarchive/oralarguments.htm>

¹²¹ Ibid, 1, 3-4, 7

¹²² Argument of John W.Davis, Ibid, 33-35.

It seems that “the Justices flirted rather seriously with a resort to history as a precedent-breaking device. At the last moment, however, they drew back from placing the Court’s sanction upon a new judicial version of the Fourteenth Amendment’s ‘original meaning.’ Instead they proceeded to break the ‘separate but equal’ rule of *Plessey v. Fergusson* by means of a “sociological” opinion. The contrast between the two techniques is the more curious because there was certainly as much plausibility potentially available in a re-examination of the historical intent behind the passage of the Fourteenth Amendment as there had been in the use of history to revive Jefferson’s ‘wall of separation’. But the Court shied off.”¹²³

The Court shied away under the burden of the Bickel report, whose content in fact surprised the Justices, as they had been unable to find an adequate explanation in the history of the Amendment. Jackson argued that among the legislators of the time “may be found a few who hoped that it would bring about complete social equality and early assimilation of the liberated Negro into an amalgamated population. But I am unable to find any indication that their support was decisive, and certainly their view had no support from the great Emancipator himself.” Justice Clark was even blunter, saying that “he always thought that the 14th amendment covered the matter and outlawed segregation. But the history shows different.”¹²⁴ It was hence the historical argument that was undermining the decision, and for the sake of unanimity it was largely discarded. Instead of setting historical record “too straight” and imposing onto 1868 Congressmen issues that were not on their agenda, the court took a bolder approach and resorted to a “sociological” decision.

¹²³ Alfred Kelly, *op.cit*, 148.

¹²⁴ Klarman, *op.cit*, 212-214.

Alfred Kelly concurs: “My half-educated guess is that the competing briefs exposed too grossly, at least for the moment, the entire fallacy of the law-office history. Quite possibly, it seems, to me, the Justices felt considerable embarrassment in adopting the interpretation of the NAACP, the only one consistent with their obvious intent in deciding the cases at hand ... It would seem likely that the evident difficulties presented by the various histories precipitated a serious difference of opinion among the Justices themselves, in a situation where unanimity was essential and even concurring opinions might damage the prestige of the decision. The Justices resorted instead to a “sociological” opinion, after Gunnar Myrdal, rather than a historically orientated piece of adjudication, although the truth of the matter may well be that the theoretical foundations of sociologically oriented reformist activism may be as difficult to defend as are those of historically oriented activism ... Equipped with an impressive mass of historical evidence with which it might well have rewritten the history of the amendment’s purpose, the Court reneged. As though in embarrassment, Mr. Chief Justice Warren’s opinion declared the historical evidence with respect to the Fourteenth Amendment’s intent concerning state segregation laws to be inconclusive, and then proceeded to suppose of the Plessy precedent without benefit of any new history, simply by declaring that it did not accord with the twentieth century implications of ‘equal protection’ because segregation generated ‘a feeling of inferiority’ in Negro children. In other words, the Court rejected history in favor of sociology.”¹²⁵

Such development seemed to confirm the assumption that the delay was caused in order for the Justices to acquire more time for deliberation. In the meanwhile, Chief Justice Frederick Vinson suddenly died in September 1953. The new Chief Justice of the

¹²⁵ Alfred Kelly, 144.

Supreme Court became Earl Warren, influential politician of the Republican Party. This Eisenhower's appointment was to create the desired turnover in Brown, although quite unintentionally. He was appointed as a conservative whom Eisenhower thought to "represent the kind of political, economic, and social thinking that I believe we need on the Supreme Court."¹²⁶ However, once in office, from October 5, Warren proved to be the creator of a new compromise on the bench of the Supreme Court. One of the first instances of overcoming of the division between the Justices was an unanimous decision in *Brown v Board of Education*, reached by the Supreme Court by the end of the year and publicly rendered on January 14, 1954.

Signed by Justice Warren, The Majority opinion found that "in each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment." Turning back on history, the Justices found that "in approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written." He dismissed the legal relevance of historical evidence on the original intent, claiming that although historical "sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."

¹²⁶ ["Personal and confidential To Milton Stover Eisenhower, 9 October 1953", In L. Galambos and D. van Ee \(ed.\) *The Papers of Dwight David Eisenhower*, . doc. 460.](http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/460.cfm)
<http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/460.cfm>

However, the ruling clearly did not use this finding as a pretext to back off: “Today, education is perhaps the most important function of state and local governments ... Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms ... To separate them from others solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone ... We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹²⁷

Eventually, social science did turn out to be of immense help to the Supreme Court in reaching this groundbreaking decision. The reports came as a great help to the Justices of the Supreme Court, torn between their personally liberal convictions and conservative, precedent-driven constitutional review. Social scientist filled this gap with the data that helped the Supreme Court reaching unanimous verdict that overturned the constitutional precedents and made segregated schooling unconstitutional. Justices were stating in the judgment that “this finding is amply supported by modern authority.” Those modern authorities were quoted in a footnote 11 to the judgment, labeled afterwards as “the most dispute-laden footnote in American constitutional law”, which contained the works of social science on the issue of effects of the segregation, including the sociological and pedagogical briefs submitted to the Supreme Court in the case: “B.Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White

¹²⁷ US Supreme Court, *Brown v Board of Education*, 347 U.S. 483 (1954),

House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 *J. Psychol.* 259 (1948); Chein, *What are the Psychological Effects of [347 U.S. 483, 495] Segregation Under Conditions of Equal Facilities?*, 3 *Int. J. Opinion and Attitude Res.* 229 (1949); Brameld, *Educational Costs*, in *Discrimination and National Welfare* (MacIver, ed., (1949), 44-48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944).”¹²⁸ Such sort of a literature review from the highest legal instance in the country was a great victory for the plaintiffs and a direct blow to an influential body of scholarship which was for years resting on the notion of inherent racial differences.

However, *Brown* decision and its evocation of “modern authorities” was a double-edged sword for the Supreme Court. The Justices were attacked overstretching their responsibility to guard the constitutional provisions, and plunging into the judicial activism. Such a landmark decision was bound to provoke resistance. The avalanche started with criticism of Professor Kenneth Clark’s experiments, which were one of the backbones of the *Brown* case.¹²⁹ From that point on, the controversy grew both in scope and length, not only regarding the authors quoted in the disputed footnote, but reappearing practically in every new scholarly field to produce an expert witness, ranging

¹²⁸ Famous footnote eleven of the US Supreme Court Decision is commented at length by Sanjay Mody, “Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy.” *Stanford Law Review* 54 (2002): 793-830

¹²⁹ Kenneth Clark, “The Social Scientist as an Expert Witness in Civil Rights Legislation” *Social Problems* 1 (1953): 5-10; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, *Harvard Law Review* 73 (1959) 1; Kenneth Clark, “The Desegregation Case: Criticism of the Social Scientist’s Role”, *Villanova Law Review* 5 (1959); Ernest Can der Haag, “Social Science Testimony in the Desegregation Cases: A reply to Professor Kenneth Clark”, *Villanova Law Review*. 6 1960: 69.

from economy and statistics to political science, sociology and linguistics.¹³⁰ One of the key points of the initial controversy was the impact of expert opinions on the Justices. Labeled as “the nine sociologists”, they were accused of “basing the decision on sociology rather than on law, of rejecting the intent of the framers of the Fourteenth Amendment and the established precedents in favor of science fiction”. Less venomous critics were pointing out that relying on social and behavioral sciences evidence in the courtroom is a dangerous path, as “modern social science is not in agreement in its basic philosophy.” Still, “when the Supreme Court cited such evidence in striking down racial segregation in public schools, the prestige of behavioral sciences was generally boosted. But the ire of its critics was all the more aroused.”¹³¹

Hence, since *Brown*, “various social scientists, lawyers, and judges have questioned litigative relevance of this evidence as well as its accuracy ... such testimony continues to be presented in these cases and, if anything, has come to play an even larger role.”¹³² On the other hand, since this decision, the confidence of social scientists and historians alike was boosted in regard to the relevance of their findings. Courtrooms became perceived as places in which scholarship could legitimately serve its public function.

¹³⁰ Paul Meier, “Damned Liars and Expert Witnesses”, *Journal of the American Statistical Association*, 81, 394 (1986), 269-276; Stephen E. Feinberg, “Ethics and the Expert Witness: Statistics on Trial”, *Journal of the Royal Statistical Society*, 160 (1997), 321-331. Richard A. Posner, “The Law and Economics of the Economic Expert Witness”, *The Journal of Economic Perspectives*, 13 (1999), 91-99; Michael J. Mandel, “Going for the Gold: Economists as Expert Witnesses”, *The Journal of Economic Perspectives*, 13 (1999), 113-120. Lawrence J. Leigh, “Political Scientists as Expert Witnesses”, *Political Science and Politics*, 24 (1991), 521-524. Lawrence Rosen, “The Anthropologist as Expert Witness”, *American Anthropologist*, 79, (1977), 555-578;

¹³¹ Herbert Garfinkel, ‘Social Science Evidence and the School Segregation Cases’, *The Journal of Politics* 21, (1959): 44, 37.

¹³² J. Sanders, B. Rankin-Widgeon, D. Kalmuss, M. Chesler, ‘The Relevance of ‘Irrelevant’ Testimony: Why Lawyers use Social Science Experts in School Desegregational Cases’, *Law and Society Review*, 16, (1981-2), p.403.

II.2.4 Historical Expert Witnessing from Antechamber into Legal Arena and Beyond

It took some time for the victory won for the Civil Rights Movement in 1954 to materialize. It seems that on the matter of desegregation forward-looking social science was ahead not only the overtly racist state legislation, but also of the realities of the American society. Although racial discrimination in public education was rendered unconstitutional, and the verdict was calling for desegregation “with all deliberate speed”, ten years after *Brown*, in 1964, only slightly more than 2% of Black children were attending desegregated schools.¹³³ It took significant political, legislative, judicial and scholarly effort to realize the decision. So deep-seeded were the prejudices sown in the last century. Still, the decision in favor of the plaintiffs undermined heavily the very logic of Jim Crow laws, and the tide unleashed with *Brown* became the foundation from which to strike down other laws based on the doctrine of separation. Eventually, the decision was interiorized as one of the basic achievements of the United States after the Second World War. Thurgood Marshal, council for the plaintiffs eventually became the first Black Justice of the Supreme Court and eugenics and ‘scientific racism’ had evaporated entirely from the contemporary scholarship.

Although historical expert witnessing was considered ambiguous and inconclusive in *Brown*, its usage was an important step for the legitimization of historians’ legal contribution. This ruling earned its place in the constitutional history exactly due to the acknowledgment that “there are times when both judge and historian should recognize that history is simply beside the point ... In such a case, the judge must

¹³³ Cf. Ralph. D Mawdsley, “A Legal History of *Brown* and a Look to the Future”, *Education and Urban Society*, 36 (2004): 36.

transcendent history, as the Supreme Court did in *Brown v. Board of Education*".¹³⁴ The very inability to reach positive conclusions about the intent of the 19th century legislators to desegregate American society proved to be important for a number of cases, which were based exactly on the segregationist intent of the authorities. One of the reasons for the proliferation of the expert testimony in similar cases after *Brown* was the slowness and inefficiency of the implementations of the discriminatory laws in education. Further, education was not the only realm of discrimination, whose main purpose was to keep Blacks out of the political process. "The day after a federal court in New Orleans had ordered the desegregation of the public school system, newly elected Governor Jimmie Davis announced to the state legislature that his administration was sponsoring a series of bills."¹³⁵ Those bills were reviving the other cornerstone of segregation - obstruction of voting rights granted to Black Americans by the 14th and 15th amendment after the Civil War, and strengthened through 1866 Civil Rights Acts. Those rights were effectively sidetracked in many Southern states with the imposition of different mechanisms, which came to be known as Black Codes, designed to systematically keep Black voters out of political process. Literacy tests, poll taxes or residence qualifications were introduced with such intent.

By the end of the century, the majority has lost that right, and even the ones who possessed it rarely exercised it. Louisiana, for instance, initially had 130,344 black voters registered. Only 5320 remained in 1900 due to the introductions of such measures.¹³⁶ In the first half of the 20th century there were no clear-cut attempts to change such situation,

¹³⁴ William M. Wiecek, *op.cit.*, 234-235.

¹³⁵ Payton McCrary, "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics," *University of Pennsylvania Journal of Constitutional Law*, 5 (2003): 666.

¹³⁶ Peterson, *op.cit.*, 181-2.

and only after the Second World War such tendencies crystallized. In the eve of desegregation impetus after *Brown v Board*, during the struggle for implementation of such decision, barely one out of three potential Black voters was registered in the South. The first visible case of such kind was *Baker v Carr*, brought in front of the Supreme Court in 1962, even before the Voting Rights Act. The court ruled that reshaping of electoral boundaries with discriminatory purpose in mind is a valid cause for federal Courts. Such decision was influenced by the expert opinion of a Tennessee State Historian, Dr Robert H. White, entitled "A Documented Survey of Legislative Apportionment in Tennessee, 1870-1957".¹³⁷ The Supreme Court remanded the case to the lower courts, but had ruled that the issue of redistricting is under the jurisdiction of the federal courts.

Among the groups that were seeking the redress of the wrongs of the past were also the American Indians, whose legal claims were coming of age in the postwar period, ranging from the breaches of the Indian treaties signed in the course of the 19th century (Fort Laramie Treaty 1851, Fort Wise Treaty 1861, Medicine Creek Treaty 1867, Fort Laramie Treaty 1868) to the contemporary patterns of discrimination. Scattered in small reservations, almost destructed during the second half of the 19th century, having obtained only partial form of citizenship through the Dawes Act (1887), their number swelled from 240,000 in 1860's to 100,000 in 1900. They obtained citizenship in 1924, and the situation in reservation lands was somewhat improved by the Indian Reorganization Act in 1934, but much remained to be addressed, as both segregation and

¹³⁷ US Supreme Court, *Baker v Carr* 369 U.S. 186 (1962) <http://laws.findlaw.com/us/369/186.html> Report of historian Robert H. White, "A Documented Survey of Legislative Apportionment in Tennessee, 1870-1957," Exhibit 2. More background information on the case in Stephen Ansolabehere, Samuel Isacharoff, *Baker v Carr in Context*, <http://web.mit.edu/polisci/research/representation/Baker-edit.pdf>"

forceful integration was harming the traditional life of Native Americans.¹³⁸ Newly formed National Congress of American Indians (NCIA) in 1944 was determined to fight for their rights in legal way. As the progress was slow, in 1960 National Indian Youth Council was formed. The issues were many – fishing rights, educational problems and the shrinking of reservations. As Bureau of Indian affairs handled these problems poorly, in order to alleviate the tensions, in 1946 the US Congress has formed an Indian Claims Commission, assigned to foster relations between the federal government and Indian tribes. One of the key areas in this dialogue was to be legal claims for compensations for the territory lost in a breach of the federal treaty. Their unique nature was land and fishing rights, guaranteed by a number of treaties. Such claims started in the early sixties, and they varied from retrieving the fishing rights and land property to granting a proper compensation. However, compensation was neither necessarily easily retrievable nor proper. For example, in 1964 when Californian tribes were compensated for the land taken in previous 100 years, getting 47 cents per acre for millions of taken acres.¹³⁹ Not only lack of readiness to compensate, but also lack of substantial knowledge of Native rights and their breaches stood in the way of legal process. Experts like Dr Helen Hornbeck Tanner, historian from The Newberry Library or a Tennessee State Historian, Dr Robert H. White stepped forth as full-blown expert witnesses in the first half of the 1960s in cases such as *Patawatomie Tribe of Indians et alia v. the United States of*

¹³⁸ General information on the history of Native Americans in Index of Native American History Resources on the Internet, <http://www.hanksville.org/NAresources/indices/NAhistory.html>. About the development of the Indian question in the USA see David Paterson et alia, *Civil Rights in the USA 1863-1980*, 48-52.

¹³⁹ Bureau for Indian Affairs, <http://www.doi.gov/bia/> Harvey D. Rosenthal, *Their day in court: a history of the Indian Claims Commission, Distinguished studies in American legal and constitutional history*. (New York: [Garland Publishing](#), 1990). Cases before the Indian Claims Commission are electronically stored in the Digital Library of the Oklahoma state University. <http://digital.library.okstate.edu/icc>

America in order to change that. Such appearances became usual sight in American courtrooms in years to come, as the practice was fully institutionalized.

This paradigm was in many ways in contrast with the type of historical expertise which was gaining currency in Europe in the same time. Although the motivation was interconnected, as it was clearly linked with the change in sensibilities prompted by the end of the Second World War, the demands put in front of the American historians were largely conditioned by the specificities of the legal setting. In stepping from the antechamber of the Supreme Court into the various legal arenas of the USA, they became growingly engaged in a number of proceedings whose variety is difficult to track. Still, those proceedings were mostly civil cases, in contrast to criminal investigations related to the mass atrocities of the Second World War. Experts in Eichmann case or in the Frankfurt Auschwitz trial testified about the general background in which a particular crime has been committed, presenting therefore a view ‘from above’ and leaving to the prosecutors, investigators and other officials of the state to establish the particularities of individual responsibility of the accused. Such division of labor, with all the inherent complexities and controversies, was still more clear-cut than the adversarial paradigm of historical expert witnessing in a variety of cases. This paradigm required more than a detached overview of a historical background. It called for a view ‘from below’, a detailed scrutiny not only of historical background but of particularities of intents and interests of participants of the trial, conducted in the competitive environment of an adversarial courtroom.

By the beginning of the 1960s, serious challenges had been posed to the theory of incompatibility between history and law. In what at first glance seems a major coincidence, historians became experts in courtrooms on both sides of the Atlantic. However, although the circumstances of institutionalization varied significantly, and bore no immediate connection, they undoubtedly bore much resemblance. Both in Germany and in the United States, historians stepped into the courtroom to testify about the bad past. Testifying about the grim realities of racism, they aimed to contribute to undoing its consequences. On the wave of the proclaimed struggle toward universal human rights, historians were mitigating between this present commitment and the cultural habits of past times. As the legal system attempted to reconcile ‘what is’ and ‘what ought to be’, historians had the even more difficult task of putting this trend in historical perspective by displaying ‘what was’. Their factual findings from the recent or more distant past were tracking the elusive trends of human rights and their breaches, and exposing the cleavage between the proclaimed standards and their neglect in reality. Institutionalized at the brink of this cleavage, both inquisitorial and adversarial paradigms of historical expert witnessing were bound to trigger major controversies and were both widely expanded and seriously problematized in the years to come.

PROBLEMATIZATIONS

This chapter deals with the problematizations prompted by developments within the two dominant paradigms in historical expert witnessing. It tracks the proliferation of historical expertise in courtrooms in the USA (III.1) and scrutinizes the debates it caused. It also tracks the discussions over historical expert witnessing in continental Europe in comparative perspective (III.2). Finally, it explores the modalities of closure between the two paradigms by the end of the 20th century.

III.1 Historical Expert Witnessing in Antidiscrimination Cases in the USA

The foundations of historical expert witnessing laid down in the late 1950s and early 1960s in United States courts branched out in the decades to come. It seemed that historians achieved not only a fully legitimized but also quite elevated and influential position in the legal process. Historians were a significant part of the boom in expert witnessing that in the era which Faust Rossi labels a liberal stage in the field regulating this legal sphere.¹ Although they offered reports or appeared to testify on different subjects, their predominant or at least most visible field remained in the area of discrimination, widened to cover different social and ethnic groups in need of protection. Alongside with this branching out, some of the problematic aspects of historical expert witnessing in the adversarial context also grew more visible.

¹ Faust Rossi, *The Expert Witness in United States Courts: How the Law has Changed*, S.J.D. program, (CEU : Budapest 2002), 1.

III.1.1 Voting Rights Cases

The legal victory for the civil rights movement in *Brown v. Board of Education* was by no means secure in the realities of United States politics. The first attempts to include Black children into the ‘integrated’ schooling system in the South were met with strong resistance. In 1957, a group of nine Black students enrolled in Little Rock Central High School in Arkansas were prevented from enrolling by their peers, seconded by parts of the local White community and by the governor of the state who used the National Guard in order to prevent integration. It took strong federal action, including the deployment of armed forces, subordination of the Arkansas National Guard to the federal authorities and direct pressure from President Eisenhower to enforce the Supreme Court’s ruling. Black children were admitted, but were still subjected to pressure and abuse. “If I were a Negro mother in the South”, wrote Hannah Arendt in an immediate reflection on the Little Rock incident, “I would feel that the Supreme Court ruling, unwillingly but unavoidably, has put my child into a more humiliating position than it had been in before ... I would in addition be convinced that there is an implication in the whole enterprise of trying to avoid the real issue. The real issue is equality before the law of the country, and equality is violated by segregation laws, that is, by laws enforcing segregation, not by social customs and the manners of educating children ... The color question was created by the one great crime in America’s history and is soluble only within the political and historical framework of the Republic.”²

² Hannah Arendt, “Reflections on Little Rock”, *Responsibility and Judgment*, (New York : Schocken 2005), 194, 198,

The systemic solution that Arendt was arguing for was attempted by the Eisenhower administration through the promulgation of the Civil Rights Act in 1957. Adopted by Congress after the longest one-person filibustering in the Senate, this bill aimed to reaffirm the voting rights of Black Americans and to push them into the political process in the parts of the USA in which they were kept out by local legislation or customs. However, the results were disappointing. If in 1957 only 20% of Black Americans were registered to vote, by 1960 the number of Black voters in the South was still dropping. The new Civil Rights Act from 1960 contained some improvements, including the extension of jurisdiction of federal courts towards the protection of voting rights, but it took a strong commitment of the Kennedy-Johnson administration to bring this legislation to life.³ The new administration expressed strong commitment towards enabling equal opportunities and enforcing human rights, running a conscious risk of splitting the Democratic Party. A new phase of the fight for political rights was initiated by President Johnson with the promulgation of the 1964 Civil Rights Act. This action of the federal authorities has created a framework for a systematic desegregation policy in the USA. An important part of the Civil Rights Act was related to compiling data on registration of voters, announcing therefore a 1965 Voting Rights Act. This document established a set of measures aimed at outlawing discrimination by disenfranchisement, providing also direct federal action to ensure the implementation of voting rights for everybody.⁴

³ History Central, *Civil Rights Act 1957*, <http://www.historycentral.com/Documents/CivilRights57.html>, *Civil Rights Act 1960*, <http://www.civilrights.org/publications/monitor/august1988/art3p1.html>

⁴ *Civil Rights Act of 1964*, http://finduslaw.com/civil_rights_act_of_1964, Our Documents Initiative, *Voting Rights Act (1965)*, <http://www.ourdocuments.gov/doc.php?doc=100> More in Steven F. Lawson, *Black Ballots: Voting Rights in the South 1944-1969* (New York : Columbia University Press 1976)

What remained was the implementation of this legislation, and courts became its main battleground. Namely, although the Voting Rights Act greatly increased the number of Black voters, further obstacles were posed to their access to this political right. In many Southern countries the tradition of gerrymandering, that is redrawing the electoral boundaries, was misused in order to minimize the voting effect of the black minority. It was usually conducted through the dilution of votes by partitioning the residential areas with a considerable Black majority into several voting districts. Consequently, “the focus of voting rights litigation shifted to a new type of lawsuit, in order to provide the new minority voters an equal opportunity to elect representatives of their choice.”⁵ Such cases were piling up in the US courts by the beginning of the 60s, as “the rush through the door unlocked by *Baker v. Carr* has been staggering.”⁶ Only in 1962 ‘redistricting’ lawsuits were filed in 33 states, and such trials were becoming more and more common. A significant number of those cases were concerned with redistricting as a means of racially-motivated vote dilution. The Voting Rights Act was a strong boost to such cases, as well as its extension in 1975. The successes of voting rights changed significantly the political landscape of the American South. “By 1990 this portrait of inequality had been transformed beyond recognition. Formal barriers to registration and voting no longer existed and in some localities African-American registration and turnout approached parity with whites. Black office holders had become routine.”⁷

⁵ Peyton McCrary, J.Gerald Herbert, “Keeping the Curt Honest: The Role of Historians as Expert Witnesses in Southern Voting Cases”, *Southern University Law Review*, 16 (1989): 104.

⁶ Peyton McCrary, ‘Bringing Equality to Power: How the Federal Courts transformed the Electoral Structure of Southern Politics 1960-1990’, *University of Pennsylvania Journal of Constitutional Law* 5 (2002), 676.

⁷ Payton McCrary, “Bringing Equality to Power”, 666-708. These far-reaching effects are described in contributions to Chandler Davidson, Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Princeton : Princeton University Press, 1994).

However, this development was far from a straightforward success story. The legal counterstrike came in 1976 with the class action of a group of citizens of Mobile, Alabama, arguing that their electoral system was not discriminating against Black American voters. This complex case was argued in front of the Supreme Court, which remanded the case back to the lower Court, with the opinion that the appellees must substantiate their claim that the election rules are discriminatory. It demanded not only proof of the effect, but also of the intent to discriminate. In an analogy with the *Brown v. Board*, the appellees turned to historians in an attempt to obtain solid historical evidence on the continuity in vote dilution and on the intent behind such practice. With no direct evidence, it was important to look at the patterns of past discrimination in charting up the constituencies on the basis of race. Such a purpose was to be established on the basis of expert reports provided by historians. One of them, Peyton McCrary, explained why “Historians have played their most important role, predictably, in the cases where there is no such ‘smoking gun’.... The courts view such an academic expert as better qualified to evaluate indirect evidence than a layman in the field ... within the last decade historians have begun to play a major role as expert witnesses in federal voting rights cases. Indeed, some cases have been decided primarily because the courts have placed credence in testimony by historians”⁸ Still, such evidence did not seem compelling to the Supreme Court, which in 1980 became quite divided with the decision in favor of Mobile. With three Justices, including Thurgood Marshall dissenting, the Supreme Court reaffirmed stricter standards for establishing the existence of discriminatory intent.⁹

⁸ McCrary, Herbert, *op.cit*, 106.

⁹ US Supreme Court *Mobile v Bolden*, 446 U.S. 55 (1980) <http://laws.findlaw.com/us/446/55.html> For details see *Mobile v Bolden*, *Further readings*, <http://law.jrank.org/pages/13410/Mobile-v-Bolden.html>

This decision was, according to many, a serious blow to the antidiscrimination movement. According to McCrary, what followed was “the erosion of the Fourteenth Amendment protection in voting rights law began in the late 80s ... because the plaintiffs did not prove that recent legislative decisions ... were also racially discriminatory in purpose, the courts dismissed the significance of the historical evidence.”¹⁰ Such verdicts were amassing in lower courts, and an unfavorable ruling followed in the 1993 congressional redistricting case *Shaw v. Reno*, in which “5-4 conservative majority of the Supreme Court reinterpreted the guarantees of the 14th Amendment in a way that made it a barrier to full equality for minority voters.”¹¹

A concern about the future of the vote-dilution cases brought about a debate on the nature and purpose of historical expert witnessing. Its limited effect was contributed to the adversarial nature of the process. The defense was initially reluctant to use expert testimony. According to one attorney, “we only use them because the other side did ... And I thought the whole thing was just a waste of time. I thought we would have been better off if we could agree that they would have no sociologist and we would have no sociologist and we would just present our facts to the court and let it come up with a decision. But you can’t do it that way – they have a sociologist and we have to have one.” Consequently, experts stormed the courtrooms, and “such testimony continues to be presented in these cases, and if anything, has come to play an even larger role in the last fifteen years”, wrote Joseph Sanders as early as 1981.¹²

¹⁰ Discussed in Peyton McCrary, “Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case”, 70 *Chi.-Kent L. Rev.* (1995): 1276

¹¹ Payton McCrary, “Bringing Equality to Power”, 707. An entire study is dedicated to this phenomenon by Morgan Koussner, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, (Chapel Hill : University of North Carolina Press 1999)

¹² J.Sanders, et alia, “The Relevance of ‘Irrelevant’ Testimony: Why Lawyers use Social Science Experts in School Desegregation Cases”, *Law and Society Review*, 16 (1981): 403-428

In an attempt to clarify his engagement, Peyton McCrary admitted that “this role troubles some academics, who wonder if involvement in an adversary proceedings somehow tempts scholars to distort their interpretation of the evidence in order to serve a cause”¹³ He was certainly not among them, as he concluded: “Critics charge that the adversary system tempts witnesses to become partisans of the cause for which they testify; some see liberals as especially guilty of serving causes. Our experience is that witnesses are less likely to fall prey to partisanship than to more pedestrian vices, such as sloppiness, muddled thinking, or lack of attention to detail, and that experts serving the defendants’ side in these cases are more likely to fall from professional grace than are plaintiffs’ experts. A vote-dilution lawsuit is an interdisciplinary enterprise in which lawyers and academic learn from each other. These cases also make available to scholar’s financial resources rarely given for academic research. The investigation often deals with issues ignored by historians in the past, and the findings presented in courtroom testimony serve to enrich our understanding of the complex relationship between race and politics in the South. In so doing, historical research may exercise a direct influence over events in the real word of the present”.¹⁴

On the other side, political scientist Warren Miller casted a doubt over the appropriateness of such role, claiming that “the motivation to do good or bad – is simply different from the motivation to find out how things work, and it is the transformation of the latter motivation into action that is science.” Such problematization particularly concerned expert witnesses in vote dilution cases, and they reacted vehemently. Morgan Koussner, a successful veteran of no less than 25 expert reports on the issue commented:

¹³ McCrary, Herbert, op.cit, 101

¹⁴ McCrary, Herbert, op.cit, 128.

“My own experience as an expert witness in six voting rights cases causes me to doubt the soundness of Warren Millers’ observation. Changing the world and doing normal science or history are not such different pursuits at all. (Expert witnessing) afforded me opportunities *to tell the truth and do good at the same time*. He maintained that “expert testimony by historians might be useful to paint a general picture of the history of racism, in order, at least, to educate judges - to remind them of social facts which they might otherwise prefer to forget.”¹⁵ The importance of historians for voting rights was for him self-evident – if the Court does not “get the history right, it cannot get the equal protection clause right.”¹⁶ In that respect, he thought that voting rights cases, as well as the other cases in which historians took part revolved around the issue of intent of the accused, and he deemed historians no less called upon than the others to assess it: “The process by which a fundamentally honest expert witness arrives at conclusions ... differs less from that which honest scholars employ in their everyday work than is sometimes charged. ... testifying and scholaring are both equally objective pursuits.”¹⁷ Even blunter was Peyton McCrary: “In any event, the virtues that lawyers seek in expert witnesses are the same as those valued by academics: knowledge of all the scholarship in their field of research, hard work in the primary sources, and honest thoughtful analysis of all the evidence. If, after that, the testimony is not likely to help the lawyer’s case, the expert will not appear on the stand. The standards of the courtroom are as high as those of academe.”¹⁸

¹⁵ Morgan Koussner, “Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing,” *The Public Historian* 6 (1984): 7-10. Also Koussner, “Ignoble Intentions and Noble Dreams: On Relativism and History with a purpose.” *The Public Historian*, 15 (1993): 15-28.

¹⁶ Morgan Koussner, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, (Chapel Hill : University of North Carolina Press 1999), 456

¹⁷ Koussner, *Are Expert Witnesses Whores?*, 19.

¹⁸ McCrary, Herbert, op.cit, 128.

III.1.2 Indigenous People's Legal Claims

Historians, ethnologists and anthropologists who were for decades testifying in the Native American legal claims cases would be less surprised by the passion expressed in this debate. In the postwar period, collecting the anthropological and historical evidence for the claims of American Indians eventually contributed to the creation of the American Society for Ethnohistory “as an outgrowth of the research done for the Indian Claims Act of 1946. By the mid 1950s the anthropological and historical reports used as evidence in Native American claims against the U.S. Government were brought together for the first Ohio Valley Historic Indian Conference”.¹⁹ One of the pioneers of this activity, Julian Steward, noted as early as 1955 that “the Indian Claims cases present challenge to anthropology that seem to me more fundamental than is generally recognized.”²⁰ In the same year the experiences gathered in preparation of such cases were exposed by Donald C. Gormley, and his conclusion was one of cautious optimism: “Despite the several deficiencies in the adversary system of producing expert opinions, it is submitted that the valuable aid gained from expert testimony can be continued by means of that same system honestly and intelligently utilized. Where anthropology has been brought to bear on issues in cases already heard, through careful and thorough research and preparation for trial, there is no question but that the task of the Commission and counsels have been greatly aided, and the cause of justice forwarded.”²¹

¹⁹ *The American Society for Ethnohistory*, http://www.ethnohistory.org/sections/about_ase/

²⁰ Julian H. Steward, “Theory and Application in a Social Science”, *Ethnohistory* 2 (1955): 292.

²¹ Donald Gormley, “The role of the expert witness”, *Ethnohistory*, 2 (1955): 336.

Was Gormley too optimistic? The adversarial nature of legal process in United States, as one of the main traits of the common law, proved to be a great source of tensions insofar as expert witnessing from social sciences was concerned. The worsening of that tension in the realm of forensic humanities was well-described by one of the veterans of this endeavor, Dr Helen Hornbeck Tanner, historian from the Newberry Library, Chicago, who served as an expert witness in native claims from 1963. Encouraged to step in by the colleague anthropologist and by the lawyer litigating the Indian land claims in southeastern Michigan and Ohio Tanner became a regular expert witness in such cases over several decades.²² Her recent personal account reveals much of the complexities in the field of forensic historiography: “My experience has taught me that the law is opposed to history; that history and the law are in a state of perpetual warfare in the court of law.”²³

Among the greatest obstacles in her work were the “absolutely irrational rules of evidence for using historical information. I found that one rule said that one could not introduce as evidence any printed material by a living author without calling in the author for questioning and cross-examination ... lawyers were very proud to eliminate contemporary research and preserve nineteenth century writing; and of course, that made me angry. The whole process was very anti-historical and showed no respect for my profession”. In finding the background information for the plaintiffs in a number of cases, “it has become an endless challenge to try to arrange historical information so it can be

²² Cases are electronically stored in the Digital Library of the Oklahoma state University, *Indian Claims Commission*, Patawatomie Tribe of Indians et alia v. the United States of America, 27 Ind. Cl. Commission 187, <http://digital.library.okstate.edu/icc/v27/icc27p252.pdf>

²³ Helen Hornbeck Tanner, “History vs. the Law: processing Indians in the American Legal System”, *University of Detroit Mercy Law Review* 76 (1999): 693.

processed by the legal system.”²⁴ On the other hand, “if lawyers and judges seemed like real sticklers on the rules in using historical evidence, they appeared to me to be remarkably lax concerning any rules for being an historical expert witness. The simple fact that I had recently obtained my Ph.D. from the University of Michigan seemed to qualify me to discuss and offer opinion about a broad range of history and about many Indian tribes. It did not seem to matter that my field of specialization was Latin American History or that I had never had a course in any branch of Anthropology. In fact, the lack of exposure to formal training in Anthropology probably was a positive factor. The lawyers appearing at the Indian Claims Commission seemed ambivalent about anthropologists.”²⁵

Over the years, Tanner became very critical towards the role of historical expert in an adversarial context. “I think it would be a mark of progress if historians working on opposed sides of the same legal case were allowed to have discussions and come to agreements on the basic facts of the case.”²⁶ Further, she advised that “something needs to be done about history and ‘hearsay evidence’. In fact, in my opinion, all the rules for the introduction of historical evidence need to be reviewed and revised.” She had a set of proposals on more constructive approach to the legal role of historical expert witness: “A historian has to present sufficient facts with reliable interpretation so that the judge can render a good decision. There can be problems in fulfilling this properly. I can see that it is possible to manipulate the rules of evidence so that the judge is deprived of the information that he or she ought to have in order to make an acceptable decision. So, I feel that the historian should be in the ‘third corner’. The role of a historian in a legal case

²⁴ Tanner, 698.

²⁵ Tanner, 699-700.

²⁶ Tanner, 697

is significantly different from the role of the lawyer. Although a historian is hired by one of the two parties, the responsibility is to keep the integrity of the historical record from being warped and distorted by lawyers so that it will be possible for a judge to render a just and reasonable decision. Even with the best evidence, most decisions in Indian cases seem to me to be unsatisfactory. I really believe that Anglo-Saxon law, because of its embedded value system, is fundamentally incapable of reaching decisions that achieve justice in Indian terms.”²⁷

Similar concerns were raised by the end of the 1970s by the anthropological community. Noting that “anthropologists too have appeared in astonishingly wide range of cases”, Lawrence Rosen emphasized that “their predominant role was in cases involving American Indians”. Rosen summarized the effect of the anthropological expert testimonies given in front of the Indian Claims Commission and concluded that “social scientists that have appeared in legal proceedings have been deeply troubled by the technical implications of their work.”²⁸ Rosen was himself engaged in a number of such cases, particularly on concerns over the clashes between scholars and the impact on the academic community. However, his student Omer S. Stewart, “did not share the fears expressed by Rosen that being an expert witness might adversely influence the scholarly role of anthropologist ... in contrast to Rosen, my experience as an expert witness has increased my respect for legal/cultural patterns of the United State, and I am convinced that they are better than any others proposed to achieve the justice promised in the Constitution of the United States.”²⁹ In an unusually sharp reply Rosen has further

²⁷ Tanner, *op.cit.*, 708.

²⁸ Lawrence Rosen, “The Anthropologist as Expert Witness”, *American Anthropologist*, 79 (1977): 558, 569.

²⁹ Omer C. Stewart, “An Expert Witness Answers Rosen”, *American Anthropologist*, 81, (1979), 110.

underlined the problems in anthropological expert witnessing: “It is because some scholars have deluded themselves into believing that legal proceedings are in no significant way different from scholarly ones .. that they mistake even the most circumspect suggestion for self-analysis and modest legal reform as attacks on their personal objectivity and the principles of American constitution law.”³⁰

Despite such contestations, the issue of the rights of Indians and other indigenous people continued as the cases under the Indian Claims Commission became quite ordinary affairs. The Commission was discontinued in 1978, by which time it had dealt with more than 540 claims, awarding more than 800 million dollars for damages. However, the remaining and new claims were transferred to the United States Court of Claims, meaning that the job was not nearly done. In regular courts historians were exposed to even greater tensions. For instance, in *U.S v. State of Michigan* (1979), another native rights case, the judge concluded that the historical expert of the State of Michigan “was not by either training or experience thoroughly familiar with the culture of the upper Great Lakes Indians” and therefore unable to help “the court as to the total circumstances of the treaties”. Similarly, in the more recent *Cayuga Indian Nation of New York v Pataki* (2001), the presiding judge relied in his judgment on a large historical excerpt taken from different expert testimonies, but noted that one of the experts “had a tendency to place a modern construct on these century-old events, and to portray the US as the ‘good guy’ and the state as the ‘bad guy’”.³¹ This lack of trust in adversarial historians was one of the bases of appeals to the verdicts, leading them up to the Supreme Court. The longstanding legal feud *United States v Sioux Nation of Indians* was, in the

³⁰ Lawrence Rosen, “Response to Stewart”, *American Anthropologist*, 81, (1979): 111

³¹ Neuenschwander, John A. ‘Historians as Expert Witnesses: The View from the Bench’, *Organisation of American historians*, www.oah.org/pubs/nl/2002aug/neuenschwander.html

wording of the 1980 Supreme Court judgment largely based on historical statements. Still, in the dissenting opinion, Justice Rehnquist warned that “Different historians, not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court's opinion. This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science”.³²

On the other hand, historical expert witnessing could not be simply discarded, as it proved crucial for a given case, as in the fishing and hunting rights case of the Native Americans in Minnesota, in which no less than five expert witnesses testified for the plaintiffs, and five more for the defense. The result was a verdict in favor of the plaintiffs, with over 30 pages of the Courts’ opinion devoted to history.³³ Apart from land and fishing rights, other topics were tackled in courts. In the recent case of the Kennewick man, a corpse from 7000 BC was claimed both by the scientific community and by a Native American tribe. As forensic anthropology failed decisively to identify the race of the body, the court asked historians to give their opinion, but their findings were indecisive as well. The expert historian who testified in the case, M.C.Minow, commented that “certainly there are cases in which forensic history and academic history are in accord and professional historians can aid the court in determining a just solution for legal disputes or criminal actions. Nonetheless, in this case ... the court asked the wrong questions of the historical discipline.”³⁴

³² United States v Sioux Nation of Indians, 448 U.S. 371 (1980), <http://laws.findlaw.com/us/448/371.html>
Cf. Edward Lazarus, *Black Hills White Justice The Sioux nation vs the United States, from 1775 to the present*. (New York, NY: Harper Collins Publishers, 1991).

³³ Quoted in Farber, op.cit, 1012.

³⁴ M.C.Mirow, ‘Kennewick Man, Identity, and the Failure of Forensic History’, in Alain Wijffels (ed.), *History in Court. Historical Expertise and Methods in a Forensic Context*, (Leiden : Ius Deco Publications, 2001), 241-6.

Controversial as it might be, this phenomenon was also growing outside the USA. The issue of the property rights of native and indigenous people was highly relevant in Canada, Australia and in other democracies based on the territory of indigenous people. Jerome Gilbert observed: “The common law doctrine on indigenous title reaches far back into history, as indigenous peoples would have their right to land recognized in the light of events that took place centuries ago. Accordingly, the development of the doctrine raises difficult questions regarding the link between law and history”.³⁵ This new conception was not necessarily brought in by historians. Outside of the USA, it was the anthropologists who were in the forefront of the venture. Absence of historians was criticized in Australia by David Ritter. He claimed that “history is the foundation of the native title. It would seem axiomatic that, as history is foundation of native title, historians should be well-represented amongst those who are busy constructing the edifice of the native title claim processes ... Paradoxically though, historians are not prominent in the native claims processes. It may indeed be the case that history has been marginalized in the native title context precisely because of its own success at (post)modernizing. Courts are clearly more at home with the comparatively objective expertise of engineers, doctors and other expert witnesses, rather than with historians who openly declare that all historical understanding is but relative and constructed.” His plea was not written in vain as in the same year a guideline for historians testifying in such cases in Australia and New Zealand, and a number of such cases are under way.³⁶

³⁵ Jerome Gilbert, “Historical indigenous people’s land claims: a comparative and international approach to the common law doctrine of indigenous people *International and Comparative Law Quarterly*, 56 (2007): 592.

³⁶ David Ritter, “Whither the Historians? The case for Historians in the Native title process”, *Indigenous Law Bulletin*, (1999), 2. Cf. Christine Choo, Margaret O’Connell, “Historical Narrative and Proof of Native Title, Land, Rights, Laws” 2 *Issues of Native Title*, vol.2, no3. (2000); Debbie Fletcher, Mel Keenan,

In United States, however, the opinions are still divided on the merits of historical expert witnessing in native claims. One of the reflective witnesses, historian Hal K Rothman, has very candidly described the whole process of his engagement in the expert witnessing in a federal court case, *Navajo Nation and Watchman et alia v. State of New Mexico* argued in 1990 in front of a federal court for cutting the funding of a home health care program of Navajo Indians. The attorney for the plaintiff, Henry Howe, aimed to prove the discriminatory intent by putting the case in wider historical perspective. He aimed to prove that “the decision to cut funding might be governed by preexisting feelings towards Native Americans in general and Navajos in particular”. As there was solid research on the matter, “Howe merely needed to find the kind of historian who could credibly express that context ... Initially Howe contacted authors of published histories of the Navajo ... He eventually settled on a younger historian, Hal K. Rothman, who had not published directly on the Navajo, but had expertise in federal policy and relations in the West ... It was a calculated risk, both the historian and the attorney recognized.’ The representative of the other side, attorney John Pound “believed that the historian’s testimony was not relevant to the case” and decided “not to seek another historian as a witness to counter the plaintiff’s historian.”³⁷

The case was heard in front of the Judge Edwin L. Mechem of the U.S. District Court in Albuquerque. “Howe put his historian on the stand ... Pound objected, arguing that the testimony had no bearing for the case ... and asked for the exclusion of the

Indigenous Land Use Agreements and the Future Role of the Historian in NativeTitle’ Paper presented at the 1999 Australian and New Zealand Law and History Society Conference (1999)

³⁷ Hal K. Rothman, „Historian v. Historian: Interpreting the past in the Courtroom“, *The Public Historian* 15 (1993), 41-3. His report: *Structural and Institutional Discrimination by the State of New Mexico Against the Najavo Nation: An Historical View*, in support of expert witness testimony in *Navajo Nation and Watchman et al v. New Mexico*, CIV 86-0576 M, U.S. District Court, District of New Mexico, September 10, 1990.

testimony. Judge Mechem decided to hear the testimony before he determined if it was admissible ... the historian gave his commentary emphasizing the continuity of attitudes and behavior toward the Navajo over a 300 years period ... with more than thirty examples, at least ten of which were more recent than 1970, the inference was strong. ... Nearly six months later Judge Mechem decided the case in favor of Navajo ... he noted the historical testimony, remarking that it demonstrated a pattern of decimation that had deep historic roots.”³⁸ The verdict was upheld on the appeal, which stated that “the historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.”³⁹

Rothman remained critical of his own success, maintaining that “the value of historians in the courtroom depends on their ability to present a credible interpretation of the situation in question. History in the courtroom is far from an academic exercise.” In another case he testified, an ironic situation developed. The two historians agreed on the evidence that was relevant, quoting same documents and the same basic chronology. One even cited the works of the other in his report.. In fact, they were so much in accord, that the court ordered a pre-trial settlement. “In this case, the interpretative testimony of the two historians became irrelevant”. By the means of conclusion, Rothman warned that as “historians in the courtroom are arbiters of information ... the credibility of the profession requires that in the courtroom, historians remain historians. As historian become commonplace in the courtroom, retaining the credibility will become more difficult.”⁴⁰

³⁸ Hal K. Rothman, *op.cit*, 43-44.

³⁹ *Navajo Nation v. State of Mexico*; US Court of Appeals, 975 F.2d 741 10 Circuit. Sept. 22, 1992

⁴⁰ Rothman, *op.cit*, 39, 50

III.1.3 From Race to Gender: Sears v. EEOC

The conflict between historical professionals and judges turned out to be minor in comparison to the clash between historians themselves in the courtroom. This is exactly what had happened some years afterwards, within yet another generation of antidiscrimination trials regarding women's rights. As elsewhere in the world, women had reasons to seek redress for historical injustice in the United States, where they were discriminated against in a number of ways. For instance, the 15th amendment gave voting rights to all male citizens, enraging the early feminists. The first serious initiatives brought about female suffrage in the state of Wyoming in 1869, but the national movement to provide it on the level of the Union arose by the beginning of the 20th century, supported through the National Woman Suffrage Association. This great fight culminated in August 1920, when the 19th amendment, granting women voting rights, got ratified. In time, as women acquired more and more political rights, so did claim for complete gender equality was growing ever stronger. The role of the Second World War was in this respect quite crucial, as women permanently entered the job market and even the military. What is usually referred to as a second wave of feminism was moving away from the solved issue of suffrage to reviewing the position of women in the context of the cultural and economic setting of society. Starting from the 1960's, such reflections on the position of women acquired firm theoretical ground, and so did insights into women's history.⁴¹

⁴¹ Cf. Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States*, (New York: Harvard University Press 1996), Nancy F. Cott, *The Grounding of Modern Feminism*. (New Haven: Yale University Press, 1987); Joan Wallach Scott, *Feminism and History (Oxford Readings in Feminism)*, (Oxford : Oxford University Press, 1996).

These reflections were indivisible from an immediate call for action, which was itself indivisible from a wider striving towards the universalization of human rights. The Civil Rights Act of 1964 owed its importance and constant renewal in American political history to its addressing many of these issues. One of its offspring was the Equal Employment Opportunity Commission, a US federal institution created in 1964 through the Civil Rights Act. Its purpose was to ensure the usage of the employment part of the Civil Rights Act, title VII, that prohibited discrimination based on race, color, national origin, sex and, religion.⁴² However, as the EEOC was not given the right to enforce its decisions, it has found the way through inspecting and reviewing allegations of discriminations and helping the litigants sue the companies. At first, it was racial discrimination which was its focus, but very soon other aspects of discrimination came to their attention, primarily gender based.

Among a number of initiatives to ensure and promote equal employment opportunities for men and women, probably the most visible one was the legal suit against the trade giant Sears, Roebuck & Co. The suit was brought in 1979, claiming that Sears was discriminating against women in hiring on positions of commission sales jobs. The claim was that, although Sears employs quite substantial number of women, the best places have been reserved for men. “During the ten-month trial which began September 13, 1984, and consumed 135 trial days, the EEOC sought to prove that Sears engaged in a nationwide pattern or practice of discrimination against women from March 3, 1973 to December 31, 1980, by failing to hire and promote females into commission sales positions on the same basis as males and by paying female checklist management

⁴² Civil Rights Act, Title VII, Equal Opportunities, http://finduslaw.com/civil_rights_act_of_1964_cra_title_vii_equal_employment_opportunities_42_us_code_chapter_21 On *Equal Employment Opportunity Commission* more on its website <http://www.eeoc.gov/>

employees less than similarly situated male employees. The district court on January 31, 1986, held for Sears on all claims and also denied the EEOC's outstanding motion for partial summary judgment.”⁴³ The verdict was appealed, but the appeal court confirmed the initial judgment in late 1988. The case was a huge uproar. However, the uproar did not come from the verdict, but from the engagement of historian expert witnesses: “The controversy centers on a conflict between two historians of women, Rosalind Rosenberg of Barnard College and Alice Kessler-Harris of Hofstra University. Both are feminists devoted to enhancing the opportunities for women in American life. The debate does not concern their scholarship: both have won deserved prizes for their contributions to the field of women’s history. Instead, the controversy involves their activities in a setting strange to historians but extremely familiar to law review readers – a court of law. Rosenberg and Kessler-Harris took opposite sides as expert witnesses in what will prove to be the major sex discrimination suit of the 1980’s, EEOC vs. Sears, Roebuck&Co.”⁴⁴

Where did the disagreement appear? As the disbalance between men and women in Sears’s commission sales was a notorious fact, the case revolved around the intent of the employer. Sears was compelled to prevent the evidence that disbalance is not a matter of company’s intent to discriminate. In attempt to do so, “Rosenberg was asked to testify on the questions of whether the apparent patterns of sex discriminations showed by employment statistic prove that Sears intended to discriminate against women in commission sales hires or whether women’s allegedly different motives in seeking

⁴³ Equal Employment Opportunity Commission, Plaintiff-Appellant, Cross-Appellee, v. Sears, Roebuck & Company, Defendant-Appellee, Cross-Appellant No., 86-1621 US Court of the Appeals for the 7th Circuit 839 *F.2d* 302 May 19, 1987, Argued January 14, 1988, <http://lilt.ilstu.edu/teeimer/Court%20Cases/EEOCvS.htm>

⁴⁴ Thomas Haskell, Sanford Levinson, ‘Academic Freedom and Expert Witnessing: Historians and the Sears Case’, *Texas Law Review*, 66 (1988): 1629.

employment could explain the statistical results away. The EEOC employed Kessler-Harris to criticize Rosenberg's account on women's purposes. Rosenberg testified that "women generally prefer to sell soft-line production, such as apparel, housewares or accessories sold on a noncommission basis, and are less interested in selling products such. Women tend to be more interested than man in the social and cooperative aspects of the workplace. Women tend to see themselves as less competitive. They of then view noncommission sales as more attractive than commission sales, because they can enter and leave the job more easily, and because there is more social contact and friendship, and less stress in noncommissioned selling."⁴⁵ Particularly irritating for Kessler-Harris was the fact that Rosenberg cited her own work on women on the market of labor. "I did in fact write those words, and they are correctly quoted. But they describe the ideology of womanhood that emerged in United States in the years before the Civil War. Why then use them as if they illustrated my perspectives on women in the 1970s?"⁴⁶ Kessler-Harris claimed "that substantial number of woman has been available for jobs at good pay in whatever field those jobs are offered, and no matter what the hours. Failure to find women in so-called traditional jobs can thus only be interpreted as a consequence of employers' unexamined attitudes or preferences, which phenomenon is the essence of discrimination."⁴⁷ Their opinions were submitted at the trial: *Offer of Proof Concerning the testimony of Dr. Rosalind Rosenberg, Written Testimony of Alice Kessler-Harris and Written Rebuttal Testimony of Dr. Rosalind Rosenberg.*⁴⁸

⁴⁵ Sears case, 628. F Supp. 1281

⁴⁶ Peter Charles Hoffer, *The Historians' Paradox: The Study of History in Our Time* (New York : NYU Press, 2008), 81-3.

⁴⁷ Kessler-Harris quoted in Haskell, Levinson, op.cit, 1634-5.

⁴⁸ Published in special edition of Women's History goes to Trial EEOC v. Sears. 1 *Signs* (1986). Offer of Proof concerning the Testimony of dr. Rosalind Rosenberg 757-766, Written testimony of Alice Kessler – Harris, 767-779.

How did they come to such differing conclusions? Much of their differences were coming straight from the very development of feminist theory and history, which developed various streams, inherently connected to social action, as the fight for women's rights continued in different and complex directions. To simplify, whereas liberal feminists were pushing for legal rights, radical feminists claimed that women who strive for equality with men lack ambition. Joan Scot was delineating this well known division in her article "Deconstructing equality-versus-difference or the uses of poststructuralist theory for feminism".⁴⁹ Applied to this case, the theoretical dilemma boiled down to a distinct practical question: "Are women's interests best served by public policies that treat women and men identically, ignoring the social and cultural differences between them? Or should we view those differences positively and seek greater recognition and status for traditionally female values and forms of behavior?"⁵⁰ Massive rereading of American history was clearly influenced by this division, and the two witnesses happened to be proponents of differing modes of the interpretation of women's history - Kessler-Harris being committed to an ideal of equality between men and women, Rosenberg emphasizing the specificities of women's thinking and behavior in the world shaped by men. The witnesses had therefore provided completely opposed answers, lending their expertise to the parties at the trial. In the ensuing extra-judicial controversy, both scholars attacked not only the findings, and interpretations, but also each other's motives in testifying. Therefore, their testimonies, which started as the analysis of the intent of the employers, ended with the analysis of each other's intentions.

⁴⁹ Joan Scott, "Deconstructing equality-versus-difference or the uses of poststructuralist theory for feminism" *Feminist studies*, 14 (1988), 33-50. See also Joan Scott, *Gender and the Politics of History* (New York : Columbia University Press, 1988)

⁵⁰ Ruth Milkman, "Women's history and the Sears Case", *Feminist studies* 12 (1986): 381

Rosenberg was less publicly exposing her views, being bitterly attacked, not the least by Kessler-Hariss: “A female historian, identifies as a feminist, had taken a position in a political trial ... What was to be gained by such testimony? A successful argument would damage those who worked at Sears as well as past and future applicants. Worse, it would set a legal precedent that would inhibit affirmative action.”⁵¹ Kessler-Harris was infuriated that Rosenberg “was prepared to testify that other women ... had not wanted well-paying jobs ... The potential consequences were terrifying.”⁵² Other attacks followed, labeling her as “immoral”, “unprofessional”, “stupid”, “prone to class-bias” etc. Such criticism was met by Carl Degler, who himself refused to testify for Sears. He was nonetheless “disturbed at the criticism of Rosenberg for having testified for Sears, I think criticism along those lines will hurt women’s history, will make it seem to be simply a polemical subject and not a true historical subject”.⁵³

Their testimonies were published by a journal *Signs*, as the editors concluded that “the case has far-reaching impact for the future of affirmative action ... One set of questions raised by the Sears case has to do with the use and abuse of history ... What happens to scholarship when historians bring their skills and expertise to bear in legal controversy? Does the use of historians as expert witnesses necessarily imply that the past predicts the future, ignoring unrealized possibilities and downplaying human agency? Is the style of discourse demanded by litigation inimical to a discipline that privileges irony, contingency and qualification? Do feminist scholars have special responsibilities in this regard, either to put their work to practical use or protect it from

⁵¹ Further commented in Stephanie Riger, “Comment on “Women’s history goes to trial: EEOC v. Sears, Roebuck and Company”, *Signs*, 13, (1988) Rosenberg Her papers on the matter are held at the Harvard University Library, *Rosenberg, Rosalind, Papers 1979-1987*, 87-M143-171

⁵² Haskell, Levinson, 1651.

⁵³ Haskell, Levinson, 1631-2.

distortion?”⁵⁴ As the controversy moved from the courtroom into the periodicals, it lost some of its edge. However, it still had a profound impact on the outlook of historical expert witnessing in the United States. “One distinguished historian ... suggested in private conversation that the moral of the Sears episode is that historians simply should refuse to serve as expert witnesses because of the improbability of being faithful to both the demands of their profession and the needs of the lawyer calling them to testify.”, wrote Thomas Haskell.⁵⁵

However, the course of events contradicted this depressing conclusion. Practically at the same time as the District Court was deliberating on *Sears v EEOC*, the Supreme Court of the United States reached a decision in *Bowers v. Hardwick*, (1986) where it upheld the statute of the state of Georgia criminalizing consenting intercourse between two individuals of the same sex. In upholding the decision, the Supreme Court was relying heavily on historical and traditional elements in condemning sodomy in American society. "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching", wrote Justice Warren Burger. The Supreme Court was sending a nation-wide message that anti-homosexual norms were deeply embedded in the American culture.⁵⁶

Such a message was ill received, not only in the growing field of scholars of gender, influenced by Michael Foucault’s analysis of the history of sexuality and other theories of its social construction. This decision of the Supreme Court was publicly

⁵⁴ Jacquelyn Dowd Hall, Preface by the board of associate editor, *Women’s History Goes to Trial*, *Signs*, 11 (1986): 751-2.

⁵⁵ Haskell, Levinson, op.cit 1657. The debate continued with a comment on Haskell and Levinson by Alice Kessler-Harris, “Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson”, *Texas Law Review* 67 (1988):429-440 and Thomas L.Haskell, Sanford Levinson, “On Academic Freedom and Hypothetical Pools: A Reply to Alice Kessler-Harris”, *Texas Law Review* 67 (1988), 1591-1604.

⁵⁶ Enfacto, *Bowers v. Hardwick*, 478 U.S. 186 (1986), <http://www.enfacto.com/case/U.S./478/186/> Detailed in Renata Uitz, op.cit, 25-30.

criticized as both the expression of a wide conservative turn, as encouragement for the state's invasion on the right of privacy, and a misreading of history by the Court: "The historian who considers the uses to which the United States Supreme Court has subjected the past comes to think that history ought to be ... required to bear this warning label: 'Caution: Inept or improper use of this product may be dangerous for your civic health.' Doctrines that live by the sword of concocted history can perish in the same way, and the current vulnerability of privacy and intimate association doctrine suggests that while good history cannot secure a doctrine, unsupported history can weaken it", wrote William Wiecek.⁵⁷ Therefore historians took a more proactive role in this subject, which came across the Supreme Court again in another similar case and related case, *Romer v Evans*. However, historical expertise ended up in an adversarial dead-lock argumentation over the nature of homosexuality between Martha Nussbaum and John Finnis.⁵⁸ Their disagreement showed much resemblance to the Sears case, leaving the door wide open for the Court to reach yet another decision which upheld the constitutionality of antisodomy laws. In the wording of Justice Antonin Scalia, who descended, but only in order to emphasize in even stronger wording based on the original interpretation of the Constitution, "if it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct."⁵⁹

⁵⁷ William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, *California Western Law Review* 24 (1987), 227, 247.

⁵⁸ John Finnis, J. "Law, Morality, and 'Sexual Orientation.'" *Notre Dame Law Review* 69.5 (1994): 1049–76. Martha C. Nussbaum, "Platonic Love and Colorado Law." *Virginia Law Review* 80 (1994): 1515–652. More on their positions and contribution to the case: *Ancient Sexuality and Gender*, *Evans v. Romer*, http://bingweb.binghamton.edu/~clas382a/study_guides/03-17_evans_v_romer.htm

⁵⁹ *Enfacto*, *Romer v. Evans*, 517 U.S. 620 (1996) <http://www.enfacto.com/case/U.S./517/620>.

So-called sodomy laws continued therefore their existence in more than a dozen American states until the case *Lawrence v. Texas* was brought in front of the Supreme Court in 2003. Once before the Supreme Court, three issues were raised by the plaintiffs: (1) Whether the petitioners' criminal convictions under the Texas "Homosexual Conduct" law — which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples — violate the Fourteenth Amendment guarantee of equal protection of the laws; (2) Whether the petitioners' criminal convictions for adult consensual sexual intimacy in their home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment; and (3) Whether *Bowers v. Hardwick* should be overruled?" In an attempt to avoid both the *Bowers v. Hardwick* blunder and the epistemological nihilism of *Romer v. Evans*, ten notable American historians wrote an *Amicus brief*, which turned out to be of major influence. The brief was challenging the ahistorical understanding of gender relations, expressed in a prejudice that the antisodomy laws are firmly embedded in history and culture. The scholars, who were considered top experts in the field, were debunking such notions as recent phenomena.⁶⁰ A majority of 6-3 in the Supreme Court ruled to strike down the criminalization of homosexual sex in Texas, overriding the 1986 decision and concluding that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter ... *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."⁶¹

⁶⁰ George Chauncey, 'What Gay Studies taught the court. The historian's amicus brief in *Lawrence vs. Texas*', *GLQ: A Journal of Gay and lesbian Studies*, 2004 10(3):509-538

⁶¹ *Lawrence v Texas* 539 U.S. 558 (2003) <http://www.law.cornell.edu/supct/html/02-102.ZS.html> Detailed in Renata Uitz, op.cit, 18.

One of the authors of the brief, historian George Chauncey observed: “I suspect that the press exaggerated the importance of our intervention; it is more likely that the Court simply used recent historical scholarship to help explain its decision to overturn Bowers, much as the Warren court cited the work of social scientists in its 1954 *Brown v. Board of Education* ruling ... Even this would be gratifying enough, and it was deeply rewarding for historians to see their collective scholarly enterprise to such a momentous decision.”⁶² In any case, fifty years after the *Brown* verdict, historians became not only legitimate, but frequently indispensable courtroom experts.

III.1.4 Debating the Adversarial Paradigm of Historical Expert Witnessing

Indispensable as it might have become, the proliferation of historical expert witnessing caused many doubts, as historians began testifying in many different cases, not only in the field of antidiscrimination. What started as a precedent was turning into a market, as organizations such as *History Associates Incorporated* and *Historical Research Associates* appeared to link litigants with experts. Such developments were raising suspicions, which Brian W. Martin, long-standing employee and vice president for litigation research at History Associates Incorporated (Rockville, Maryland), an organization which offers the help of historians, also including conducting historical research for litigations, aims to dispel: “Because both the law and history encompass the full range of human experience, the variety of historical issues that may arise in a legal setting is conceivably just as broad.” Martin claimed that “if the number of historians working as experts in legal matters has increased in the past two decades, it is still hardly

⁶² George Chauncey, *op.cit.*, 509-10.

a growth industry.”⁶³ In response to his claim, John A. Neuenschwander, history professor and the judge agreed that the adversarial nature of the legal system is not harming the cause of justice, as all sides in the courtroom have a vested interest in having an accurate and reliable expert. He also agreed that historians “represent only a tiny fraction of the total pool of experts in the courtroom: Among 7,600 different types of experts, historians are barely visible, but appear regularly in four types of cases: “Native American Rights, Voting Rights, Deportation and Denaturalization, and State of the Art Cases.”⁶⁴ ‘State of the art’ cases also had their share in provoking a controversy. For example, one of the main bones of contention in 20th century US schooling in this respect was the relation between evolutionism and creationism. The rejection of Darwin’s teaching in some of the US states was notorious, and had led to legislative prohibitions, as in Tennessee, in which teaching Darwinism was rendered illegal through the Butler law in 1925. The famous ‘Scopes Monkey Trial’ case removed this obstacle, but creationists were controlling the school boards in Tennessee, Kansas, Arkansas, Alabama and even Illinois at the time. The ambition to change Act 590 of Arkansas (1981) calling for a ‘balanced treatment’ of creationism and evolution brought historian Charles Bolton to a case launched by the American Civil Liberties Union.⁶⁵ The case ended with a compromise, for in 1999 the Kansas Board of Education voted evolution out of its curriculum, causing a strong public outcry.

⁶³ Brian W. Martin, “Working With Lawyers: A Historian’s Perspective”, *Organization of American Historians*, <http://www.oah.org/pubs/bl/2002may/Martin.html> Short but interesting text of Brian W. Martin also sheds more light on the financial aspect of historical expert witnessing, which is a matter not often raised in the academic context and out of scope of this dissertation, but by no means negligible.

⁶⁴ John Neuenschwander, ‘*Historians as Expert Witnesses: The View from the Bench*’, Organisation of American historians, www.oah.org/pubs/nl/2002aug/neuenschwander.html

⁶⁵ Charles Bolton, “The Historians as Expert Witnesses: Creationism in Arkansas”, *The Public Historian* 4 (1982): 59-70. More on the history of reception of Darwinism in Merryl Wyn Davies, *Darwin and Fundamentalism* (Cambridge : Icon Books 2000.)

The other important aspect of historical expert witnessing regarding state of the art appeared in tobacco and health related cases. As the United States enforced tobacco warnings on packaging labels in 1966, the crux of such cases revolved around the conduct of the tobacco industry until that period in the realm of advertisement. In 1994, Professor Stephen Ambrose testified in a Louisiana case related to health injuries caused by smoking. He analyzed the level of information the public received about health hazards in the postwar period, and he concluded that there was a general knowledge that smoking is harmful and cannot be good, and that after the Second World War “when the warning labels first went on the cigarette packs, you would have to have be deaf and blind not to have known that already in the United States”. He was followed by others, historians and social scientists alike.⁶⁶

Public controversy, unusually bitter even within the realm historical expert debates emerged.⁶⁷ Ambrose was accused of being a hired gun for the tobacco industry. Similarly, the engagement of Kenneth Ludmerer, president of the American Association for the History of Medicine provoked a complete outrage: “Historians of medicine last year were shocked to learn that he has been quietly working as an expert witnesses for the tobacco industry ... on at least 13 separate trials over the past 15 years, always for the defense, earning over half a million US dollars”, wrote Robert Proctor, one of the first historians to testify that “instead of reporting honestly on the hazard the industry began a massive campaign of disinformation to convince the public that smoking was safe.”⁶⁸

⁶⁶ Overview of those cases in Tobacco Cases, <http://www.tobacco.neu.edu/litigation/cases/index.htm> and

⁶⁷ Laura Maggi, Bearing “Witness for Tobacco”, *Journal of Public Health Policy*. 21 (2000), 296.

⁶⁸ Robert Proctor, Should medical historians be working for the tobacco industry?, *The Lancet*, 363, (2004) Robert Proctor, *A Historical Reconstruction of Tobacco and Health in the US, 1954-1994*, <http://legacy.library.ucsf.edu/tid/vmm56c00/pdf> . Expert witness report filed on behalf of plaintiffs in the civil action USA v Philip Morris. Background of the case and the full list of exhibits, reports and judgments in USA v Philip Morris et alia, <http://www.tlaonline.com/usdoj/index.htm>

A bitter controversy within the field of the history of medicine over the nature of proper expertise was a good indicator that this issue was underproblematized. “The historical profession has really not been prepared for this,” said Robert Proctor, “We don’t have disclosure rules for publications, we haven’t had discussions about the ethics of whether to testify or not to testify.”⁶⁹ And indeed, the issue of the responsibility of a historian in a legal process was treated only occasionally.⁷⁰ Do historians have something to offer to legal proceedings? The issue was discussed in 1997 within the *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*. It was sparked by Daniel A. Farber. “However their tasks may differ, both the judge and the historian have traditionally defined their roles on the basis of concepts like evidence, proof and truth”, he exclaimed, warning that all those concepts have recently been challenged both in jurisprudence and in historical studies.⁷¹ He maintained that the impact of the postmodern challenge on the erosion of those concepts is far-reaching. He recognized well that the challenge is particularly great in common law, where adversarialism pushes “expert witness ... under pressure to simplify and recast her views for advocacy purposes”. This temptation became harder to resist, but also harder legitimizing after what Farber distinguished as a multilevel attack on objectivity. He illustrated the strain on the example of several cases, notably *Chipavaa*, *Sears* case and *Romer v Evans*. He reached the conclusion that “it would be a mistake to abandon the goal of objectivity,” but had at the same time warned on the need for caution.⁷²

⁶⁹ Patricia Cohen, “History for Hire in Industry Lawsuits”, *The New York Times*, June 14, 2003.

⁷⁰ Early signs of the formation of such debate Paul Soifer, “The Litigation Historian: Objectivity, Responsibility and the Sources”, *The Public Historian*, 5 (1983) 47-62

⁷¹ Daniel A. Farber, “Adjudication of Things Past: Reflections on History as Evidence”, *Hastings Law Journal* 49 (1998): 1010-1

⁷² *Ibid*, 1031.

In an attempt to put the topic on firmer transdisciplinary common ground, Farber quoted the criteria of reliability as exposed by a recent historiographical work of Appleby, Hunt and Jakob: “The system of peer review, open refereeing, public disputation, replicated communication and the extended freedom from censorship – makes objective knowledge possible.”⁷³ He optimistically juxtaposed this standard to the criterion of the Supreme Court in the Daubert case, which admits evidence if it is based on scientific method (namely: 1. Whether the theory has been tested, 2. Whether it has been subject to peer review and publication, 3. The general acceptance of the theory in the scientific community”). He cautiously questioned to what extent the Daubert criterion could reasonably stretch from scientists to historians. The concern that Daubert is not an applicable criterion insofar as social science is concerned is not new, but Farber took it to a new level by scrutinizing the developments in contemporary historiography, particularly in the methodological concerns raised by the advent of postmodern critique and the rise of historical relativism.⁷⁴

Reuel Schiller commented critically on Farber’s contribution: “According to Farber, historical relativism, post-modernism, multiculturalism and critical legal studies have emerged as the four horsemen of the apocalypse, forming an unholy alliance that threatens to disrupt truth-finding in the judicial system. The problem with Farber’s paper is that these are not the four horsemen of the apocalypse but rather the four

⁷³ Farber, 1036-8. Quoted from Joyce, Appleby, Lynn Hunt, and Margaret Jacob *Telling the Truth About History*. (New York : Norton 1994), 281.

⁷⁴ Application of Dauber in social sciences is discussed in Edward Winkelried, “The Next step after Daubert, Developing a Similar Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony”. *Cardozo Law Review* 15 (1994): 227; Teresa Renaker, “Deciding when Daubert should Apply to Social Science Evidence”, *California Law Review* 84 (1996): 1657 On the issue of relativism in historical scholarship see Keith Jenkins, *On ‘What is History’?*, (London and New York, Routledge 1995). Less sympathetic, more systematic account in Mark Thompson, *Postmodernism and Historiography*, (London : Routledge, 2001)

strawhorsemen.”⁷⁵ Schiller was toning down Farber’s concerns, particularly about the demise of objectivity in historical scholarship, arguing that that notion is the impact of the theoretical work of Hayden White and others and of success of Peter Novick’s book *That Noble Dream*, but warning that it does not stand for the state of the art. He claimed that the role of historical expert witness in an adversarial system is problematic indeed, not only because of the “age-old temptation to mold history to suit the needs of litigants”, but also because “the nature of the historians’ search for truth ... often does not mesh well with the needs of the legal profession.” Nonetheless, he maintained that “yet, despite inflamed passions on the part of the historians, the lesson I draw from these cases is that the adversarial process is an excellent buffer against these who would abuse historical truths in the interests of their client. Through the use of rival experts and impeaching cross-examination, lawyers put historians’ testimony through a crucible that uncovers biases, flawed data, laughable interpretations, and outright deceit.” The postmodern historian “may warp young minds in the classroom, but he will be challenged and discredited in the courtroom. While historians debate the merits of Derridian relativism in the ivory tower, the legal process is safe.”⁷⁶

Not all would agree. Summarizing much of the points of half a century of debates, Jonathan Martin wrote an alarming article in 2003, entitled *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, which was drawing back to the criticism of expert witnessing and proposals to reform it. Martin enumerated the fields and instances of historians taking the stand in the USA (Native American rights, gay rights, voting rights, water rights, border disputes, trademark disputes, gender

⁷⁵ Reuel E. Schiler, “The Strawhorses of the Apocalypse: relativism and the historian as expert witness”, *Hastings Law Journal* 49 (1998): 1169

⁷⁶ *Ibid*, 1176.

discrimination, employment discrimination, establishment clause violations, toxic torts and product liability, tobacco litigation and deportation of alleged Holocaust participants).⁷⁷ He concluded that their testimony “poses a problem for the legal system”, particularly on the level of federal courts. Federal courts are guided by rule 702, demanding that testimony be reliable in order to be admitted. The Supreme Court interpreted reliability as relying on a sound epistemological basis and recognizable method. Martin claimed that paradoxically, “historians often neglect the conventional methods of their craft when offering expert testimony. Outside the courtroom, historians generally expect one another to formulate complex, nuanced and balanced arguments that take into account all the available evidence ...At trial, however, the pressures of the adversary system routinely push historians toward interpretations of the past that are compressed and categorical towards something akin to Ambrose’s ‘deaf and blind’ testimony. As a result, historians now frequently offer unreliable evidence.” Martin gave a short summation of historians’ involvement in the American legal system from *Brown vs. Board* until the end of the 20th century. While acknowledging the importance and sometimes even indispensability of historical testimony for the legal system, he claimed that it comes with a heavy burden and often sinks either into insignificance or opens up a way towards miscarriage of justice or futile courtroom exchanges between the experts. “The source of the problem with historical testimony is not difficult to locate. The adversary system exerts a powerful force on all trial participants, and it compels historians to generate uncharacteristically categorical and unequivocal assertions.”⁷⁸

⁷⁷ Martin, Jonathan D. “Historians at the Gate: Accommodating expert testimony in federal courts”, *New York University Law Review* 78 (2003): 1520

⁷⁸ *Ibid*, 1541-2.

Martin showed no intention to abolish the institution of historical expert witnessing. He maintained that “history is too important to the legal process to omit altogether.” Therefore he “argues that in order to ensure intellectual due process, historians should be appointed by the court rather than called by the parties when cases require expert historical testimony.”⁷⁹ Martin saw the solution for improving the impact of historical expert witnessing, insofar as it appears in front of the federal courts in the USA in using some of the neglected rules of the Federal Criminal Code. He claimed that many of the aberrations can be avoided through rule 706, permitting the court to appoint an expert of its own choosing with consultation of the parties.⁸⁰ However, Martin noted that, although this possibility was always at hand, judges were by and large reluctant to use this nonadversarial clause. Still, Martin urged them to overcome this resistance and he called also for charting the lists of qualified expert witnesses by professional organizations and academic groups. To be sure, his proposals were not revolutionary, as its elements were in circulation from the end of the 19th century.

However, this renewed urgency is underlining both the epistemological peculiarities of historiography and the occasional importance it might have in a proceeding call for careful scrutiny that would avoid the possibility of a complete paradigm clash between historians in the courtroom which has proven to be harmful for the course of justice. How would historians react and the judges react? Many experts would find this solution unburdening, but also troublesome. In the latest edition of

⁷⁹ Ibid, 1521-3. Cf, Federal Rules of Criminal Procedure, <http://www.law.cornell.edu/rules/frcrmp/Rule16.htm> and particularly Federal Rules of Evidence, <http://www.law.cornell.edu/rules/fre/rules.htm>

⁸⁰ About this solution Pamela Louise Johnston, “Court-Appointed Scientific Expert Witnesses: Unfettering Experience”, *High Technology Law Journal* 2 (1987), 249-272; Ellen E.Deason, “Court Appointed Expert Witnesses”, *Oregon Law Review* 77 (1998), 59-75

Medical History (1/2009), two historians, David Rosner and Gerald Markowitz, give an account of their trials and tribulations: “In this context, it is important for us to recognize the growing demand for our skills. We may be dragged kicking and screaming into moral dilemmas where we are forced to confront the question: what are the boundaries of our involvement in public disputes? In part, this will be an unwelcome circumstance for us. Yet, we would argue that we owe society a great deal and we owe those who are often without a voice a great deal more. We believe that the demands from the legal system will force us to crystallize our sense of purpose and the humanistic traditions that lend legitimacy to our field. A greater relevance and involvement of historians will force us to define what is “good” history, both methodologically as well as morally.”⁸¹ Such self-regulating attempts, however, labeled recently as ‘ethical turn’, have provided modest results so far.⁸² Still, it is an open question if the judges would perform this complicated task any better, and this approach might even backfire as an infringement into the scholarly attempts to regulate professional and ethical standards within the craft. However, the very problematization of adversarial expert witnessing is an important step towards its application in common law. Interestingly enough, such dilemmas coincide with developments in the realm of continental law, where the institutionalization of historical expert witnessing was challenged from completely opposite positions.

⁸¹ David Rosner and Gerald Markowitz, [‘The Trials and Tribulations of Two Historians: Adjudicating Responsibility for Pollution and Personal Harm’](#), *Medical History* 59, no 2 (2009): 290.

⁸² Cf. Alun Munslow, *The Routledge companion to historical studies* (London : Taylor & Francis, 2006), sv. *Ethical turn*

III.2 Historical Expert Witnessing in Settling Europe's Bad Past

If reforming proposals were to be adopted, historical expert witnessing in the USA would come closer to the inquisitorial model of experts as exercised in the Civil law. Paradoxically, such changes would be introduced exactly in the period in which continental Europe's historical expertise is a subject of strong criticism, not least for the perceived importation of adversarial practices from the USA. Such debates, beginning with the collapse of communism and ranging through the last decade, were most visible in the belated Second World War criminal cases that took place in France. The role of historians in exposing the bad past of the Vichy times through those trials triggered a public controversy. However, less vehement, but equally important problematizations were evident across the Continent. Hence the French cases are put into a comparative perspective by scrutinizing them alongside the legal handling of crimes from the Second World War in Yugoslavia.

This unlikely comparison calls for justification. It would be hard to imagine two countries with a more different postwar history – France entering the postwar period in the capitalist West, Yugoslavia in the communist East, France exiting the period as one of the pillars of European integration, Yugoslavia disintegrating into civil war. Still, it seemed that the semblance of their wartime experience (France was defeated in the brief fighting of 1940, partly occupied and partly subject to the collaborationist regime, and much the same happened to Yugoslavia in 1941) proved to be strong enough to produce similar debates, at least insofar as the legal handling of the past and the role historians as experts are supposed to play in it are in question.

III.2.1 Legal Dealing with the Past in the Postwar France

Dealing with the past in the immediate postwar period in France was particularly brutal. “Between the summer of 1944 and the beginning of 1945, about 10000 people were executed without any real judgments ... The High Court of Justice put on trial about 100 ministers and other politicians, including Petain and Laval, the heads of the State. More than 50% were condemned to term or life in prison; 18 were condemned to death and 3 executed. The justice launched civil or criminal investigations on about 350 000 French citizens, among whom more than a third were actually put on trial ... Among the accused, about 95000 were actually condemned. Finally, 7000 death penalties were pronounced, and at least 1600 people were really executed.” Henry Rousso ends this stunning statistic with the conclusion that “the French trials were among the most tough all over Europe.”⁸³ Indeed, more people were sentenced to death in France than in all the other countries in Western Europe together. The legal reaction against collaborators was not exhausted in the first postwar years. A steady stream of trials continued in order to encompass both the Nazi perpetrators and their French collaborators, peaking in 1953 with the Oradour trial, in which members of a Waffen SS unit were tried for executing 642 inhabitants of the village of Oradour-sur-Glane on June 10th 1944.⁸⁴ The military

⁸³ Henry Rousso, *Vichy, Crimes against Humanity, and the Trials for Memory*, University of Texas, <http://www.utexas.edu/cola/insts/france-ut/archives/rousso.pdf>, p.4. More on the postwar retributions in France see contributions in: István Deák, Jan Tomasz Gross, Tony Judt, *The Politics of Retribution in Europe: World War II and Its Aftermath*, (Princeton : Princeton University Press, 2000), 194-211; Klaus-Dietmar Henke, Hans Woller, *Politische Säuberung in Europa, Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, (München : DTV, 1991), 192-240

⁸⁴ The timeline of those cases and the detailed analysis of the Oradour process in Hennig Meyer, *Die französische Vergangenheitsbewältigung des Zweiten Weltkriegs durch die Rechtsprechung am Beispiel des*

tribunal in Bordeaux which was trying the gruesome crime was confronted with a telling surprise – out of 21 perpetrators available to French Justice, 14 were Alsations enjoying French citizenship. Their sentence was a matter of public outrage, as well as the pardon they acquired by the end of the same year. The general amnesty declared soon afterwards was meant to serve as a tool to make a clear break with the past, as well as to enforce the new vision of the French past, which was downplaying the scope of collaboration and presenting French society firmly unified in the struggle against Fascism. This attempt to put a stop to the reexamining of the past was not only perceived as a way to stabilize the country. It was also a means of upholding the stature of France as a victorious country of the anti-fascist coalition and to boost its international stature, as the end of the Second World War was all but the beginning of the true postwar period for France. France was entangled in armed conflicts, struggling to maintain its colonial Empire in Indochina, as well as its overseas territories in Algeria.⁸⁵ Legitimizing itself as a democratic state, France was discouraging attempts to dig into the dark side of its recent past. Consequently, many layers which contributed to the downfall of the Third Republic remained covered. Historians were not in the forefront of their dismantling.

However, the ambiguous trends in prosecuting Nazi crimes in Germany raised concerns in France. The wave of trials of low-ranking perpetrators from the Ulm case to the Frankfurt Auschwitz trial raised fears that the Federal Republic of Germany could put a stop to these ventures after the expiry of its statute of limitation for murders in 1965,

„Oradoursprozesses“, in: Oliver Brupbacher et alia (ed.), *Erinnern und Vergessen*, (München : Martin Meidenbauer 2007), 230-246.

⁸⁵ Martin Shipway, *The Road to War: France and Vietnam, 1944-1947*, (New York : Berghahn Books, 1996), An account on the postwar attempts to maintain the colonies in Frederick Quinn, *The French Overseas Empire*, (Westport : Praeger, 2000), 219-270. The struggle to wrestle with the legacy of the Second World War in France is described in Stanislav Sretenović, “Istoriografske debate i kontroverze u Francuskoj i Italiji”, in: *Srbija (Jugoslavija) 1945-2005*, (Beograd : Institut za savremenu istoriju, 2006), 265-275.

and therefore abandon the project of dealing with the Nazi past altogether.⁸⁶ Attempting to prevent the possibility of Nazi criminals avoiding justice altogether and also incited by the Eichmann kidnapping and trial, French parliament abolished in 1964 the statute of limitations in regards to crimes against humanity as defined by the International Military Tribunal in Nuremberg. Importantly, the statute of limitation was abandoned only in regards to the crimes against humanity, but not regarding war crimes. On the other hand, France did not sign the UN international agreement on war crimes and crimes against humanity of 1968. Critics pointed out that this differentiation might be in connection to the growing accusations about the behavior of the French military in Indochina and Algeria.⁸⁷

Still, although that might not have been the chief motivation of the legislators, further encouragement was given to the process of legal dealing with the Second World War. The revolt of 1968 with its profound antiestablishment positioning was further exacerbating the disaffection and posing important questions, not just about the French role in Indochina and Algeria, but also about the hidden past of the mainland.⁸⁸ Such tendencies boomed in the beginning of 1970s, with the filming of Marcel Ophüls' documentary *Le chagrin et la pitié*, as well as with the historical research on the Vichy government, indicatively conducted by an American scholar, Robert Paxton. On the other

⁸⁶ See Martin Clausnitzer, 'The Statute of Limitations for Murder in the Federal Republic of Germany', *International and Comparative Law Quarterly* 29 (1980): 473-479.

⁸⁷ Henry Rousso, op.cit. 5.

⁸⁸ On the connection see Etienne François, 'Die späte Debatte um das Vichy-Regime und den Algerienkrieg in Frankreich', in: Martin Sabrow et alia, *Zeitgeschichte als Streitgeschichte*, (München : Beck, 2003), 268. More on the connection between the Vichy and Algeria in Stina Löytömäki, 'Legalisation of the memory of the Algerian war in France', *Journal of the History of the International Law*, 7 (2005): 157-179; Raphaëlle Branche, 'The state, the historians and the Algerian War in French Memory, 1991-2004', in: Harriet Jones, op.cit, 174-192. Raphaëlle Branche, 'La torture pendant la guerre d'Algérie: un crime contre l'humanité?', in Jean-Paul Jean, Denis Salas (dir), *Barbie, Touvier, Papon. Des procès pour la mémoire*, (Paris : Autrement, 2002), 136-143.

hand, a new emphasis on a distinctive anti-Semitic dimension of crimes of the Second World War gained visibility. According to Robert Paxton, all these developments created preconditions for a second generation of war crimes trials in France.⁸⁹ Activists such as Serge and Beate Klarsfeld were prompting these debates and adding new research, which was leading to investigations into the crimes against humanity committed against Jews by German and French perpetrators.⁹⁰ By the end of the 1970s, there were seven indictments for crimes against humanity, two of which related to Nazi perpetrators and five against French collaborators.

There was a long way to be crossed from indictments to actual trials. The studies of the Vichy period were revealing not only the real scope of the collaboration, but also its strong inner motivation in the French elite. Robert Paxton's *Vichy France, Old Guard and New Order* (1972) was an icebreaker for a number of studies dealing with the extent of complicity of French officials in the darkest chapters of the Second World War, including the deportations of Jews from France. The slow pace of criminal investigations was fueling the suspicion that the power elite of contemporary France had sufficient continuity with the networks of the Vichy period to put a stop to unwanted revelations. Biographies of many French postwar strongmen became a matter of close scrutiny, and were revealing staggering continuities, as in the case of Maurice Papon, postwar budget minister and chief of the Paris police, who was discovered to be a wartime Vichy police official in Bordeaux or René Bousquet, postwar power broker, who was at the time heading the Vichy police. The latter was an intimate friend of François Mitterrand,

⁸⁹ Robert Paxton, 'The Trials of Holocaust Perpetrators in France', in Ronald Smelser (ed.), *Lessons and Legacies: The Holocaust and Justice*, (Evanston : Northwestern University Press 2002), 240-4.

⁹⁰ Alan Levy, *Nazi Hunter. The Wiesenthal file*, (London : Robinson 2005), 298-300. In 1978 Klarsfeld published a list of 7521 Jews deported from France. Jean-Paul Jean, Denis Salas, op.cit, 13.

French president from 1981. All these painful revelations were showing that French contemporary history was much more complex than many of the contemporaries were willing to admit.⁹¹ The question was how and when would French society react to its own past.

Perhaps this was the reason why the accused on the first belated trial was a German perpetrator - Klaus Barbie, notorious wartime head of the Lyon Gestapo whose torturing techniques earned him the nickname of the Butcher of Lyon. Detected in Bolivia by Klarsfelds as early as 1971, he was extradited to France only in 1983 and put on trial in 1987. Envisaged as a public spectacle, filmed and widely broadcast, the trial in Lyon was conducted as a memory making event. A number of witnesses took the stand, as well as experts, including historians. The authenticity of the documents signed by Barbie was confirmed by Alfred Streim, jurist and historian, who was a Chief of the German Justice Ministry Department for dealing with the Nazi crimes and a long-term collaborator in Zentrallstelle Ludwigsburg.⁹² However, the main disseminator of historical narratives on the trial was no other but Barbie's lawyer, Jacques Vergès. Leftist radical and anticolonialist with a taste for controversial defenses of terrorists and mavericks, Vergès was delighted to use the Barbie case in order to offer a counter-reading of the French recent past. He was condemning the French elite for scapegoating Barbie in order to avoid confronting both the depths of the French collaboration and the crimes committed in the French colonial empire in the postwar period. This defense could not save Vergès's client, but succeeded in widening the public debate on those issues. In such controversy, new cases appeared, as well as the issues regarding no less than the

⁹¹ Richard J. Golsan, *Vichy's Afterlife: History and Counterhistory in Postwar France* (Lincoln : University of Nebraska Press, 2000)

⁹² Richard Bernstein, 'Papers on Barbie called Authentic', *New York Times* May 19 1987,

involvement of then French president François Mitterand in the Vichy government.⁹³ France was experiencing, in the wording of Henry Rousso, “an explosion of memory”, the awakening from the long-dormant Vichy syndrome.

Rousso’s 1987 monograph of the same title, and the subsequent book with the telling subtitle *passé qui ne passe pas*, revealed that the trials are important “vectors” of that memory as by the beginning of the 1990s the investigations on French perpetrators of war crimes were bringing results.⁹⁴ The consensus that history is to be brought to trial was being built, but it was not easy to launch a process. Since René Bousquet, a high-ranking official of the Vichy regime, was about to stand trial, he was gunned down by a crazed publicity-seeker, it was to be a collaborator of lower rank to be the first Frenchman tried for committing crimes against humanity.⁹⁵ Paul Touveir, a former member of the *Milice Française*, the Vichy paramilitary force, actually served under Barbie in the local government. Among his wartime crimes was the order to execute seven imprisoned Jews in June 1944 in Rillieux-La-Pape in retaliation for the assassination of Phillipe Henriot, Vichy minister of information and propaganda. His case was well known, as he was sentenced to death in absentia for treason. He was however

⁹³ Short overview by Richard J.Golsan, “Crimes-against-humanity trials in France and their historical and legal contexts”, in: Patricia Heberer”, *Atrocities on trial*, 247-261. Jewish Virtual Library, The Trial of Klaus Barbie, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/barbietrial.html#court> More on didactic aspects of the trial in Lawrence Douglas, op.cit, 185-194.

⁹⁴ **Henry Rousso**, *Le syndrome de Vichy (1944-198...)* (Paris : Éditions de Seuil, 1987); **Eric Connan**, **Henry Rousso**, *Vichy : un passé qui ne passe pas*, (Paris : Fayard 1994)

⁹⁵ Cf. Jean-Paul Jean, ‘Les crimes reproches a René Bousquet 1943, 1949, 1993’, in Jean-Paul Jean, Denis Salas (dir), *Barbie, Touvier, Papon. Des procès pour la mémoire*, (Paris : Autrement, 2002), 111-120.

pardoned by President Georges Pompidou at the beginning of the 1970s, but was indicted again in 1981 as the Rillieux-La-Pape massacre could be qualified as a crime against humanity for which there was no statute of limitation. Fearing the renewal of his trial, Touvier disappeared from the scene, and there were rumors that the Catholic Church was assisting his hiding. Indeed he was found and arrested in 1989 in a monastery in Nice. In order to dispel those views, the Church called upon historians to establish a commission chaired by René Rémond, a prolific academic. Hence a sort of extralegal commission was formed, that had produced and edited volume about Touvier and the Church. However, much more was to come as far as the engagement of historians was concerned. The times had significantly changed during the century from the Dreyfus affair, and French historians have not had a ready answer on the legal relevance and applicability of their findings.

III.2.2 Historical Expertise in France

By the time Paul Touvier was brought to trial in 1994, French historiography had quite something to say about the Second World War. There was an abundance of scholarship on the issue, particularly in regards to resistance and collaboration.⁹⁶ Such research was institutionalized in the early postwar period through the *Comité d'histoire de la deuxième guerre mondiale*, and particularly boosted with the 1978 creation of the *Institut d'histoire du temps présent*.⁹⁷ Its founder François Bédarida was in the forefront of the new definition of public engagement of historians, and was stimulating exactly the

⁹⁶ See Stanislav Sretenović, *op.cit.*, 272-5.

⁹⁷ L'Institut d'histoire du temps présent, *Historique*, <http://www.ihtp.cnrs.fr/spip.php?rubrique108?lang=fr>

research into the most sensitive aspects of recent history. In his book, tellingly entitled *The Social Responsibility of the Historian*, he warned: “We must choose between scholarship and fiction... after the radical critique of the 1960s, which destroyed the certainties, buried the utopias and disassembled the beliefs, once as since the 1980s witnesses a return to the values of humanism, morals and meaning. To be sure, historians have their part in that recasting of intellectual life. They must continue to confront the imperatives of the present.”⁹⁸ However, although relying on the rich tradition of public engagement of French intellectuals, such an approach did not necessarily envisage a legal role for historians. For example, Nicola Gallerano’s contribution to Bédarida’s edited volume has charted a long list of the possible public uses of history, but the courtroom usage was conspicuously absent from this account.⁹⁹ With the involvement of historians in the Dreyfus affair largely forgotten, and with the complete lack of interest in the development in historical expert witnessing which had taken place in Germany and the United States, the French legal system, as well as historiography and the wider public, were not fully prepared for the challenges posed by this precarious confluence of history and law.¹⁰⁰

In respect to expertise, French procedure, rooted in continental legal doctrine, is very different from American common law. It maintains the distinction between witnesses and experts, and strictly speaking does not know the institution of expert witness. The law is however somewhat different in comparison to the German procedure, insofar as the experts could be asked to testify not only by the judge, but both by the

⁹⁸ François Bédarida, *The Social Responsibility of the Historian*, (New York : Berghahn Books 1994), 5-6.

⁹⁹ Nicola Gallerano, ‘History and the Public Use of History’, in François Bédarida, *The Social Responsibility of the Historian*, (New York : Berghahn Books 1994), 85-101.

¹⁰⁰ Cf. Alain Wijffels, *History in Court. Historical Expertise and Methods in a Forensic Context*, (Ius Deco Publications : Leiden, 2001)

prosecutor or defendant. Yet another sort of expert could be contracted by the prosecution during the pre-trial stages of the process in order to help in the investigation.¹⁰¹ Interestingly enough, despite all this variety, in a strange twist of the Touvier case historians were called upon as plain witnesses. Consequently, they were not given the benefit of taking a look at the documents of the trial and were asked to testify about different aspects of the context in which the accused was acting. The director of the IHTP, Bédarida's successor Henry Rousso, found such a role inappropriate. Called to testify, he refused to appear and was eventually not called in front of the Tribunal.

Other influential scholars of the Vichy period, such as Robert Paxton, accepted, and were questioned by the court. "Robert O. Paxton is a former chairman of Columbia University's history department, unknown outside academic circles in the United States, who spends quiet weekends on Long Island's barrier beaches watching millions of birds fly south ... In France, the country Mr. Paxton has studied his entire adult life, his existence is different. There, Paxton is virtually a household name, and he is part of the nation's modern conscience.", wrote *New York Times* on the eve of the trial.¹⁰² In the courtroom, he was mercilessly questioned by Touvier's lawyer Jacques Trémolet de Villers, in a practice resembling a cross-examination. In a manner similar to Jacques Vergès, he was suggesting that Touvier was a scapegoat for all entire policies conducted at the time. Villers furthered this criticism, attacking the very core of legal applicability of historical knowledge, and famously concluding that, after all, "history is only an

¹⁰¹ Historical take on the development of the practice in Frédéric Chauvaud (avec la collab. de Laurence Dumoulin), *Experts et expertises judiciaires en France 1791-1944*, (Poitiers : Rapport Gerhico/GIP Justice 1999). Its contemporary relevance in Laurence Dumoulin, 'L'expertise judiciaire dans la construction du jugement', *Droit & Societe*, 44-5 (2000) : 199-223

¹⁰² Elisabeth Bumiller, 'A Historian Defends his Leap from Past to Present;', *The New York Times*, January 31 1998

opinion.”¹⁰³ Eventually, historical evidence was not of much importance for the verdict. In 1992, the criminal chamber of the Paris Court of Appeals acquitted Touvier, as it interpreted the 1985 definition of crimes against humanity as committed “by the regime that practiced policies of ideological hegemony.” Therefore his acquittal was at the same time interpreted as a sort of an indirect acquittal for Vichy, whose authenticity of hegemonic ideology was negated. The ruling was overturned by a higher court and Touvier was finally sentenced to imprisonment for life for crimes against humanity. He died in 1996, but the debate persisted.¹⁰⁴

In contrast to the Touvier case, Maurice Papon was anything but a low-ranked perpetrator. The indictment against him hit the very centre of the public controversy, as he maintained a successful career in postwar France, being among other things involved in repressive policies against Algerians at the beginning of the 60’s as the prefect of Paris police. He climbed up the ladder to become Minister of Finance under President Giscard d’Estaing, when in 1981 the rumors about his connections to the wartime deportations of Jews ended his carrier. However, his trial was triggered by the role he performed in the deportations of Jews both from Vichy and the Bordeaux region. Both sides asked a number of historians to step forward as witnesses.¹⁰⁵ Two types of historians took part in the proceedings – one who helped the pretrial investigations in the pre-1987 period in the capacity of experts, and another who testified as witnesses without previous connection to the case. Paradigmatic for the first group was Michel Bergès, who served as an expert

¹⁰³ Mark Osiel, *Mass Atrocity, Collective Memory and the Law*. (Brunswick and London : Transaction publishers, 2000), 218.

¹⁰⁴ Marouf Hasian, ‘The "Vichy Syndrome" and Legal Decision-Making in French Holocaust Trials’ *Speaker and Gavel* 39 (2002): 1-24.

¹⁰⁵ Detailed in Alain Wijffels, ‘Historians and the Papon-trial’, in Alain Wijffels, *History in Court. Historical Expertise and Methods in a Forensic Context*, (Ius Deco Publications : Leiden, 2001), 267-302.

in the pretrial phase and as a witness during the trial. His testimony was in the end contested by both the prosecution and the defense, as he was relying on the previous experience as expert, which was procedurally not desirable.¹⁰⁶ In the late stage of the trial, by the end of 1997, a number of historians testified and were examined as witnesses. J.F. Steiner, a personal acquaintance of Papon testified on his behalf, and Maurice Druon, secretary of the French Academy supplemented his testimony on Papon's case in front of the postwar *Jury d'honneur*.¹⁰⁷

Broader were the exposés of historians who testified about the general context in Vichy and the scope of its anti-Jewish policies (R.Paxton, H.Amoroux, J-P. Azzema, Ph.Burrin, R.Remond, J.Lacouture, M.O.Baruch). Different aspects covered by the witnesses were not always in connection to Papon, and were frequently even contradictory to one another. Again, Paxton's testimony was at the center of attention as it was the most general: "As a historian, I've studied the Vichy administration since 1960. At the start from German documents, then from French official archives. I've never worked on departmental archives of the Gironde, and so I have no notes on Papon. I'm neither a specialist on the Gironde during the occupation nor of Papon's administrative career. I want to talk about the Vichy administration and describe the context in which he took part in the internment and extermination of Jews from 1940 to 1944." After his expose, the defense attorney Jean-Marc Varaut exclaimed "that contrary to procedure,

¹⁰⁶ Rules of procedure are examined in Henry Rousso, 'French legal procedure and terms', in Henry Rousso, *The Haunting Past*, (Pennsylvania: University of Pennsylvania Press, 2002), 87-8.

¹⁰⁷ Wijfells, op.cit, 286-292, Their testimonies are partially available in: *Le proces de Maurice Papon, Compte rendu stenographique*, 2 vols, Paris Albin Michels, 1998. Parts of transcripts and other case-related documents are available on *Affaire Papon. Site des Parties Civile*, <http://www.matisson-consultants.com/affaire-papon/index02.php> More about the process in Henry Rousso, 'Justiz, Geschichte und Erinnerung in Frankreich. Ueberlegungen zum Papon-Prozess', in Norbert Frei, op.cit, 141-163

Paxton had given evidence neither on the facts nor on the personality or morality of the accused.” Varault asked:

“You are the historian for the civil plaintiffs. Is your role here compatible with your ethics? Is it the role of a historian to appear in a court proceeding?”

”President Castagnede: "No, Me. Varaut, a witness, just as soon as he is heard by the court, becomes the witness of everyone. In 1963, at the trial of guardians at Auschwitz for crimes against humanity, historians intervened to explain the context. After their testimony, some arguments were no longer possible."

Varaut: "Excuse me, you are right."

Paxton: "Historians must not refuse to come. A historian is neither an eyewitness nor a judge."

The accused Papon: "I will make an observation of style. I was surprised to hear just now Monsieur le professeur say that the historian does not judge. History is like science. I think that it is an extremely fluid matter and that it is difficult to apprehend."¹⁰⁸

The defense aimed further to prove that history is difficult to cope with by calling upon Henry Rousso, a leading expert on the relationship between history and the memory of Vichy. However, he refused again in a particularly sharp letter. Instead of taking part in that venture, Rousso made his refusal to testify public: “In my soul and conscience, I believe that historians cannot be ‘witnesses’ and that a role as “expert witness” rather poorly suits the rules and objective of the court trial. It is one thing to try to understand history in the context of a research project or course lesson, with the intellectual freedom that such activities presuppose: it is quite another to try to do so under oath when an individual’s fate hangs in the balance.”¹⁰⁹ Regardless, Papon was sentenced to 10 years imprisonment in 1998. In April 2002, a civil suit following the criminal trial was ended

¹⁰⁸ Taken from *Affaire Papon. Site des Parties Civile*, <http://www.matisson-consultants.com/affaire-papon/traductions/chronicle04.htm>

¹⁰⁹ Henry Rousso, “Letter to the Court” in: Henry Rousso, *The Haunting Past* (Pennsylvania : University of Pennsylvania Press 2002), 86.

with the decision by the *Conseil d'Etat*, ruling he ought to pay 700,000 dollars to the victims and their relatives.¹¹⁰

Upon his return to United States Paxton, as well as other historians reflected on this experience for the *New York Times*: "It's a bit odd. Historians don't decide the guilt or innocence of an individual with respect to the penal code. Historians are trying to understand the past, to make the past intelligible. But you certainly do judge -- this person did well, that person didn't do well." "I have very mixed feelings," said Stanley Hoffmann, the Harvard government professor who wrote the introduction to the French edition of Mr. Paxton's book. "If all one wants from the historians is a lecture about the background, O.K. But probably the members of the jury can read. If you want people to testify about the case at hand, which is, after all, trying one human being, the historians know as little as anyone else. They have not gone through the records of this man. If I had been asked, I would have declined. I really don't think it's the function of historians." The same view is held by Henry Rousso, one of France's most prominent historians, whose own work on Vichy was deeply influenced by Mr. Paxton. Mr. Rousso was asked to testify at the Papon trial but declined. "I refused to be used, not for my knowledge but for my position," Mr. Rousso said. Like many historians, Mr. Rousso added that he was dubious about the lessons that could be learned from the past. In his view, the role of the historian is to "sensitize public opinion about the complexity of the past." Either way, he and his colleagues have become active participants, through the French media, in what one French sociologist calls France's "extraordinary masochism" over its shifting view of

¹¹⁰ Henry Rousso, *Vichy, Crimes against Humanity, and the Trials for Memory*, 2. More in Richard J. Golsan (ed.), *The Papon Affair* (New York: Routledge, 2000)

itself in World War II. "We are not only scholars completely detached from the topic," Mr. Rousso said. "We are part of the scene now."¹¹¹

Henry Rousso was far from being satisfied with the outlook of that scene: "For the first time, a court based its verdict on a still elaborated historical expertise, given by professionals who came at the bar to explain what they have done in previous works - to see historians raising their right hand, and swear they will say the truth all truth, only the truth was not the less bizarre image of these "show trials".¹¹² Disappointed with the results, but aware of the importance of the venture, he was set to organize a thorough debate. In a book-length interview, Rousso had opened up a debate by explaining his double refusal to serve as a witness in both Touvier and Papon trial. He problematized the relations between history and law. "In the final analysis, a judicial history is a history where rhetoric gets the upper hand on argumentation, with the accusers and the accused being thrown in the same boat willy-nilly." He was wondering if historians should have taken part in those as they "conduct inquiries and seek the truth just like the detectives ... in my opinion, the comparison stops there. The primary risk comes from the instrumentalization of historians. The court summons them in the service of ends that are clearly legitimate, but in my opinion, these ends have little to do with scientific method, which seeks to understand rather than to judge and even less to absolve or to condemn."¹¹³ Asked about his reasons to refuse to testify in Touvier and Papon trial, he claimed: "I had already been asked to testify in 1994 by plaintiffs in the Paul Touvier

¹¹¹ Elisabeth Bumiller, 'A Historian Defends his Leap from Past to Present', *The New York Times*, 31.1.1998. Reflections of participants and observers are collected in Jean-Paul Jean, Denis Salas (dir), *Barbie, Touvier, Papon.*, (Paris : Autrement, 2002), 58-70, Richard Golsan (ed.), *Memory, The Holocaust, and the French Justice* (Hanover : University Press of New England, 1996)

¹¹² Henry Rousso, *Vichy, Crimes against Humanity, and the Trials for Memory*, 9.

¹¹³ Henry Rousso, *The Haunting Past*, (Pennsylvania: University of Pennsylvania Press 2002), 86, 53. Also Henry Rousso, 'L'expertise des historiens', in Jean-Paul Jean, Denis Salas (dir), *Barbie, Touvier, Papon.*, (Paris : Autrement, 2002), 58-70,

trial. Unlike four of my colleagues, I declined, explaining that, on the one hand, I wanted to preserve my freedom of speech and analysis ... and, on the other hand the trial struck me as biased.” In Papon case however, “the presence of historians on the stand struck me as just as problematic. First of all, I was named by the defense without any prior notification.” Rousso questioned the need for the “the massive presence of historians’... as if the truth had more weight in the mouths of historians than in those of lawyers and magistrates.” He claimed that there is also a fault in the French system, not allowing the experts to see the materials at stake and he was drawing a parallel with the developments in Germany in the 60s. Taking the example of German postwar historiography and German prosecution of war crimes facilitated by the Institut für Zeitgeschichte and Zentralstelle Ludwigsburg, in which “jurists and historians were seeking a truth that they helped elaborate together, each with their respective methods and objectives ... In the French instance, in the context of the late 1990, the situation was of an entirely different order.”¹¹⁴ Rousso was persistent in creating a professional debate on the issue, both regarding the Papon trial, and the general relationship between memory, history and the law. Some of those debates were hosted by the IHTP, the others were held elsewhere and the controversy got its full public dimension.¹¹⁵

This activity had a profound impact on the understanding of the role of historians in France. The search for the reasons for the failure of historians to produce a satisfactory narrative continued, and many have found its causes in the very institution of expert witnessing. Prompted by the Papon trial, Jean-Noël Jeanneney wrote a book *Le Passé*

¹¹⁴ Henry Rousso, op.cit, 58-9.

¹¹⁵ Henry Rousso, Anne Boigeol, [Usages politiques du droit et de la justice](#), *Bulletin de l'IHTP*, n° 80, 2002, 116; Table ronde, *Le memoir et l'histoire*; Annie, Deperchin Vérité historique - vérité judiciaire : http://www.enm.justice.fr/Centre_de_ressources/syntheses/verite_historique/demande.htm

dans le pretoire. L'historien, le juge et la journaliste in 1998, asking: "What is then the specific function of the historian in front of the court? Is he for Justice a sting, a replacement, *un faire-valor*, a warning? And is justice aware of it?"¹¹⁶ Reflecting on the recent cases, he promptly noted the greatest confusion derived from the French legal system: "This confusion between witnessing and the expertise has other consequences, very concrete: historian has to express himself in the conditions unfavorable both towards calmness and precision." Jeanneney's collection of essays regarding the war crimes trials in France was followed by a detailed research in Olivier Dumoulin's *Le rôle social de l'historien. De la chaire au pretoire* in 2003. This critical account of the public role of historians was widely reflecting on the issue of historical expertise in a longer historical perspective in the French context. His *longue durée* approach to the transformation of the role of historians in the courtroom was tracking their involvement in legal processes in France from the mere authentication of documents in the Dreyfus case to the full-blown expertise one century later. "In front of this Tribunal, which civilian parties and the defense would have made into the tribunal of History, witnesses of a particular genre, experts of a singular breed, were summoned: Historians. Strange witnesses indeed" commented Dumoulin critically on the change of the expert role of historians in the Papon case.¹¹⁷ Dissatisfied with the outcomes, he also connected this shift to the deficiencies of the contemporary French legal context, which he found to be heavily influenced by the adversarial legal practice characteristic of the United States. Each in their own way, Rousso's and Dumoulin's efforts contributed to the diachronically sensitive and comparatively oriented approach to the topic, whose importance was

¹¹⁶ Jean-Noël Jeanneney, *op.cit*, 13-16.

¹¹⁷ Olivier Dumoulin, *Le rôle social de l'historien*. (Paris, Albin Michel 2003), 11.

underscored by the very vehemence of their criticism. A century of historical expert witnessing in France was filled with tensions and twists which cut deep into the realm in which history, law, memory and politics meet. However, French experience, with all its contradictions, is by no means an isolated event in the history of historical expert witnessing and belongs to the wider European trend. Therefore, it is best understood in a comparative perspective.

III.2.3 Dealing with the Past in the postwar Yugoslavia

Although the overall political context in postwar Yugoslavia was largely different, the tendencies regarding dealing with the past bore some striking similarities. Like France, Yugoslavia also succumbed to the attack of the Axis powers in a matter of weeks, both militarily outnumbered and weakened through its internal differences. Dismembered as France, it gave birth not only to the one but several collaborationist regimes on its former territory. As in France, the government in exile was installed in London, vested in continuation of the struggle and supporting the fragmented resistance groups in the country. This setting was further complicated in Yugoslavia by open conflicts between the communist and noncommunist resistance, as well as the atrocious warfare between Yugoslav ethnic groups, amounting to a brutal civil war of *omni contra omnes*, particularly directed against the civilian population, targeted as potentially hostile by the nationalist armed factions.

By the end of 1944, the partisan Movement of National Liberation led by the Communist Party of Yugoslavia emerged as the dominant factor in the region, supported by the Allied governments and legitimized through a set of transitional agreements with the exiled Royal Government. As war was brought to its end and more and more territory was under the control of the Movement of National Liberation, this new governance was shaped under the motto of “merciless fight against the occupiers and their domestic servants.” The legal basis for such policies was set in the Ordinance of Military Courts from 24 May 1944, and findings were to come through the State Commission for Documenting the Crimes of the Enemy and the Collaborators formed in November 1943.¹¹⁸ Modeled after the Allied War Crimes Commission, this State Commission has nonetheless proved to be an instrument of political takeover as well. Under the chairmanship of the doctrinaire Marxist philosopher, Dušan Nedeljković, it received more than 930,000 reports on war crimes by citizens, and collected over 20,000 documents, resulting in proclaiming 66.420 war criminals, of which almost 50.000 were Yugoslav citizens.¹¹⁹ The evolving system of security was supposed to execute the policies of retribution through the foundation of the political police named the Department for the Protection of the People in May of the same year, with the help of evolving specialized forces of police and the military. As a response to an experience of occupation, in the last months of 1944 and first half of 1945, a wave of legal and extralegal measures of repression swept through the country, targeting individuals and

¹¹⁸ Overview of historiographical and political tensions in examining the issue of collaboration in Milan Ristović, “Collaboration in Serbia during the WW II. Historiographical and (or) political problem”, in Thomas Bremer (ur.) *Religija, društvo i politika. Kontraverzna tumačenja i približavanja*. Bonn 2002, 10-25. Legal setting analyzed in Srđan Cvetković, *Između srpa i čekića*, (Beograd : Institut za savremenu istoriju 2006), 110-123.

¹¹⁹ Archives of Yugoslavia, *Državna komisija za utvrđivanje zločina okupatora i njihovih pomagača*. (State Commission for Documenting of the Crimes of the Enemy and the Collaborators), f-110

groups as different as pro-Fascists, anti-Communists, but also ethnic Germans. Although no reliable statistics exist even now, the purge resulted in the emigration and expulsion of over 800,000 Yugoslav citizens (including the Volksdeutsche), and probably more than 100,000 judicial and extrajudicial killings. This retribution added to an already appalling death-toll of more than a million fatalities of the Second World War in Yugoslavia.¹²⁰

With the end of the war and definite establishment of the new government, this cleansing was followed by wide judicial activity directed against both the leadership and rank-and-file of opposing forces. Some of the caught leaders were brought to trial with groups of their supporters, sentenced to death and executed (Serb Chetnik leader General Dragoljub Mihailović, Slovene collaborating General Leon Rupnik, German General Alexander von Lehr), or sentenced to prison terms (Croatian archbishop Alojzije Stepinac got 15 years and the president of wartime royal government Slobodan Jovanović got 20 *in absentia*). Others, like collaborating Serbian Prime Minister General Milan Nedić died during investigation, or were assassinated somewhat later under shady circumstances, like Ante Pavelić, leader of the fascist Independent State of Croatia. Many followers of those movements were also sentenced in the immediate postwar period. In the following years long prison terms were the most common sentences, and in 1952 new Penal Code and system of civil courts came into effect.¹²¹ All in all from 1945 until 1953 around

¹²⁰ Overall estimations of Yugoslav wartime loses were published in late 80s by Bogoljub Kočović, *Sahrana jednog mita. Žrtve drugog svetskog rata u Jugoslaviji* (Beograd : Otkrovenje 2005) and Vladimir Žerjavić, *Gubici stanovništva Jugoslavije u Drugom svetskom ratu*, (Jugoslavensko viktimološko društvo : Zagreb 1989). The scope and number of fatalities, and the conditions under which they occurred are a subject of debate and will probably remain controversial. The latest estimations on the atrocities are collected and commented in Srđan Cvetković, *Između srpa i čekića*, 236-9.; The estimations for the deaths on the Yugoslav northern borders are no less controversial and are accesible at Mario Grčić (ed.), *Otvoreni dossier Bleiburg*, (Zagreb : Start, 1989). New research is being conducted in Slovenia, alongisde with the exhumations. „Slovenia: Mass Graves Found“, *New York Times*, 5 March 2009.

¹²¹ Rajko Danilović, *Upotreba neprijatelja, Politička suđenja u Jugoslaviji 1945-1991* (Valjevo : Valjevac 1993); *Stenographic notes from the trial of Dragoljub Draza Mihailovic*, (Belgrade : Udruzenje novinara

11,000 death sentences were rendered, and more than 105,000 people were sent to jail for war related offences. Some clemency was shown in the same time as in France, around 1953, due to the changed geopolitical position of socialist Yugoslavia which was in an open breach with the Soviet Union, whose supporters among Yugoslav communists now started filling the prisons and concentration camps.¹²²

In spite of that change, the events surrounding the end of the Second World War became one of the secrets of socialist Yugoslavia, starting from the very number of casualties. In the immediate postwar period Josip Broz Tito gave an estimate (exaggerated, as we now know, partly in the context of setting the retributions from Germany, partly out of the need of reinforcing a wartime martyrology) that 1,700,000 Yugoslavs died in WWII. This estimate was promptly backed by the appropriate demographical research and became the official history of the darkest side of the Second World War.¹²³ The mere questioning of the number, let alone the identity of the victims and the circumstances in which they lost their lives amounted to a dangerous breach, and such investigations were discouraged. However, the discrepancy in the proclaimed number of victims proved to be a time bomb, as it was lending itself to quite arbitrary statements on their identity and the conditions under which they lost their lives. In order

FNRJ, 1946) Evgenije Jurišić, *Sudski proces Tito-Mihailovic*, (Beograd : Nova 164, 2001), General Rupnik and General Nedic Judgment of Lehr in Jelena Lopičić-Jančić, *Ratni zločini protiv zarobljenika. Sudska praksa*, (Beograd : Vaša knjiga : 2005), 19-23; Jakov Blažević, *Mač, a ne mir. Za pravnu sigurnost građana*, (Beograd, Zagreb, Sarajevo: Mladost 1980). Web Archive: *The Trial of Dragoljub Draza Mihailovic 1946* <http://trial-mihailovic-1946.org> The Pavelic Papers. An independent project research the history of the ustase movement, <http://pavelic-papers.com/misc/about.html>

¹²² Seminal reading on this issue: Ivo Banac, *With Stalin against Tito : Cominformist splits in Yugoslav Communism* (Ithaca : Cornell University Press, 1988).

¹²³ Such findings were duly confirmed in December 1945 by the State Commission for Documenting of the Crimes of the Enemy and the Collaborators. See FNRJ, *Državna komisija za utvrđivanje zločina okupatora i njihovih pomagača*. Beograd 1946. The overview of the attempts to determine the number of victims in Srđan Bogosavljević, „The unresolved genocide“, in Nebojša Popov, Drinka Gojković (ed.) *Road to War in Serbia*, (Budapest : CEU Press, 2000), 146-159. The discussions on this sensitive matter behind the closed doors of the Party are partially described in Franjo Tuđman, *Bespuća povijesne zbiljnosti*, (Zagreb Hrvatska sveučilišna naklada 1994), 69-81

to prevent such speculations, the Organization of war veterans (SUBNOR) launched in 1950 the creation of the list of the victims of war. However, their task was discontinued, and picked up by the beginning of the sixties by the Federal Government, which initiated in 1964 a census of the victims, excluding though the citizens of Yugoslavia who died as collaborationists. This census “The victims of war 1941-1945” was completed in 1966, but its results were embargoed as the list named 597.323 persons, which was not even near to the official numbers.¹²⁴

For obvious reasons, historians were reluctant to tackle this issue, and some who did, like General Franjo Tuđman, the head of the Institute for the Workers Movement of Croatia, had an elaborate political agenda. In 1965 he acquired a draft of the census, whose numbers provided him with the arguments for his main thesis that the victims of the Croatian fascist terror were artificially inflated in the postwar period. He was particularly targeting the number of victims of the Jasenovac concentration camp, claimed by some to reach almost a million, predominantly Serbs. Tuđman argued that an urgent revision of the numbers was needed.¹²⁵ As he was also one of the key actors in the cultural and political initiatives towards the greater independence of Croatia within Yugoslavia, his initiatives were stopped with the crushing of that movement in 1971, which brought him nine months in jail. Squeezed out of public life, marginalized and embittered, Tuđman was set on formulating his own historical account, engaging in fights over the number of victims and particularly in the ugly debate over the nature and scope of the Ustasha-run concentration camp of Jasenovac, claiming that the number of its

¹²⁴ Dragan Cvetković, ‘Popis „Žrtve rata 1941-5“ iz 1964’, in: *Genocid u 20.veku na prostorima jugoslovenskih zemalja*, (Beograd : Muzej genocida, 2005), 77-84.

¹²⁵ Tuđman describes the sequence of events in Franjo Tuđman, *Bespuća povijesne zbiljnosti*, 73 Cf. Kosta Nikolić, *Prošlost bez istorije* (Beograd : Institut za savremenu istoriju 2003), 279-318.

victims would not exceed 30,000 of victims of different ethnicities. These claims were not to enter the public field until the death of Josip Broz Tito in 1980. In the following years of insecurity, liberalizations in public life were intertwined both with occasional nationalistic outbursts and unpredictable waves of repression, which was effectively preventing the structuring of this sensitive debate and giving elements for its instrumentalization. As early as February 1981, Franjo Tuđman was jailed once more for denying the official number of 1.700.000 victims of the Second World War, but his account influenced the debate in the literature abroad.

This retackling of the issue of war casualties and the nature of genocide was coming from other quarters and with different ambitions as well. One of its champions was Tito's official biographer Vladimir Dedijer, who fell from grace in 1954, was purged from the Party and moved to the West. He established himself in the USA as a historian and human rights promoter. He was much engaged in the creation of the Russell Tribunal and maintained close personal contact with Sartre and Russell.¹²⁶ By the time the Tribunal was falling apart in 1967, Dedijer attempted to open up a plethora of new topics, moving from the Vietnam war both in time and space, raising the issue of police repression in Germany, the fate of Native Americans in the United States of America, the policies of the Spanish conquistadores in Southern and Central America. The Second Russell tribunal in 1973 investigated breaches of human rights in Latin America. The last topic brought it closer to the issue which was his *idée fixe*, the role of the Catholic Church in 20th century atrocities. Bringing this interest back home, Dedijer now strived to uncover the diminished scope of WWII atrocities. There were also proactive efforts to

¹²⁶ Milo Gligorijević, *Rat i mir Vladimira Dedijera*, (Beograd Narodna knjiga 1985), 115-122. Bertrand Russel, Jean-Paul Sartre, *Das Vietnam Tribunal oder America von Gericht*, (Rowohlt : Hamburg 1968)

discourage the alternative narratives of the end of the Second World War by republishing the transcripts from the immediate postwar trials or by organizing a nation-wide project on wartime repression, coordinated by the Institute for Contemporary History in Belgrade. Lastly, following Vladimir Dedijer's initiative, the Serbian Academy of Arts and Sciences formed a Board to collect sources on genocide in August 1984.¹²⁷ To that end, he forcefully reintroduced the term 'genocide' in a public sphere and scholarly literature. Although Dedijer was attempting to prove the intimate connection of the Catholic Church and the fascist Ustasha regime, his motivation was not that of a Serbian nationalist. He was equally interested in open discussion of the scope of atrocities committed by Serbian nationalist Chetniks against Muslim civilians in Eastern Bosnia.¹²⁸ There were other initiatives, such as the attempts to claim the responsibility of Kurt Waldheim, Secretary General of the UN, or the desire to reemphasize the responsibility of the Catholic Church and its archbishop Alojzije Stepinac for genocide.¹²⁹

In the midst of this confusion, the avalanche that started in France with the Klaus Barbie trial is comparable to the outbursts in Yugoslavia that followed the extradition of Andrija Artuković, Minister of Interior in the Pavelić government, who was tried in Zagreb in 1986 and condemned to death. The verdict was not carried due to his old age, and he died in prison in 1988. As in the French case, it is difficult to discover an immediate influence from the USA, besides the extradition of Artuković at the time of Reagan's administration. As with the Barbie case in France, the Artuković case was an opportunity to bring an entire period of history in front of the tribunal, but again as in the

¹²⁷ Milo Gligorijević, *op.cit.*, 274-9

¹²⁸ This initiative is detailed in Xavier Bougarel "When and How Did the Term Genocide Enter the Yugoslav Space?", Paper delivered on a conference on reception of the ICTY, Paris 2006.

¹²⁹ On Waldheim affair see Alan Levy, *Nazi Hunter* (London : Robinson 2005), 407-520.

Barbie case, without the presence of historians. However, the out-of-courtroom debate was eroding, leading to the nationalistic takeover of the debate and the fight to maintain the memory over the dead in order to legitimize the policies of confrontation.¹³⁰

Eventually, instead of opening up new cases from the Second World War and stabilizing the public memory of that period, Yugoslavia collapsed into yet another war, which was shifting attention from the mid-20th century casualties and war crimes to contemporary ones. Sobering attempts to establish the actual number of Second World War victims satisfied nobody. Particularly gruesome was the debate about the number killed in the concentration camp Jasenovac.¹³¹ These initiatives fell on fertile, if dangerous ground. Old wounds were opened in a reckless way as the means for preparation of inflicting new ones. As the Communist narrative was falling apart, the state was dismantling as well in a violent war, which the opposing sides were frequently presenting as a continuation of the Second World War. Many a champion in the fight over the number of victims of war became leading figures – Tuđman was elected President of Croatia in 1990, and Dedijer's Board of Academy was swayed and utilized for Serbian nationalist goals. Furthermore, instead of retrials or belated trials, the scene was set for official or unofficial rehabilitations of the anticommunist leaders of the Second World War.¹³²

¹³⁰ For example see introduction in the reprint of the transcripts of the Stepinac trial by Branimir Stanojević, *Alojzije Stepinac: Zločinac ili svetac?*, (Beograd : Nova knjiga, 1986), 9-76.

¹³¹ Tea Sindbaek, «Masakri i genocid počinjeni u Drugom svjetskom ratu i ponovno otkrivanje žrtava», u: *60 godina od završetka Drugog svjetskog rata – kako se sjećati 1945.godine*, Sarajevo 2006, 63-73; Kosta Nikolić, op.cit, 279-292, 304-316.

¹³² Such trends are described in Ulf Brunnbauer (ed.), *(Re)writing History. Historiography in Southeast Europe after Socialism*, (Münster : Lit Verlag 2004). For revisionism in former Yugoslavia see Todor Kuljić, “Revised History and New Identity in Eastern Europe”, *Journal for Politics, Gender and Culture*, 4 (2005): 63-86. Srđan Milošević, „O jednoj desnoj reviziji pogleda na antifašističku borbu u Srbiji“, u: *60 godina od završetka Drugog svjetskog rata – kako se sjećati 1945.godine*, Sarajevo 2006, 37-54.

III.2.4 Historical Expertise in the former Yugoslavia

During socialism, Yugoslav historians were engaged in the legal dealing with the past, albeit indirectly. Vladimir Dedijer served as a president of Russell's Tribunal, as a sort of historian in the role of a judge, and Franjo Tuđman was tried for the statements he made in the capacity of a historian, but historical expertise was not demanded by the Yugoslav courts. Experts from social sciences were rarely deployed in the jurisprudence of socialist Yugoslavia, whose legal setting was basically created after the German criminal code, amended in accordance with the Soviet model. Although they could be recommended by the parties, experts were summoned exclusively by the judge, who dictated the field of their expertise and was likely to hand-pick from the list of sworn experts. Exceptions were rare.¹³³ Historians were particularly not prospective witnesses, as strict adherence towards a theory of distance was keeping them out of the field of legal interests. "To put it simply, historians is not, and is not supposed to be a prosecutor, a judge, or an attorney", explicit was one of the leading Yugoslav historians, Andrej Mitrović.¹³⁴

However, as the topic of the crimes of the Second World War was reopened in the second half of the 1990s, so was the engagement of historians in the legal processes. The first direct impetus came from Croatia following the extradition of Dinko Šakić, wartime commander of the Jasenovac concentration camp, tracked down in Argentina by Efraim

¹³³ Details in Snežana Soković, *Veštačenje kao dokaz u krivičnom postupku*. (Kragujevac: Pravni fakultet, 1997), Case célèbre in this respect was of dr Ivković, who was accused for defaming the regime on the basis of secretly taped conversation. The presiding Judge Ilija Radulović, had set Ivković free, giving the floor to an expert opinion of philosopher Svetozar Stojanović, who as a professor of ethnics labeled secret tapings as a "Hiroshima of morality." Detailed in *Hereticus* 3-4 (2007), 260-2.

¹³⁴ Andrej Mitrović, *Propitivanje Klio*, (Beograd : Vojska 1996), 118. Historians were in general disinclined to expose their work to such form of scrutiny due to the pressure the craft was experiencing. More in Đorđe Stanković, Ljubodrag Dimić, *Istoriografija pod nadzorom* (Beograd : Službeni list, 1996)

Zuroff of the Simon Wiesenthal Centre, and handed over to Croatia in 1998. The trial which began in Zagreb was a massive event in which more than 40 witnesses stepped forward. Five (Ivo Goldstein, Jelka Smreka, Josip Kolenović, Vladimir Žerjavić and Frane Glavina) were historians or social scientists, whose appearance contributed to the 20 year prison verdict of Šakić, who died in Zagreb prison.¹³⁵ Their expertise caused a debate as the accounts they were giving were tackling one of the most sensitive issues in recent Croatian history, and their interpretation was clearly at odds with the findings of Franjo Tuđman, who still was president of Croatia at the time. Arguments were raised that it is not historians' job to adjudicate the past. Similarly strong sentiments were furthered by the appearances of historians from both the region and abroad in front of the International Criminal Tribunal for the former Yugoslavia.¹³⁶

Belated legal interest for the atrocious aspects of the Second World War was coupled with recent warfare in Serbia as well, with a strangely vehement anticommunist twist. During the war in the former Yugoslavia, the general atmosphere of impunity and victimhood was inhibiting legal system and dividing the historical community. Only in 2003 was the Special War Crimes Prosecutor's Office of Republic (WCPO) created in Serbia in order to prosecute war crimes committed on the territory of the former Yugoslavia. In the first years the WCPO was largely focused on the cases deriving from the war that had torn that country apart.¹³⁷ Historians were not likely to be of much help in these investigations, and indeed there was a huge resistance towards their involvement

¹³⁵ Material and detailed documentation on Trial of Dinko Sakic, <http://public.carnet.hr/sakic/> Clipping on the debates over historians available at <http://public.carnet.hr/sakic/hinanews/arhiva/9905.html>

¹³⁶ Historical expert testimonies regarding Croatia and wars in former Yugoslavia deployed in *Kordić and Čerkez* case are available in "ICTY and the Historians", *Časopis za suvremenu povijest*, 36, (2004).

¹³⁷ Mandate and information on the jurisdiction, legal basis and activity of the War Crimes Prosecutor's Office at http://www.tuzilastvorz.org.rs/html_trz/index_eng.htm More in Bruno Vekarić, Jasna Šarčević-Janković (ed.), *Office of the War Crimes Prosecutor 2003-2008*, (TRZ : Belgrade, 2008)

exactly due to the abundant and controversial usage of historical expert testimony in The Hague Tribunal. At the same time, local historians did not conduct neither thorough nor systematic research in regards to the crimes committed during the violent dissolution of Yugoslavia.

The same could not be said for the research on the Second World War, particularly on its atrocious aspects, which became a matter of enraged public debate during the 1990s. After the collapse of the Milošević regime, it became clear that Serbia has quite a number of untackled bad pasts to confront. However, as wartime experience took its toll on humanitarian sensibilities, the issues of atrocities became hostages of day-to-day politics. The possibility of maintaining a universal yardstick towards human rights breaches from the past remained elusive, and the debates on which past to confront, and how, grew sterile.¹³⁸

This cleavage was becoming ever greater, as historiography was *de facto* both accusing and rehabilitating, and the legal system did not react. Instead of pursuing the course of lustration and denationalization, the only actual legal response was a controversial *Law of Rehabilitation* from April 2006, opening a possibility of rehabilitating persons who were not given a proper trial from 1941 onwards.¹³⁹ This legislation was supposed to make possible the annulment of the judgments which were

¹³⁸ See critical comments in Todor Kuljić, *Prevladavanje prošlosti. Uzroci i pravci promene slike istorije krajem XX veka*, (Helsinški odbor za ljudska prava u Srbiji : Beograd 2002); Vladimir Vodinelić, *Prošlost kao izazov pravu (Srpska strana pravnog savladavanja prošlosti)*, (Centar za unapređenje pravnih studija : Beograd, 2002).

¹³⁹ Zakon o rehabilitaciji, Law of Rehabilitation, Narodna skupština Republike Srbije, http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=331&t=Z# Critically commented in Vladimir Vodinelić, „Rehabilitacija, svemu uprkos“ in *Hereticus 1* (2007): 251-271. Early reactions of historians on the possibility of rehabilitation: Đorđe Stanković, «Srpska medijska kultura sećanja», u: *Tokovi istorije*, 1-2/2006, 265-284. The attitudes of historians Milan St. Protić and Branka Prpa in *Most Radija Slobodna Evropa*, *Treba li rehabilitovati žrtve političkih progona*, <http://www.danas.co.yu/20060218/vikend3.html>, (12.12.2006) Overview of the rehabilitated persons in Srđan Cvetković, *Rehabilitacija*, *Hereticus 1* (2009): 212-225.

unjust. To that end, it provided for rehabilitating persons deprived of their rights for political and ideological reasons starting from 1941. Quite serious problems derived from this short law of unclear, but very broad application, which was promulgated abruptly and in the absence of a public or professional debate. Its first actual consequence was an avalanche of rehabilitation petitions. The judges of regular courts were pressured by the emerging cases. They would routinely ask for the documents from the Ministry of Interior, Ministry of Justice and the secret services, and usually nullify the judgments on the bases of procedural faults, as the law was opening up such possibility.

This policy of rehabilitation without touching upon the merits of the case was not generally calling for historians. However, as the attention of the public was diverted to these cases, uneasiness appeared. Procedural faults in the processes led from 1941 were legion, and they constituted a very broad base for rehabilitation. Some of clearly guilty individuals were rehabilitated, due to the fact that there were shortcomings in their trials. On the other hand, some notably innocent persons could not have been rehabilitated, as their judgments could not be found or were never rendered. Such inconsistencies motivated some of the judges to engage historians in order to share this burden of responsibilities. Therefore in January 2009 Kosta Nikolić from the Belgrade Institute of Contemporary History wrote an expert opinion to support the decision of the Šabac District Court to rehabilitate two gendarmes gunned down by a Communist resistance leader on July 7th 1941. The inclusion of the historian however added fuel to the controversy, as this event was until 2003 celebrated as the official *Day of the Resistance in Serbia*. Its indirect delegitimization through this rehabilitation triggered a debate

between historians.¹⁴⁰ The debate is likely to be furthered over the year, as the list of rehabilitated persons is getting longer and encompassing people from all sides of the political spectrum. As the process of rehabilitation can be initiated by any interested party or individual, it is likely both to be utilized by different actors on the political scene and to provoke accusations of the creation of a new culture of memory. In any case, in the absence of appropriate archival material, it is likely not to prove sensitive enough to suit the complex demands of dealing with the Second World War in Serbia.

In contrast to this project of dealing with the past ‘from above’, a curious set of events laid the ground for another avenue of historical expertise, through the activity of the Serbian War Crimes Prosecutor’s Office. Although set up primarily to deal with war crimes from the 1990s, its jurisdiction was defined broader, so as to encompass prosecution of war crimes committed on the territory of former Yugoslavia regardless of when and where they were committed. In the chaotic context of post-Milošević Serbia many people regarded the WCPO as an institution that might help shed light on cases from the Second World War as well. Such interest started with a petition by the Topola museum curator in central Serbia, who found a grave with remains of six people apparently shot by the Germans.¹⁴¹ Upon exhumation, the identity of victims, who were members of the Chetnik Royalist group, came as a surprise for the prosecutors, and the case was moved into an investigative stage. No historians were consulted and the case remained open as the wrongdoers could not be identified. Being an intern in the WCPO, I

¹⁴⁰ Kosta Nikolić, “Uloga seoskog vašara u srpskoj istoriji”. *NIN*, 08.01.2009; Đorđe Stanković, “Istorijska nauka i politički sudovi”, *Nova srpska politička misao*, 20.04.2009 <http://217.26.213.177/istina-i-pomirenje-na-ex-yu-prostorima/istorijska-nauka-i-politicki-sudovi.html>. Indeed, as early as February 2009, Serbian Ministry of Labour and Social Policy launched wide consultations with historians about the new date appropriate for celebration of the Day of Resistance, ended in futile discussions without result.

¹⁴¹ War Crimes Prosecutor’s Office, Cases, Pre-Trial Stage, Oplenac, http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.htm

was naturally interested in such cases, noting the resistance which I could contribute to the implicit theory of incompatibility, but also to the understandable necessity of not losing focus from the recent more urgent and recent crimes. In unofficial conversations I got some positive feedback only from the Deputy Prosecutor Bogdan Stanković, who had a keen interest in history and was well aware of the fact that the recent bloodshed was preceded by many similar criminal patterns. However, he as well told me that such cases are not likely to be pursued, both for practical reasons of keeping the focus on the crimes of 1990s, and due to the notion that history has already rendered its judgment.¹⁴²

At the same time, through my work in the Institute for Contemporary History, I came to know Dr Dobrivoje Tomić, an elderly dentist who emigrated from Yugoslavia in 1945, after his father's Dušan arrest. His father disappeared from prison, and was supposedly shot and buried at the mass grave in Boljevac, Zaječar County, Serbia. Tomić returned to Yugoslavia in 2000, asking repeatedly for justice in many instances but remaining without a plausible response. Then, to my astonishment, I grew to hear from the colleague at my Institute that he wrote a letter to the War Crimes Prosecutor's Office, got a positive answer and was contacted by the investigators. I enquired with the Prosecutor's Office, and was told that although the case seems to be a war crime, having in mind the state of the evidence not much can be done. However, the Tomić case was a key subject of one of my close colleagues at the Institute, Srđan Cvetković, who published widely on the repression in Serbia 1944-1953.¹⁴³ I knew that he was in possession of not just the material regarding the case, but of many other elements which could help put the case in adequate context and in the pattern of events which could make

¹⁴² Interview with Prosecutor Bogdan Stanković, Užice, June 18, 2008.

¹⁴³ Pretrial Expert report by Srđan Cvetković in Tomić case for the Serbian War Crimes Prosecutor's Office

this a war crime case. The dilemma I was in was rather obvious. As a researcher of the topic of historical expert witnessing, I was more than aware of the controversies accompanying the practice. Still, it seemed to me quite illegitimate to simply shy away without at least hinting that such an avenue is a possibility. With this agenda, I talked to the prosecutor and the investigator, relating to them that I know a historian who has information on the case and I set up a meeting. The evidence brought in by Cvetković was gratefully received and has advanced the case, which is not likely to get to court, but would probably lead to the exhumation of the gravesite, which was Dr Tomić's initial wish.

However, after this meeting, I did a bit of soul searching. I had a unique opportunity to observe the process of the complex interactions of the disciplines, being at the same time a researcher in the Institute for Contemporary History in Belgrade and intern in WCPO, and was in the position to both witness and participate in the shift from the theory of incompatibility to the gradual reception of the idea that historians might serve as expert witnesses. I understood that now is the time to contribute to the making of informed choices for the participants in this complex venture. I prepared a portfolio containing materials regarding historical expert witnessing in comparative perspective, and submitted it to the WCPO, as well as to fellow historians. In this I included also the recent experiences in Croatia, in which Dinko Šakić was tried and a group of historians testified, as well as the case of Milivoj Ašner in which Tvrtko Jakovina made an expert testimony for the prosecution. I enumerated the articles on German and American experience of historical expertise in war crimes trials, and particularly the challenges encountered both by legal systems and community of practitioners. The overall

recommendation was that, having in mind the controversial nature of historical expertise, continental specificities of Serbian judiciary and the sensitive nature of the cases, the WCPO needs either to discontinue efforts in this direction altogether or to create a sustainable and compelling long-term strategy of maintaining a universal yardstick.¹⁴⁴ I also proposed, relying on the German model, that rather than engaging the individual expert witness, such responsibility should be assigned to the institution from the field. To that end, an exchange of letters of intents was made by the Institute of Contemporary History and War Crimes Prosecutor's Office, formalizing their cooperation.¹⁴⁵

When in a couple of days I received a phone call from the WCPO, I assumed that they will either discontinue the 'belated' cases in light of such controversies or give a boost to the integrated institutionalized approach. Neither has happened. I was called to recommend an appropriate historian who could offer credible expertise on the Independent State of Croatia in the Second World War, as the Prosecution decided to file a request for the extradition of Milivoj Ašner from Austria. In an attempt to find an impartial historian on a very heated topic, I proposed another colleague, Dr Milan Koljanin. Unlike the majority of historians who worked in the field of the atrocities of Second World War, Koljanin had shown outstanding sensibility and was not labeled as a biased researcher.¹⁴⁶ I phoned him, and he promptly got in touch with the Prosecutor's Office, as he was acquainted with the case. Virtually in the same week, the news broke that an American citizen Peter Egner is identified as a person who committed war crimes in Serbia and he was to be stripped of his citizenship. Koljanin was engaged on that case

¹⁴⁴ Vladimir Petrović, Izveštaj o istorijskim veštačenjima Tužilaštvu za ratne zločine, July 7, 2008.

¹⁴⁵ TRZS, Upitnik povodom dokaznog materijala, July 09, 2008; ISI, Predlog o saradnji, July 10, 2008.

¹⁴⁶ War Crimes Prosecutor's Office, Cases, Pre-Trial Stage, Peter Egner, Šandor Kepiro, Milivoje Ašner http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.htm

immediately, as this was his narrower topic. At the same time, substantial public attention was drawn to those cases, as well as to the activity of the prosecution and the historians engaged. Professional community became restless. In light of all this attention, the WCPO still did not take integral approach to the cases. By the beginning of 2009 the extradition of Milivoj Ašner, Peter Egner and Sándor Képíró is still awaited, but not actually expected, and Tomić and Oplenac are in a standstill. Still, in the near future, those would be pushed forward and historians would be suggested as experts in those trials, and I grew to realize the tremendous impact of volatility and contingency in the realm of my study.

In that respect, whether historians would appear in Serbian courtroom as full-blown expert witnesses remains an open question, dependant *inter alia* on changes in the Law on Criminal Procedure. The existing Law from 2001 is putting the investigation in the hands of the judge who has the full capacity to select experts. As in the earlier penal code laws and procedures, the judge is choosing experts and the opposing sides having limited right to propose theirs. In case the sides contest the expert, the judge would order another expert opinion. Expertise is concerned with narrow matters, and experts usually came from the list of sworn witnesses, although the judge can assign an institution or a person outside the list. The prosecution has a possibility to put the expert on a contract in the pretrial stage, without any guaranties that he could play a role in the trial as well.¹⁴⁷ The changes introduced in the 2006 proposal of the Law on Criminal Procedure would introduce prosecutorial investigation, and would affect the choice of the experts, by giving the parties a stronger say in choosing experts. As prosecutors are supposed to play greater role in investigation, at the expense of the investigative judge, they are to be in

¹⁴⁷ Zakonik o krivičnom postupku iz 2001. (Law on Criminal Procedure 2001)

closer contact with the experts. One of the greatest novelties was setting the conditions in which experts from abroad could be contracted.¹⁴⁸ These changes come as a recognized influence of the adversarialisation and internationalization of criminal law, noted to be affecting both the French and German penal codes as well. How this will setting influence historical expert witnessing remains to be seen, as the changes in the Law are still stuck in a parliamentary quagmire.

Although in many ways different, historical expert witnessing in Common and Continental law faced similar challenges. Alongside its diffusion, powerful criticism emerged, leading to proposals which could lead to a certain procedural closure, caused by dissatisfaction with the current practice. In the USA and other countries of the accusatorial jurisdictions there is a call to reform expert witnessing towards a more neutral nonadversarial position. In contrast, continental jurisdictions are striving towards a more adversarial outlook. In the light of these developments, the past which will not pass is by no means a German particularity, and its addressing through historical expertise is hardly an American invention. “Historians followed the lawyers’ lead in this regard not only because the lawyers’ documents were those most readily available, but at least partly because the then-prevalent conception of the ‘historian as neutral judge’ established a natural affinity between how courts and historians understood their respective callings. Only years later did historians come to realize how the evidentiary

¹⁴⁸ Milan Škulic, Vanja Bajović, *Novine i izmene zakonika o krivičnom postupku iz 2006. godine u poređenju sa Zakonikom o krivičnom postupku iz 2001*, (Beograd : Službeni glasnik, 2007), 10, 24. See also Milan Škulić, „Country Law Studies: Serbia“, in Stefanie Ricarda Ross, *The rights of suspects/accused and their defense in criminal proceedings in South East Europe* (Bucharest : KAS 2008), 287-341; Bruno Vekarić et alia, *Public Relations in prosecutors Offices* (Belgrade : SINRJS, 2007), 24-50.

focus of the criminal proceedings has unwittingly skewed their analysis in favor of what came to be as the ‘intentionalist’ interpretation of the period.”, writes Mark Osiel.¹⁴⁹ There is no reason to conclude that the continental revolution in historical expert witnessing is a mere consequence of the one-sided transfer of American legal experience. Europe had its own past to confront. Subsequent problematization of historical expert witnessing was therefore not only shifting between adversarialism and inquisitorialism, but got largely internationalized by the end of the 20th century.

¹⁴⁹ Mark Osiel, *Mass Atrocity, Collective Memory and the Law*. (Brunswick and London : Transaction publishers, 2000), 100.

INTERNATIONALIZATIONS

This chapter deals with the aspects of internationalization of expert witnessing in the last decade of the 20th century and in the first decade of the 21st. Firstly (IV.1) it analyzes the transnational contribution of historians in legal dealings with the phenomenon of the denial of past crimes. The trials of this genre in which historians took the role of expert witnesses are revisited in different national jurisdictions. Alongside this horizontal internationalization, the chapter (IV.2) deals with the role historians played in the rebirth of the international criminal courts at the end of the 20th century.

IV.1 Historical Expert Witnessing in Legal Limits of Past Interpretations

Some of the most interesting features of transnational historical expert witnessing appeared in the context of involvement of the courts in distinguishing between legitimate and illegitimate historiographical interpretations. Namely, contrary to radical postmodern approaches, there are limits to the representations of the past. Even if one subscribes to the trend which sends the traditional distinctions between facts and values, description and interpretation to the junkyard of historiography, several rather lively “reality checks” are to be taken into account, both within the craft and outside it. Much of this hazy field has been the subject of legal interest, and the involvement of historians in such cases constitutes a process through which the edges of credible academic discourse are cut, for better or for worse.

IV.1.1 Historical Revision between Nonconformism and Denial

Ambiguities surround the term revisionism, loaded with meanings, denoting both legitimate reassessment of the past and its illegitimate manipulation. Setting the terminology straight by differentiating between revisionism (provocative, controversial nonconformist questioning of entrenched beliefs) and “revisionism” (denial of crimes, distortion of the truth through apology of extreme policies) would seem sensible, but presents a surprisingly slippery task.¹ The border between the two is in fact unstable, and powerful instruments outside academia often tip the balance. Primarily the law: across the world a number of self-proclaimed revisionists are caught up in the webs of legal proceedings. Some of them are in jail. *Freedom for Europe’s Prisoners of Conscience!*, demands Mark Weber, head of the USA-based revisionist Institute for Historical Review, commenting on the imprisonment of some of the leading figures of contemporary revisionism, such as Ernst Zündel, David Irving and Germar Rudolf, claiming that they are victims of suppression of the freedom of academic expression.² However, there is more to it. Rather than simple victims of crime of thought, revisionists operate, and have always operated, at a sensitive junction between history and law. The current wave of their legal predicaments is a stage of the long-lasting, structurally entangled relationship

¹ The dilemmas of distinguishing the narrow and wider understanding of historiographical revisionism are exposed in Brigitte Bailer-Galanda, “Revisionism” in Germany and Austria: the Evolution of a Doctrine <http://www.doew.at/information/mitarbeiter/beitraege/revisionism.html>, The sort of revisionism scrutinized in this article is increasingly being labeled as “revisionism” (in the USA) or negationism (in France). For detailed account on negationism in Valérie [Igonet](#), . *Histoire du négationnisme en France* (Paris : Seuil, 2000). Different aspects of revision are a topic of *History and Theory*, “Revision in History” 46 (2007).

² Mark Weber, *Freedom for Europe’s Prisoners of Conscience!* Irving Zundel, Rudolf Still in Prison, November 16, 2006, http://www.ihr.org/news/061112_prisoners_of_conscience.shtml (22.10.2006)

between revisionism and the law, central to the understanding of both legitimate and illegitimate revisionist undertakings.

How did this connection emerge? To begin with, revisionists (legitimate as well as illegitimate) need to have something to revise. Any subject of their revision is more than just a conventional scholarly interpretation of the past. They challenge something bigger - the “official” truth, a paradigm sanctioned by political authorities, guarded by legal decisions and maintained by the majority of allegedly opportunistic academics. This dynamic is typical of revisionist discourse and makes it easy to differentiate between a regular scholarly debate, conducted in the form of an informed dialogue between academics, and a politically saturated exchange. High-profile legal proceedings and landmark courtroom decisions, as examples of a legally imposed truth, are thus prone to become a starting point of their revision. The term was in fact used for the first time to describe intellectuals who were fighting for the revision of the Dreyfus case. It also entered historiography in a similar context, as it was initially used to describe the activities of a number of interwar historians challenging the famous Article 231 of the Versailles Treaty.³ Nonconformism towards governmental narratives and suspicion towards propaganda were typical features of early revisionism.

Structurally similar, albeit manifestly very different developments occurred in the aftermath of the Second World War, whose juridical follow-up was much more thorough and took on various forms of legal and extralegal retribution.⁴ Criminalization of Nazi

³ Article 231 and related parts of the Versailles treaty were based on the findings of the international “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties”, *American Journal of International Law*, 14 (Jan. - Apr., 1920): 95-154.

⁴ Comparative overviews of the postwar retribution in Europe: Claudia Kurtzidis-Haider, *Keine “Abrechnung”. NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945* (Leipzig, Wien : Akademische Verlagsanstalt, 1998); Henke, Klaus-Dietmar et alia, ed. *Politische Säuberung in Europa*

Germany and its allies and collaborators resulted in a number of proceedings, in the course of which more and more factual knowledge was gathered about the atrocious aspects of *Neuordnung Europas*. Following defeat on an unprecedented scale, the Third Reich was dismantled, its archives seized and utilized to furnish evidence for the trials to come. In the midst of this frenzied activity stands the Trial of Major War Criminals before the International Military Tribunal in Nuremberg. As the years went by, it became clear that Nuremberg had left an ambiguous legacy. Procedural faults were legion, and easy targets for barrages of political, legal and historical criticism. Skeptical voices labeled it an exercise in victors' justice, and yet another imposition of the official truth. Various aspects of the proceedings were scrutinized and directly or indirectly criticized by reputed legal scholars, political scientists and historians. As early as 1961, A. J. P. Taylor provoked lively debate with his *Origins of the Second World War*. His interpretation of the causes of the war was very remote from the framework offered by the Nuremberg Judgment, and was boldly subtitled *A Revisionist View*.⁵ Many serious studies of the Nuremberg proceedings since then have maintained a critical edge towards what Mark Osiel recently named called "Nuremberg's conspiratorial outlook on history". Michael Marrus concurs that "as most of the historians would agree...this interpretation has not withstood the research of a subsequent generation of scholars."⁶ Nuremberg, with its complex relation to history (as outlined in first chapter) is indeed a topic on which reasonable, well-informed people have many doubts.

(München : München Verlag 1991); István Deák et alia eds. *The politics of retribution in Europe : World War II and its aftermath* (Princeton, N.J. : Princeton University Press, 2000).

⁵ A.J.P. Taylor, *The Origins of the Second World War* (Middlesex: Penguin Books 1961), 68-72.

⁶ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, London : Transaction Publishers, 2000), 100. Michael Marrus, "History and the Holocaust in the Courtroom" in Ronald Smelser ed. *Holocaust and Justice*, (Evanston, Illinois : Northwestern University Press 2002), 235.

Fishing in this murky water was a bliss for the newly emerging, significantly different brand of revisionism. It is no wonder that most researchers into the history of Holocaust denial usually single out Maurice Bardéche's book *Nuremberg or the Promised Land* (1947) as its point of departure.⁷ Without the benefit of much scholarly argumentation, but with a very clear political agenda, authors like Bardéche had set out to undermine the impact of the postwar trials and revise their findings. Criticizing Nuremberg alongside with reputed scholars gave the new revisionism badly needed legitimacy.

However, unlike benevolent critiques, they were using selective, guided attacks in order to exculpate the Nazi policies that were buried in the Nuremberg. Shielded to some extent by the Cold War-generated equation of the crimes of communism with those of national-socialism, they produced many frighteningly successful distortions of otherwise convincing arguments. The participation of Soviet representatives in the Nuremberg proceedings prompted the revisionists to claim that the trial was not only victors' justice, but not justice at all. The inability of the Nuremberg prosecutors to establish the exact number of murdered Jews was misused for recurrent reductions of the death-toll. The non-existence of the written order signed by Hitler regarding the final solution of the Jewish question was evoked as an argument *ex silentio* that he knew little or nothing about the death camps.⁸

⁷ Maurice Bardéche's entrance into the limelight is analyzed by Igounet, *op.cit.*, 37-60. He is singled out as the forerunner of contemporary revisionists both by Deborah Lipstadt, in *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York : Free Press, 1992), 50. and by Baillet-Latouff, *op.cit.*

⁸ Revisionists found many similar footholds in this approach. There is no reason to detail on all the manifestations of such writings, but its last word, David Irving's *Nuremberg: The Last Battle* (London : Focal Point, 1996) deserves attention, as this book delivered sharp blows both to the legality and the legitimacy of the Nuremberg proceedings, and is in the dire need of factual scrutiny. Many aspects of the book were criticized by the established interpreter of the Nuremberg trial Ann Tusa, *Guilty on Falsifying History*, http://www.nizkor.org/ftp.cgi/people/i/irving.david/press/Electric_Telegraph.961109 (20.10.2006)

The attack on the Nuremberg and related trials was at the heart of what Pierre Vidal-Naquet labeled “an assassination of memory” and Deborah Lipstadt calls a “growing assault on truth and memory”.⁹ Still, the new revisionists consciously promoted themselves as inheritors of interwar revisionism. The presentation of the Institute for Historical Review states: “Devoted to truth and accuracy in history, the IHR continues the tradition of historical revisionism pioneered by distinguished historians such as Harry Elmer Barnes, A.J.P. Taylor, Charles Tansill, Paul Rassinier and William H. Chamberlin”.¹⁰ However, the differences were striking. Unlike the interwar debate on the question of German guilt, which did advance factual knowledge on the outbreak of the First World War, and did contribute to a wider understanding of causality in history, the new revisionism had far less to offer. Whereas the interwar revisionist historians were questioning the dictum of a peace treaty, which was a political imposition in a legal document, postwar revisionists were attacking the core of postwar legal proceedings. Whereas most other scholars concentrated on criticizing the concept of crime of conspiracy and crimes against peace as defined at Nuremberg, new revisionists carried this skepticism to investigations into crimes against humanity and war crimes, casting doubts on their findings. Academic nonconformism in the spirit of “speaking the truth to power” was transformed into an outright denial of human suffering. Suspiciously, among the ranks of the new revisionists one could seldom find reputable professional historians, instead of whom mavericks of different brands took over the floor. Nevertheless, in the light of the deepening crisis of historical scholarship shaken by relativism, strengthened

⁹ Both authors attempted to systematize the typical strategies of denial: Pierre Vidal-Naquet, *Assassins of Memory. Essays on the Denial of the Holocaust* (New York : Columbia University Press 1992), 18-24; Deborah Lipstadt, *op.cit.*, 21-27. On the matter see also Stanley Cohen, *States of Denial: knowing about atrocities and suffering*. (Cambridge : Polity Press, 2001)

¹⁰ IHR, *A Few Facts About the Institute for Historical Review*, <http://www.ihr.org/main/about.shtml>

by the so-called “Hitler’s wave” of both increased and esthetized interest in the Second World War of the early seventies, they gained significant visibility. Initially the work of several marginalized individuals, their approach developed in the course of the seventies into a recognizable standpoint on the margins of this extremely controversial and sensitive field.

IV.2.2 The Long Arm of the State(s): Defining Revisionism Legally

Ironically, it was precisely the limited success of the new revisionists of the late seventies and eighties which put in motion a set of legal mechanisms against them, and has assigned to them the derogatory label of “revisionists”. In fact the authors of revisionist literature regularly come into collision with the law. Maurice Bardéche himself was sentenced to a year in prison, although he never went to jail. However, with growing global sensitivity towards the crimes of the Second World War, enhanced through the second generation of Holocaust related trials (The Ulm trial, the Eichmann trial, the Frankfurt-Auschwitz trial other proceedings elaborated in the second chapter), new sentiments were powerfully augmented by public controversies like the one over President Reagan’s visit to the Bitburg cemetery. On the other hand, powerful strive toward study of collective memory and its impact on society had an immediate effect on both research of history and rendering of justice. The tables have turned against the revisionists.¹¹

¹¹ On the Bitburg issue see Geoffrey Hartman (ed), *Bitburg In Moral and Political Perspective*. (Bloomington: Indiana University Press, 1986). On the revival of the study of memory and its impact see Pierre Nora, “Between Memory and History: Les Lieux de Memoire”, *Representations* 26 (1989), 7-24. See also Tzvetan Todorov, *Hope and Memory*. (London : Atlantic books 2003)

Shaken social consensus started calling for the legal protection of public memory, and there were tools available. Contrary to popular belief, freedom of speech in the public sphere is far from unlimited in functioning democracies. Many aspects of expression are, in one way or another, suppressed in public life. Certain ways of addressing the past are also illegal in a number of countries. This is particularly the case with the denial of mass atrocities, above all with Holocaust denial. A number of countries have criminalized these ways of contesting the existence of crimes against humanity. Expressed in formulations which differ significantly, Holocaust denial constitutes a crime in Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Portugal, Romania, Slovakia, Spain, Switzerland, and Israel. Where direct criminalization was absent, as in the United Kingdom, Canada, the United States and elsewhere, legislation concerning hate speech and incitement to racial hatred also paved the way for a new wave of Second World War related trials, concerned with the aberrant memory or inadequate representation of those events.¹²

However, the vigor with which these mechanisms are applied varies from jurisdiction to jurisdiction. Germany has long tradition of combating revisionism legally, which might be seen as an insistence on discontinuity between the Federal Republic and the Third Reich, as well as the determination never again to allow the judicial system to become the mere bystander of a prospective *Machtergreifung*. Hence, such proceedings have become a matter of routine under article 185 of the Penal Code, which punishes behavior violating the honor of the complainant or under article 130 (3), which explicitly prohibits incitement to racial hatred. In addition, from the *Zionist Swindle* case (1977)

¹² Comparative overview in Robert A. Kahn, *The Holocaust Denial and the Law* (New York : Palgrave 2004), 65-84

onwards, the denial and minimization of the number of Jewish victims of the Nazi regime specifically constitutes a crime. In 1985, the law colloquially called *Gesetz gegen die "Auschwitz-Lüge"* (Law against the "Auschwitz Lie") was passed and has been upheld in trials like the *Deckert* case, in which the leader of the National Democratic Party Günther Deckert was found guilty of incitement to racial hatred, and the *Holocaust Denial* case in which the German Supreme Court ruled, after a neo-Nazi rally, that the right to freedom of speech does not protect Holocaust deniers.¹³

Similar historical experience probably guided Austria in the same direction, with a zeal which shows no signs of withering six decades after the Second World War. Although Austria was not usually evoked as an example of thorough dealing with the past, on 20 February 2006 David Irving, British self-styled revisionist historian, was sentenced to three years in prison for Holocaust denial, under Austria's 1947 law prohibiting the "public denial, belittling or justification of National Socialist crimes".¹⁴ The law under which Irving was found guilty was severed in 1992 to combat the revival of the ideology of the NSDAP through explicit criminalization of the denial. In the reasoning of the court, this is exactly what Irving was doing in the course of lectures he held in Austria in 1989. Upon his subsequent visit to this country, he was identified, arrested, detained, and tried, provoking yet another public controversy on the legal limits of representations of the past in contemporary society.

¹³ About the legal fight against revisionism in Germany via criminal law see Robert A. Kahn's *The Holocaust Denial and the Law* (New York : Palgrave 2004), 65-84. About the role of the "Auschwitz lie" in revisionist discourse see Brigitte Bailer-Galinda, Wolfgang Benz, Wolfgang Neugebauer (Hrsg.), *Die Auschwitzleugner : revisionistische Geschichtslüge und historische Wahrheit* (Berlin : Elefanten Press, 1996). The law against the "Auschwitz lie" is commented and debated in Eric Stein "History Against Free Speech: The New German Law Against the "Auschwitz" and Other "Lies"", *Michigan Law Review*, 85 (1986); Eric Stein, "On the 'Auschwitz Lie'", *Michigan Law Review*, 87, No. 5 (Apr., 1989): 1026-1032.

¹⁴ More about the juridical dealing with the Nazi past in Austria in several contributions in Claudia Kuretsidis-Haider, Winfrid R.Garscha eds., op.cit, 16-128.

Comparable practice developed somewhat later in France, as what Henry Rousso labeled the “Vichy syndrome” was long dormant.¹⁵ However, as one of the many after-effects of the 1968 rebellion, the issue of appropriate remembrance of the Second World War reappeared, strengthened by the burden of more recent instances of crimes committed in the course of decolonization. The anti-Jewish policy of the Vichy government became an issue of contention in a number of cases, beginning with the trial of Klaus Barbie in 1987. Barbie’s skilled lawyer, Jacques Verges, based his defense on stretching the notion of crimes against humanity to the conduct of the French authorities in Indochina and Algeria, and in effect suggested a powerful alternative reading of the recent history of France.¹⁶ In a subsequent wave of moral revisiting of French history, the high profile of revisionists became an embarrassment to France, leading to a legislative reaction – in 1990 Parliament passed the so-called Gayssot law, which was furthering the 1972 Holocaust denial law and criminalized the contestation of crimes against humanity.¹⁷ One of the first defendants under that law was Robert Faurisson, professor of literature at the University of Lyon and the most vocal Holocaust denier in France, who unsuccessfully appealed against the verdict to the United Nation’s Human Rights Committee. However, the Gayssot law does not necessarily concern only mavericks in

¹⁵ Henry Rousso maintains that the postwar purge of Nazi collaborators and Vichy loyalists was followed by widespread public oblivion regarding the issues of the Second World War, which in turn reappeared with particular forcefulness after 1968, and again in late eighties. The main phases of this development are outlined in his *The Vichy Syndrome* (Cambridge, Mass : Harvard University Press, 1991), 220-227.

¹⁶ Verges’s strategy is analyzed in Douglas Lawrence, *op.cit.*, 207-9. Among the examples of such reactions in juridical terms, French General Paul Aussaresses, veteran of the Algerian war, was convicted in 2002 for justifying the implementation of torture during his operations in Algeria in his memoirs. The grounds for his conviction were found in a 1881 law on the media. The case is analyzed by Stina Löytömäki, “Legalization of the Memory of the Algerian War in France”, *Journal of the History of International Law* 7, (2005): 157-179.

¹⁷ Legifrance. Loi Gayssot http://www.legifrance.gouv.fr/WAspad/_UnTexteDeJorf?numjo=JUSX9010223L (20.10.2006) Gayssot Law is commented and its application described in: Robert Kahn, *op.cit.*, 94-117. The circumstances under which it was passed are described in Igounet. *op.cit.*, 444-446. More on the law in Jean-Noël Le Passee dans le pretorire. *L’historien, le juge et la journaliste* (Paris : Seuil 1998), 46-50

scholarship, like Faurisson, Vincent Reynouard or Roger Garaudy, but also right-wing politicians like Jean-Marie Le Pen.

European countries are generally in the forefront of the criminalization of harmful interpretations of the past, which are deemed to be a means of spreading hate-speech and inciting racial and ethnic hatred. Their commitment to combating this phenomenon is apparent in a set of initiatives started recently by the Council of Europe through the *Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems*. Article 6 of this Protocol obliges the signatories to penalize “distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognized as such by final and binding decisions of the International Military Tribunal, established by the London Charter of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognized by that Party.”¹⁸ The intention is to regulate this realm as well, for the Internet has become one of the main battlefields for deniers and defenders of the memory of the Holocaust.

The other way of addressing the legitimacy of a certain interpretation of the past is available and advocated as a less harmful alternative. Revisionism could be sanctioned indirectly, through civil proceedings in which individuals or groups file complaints against the alleged offenders on the grounds of causing mental harm, or producing and distributing offensive publications. A *cause célèbre* in this respect in the United States

¹⁸ Council of Europe, Treaties, 29.1.2003, <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm> (20.10.2006).

was the 1981 *Mermelstein case* in which a Holocaust survivor, Mel Mermelstein, sued the Institute for Historical Review following their announcement of reward to anyone who could prove that Jews were put to death by gassing in Auschwitz.¹⁹ The Institute lost in a way which constituted a major juridical defeat for revisionists, for the Californian court admitted the Holocaust into evidence as judicial notice, proclaiming it an event so well-known and indisputable that it need not be proven in court. The success in the *Mermelstein case*, which was both preceded and followed by similar ventures in both continental and common law, indicated that criminal law is not indispensable in combating denial. If criminal action aims at delegitimizing many facets of revisionism, civil suits are delegitimizing them, frequently with equal success.

The involvement of the state in this debate had, and still has, many opponents in very different quarters. Revisionists are naturally very much against such laws, but such activities are disapproved of by many liberals, too. Criticism is strong in countries with a long tradition of the constitutional protection of free speech, and particularly in common law countries - criminalization of the Holocaust denial has never been discussed seriously in the United States, and Great Britain has recently dropped the idea of introducing it. The exception in this respect is Canada, in which a denier, Ernst Zündel, was put on trial. However, even his verdict was eventually quashed by the Supreme Court on the basis of protection of free speech.²⁰ One of the great controversies regarding revisionism was sparked off when Noam Chomsky's essay *Some Elementary Comments on the Rights of Freedom of Expression* prefaced Robert Faurisson's *Memoire en defense*. Chomsky's

¹⁹ About the case: Robert Kahn, op.cit, 22-31.

²⁰ The Zündel judgment and related material are available at The Nizkor Project. Supreme Court of Canada: *1992 Zündel Judgement*, <http://www.nizkor.org/hweb/people/z/zundel-ernst/supreme-court/1992-preliminary-version.html>, (20.10.2006)

argument was that, although he does not concur with Faurisson's thesis, he feels the need to defend his right to express it.²¹ Even the most vocal fighters against Holocaust denial, like Deborah Lipstadt, have many reservations about such laws: "As an American, I'm a staunch believer in free speech. I recognize, however, that the situation in Germany is different and that there might be room there for a law against Holocaust denial; but there is also a practical aspect to my general opposition to laws against Holocaust denial. When speech is restricted, it becomes 'forbidden fruit' and more interesting to people."²² The trials lend the revisionists, as noted by Ernst Zündel himself, a million dollars' worth of publicity, with some public sympathy, claiming to be persecuted thinkers and comparing themselves, as Robert Faurisson did, with Galilei: "Did Galileo Galilei have the facts right? Do we, the Revisionists, have the facts right?... That is the question."²³ In that respect revisionism was playing the card of relativistic tendencies of postmodern critical approach toward the concept of 'growth' of historical knowledge

Many public figures who otherwise do not think revisionists have the facts right are championing the retraction of 'legislation of the past' and showing concern about the tendency towards this tendency in Europe.²⁴ Professional historians are particularly engaged in working for their revocation. A group of 19 historians in France has recently protested against all "historic laws".²⁵ The gist of their argument is captured by Timothy Garton Ash, who commented the French Parliament 2005 law on colonialism: "No one

²¹ For more about Chomsky's involvement see Vidal-Naquet, op.cit, 65-73.

²² Denial of the Holocaust and Moral Equivalence. An Interview with Deborah Lipstadt, Jerusalem Centre for Public Affairs. August 1, 2003, <http://www.jcpa.org/phas/phas-11.htm> (20.10.2006)

²³ Robert Faurisson. Letter to Christopher Hitchens, October 5, 1994, <http://www.vho.org/aaargh/engl/FaurisArch/RF941005.html> (20.10.2006)

²⁴ For a recent critical overview see Gerard Alexander's "Illiberal Europe", *Weekly Standard*, 11, issue 28, (April 10 2006),

²⁵ Several such initiatives are mentioned in Christopher Caldwell,. "Historical Truth Speaks for Itself" *Financial Times*, February 19, 2006, (20.10.2006)

can legislate historical truth. In so far as historical truth can be established at all, it must be found by unfettered historical research, with historians arguing over the evidence and the facts, testing and disputing each other's claims without fear of prosecution or persecution.”²⁶ Time and again, the debate resurfaces along the frontlines of proponents of complete academic freedom, based on implicit theory of incompatibility of legal and historical reasoning.

Still, quarrelling scholars addressed the court to resolve their claims. “Once someone is labeled as a Holocaust denier that person becomes illegitimate, and rightly so.”, claims Israeli Professor Neil Gordon after recently winning a suit against his colleague Steven Plaut, who alleged him to be “a fanatic anti-Semite”.²⁷ This aspect of defamation undoubtedly made litigation over revisionism develop in rather unexpected directions towards the end of the century, and showed that civil cases also have their weaknesses. This option is open to “revisionists” as well as to others, and is particularly utilized in their attempt to present themselves as credible revisionists, rather than contemptible deniers. Revisionist historian David Irving tried to play this card by suing Deborah Lipstadt in 1996 for calling him a Holocaust denier. Even the mainstream academia has also seen similar initiatives. One of the legal after-effects of the Goldhagen debate was a libel threat by Daniel Goldhagen against Ruth Betinna Birn, whom he decided to sue unless she retracted her devastating review of his book *Hitler’s Willing Executioners*. Writing about the Holocaust, as well as writing about writing about the Holocaust, already subject to very different interpretations, has become a true intellectual minefield.

²⁶ Timothy Garton, Ash, “This is the Moment for Europe to dismantle taboos, not to erect them”, *The Guardian*, October 19, 2006.

²⁷ Ira Moskowitz. “U.S.-born professor guilty of libeling colleague”, *Haaretz*, June 9, 2006.

This debate remains unsettled. Many revisionists have been prosecuted, and some of them have gone to jail. But does this have an impact on conventional historiography? It depends. Although cases regarding revisionists are sometimes conducted in an isolated courtroom context, their ability to influence scholarship should not be underestimated, as the examples which follow show. Whether the cases involve criminal or civil suits, there are a number of ways in which the proceedings can break out of the courtroom and directly or indirectly involve scholars. As the law invades their realm, tensions regarding authority arise. Are the courts in a position to judge history? Could they assess the work of historians? How should historians react in such situations? Although these dilemmas have been on the table since the turn of the centuries, as Dreyfus and Friedjung cases described in first chapter demonstrate, we are far from definite answers. Each case brings about a new debate. Worse still, the age of extremes has brought about certain radicalization of the stakes. At least since history was brought to trial in the Nuremberg, the relationship between historiography and law was irretrievably changed. Accuracy and responsibility in approaching sensitive topics became not only a matter of professional integrity and personal ethics, but also a matter of public interest and social demand. Therefore in various jurisdictions scholars could attract the attention of the public prosecutor or civil claimants for their views and findings. Processes arising from such setting would not only put practitioners of historiography in danger of punishment, but would put the judges in the strange position of rendering judgments over the quality of their historical interpretation, producing peculiar text in which legal form transmits historiographical content.

IV.1.3 Historians as Accusers, Accused and Experts in the Defamation Cases

Although most of the accounts on the peculiar position of defamed historians stress the novelty of this precarious position, historians were in the peril of being sued and defamed throughout the age of extremes. Liability for the impact of historical writing, if assessed as untrue and offensive was in circulation as least since the Friedjung case. However, in the last decades of the 20th century, such suits mushroomed, particularly in Western Europe and the United States. This explosion of litigation is systematized by Antoon de Baets, who warns that “more than may be expected, historians land in the dock.” He rightly concluded that “defamation is clearly an affair of historians of the contemporary”.²⁸ From his assessment it comes clear not only that the scope such cases increased drastically, but also that its content shifted firmly toward the issues of researching into mass atrocities and human rights breaches. As yet another belated aftereffect of the change in sensibilities augmented by the Nuremberg, such cases boomed by the end of the 1980s. The first to achieve was such as the suit was brought by Lord Aldington onto Count Nicolai Tolstoy and his publisher, due to his writings about the fate of the war prisoners from Yugoslavia, captured by the British in Austria, handed over to the Yugoslav partisans and Soviets who killed a substantial number of them without a trial. In his book *The Minister and the Massacre*, he accused British officials as accomplices in this atrocity, lost a suit and was to pay 1.5 million pounds, a verdict which European Court of Human Rights found disproportional.²⁹

²⁸ Antoon de Baets, “Defamation Cases against Historians”, *History and Theory* 41 (2002) : 346-366.

²⁹ Nicolai Tolstoy, *The Minister and the Massacre*, (London : Century Hutchinson, 1986). On the controversy see Mario Grčić (ed.), *Otvoreni dosier Bleiburg*, (Zagreb : Start, 1989). On the legal aftermath of the case see Tim Rayment, “The Massacre and the Ministers”, *Sunday Times*, April 7, 1996.

If the legal predicaments of Tolstoy's could be contributed to his finger pointed at the members of the British establishment and to the conduct of the institutions at the heights of the age of extremes, the following years have shown that passionate public controversies and legal ventures could just as easily be revolved around the atrocities from the beginning of these troubled times. Although not considered as the defamation case proper, the case in 1994 against one of the best known British Orientalists, Bernard Lewis from Princeton University, who stood trial in Paris underscores the importance of the matter. The immediate cause was an interview in which he cast doubts on the appropriateness of the term genocide for the 1915 massacre of Armenians in the Ottoman Empire, to which he referred as "the Armenian version of this event ... Turkish documents prove the will to deport, not to exterminate."³⁰ Lewis has therefore tackled a very sensitive issue.

He was indicted under the Gayssot law, but acquitted on the basis of the interpretation of the court, which defined crimes against humanity in accordance with the definition of the London Charter of 1945 and was hesitant to stretch the notion to prior events. However, Lewis was sued in a civil case in three separate suits by the French Forum of Armenian Associations and LICRA (Ligue contre le racism et l'antisemitisme). The French court claimed not to be interested in resolving either historical issues or historiographical method: "The Court is not called upon to assess or to state whether the massacres of Armenians committed from 1915 to 1917 constitute or do not constitute the crime of genocide...in fact, as regards historical events, the courts do not have as their

³⁰ *Le Monde*, 16 November 1993. The case of Bernard Lewis became an important tool in on-going Turkish and Armenian wars of memory. Consequently, Internet resources on the event show considerable bias. Noteworthy exception: The Bernard Lewis Trial, <http://www.ids.net/~gregan/lewis.html> (20.10.2006). The case is commented in Jean-Nöel Jeanneney, *Le Passee dans le pretorire. L'historien, le juge et la journaliste* (Paris : Seuil 1998), 37-43.

mission the duty to arbitrate or settle arguments or controversies these events may inspire and to decide how a particular episode of national or world history is to be represented or characterized...in principle, the historian enjoys, by hypothesis, complete freedom to relate, according to his own personal views, the facts, actions and attitudes of persons or groups of persons who took part in events the historian has made the subject of his research.”³¹

However, in spite of those reservations, in order to assess whether Lewis had injured the Armenian community or was simply doing his job, legal scrutiny of his scholarly activity was deemed necessary by the court: “Whereas, even if it is in no way established that he pursued a purpose alien to his mission as a historian, and even if it is not disputable that he may maintain an opinion on this question different from those of the petitioning associations, the fact remains that it was by concealing elements contrary to his thesis that the defendant was able to assert that there was no "serious proof" of the Armenian genocide; consequently, he failed in his duties of objectivity and prudence by expressing himself without qualification on such a sensitive subject; and his remarks, which could unfairly revive the pain of the Armenian community, are tortious and justify compensation under the terms set forth hereafter.”³² Lewis lost one of the suits, and paid the symbolic sum as compensation for an offense towards the sentiments of the Armenian community. Clearly, the court was both in the position of rendering judgments over the appropriateness of his scholarship, and in the obligation to do so. Forced to enter into the field of historical interpretations, the court was entering the field of sensitive field, and so were the historians.

³¹ The Bernard Lewis Trial, “Judgment Rendered 21 June, 1995”, 12, http://www.ids.net/~gregan/dec_eng.html (20.10.2006)

³² Ibidem, 14

After the trial, Lewis was critical of the legal findings: “There is no evidence of a decision to massacre. On the contrary, there is considerable evidence of attempts to prevent it, which were not very successful. Yes there were tremendous massacres, the numbers are very uncertain but a million may well be likely ... the issue is not whether the massacres happened or not, but rather if these massacres were as a result of a deliberate preconceived decision of the Turkish government... there is no evidence for such a decision.” Such persistence made him a target of criticism coming from the academia, which he attempted to defer by delineating the case he was engaged in from the ongoing debates on the Holocaust denial: „The deniers of Holocaust have a purpose: to prolong Nazism and to return to Nazi legislation. Nobody wants the 'Young Turks' back, and nobody wants to have back the Ottoman Law. What do the Armenians want? The Armenians want to benefit from both worlds. On the one hand, they speak with pride of their struggle against the Ottoman despotism, while on the other hand, they compare their tragedy to the Jewish Holocaust. I do not accept this. I do not say that the Armenians did not suffer terribly. But I find enough cause for me to contain their attempts to use the Armenian massacres to diminish the worth of the Jewish Holocaust and to relate to it instead as an ethnic dispute.“³³ However, his stance remained a matter of public controversy, stirred on the one hand by the reluctance of Turkish authorities to assume historical responsibility for the atrocities, and the determination to avoid the legal qualification of genocide, and on the other by the pressure from governments and international organizations who recognize the existence of genocide over Armenian and the pressure groups who call for acknowledgment of their sufferings.

³³ [Statement of Professor Bernard Lewis, Princeton University](#), "Distinguishing Armenian Case from Holocaust", *Assembly of Turkish American Associations*, April 14, 2002

The other type of interaction between academics in litigations regarding mass atrocities was displayed in *Regina vs. Ernst Zündel*, a 1985 criminal case in Canada in which a Neo-Nazi publisher was accused of spreading false news after publishing an essay entitled *Did 6 Million Really Die?*.³⁴ The prosecutor built his case on an attempt to prove that Zündel was purposefully spreading false news. He was bound to prove that Zündel was aware of the truth – that he knew about the Holocaust and maliciously misguided the public. As the judge declined to accept the existence of the Holocaust as a judicial notice, it became a necessity to prove that the Holocaust occurred and was to be believed in beyond reasonable doubt by an average person. In addition to the customary sorts of evidence, such as documents and eye-witness testimonies, the prosecution embarked on a less standard venture – bringing historians into court as expert witnesses. The expert witness for the prosecution was no other than Raul Hilberg, one of the best known Holocaust students. Zündel’s lawyer, Douglas Christie, set out to defend his client by relativizing the epistemological value of knowledge about the past. In the process which Lawrence Douglas refers to as ‘relativizing history and volatilizing memory’, Christie was in a sense announcing the approach of Touvier’s attorney that “history is only an opinion”, and that there are no firm criteria for preferring one opinion over the other. In a very flamboyant and abusive manner, he was challenging the accounts of the eyewitnesses and other exhibits shown by the prosecution. In order to present the Holocaust as a highly disputed and debatable chain of ill-researched events, he was utilizing all the advantages of adversarial criminal proceedings, including abusive cross-examination of the Holocaust survivors.³⁵

³⁴ About the case: Robert Kahn, *op.cit.*, 85-94, Deborah Lipstadt, *op.cit.*, 157-177.

³⁵ Analyzed in Lawrence Douglas *The memory of judgment.* 213-225.

Experts were also targets of this epistemological nihilism. He generally dismissed historical expert testimonies as hearsay, and exposed Hilberg to highly

Christie: In regard to Bergen-Belsen, have you ever visited that camp?

Hilberg: No.

Christie: In regard to Dachau, have you visited that ...

Hilberg: No, I have not visited – I can tell you, to save your questions, I have visited only two camps.

Christie: What were they?

Hilberg: Auschwitz and Treblinka

.....

Christie: After you wrote your first book?

Hilberg: Yes

Christie: So you wrote a book about a place before you went there.

After this attack on Hilberg's credibility as an investigator on spot, Christie continued to scrutinize his sources, demanding firm scientific evidence over the existence of gas chambers:

Christie: Name one report of such kind that showed the existence of gas chambers anywhere in Nazi-occupied territory.

Hilberg: I still don't quite understand the import of your question. Are you referring to a German, or a post-war –

Christie: I don't care who – German, postwar, Allied, Soviet – any source at all. Name one that –

Hilberg: To prove what?

Christie: To conclude that they have physically seen a gas chamber. One scientific report.

Hilberg: I am really at a loss. I am seldom at such a loss, but –

Christie: I put it to you, you are at a loss because there isn't one.

Christie was consciously pushing for firm scientific confirmation, brushing aside all the report based on eyewitness accounts and historical documents. However, adding to such relativistic approach, he commissioned expert historical testimony for his own client from no other than Robert Faurisson.³⁶

³⁶ Excerpts from Hilberg's cross-examination appear in Lawrence Douglas, op.cit, 230-238.

Consequently, the trial offered the strange spectacle of a debate between the experts brought by the defense and those provided by the prosecution. In vain did Hilberg attempt to explain the difference of methodology in hard sciences, social sciences and humanities, concluding in exasperation: “This is the problem of teaching history in such a small setting.”³⁷ The complex case dragged from the first hearing, at which Zündel was found guilty, to the Supreme Court and back for a retrial. During the retrial, Hilberg’s place was taken by another prominent expert on the period, Christopher Browning.³⁸ The defense also strengthened their ranks, bringing David Irving to the witness box. Needless to say, such skirmishes increased the fame of revisionists. Eventually, Zündel was found guilty. The case went to appeal, and was sent for retrial owing to procedural faults. He was found guilty again, and this time the verdict was confirmed on appeal, but was eventually reversed by the Supreme Court on the grounds of protection of free speech.³⁹ The ultimate failure unintentionally delivered the message that the Holocaust is a debatable event in scholarship. It has also shown the limitations of adversarial criminal proceedings over matters as sensitive as mass atrocities of recent past, but also the interconnected nature of contemporary legal systems. Namely, as he never obtained neither Canadian nor American citizenship, he was extradited to Germany where he was wanted for inciting racial hatred. After the trial which begun in 2006 and ended in 2007, he was sentenced to five years imprisonment, maximum sentence for braking the Volksverhetzung law banning hatred against a minority of the population⁴⁰

³⁷ Lawrence Douglas, op.cit, 236.

³⁸ Christopher Browning talks about his experience in the witness box in *Holocaust Denial in the Courtroom: the historian as expert witness*, <http://www.plu.edu/~lutecast/2004/20041014-lemkin.html>

³⁹ Full judgment available on The Nizkor Project, Supreme Court of Canada: *1992 Zündel Judgement*, <http://www.nizkor.org/hweb/people/z/zundel-ernst/supreme-court/1992-preliminary-version.html>

⁴⁰ Landesamt für Verfassungsschutz Baden-Württemberg "[Verteidigung von ZÜNDEL legt Revision ein](http://www.verfassungsschutz-bw.de/rechts/files/r_sonstige_2007_03.htm)" http://www.verfassungsschutz-bw.de/rechts/files/r_sonstige_2007_03.htm

However, a case in which the courtroom exposure of historians reached a peak, and which combined aspects of both the Lewis and the Zündel cases, was *David Irving versus Penguin Books Ltd. and Deborah Lipstadt*.⁴¹ The case was brought on the basis of a writ filed by David Irving in 1996, in which he claimed to have been defamed by Deborah Lipstadt, American social scientist. In her book *Denying the Holocaust* Lipstadt considered David Irving “one of the most dangerous spokespersons for Holocaust denial.”⁴² Assessing that such estimation damages his reputation, he sued both her and her publishers, demanding compensation for his damaged reputation, and the trial began in 2000. According to British libel law, the burden of proof rests with the defendants, who were obliged to prove that the accusation was false. This meant that they had to prove that Irving was a Holocaust denier: a complex task. In order to convince the judge that Irving denied the Holocaust, the defendant had to show what the Holocaust was, prove that Irving was familiar with the facts regarding the Holocaust, and that he had purposefully twisted or ignored crucial facts in order to deny it. As summarized by Irving himself, the defendants had to show “...first, that a particular thing happened or existed; second that I was aware of that particular thing as it happened or existed, at the time that I wrote about it from the records then before me; third, that I then willfully manipulated the text or mistranslated or distorted it for the purposes that they imply.”⁴³

⁴¹ Deborah E. Lipstadt, *History on Trial, My day in Court with a Holocaust Denier*, (New York : Ecco Book, 2005). The role of historians analyzed in Alain Wijffels, ‘Postscript: Irving v. Penguin and Lipstadt.’ in Wijffels, op.cit, 303-335.

⁴² She underscored his “thesis that Hitler did not know about the Final Solution”, finding him ‘an ardent admirer of the Nazi leader’ who “set off to promulgate Holocaust denial notions in various countries... Familiar with historical evidence, he bends it until it confirms with his ideological leanings and political agenda.” Deborah E. Lipstadt, *Denying the Holocaust. The growing assault on Truth and Memory*, , (London and New York: A Plume Book, Penguin Group 1994), 161, 180-181

⁴³ Holocaust Denial on Trial, Transcripts, Day 01, *Opening Statements by Richard Rampton and David Irving*, p.34, <http://www.hdot.org/ieindex.html>,

And that was exactly what the defense intended to do. In addition to the submission of an enormous amount of written evidence, one way was to call upon expert witnesses. The defense commissioned no less than five reports by prominent historians and social scientists (Richard Evans, Robert Van Pelt, Christopher Browning, Peter Longerich, Hajo Funke).⁴⁴ Irving also called upon historians such as John Keegan and Cameroon Watt to testify on his behalf. The outcome was “something new: a Holocaust trial without victims and without perpetrators ... in which history is judged, as well as made.”⁴⁵

Irving was in fact fighting a battle to retain the title of respected, or at least relevant, revisionist historian. He objected to being labeled a Holocaust denier, claiming that at no time had he denied the mass murder of Jews by the Nazis, not resisting however the temptation to use the same strategy of globalizing the Holocaust as launched by Vergès in the Barbie trial – he stated that “the whole of World War Two can be defined as a Holocaust.”⁴⁶ To counter this, some of the expert reports of the prosecution were about the Holocaust; the others were about Irving, his extreme right-wing politics and scholarship. Even more than in the Zündel case, historians were debating the appropriateness of an interpretation of the past. The quality of Irving’s method was torn to pieces by Professor Richard Evans, who subjected Irving’s entire opus to careful

⁴⁴ All the reports are accessible on Holocaust Denial on Trial, Evidence, (Richard J. Evans, *David Irving, Hitler and the Holocaust Denial*; Hajo Funke, *David Irving, Holocaust Denial, and his Connections to Right Wing Extremists and Neo-National Socialism in Germany*; Christopher Browning, *Evidence for the Implementation of the Final Solution*; Peter Longerich, *Hitler’s Role in the Persecution of the Jews by the Nazi Regime and The Systematic Character of the National Socialist Policy for the Extermination of the Jews; The Van Pelt Report*) <http://www.hdot.org/ieindex.html> (20.10.2006) and <http://www.holocaustdenialontrial.org/trial/defense#expert>

⁴⁵ D.D. Guttenplan, *The Holocaust on Trial* (New York: W.W. Norton, 2001), 16. The trial was not only exceptionally well covered by the press, but its full transcripts and related documents are available at internet portals: Emory University, *Holocaust Denial on Trial* <http://www.holocaustdenialontrial.org> and <http://www.hdot.org/>

⁴⁶ Quoted in Richard Evans. *Lying about Hitler*, (New York: Basic Books, 2002), 110.

scrutiny and identified a number of factual errors, distortions, manipulations and mystifications. He simply denied him the title of historian: "It may seem an absurd semantic dispute to deny the appellation of 'historian' to someone who has written two dozen books or more about historical subjects. But if we mean by historian someone who is concerned to discover the truth about the past, and to give as accurate a representation of it as possible, then Irving is not a historian ... Irving is essentially an ideologue who uses history for his own political purposes; he is not primarily concerned with discovering and interpreting what happened in the past, he is concerned merely to give a selective and tendentious account of it in order to further his own ideological ends in the present. The true historian's primary concern, however, is with the past. That is why, in the end, Irving is not a historian."⁴⁷ As the attempts by Irving to refute Evans' findings in the course of cross-examination failed, his scholarly reputation was badly damaged; it was not salvaged by the unwilling and unenthusiastic testimonies of his own expert witnesses, Donald Watt Cameroon, a military historian who was subpoenaed to the trial.

Although operating in an adversarial setting, the relativistic quagmire typical for some of the US trials was avoided, partly due to the specificities of expert witnessing in Britain. They were explained to Richard Evans by Anthony Julius, whose company took the case: "The first duty of an expert, he said, was to the court. That is, the evidence had to be as truthful and objective as possible. Expert witnesses were not there to plead the case. They were there to help the court in technical and specialized matters. They had to give their own opinion, irrespective of which side had engaged them. They had to swear a solemn oath to tell the truth and could be prosecuted for perjury if they did not. On the

⁴⁷ Holocaust Denial on Trial, Richard Evans, *David Irving, Hitler and Holocaust Denial*, 6.21 <http://www.holocaustdenialontrial.org/evidence/evans006.asp> (20.10.2006)

other hand, they were usually commissioned by one side or the other in the belief that what they said would support the case being put rather than undermine it. At the end of the day, it was up to lawyers whether or not they used the reports they had commissioned. I would be paid by the hour not by results. So the money would have no influence on what I wrote or said. If I did agree to write an expert report, however, and it was accepted by the lawyers, then I could expect to be presented to the court and I would have to attend the trial to be cross-examined on it by the plaintiff.”⁴⁸ This mechanism was partly also due to the fact that the case was a bench trial, without the jury whose judgment the judge would have to protect. The judge was also in the position to read the abundance of the material submitted in the case, and to formulate his opinion on the contested matter with the help of the historians.

IV.1.4 The Court Speaks: Over the Edge of the Academic Discourse

Interestingly enough, otherwise bitterly opposed sides agreed on one thing: that *Irving v. Lipstadt* was not a trial about history, but about the ways Irving was interpreting it. Irving stated that “this trial is not really about what happened in the Holocaust.” Defense attorney proclaimed that “this is obviously an important case, but that is not however because it is primarily concerned with whether or not the Holocaust took place or the degree of Hitler’s responsibility for it.” The judge also maintained that “this trial is not concerned with making findings of historical facts.” He reemphasized this position in the opening of the judgment: “it is not for me to form, still less to express, a judgment

⁴⁸ Richard Evans, *Lying about Hitler*, (New York: Basic Books, 2002), op.cit, 7.

about what happened. That is a task for historians.”⁴⁹ Still, the task of the judge was not easy. As in the Lewis case, what the judgment contained was a strongly historicized verdict, worth quoting at some length, for it undoubtedly captures the moment in which a revisionist was transformed to “revisionist” and the border of academic discourse was deemed to have been crossed:

“I have found that most of the Defendants’ historiographical criticisms of Irving set out in section V of this judgement are justified. In the vast majority of those instances the effect of what Irving has written has been to portray Hitler in a favourable light and to divert blame from him onto others ... Mistakes and misconceptions such as these appear to me by their nature unlikely to have been innocent. They are more consistent with a willingness on Irving’s part knowingly to misrepresent or manipulate or put a “spin” on the evidence so as to make it conform with his own preconceptions. In my judgment the nature of these misstatements and misjudgments by Irving is a further pointer towards the conclusion that he has deliberately skewed the evidence to bring it into line with his political beliefs ... The double standards which Irving adopts to some of the documents and to some of the witnesses appears to me to be further evidence that Irving is seeking to manipulate the evidence rather than approaching it as a dispassionate, if sometimes mistaken, historian ... In my view the Defendants have established that Irving has a political agenda. It is one which, it is legitimate to infer, disposes him, where he deems it necessary, to manipulate the historical record in order to make it conform with his political beliefs ... Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism.”⁵⁰

⁴⁹ Quotes from D.D Guttenplan, op.cit, 29, 34, 30, 274.

⁵⁰ Holocaust Denial on Trial , Judgment, XIII, *Findings on Justification* 13141, 13.144. 13.151, 13.162, 13.167 <http://www.hdot.org/ieindex.html> (20.10.2006)

These long quotations are only excerpts from a devastating verdict over 300 pages long, which was clearly in favor of the defendants and disastrous for Irving's reputation. In the aftermath of the trial he spent some time recuperating as an academic outcast, desperately trying to retrieve some of his credentials, and radicalizing his standpoint in a way which eventually brought him into the Vienna prison cell, in which he apparently wrote a book about his clashes with the law entitled *Irving's War*.⁵¹ Since the end of 2006, Irving is free again, but it seems that his career as a scholar has come to an end.

The Irving-Lipstadt case attracted considerable media attention. Much of it focused on the phenomenon of legal limitations on historical interpretations.⁵² Numerous comments showed unease over the courtroom demarcation between legitimate and illegitimate revision. David Robson noted that "a libel court is somewhere to fight battles, score points and collect damages. But for seekers of light, understanding and historical truth, it is very often not the place to look." Neal Ascherson observed that in a trial "fragments of history are snatched out of context, dried, treated and used as firelighters to scorch an adversary...for establishing what really happened in history, English libel court is the worst place in the world." Daniel Jonah Goldhagen wrote that "the ruling of a court has no bearing on historical fact: the court is a place where legal issues are adjudicated according to the particular standards of a given country, not where historical issues are decided according to the different and well-established standards of historical scholarship".⁵³

⁵¹ David Irving, *Vienna Imprisonment*, <http://www.codoh.com/irving/irvvienna.html> (20.10.2006)

⁵² Media coverage of the trial was a subject of a survey: Dan Yurman. "The News media and Holocaust Denial", *Idea*, 5, (May 24, 2000), <http://www.ideajournal.com/articles.php?id=23> (20.10.2006)

⁵³ These critical approaches are assembled in Richard Evans, *op.cit.*, 186-187.

Richard Evans expressed a different, more optimistic view, enumerating the reasons why the court seemed an appropriate place to fight this methodological battle. He argued that during legal proceeding the participants are not subject to constraints of time and space, as is frequently the case in academic debates. Further, he claimed that in court, unlike in scholarly debate, it is not so easy to evade the debated questions. Finally, he pointed out that the rules of evidence in court, at least in civil cases, are not so unlike the historical rules of evidence.⁵⁴ This view is however, countered by a short remark by Simone Veil, warning that “one cannot impose a historical truth by law.” Can one? The cases summarized above show that one can. But should it happen? The question remains open for discussion. It would surely be tempting to assess the best ways to combat revisionism, or to work out whether trials are the proper way to do so. However, this issue is beyond the scope of this paper, for it is likely to remain, in the words of Michael Marrus, a “serious question, upon which the people of good will seriously disagree.”⁵⁵ It is worth mentioning though, that 2007 has started exactly without much disagreement, following the German initiative for the criminalization of the Holocaust denial at the level of the EU as well as the the Resolution of the General Assembly of UN from January 2007: “*Noting* that 27 January has been designated by the United Nations as the annual International Day of Commemoration in memory of the victims of the Holocaust, 1. *Condemns without any reservation* any denial of the Holocaust; 2. *Urges* all Member States unreservedly to reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end.”⁵⁶

⁵⁴ Ibid, 188-191.

⁵⁵ Michael Marrus, in Ronald Smelser, *op.cit.*, 227.

⁵⁶ A/RES/61/255 daccessdds.un.org/doc/UNDOC/GEN/N06/509/67/PDF/N0650967.pdf?OpenElement Discussion available on General Assembly, <http://www.un.org/News/Press/docs/2007/ga10569.doc.htm>

As Napoleon once said, “history is the version of the past events that people have decided to agree upon.” It would be professional blindness to maintain that the people in question are necessarily historians. They might easily be jurists or politicians. And they reach agreement in accordance with their own disciplinary requirements. The complexities of the cases described above demonstrate that the legal delineation between legitimate and illegitimate interpretations of the past is a global venture which takes very different shapes in particular local contexts. Hence generalized conclusions would most likely fail to honor the complexity of the entanglement between history and the law. They would also lack sensitivity towards the circumstances in which particular cases appear and would not give substantial information on the influence court activity actually has on communities of historians. However, outlining some general trends and posing a question or two might provide avenues for more structured discussion.

It is fairly obvious that criminal prosecution of Holocaust denial is more likely to happen within the realm of continental legal traditions. Although one of the most interesting such cases took place in Canada, the problems it encountered and the eventual extradition of Zündel to Germany, where he was promptly locked away and now awaits a verdict, support this conclusion. Similarly, the legal entanglements of David Irving, who served as an expert witness in the Zündel case, lost a libel suit, his money and his reputation in Great Britain, but remained a free man until his arrest in Austria in November 2005, strongly indicate that leniency towards revisionism is more likely to be found in common law countries. How is this so? Several possible interpretations might be put forward for discussion. It is hard to neglect the fact that the borders of Hitler’s Fortress Europe largely corresponded to the borders of continental Europe, whereas the

classic common law countries, such as Great Britain and United States, remained out of his grasp. Might it be that the countries which had more immediate experience of Nazi occupation and domestic collaboration have a particular take on the issues of the revision of that part of their past, whereas the more remote position of the non-continental jurisdictions allows them a more relaxed approach? That argument, however, could also be historically turned around into the research question: how come the German conquest was so successful exactly in the realm of continental law?

Further inspection of the legal context of the cases brings us closer to the relevance of the trials for historiography. Why do some of the trials roll on in silence, whereas others constitute public events? In this respect, the difference between adversarial and inquisitorial legal procedure is revealing. In an inquisitorial proceeding, generally typical of continental law (with the notable exception of France), the role of the judge in the process is immense. The judge is not only the arbiter of the case, but also a very active fact-finder, as the underlying philosophy of the inquisitorial trial is a common quest for the truth, upon which a certain law is to be applied. In contrast, the typical adversarial, common-law based trial presupposes the detachment of the judge, who is primarily supposed to observe that the rules and procedures are properly observed by the contesting parties. In such cases, the truth is supposed to evolve from frequently disparate accounts given by the parties. The consequences of these differences are important. In inquisitorial trial considerable segments of the case are handled in written form, frequently *in camera*, whereas the adversarial case is usually characterized by a public demonstration of the evidence and has a theatrical aspect to it. Hence cases handled in the inquisitorial legal system are not likely to turn the courtroom into a history classroom.

The adversarial system has that potential, displayed both in criminal and civil cases, as demonstrated in the Zündel and Irving cases. History becomes debatable, and the restraining conditions of this debate in a courtroom setting could lead to unpredictable outcomes. Perhaps more importantly, cases of this sort are as a rule led both in the courtroom and outside. Considerable media attention which they get is a double-edged sword, as it is accompanied with dangerous simplifications.

Still, juridical activity in the delineation of proper scholarship is an important reminder of a simple fact too easily neglected by contemporary epistemological debates. Historiography does not operate in isolation from the rest of society. It represents a social practice which is entangled, harmonized or contrasted, and lastly accountable to the other powerful factors which shape our reality. Wrestling with the problem of the proper interpretation of the past, the courts could not allow themselves abstract detachment. By and large, they had to resort to a strikingly plain criterion. What was necessary was to assess the intentions of the accused. If he was committing factual mistakes or errors in judgment in good faith, mere carelessness would not make him a denier. Bad intentions and deliberately deluding the public would. This differentiation between benevolent and malevolent writing, which bravely ignores Roland Barthes' dictum on the death of the author, is in fact not as unsophisticated as it may seem. It rests on a minimalist, yet effective epistemological presupposition that in a given system one might not necessarily have to know the truth to be able to recognize a lie. Such a demarcation line was drawn in distinguishing revisionists from "revisionists." At the same time, this line represents the edge of credible academic position.

Does this thin line contain a possibility of growing into a permanent yardstick? The verdict in the Irving case was hailed by Wendie Ellen Schneider, who argued that the trend it was setting could be the beginning of standard of “conscientious historian”.⁵⁷ How universal this standard could become? It is difficult to say. In the world parceled in different jurisdictions, rules and regulations, its maintenance seems elusive. Regardless, the cases regarding the Holocaust denial, from Zündel to Irving, have shown a certain transnationalisation of historical expert witnessing. Witnesses who stepped in front of a Canadian court in came from United States and Canada, and the defendant was a Canadian citizen of German origin. In *Irving*, the defendant was from the United States, and the witnesses came from Great Britain, but also from Unites States, the Netherlands and Germany. This is not only the indicator of greater intellectual mobility. In the realm of the denial of crimes of the Second World War, this activity amounts to a sort of repetition of a global shift that occurred half a decade ago. In fact, no lesser controversies were caused by the other crimes of the Second World War. This is particularly the case with the crimes committed by the Allies during the war, particularly the ones committed by the Soviets. Consequently, after the collapse of the Warsaw pact, this became a recurrent topic. The issues such as the execution of Polish officers in the Katyn forest and elsewhere, crimes during the advancement of Soviet troops into Germany, but also the expulsion of Germans in the wider Eastern European framework are for some time on the very brink of achieving the legal dimension. However, if those events were to prove that there is a globalized legal activity and a global community of historians, it is still far from the conclusion that there is global history writing.

⁵⁷ Wendie Ellen Schneider, ‘Case Note: Past Imperfect’, *The Yale Law Journal*, 110 (2001): 1531-1545

IV.2 Historical Expert Witnessing in Global Rendering of Justice

Strive to study the totality of world's history was an important trend in historical research at least since the Enlightenment. Somewhat neglected with the prevalence of national historiographical frameworks of the 19th and early 20th century, this universalist tendency was still maintained through the common standards in teaching of general history in curricula of universities or through voluminous syntheses of world's history. However, tensions between generalist and particularistic takes on the past were resurfacing throughout the age of extremes. Globalization of justice through the development in international criminal law was one of the important influences in this process, exacerbating much of the otherwise hidden tensions.

IV.2.1 Writing Global History and Rendering Global Justice in the Age of Extremes

Internationalization of historical studies was institutionalized as early as 1900, through congresses as well as the other forms of transnational cooperation. First World War and the tumultuous interwar period has on the one hand undermined these tendencies, but had on the other given them new impetus through the mass emigration of specialists and their ideas.⁵⁸ During the years of rebuilding of system of relations in Europe, much attention was given to the intellectual and educational realm - bilateral commissions between France and Germany (Commission Internationale de Coopération Intellectuelle) was sponsored by League of Nations with International Bureau of

⁵⁸ On the nascent of international history in the 20th century see Raphael Lutz, *Geschichtswissenschaft im Zeitalter der Extreme. Theorien, Methoden, Tendenzen von 1900 bis zur Gegenwart*, (München : Beck 2003), 20-2, 40-42, 59-63, 152-3, 196-211

Education and International Institute of Intellectual Co-operation based in Paris. Similar cooperation was taking place in historiography, channeled through the International Committee of Historical Sciences held in Geneva in 1926.⁵⁹ Fragile as it was, such cooperation was cut down by the Second World War, but similar initiatives were rebuilt under the guidance of UNESCO, and they had some impact on the national historiographies. Still, despite wide appeal of new historiographical trends (history of international relations, different blends of Marxist historiography, structuralism or postcolonial studies) global history hardly emerged, constrained both by the national state research agendas and by the Cold War hostilities, which made international congresses of historians mirror of political confrontations.⁶⁰

With the end of the Cold War the context has abruptly shifted and international cooperation of historians acquired new dimension, expressed also through more dynamic activity of the International Commission for Historical Sciences and through a plethora of old-new expressions such as universal history, global history, international history or transnational history.⁶¹ Not just that the new periodicals, such as *Journal of World History* (1990) were launched, but strive towards massive negotiation with the past took place on a global scale. However, the “lifting of the iron curtain” did not bring about a

⁵⁹ On that meeting see introduction in Georges Bratianu, *L'organisation de la Paix dans l'histoire universelle des origines à 1945*, (București : Editura Enciclopedica, 1997) in the volume he wrote after the war but dedicated to the members of the 1926 committee. On interwar tensions in Keith Wilson (ed.), *Forging the Collective Memory: Government and International Historians Through Two World Wars*. (Providence 1996) International cooperation in the West peaked in the postwar collaboration between French and German experts on historical textbooks. For one of the latest outputs of this longstanding development see Daniel Henri, Guillaume Le Quintrec, Peter Geiss (hrsg), *Histoire/Geschichte: Europa und die Welt vom Wiener Kongress bis 1945*, (Stuttgart/Leipzig : Klett Verlag 2008).

⁶⁰ Raphael Lutz, op.cit, 215-6.

⁶¹ On International Commission for Historical Sciences, <http://www.cish.org/> Cf Gunilla Budde et alia (ed.), *Transnationale Geschichte; Themen, Tendenzen und Theorien* (Göttingen : Vandenhoeck & Ruprecht, 2006); Patrick Manning, *Navigating World History. Historians Create a Global Past* (New York : Palgrave Macmillan, 2003). On the cultural impact of 1989 See contributions in Sorin Antohi, Vladimir Tismanenau (ed.) *Between Past and Future, The Revolutions of 1989 and their Aftermath* (Budapest : CEU Press, 2000);

closure, as significant differences in the work of historians of different parts of Europe came to light. Early comparative contributions in contemporary history from the East showed enormous personal and institutional effort pushed toward the creation of sustainable Marxist narrative fit to accommodate the specific needs of national states. The prevalence of party history and military history, avoidance of contemporary history and of comparative approach seemed relatively uniform and petrified, particularly when scrutinized from the outside.⁶² Hidden beneath were the enormous differences between those historiographies rich in quantity but problematic in content. All those powerful currents came after 1989 in different shapes and sizes.⁶³

Although with the collapse of Communism a new trend toward writing global history was on the agenda, the end of the Cold War did not bring the abrupt change, and has in some dimensions even created additional confusion in the transfer of knowledge and experience. It was not just the proverbial lack of funding and the chaotic archival situation which was a cause of concern, but the very content of the history writing: “Writing recent history of the Central and Eastern part of Europe is unlike the work of the Western historian, who can turn to published sources, contemporary report, memoirs by participants and eyewitnesses, whose work is embedded in solid, mostly normalized and consolidated public memory ... The recent history of Central and Eastern Europe is the history of bad times.”, concludes István Rév.⁶⁴

⁶² Watt, op.cit, 206-306. Cf. Georg Iggers, *Marxist historiography in transformation : East German social history in the 1980s* (New York : St Martin's Press, 1991)

⁶³ For major differences in this scrutiny see thematic volume “Historiography of the Countries of Eastern Europe” *American Historical Review* 97 (1992) and compare with more recent comparative account of Ulf Brunnbauer, [\(Re\)Writing History. Historiography in Southeast Europe after Socialism. \(Münster : Lit-Verlag, 2004\).](#)

⁶⁴ István Rév, *Retroactive Justice*, 3.

In the area in which the feeling of victimhood had significantly different meaning that in the Western Europe, the collapse of a master-narrative could as well have been replaced with the historical accounts which were had destabilizing potentials. Still, the past needed to be addressed, by historians and jurists alike. Legal activity in the process of democratization, came to be known as transitional justice, was central to this venture. Following the example of Germany, whose troubled legal relation to its own past seemed to have produced a deep, structural social change, post communist countries embarked in a series of legal encounters with their own past.⁶⁵ This is not to say that ventures of that kind were not burdened with controversies beyond the initial consensus: “It is hard to decide, in a region like Eastern Europe, how far one should go back in time in the process of retribution; whom to make individually responsible for the tragedies of the past – back to the 1940s, perhaps? Most of those who perpetrated crimes in the 1940s are today dead. Should one therefore begin in Hungary with the events of 1956, in Czechoslovakia with those of 1968, and in Poland with 1980?” asked István Deák.⁶⁶ Where to begin, and what actually to do was the question which was burdening politicians, historians and lawyers of Eastern European countries. More or less prompt condemnations of Communism were to follow by the government officials, or by many historians, who fashioned their studies emulating Curtois’s *Black Book of Communism*. However, despite deliberations on creation of inventive mechanism, such as truth commissions, largely failed.

⁶⁵ Adam Czarnota et alia, *Rethinking the Rule of Law after Communism*, (Budapest : CEU Press, 2005). Seminal readings on transitional justice (Neil Kritz, *Transitional Justice*. Washington, D.C : United Institute of Peace Press, 1995; James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*. (Notre Dame, University of Notre Dame 1997); Ruti Teitel, *Transitional Justice*. (Oxford : Oxford University Press 2000); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*. (New York : Cambridge University Press, 2004) impact of legal actions on collective memory is empirically most extensively covered in Paluma Aigullar et al, *The Politics of Memory: Transitional Justice in Democratizing Societies*. (Oxford : Oxford University Press, 2001)

⁶⁶ “Historian’s Judgment: Reflections by Istvan Deak”, *Ab Imperio* 3 (2007): 84.

Still, once pass this *blanco* condemnation, controversies remained on how to wrestle with the Communist legacy legally, be it lustrations, commissions, opening of the secret service archives, rehabilitations, denationalization, restitutions of property or civil or criminal cases. Indeed, perhaps never before was such vast number of proposals to deal with the bad past offered to such number of countries in such a short span of time. The choices were telling. Researching into legal responses of Eastern European countries on a comparative level became practically a scholarly discipline on its own, which has delivered valuable insights.⁶⁷ However, it is difficult not to notice that, two decades after its collapse, despite vivid legal actions (or telling their telling absence), political, social and historical interest in the Communist period is somewhat withering away. “The strange silence surrounding the history of communism after 1989, however, seems to suggest the belief that, unlike fascism, communism has finally and truly come to an end, and that there is neither the need nor the time to remember it, to face it, or to talk about it.”, writes István Rév and explains this strange phenomenon with a quote from Francois Furet: “Communism never conceived any tribunal other than history’s, and it has now been condemned by history to disappear, lock, stock and barrel. It’s defeat, therefore, is beyond appeal.”⁶⁸

⁶⁷ Csaba Varga, *Coming to terms with the past under the rule of law : the German and the Czech models*, (Budapest: Vindzor Club 1994). An early account of a keen observer in Tina Rosenberg, *The Haunted Land*, (New York, Vintage Books 1995); One of the first comparative scrutinies in John Borneman, *Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe*. (Princeton, N.J. : Princeton University Press, 1997), followed by Aurora Voiculescu, *Human rights and political justice in post-communist Eastern Europe : prosecuting history* (Lewiston, N.Y. : Edwin Mellen Press, 2000). Short account from greater historical distance by Jacques Rupnik, “The Politics of Coming to Terms with the Communist Past.” *Tr@nsit-Virtuelles Forum*, (22), 2002. Apart of Transit, a number of other journals, such as *East European Constitutional Review* are entirely dedicated to this change in the realm of constitutionalism.

⁶⁸ István Rév, “Counterrevolutions”, Sorin Antohi, Vladimir Tismanenau (ed.) *Between Past and Future, The Revolutions of 1989 and their Aftermath* (Budapest : CEU Press, 2000), 266. Interesting contributions in Martin Krygier et alia (ed.) *Marxism and Communism, posthumous reflections on politics, society and law* (Amsterdam : Rodopi, 1994)

In fact, the most obvious phenomenon on the political landscape in the eve of the withdrawal of communism was the renaissance of nationalist narratives.⁶⁹ Both historiography and legal mechanisms became prone to become carriers of such messages. This peculiar setting, barely comprehensible to a Western observer, in which every condemnation of communism is a tool in the hands of nationalists, and every attack on nationalism serves to legitimize communist legacy, was an additional burden and a serious obstacle to simple applications of transitional justice mechanisms recommended by various authors. Spiting the general trend towards deeper integrations, local historiographies were tempted the ‘drums and trumpets’ of the national revival, consciously risking their parochialisation. In such a context, one of the fibers that were keeping the global historical interpretations together was a thin stream of adherence to international legal standards and signed international conventions, accompanied with at least declarative support to the great shift towards universalisation of human rights. However, the tensions surrounding the local interpretation of this shift were unavoidable, creating new trenches in the old battleground. Nuremberg, as a symbol of rendering criminal justice on the national level, was not only discontinued in the Cold War squabbles over the creation of permanent court, but was put to additional scrutiny as “there was a fundamental dissonance between the national cleavage of the various trial programs in existence and the international nature of Nazi criminality in terms both the locus of crimes and the profile of victims.”⁷⁰

⁶⁹ This phenomenon has naturally induced a boom in the studies of nationalism. Fairly recent assessment of this development in Umut Özkırımlı, *Contemporary debates on nationalism : a critical engagement*, (Basingstoke, Hampshire : Palgrave Macmillan, 2005); The development itself is a subject of contributions in Alina Mungiu-Pipidi, Ivan Krastev (ed.), *Nationalism after Communism. Lessons Learned* (Budapest : CEU Press 2004).

⁷⁰ Donald Bloxham, op.cit, 1-2.

What was to be the future of international rendering of justice after 1989? Researchers and observers had mixed expectations, seeing as Mark Osiel, both the advantages of local rendering of justice for the creation of interiorized human rights sensitive culture, and understanding the necessity of emergence of such standards on a global level.⁷¹ The example of Germany and its experience with international law during the 20th century was evoked as a possible avenue, and negotiations for the establishment of permanent international tribunal were started anew.⁷² However, it was soon revealed that the states are not much more ready to submit under the power of the international judiciary, and the negotiations leading to such a court went painstakingly slow.

The events, however, were much faster. Somewhat paradoxically, with the end of the Cold War the world became less stable place. Wars and humanitarian crises were exacerbated globally, and the discrepancy between the proclaimed commitments of the international community and the realities of atrocious warfare in places like Yugoslavia and Rwanda was calling for reaction. As one of those reactions, the Security Council has established in the course of 1993 *ad hoc* criminal tribunals for those regions. The conviction expressed as a core achievement of the International Criminal Tribunal for the former Yugoslavia was, that “as the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990’s have emerged. Facts once subject to dispute have been established beyond a reasonable doubt by Judgments ... The determination beyond reasonable doubt of certain facts is crucial in combating denial and preventing attempts at revisionism.”⁷³

⁷¹ Mark Osiel, *op.cit.*, 207, 235.

⁷² Paul Betts, “Germany, International Justice and the 20th century”, *History & Memory* 17 (2005): 45-86

⁷³ The International Criminal Tribunal for the former Yugoslavia (ICTY), Tribunal’s Core Achievements, <http://www.un.org/icty/glance-e/index.htm>, 2.3.2006.

IV.2.2 Locating the International Criminal Tribunal for the former Yugoslavia

Experts were to play an important role in this venture. Out of 3360 witnesses who have so taken a stand at the International Criminal Tribunal for the former Yugoslavia until February 2006, 226 belong to the category of experts. Many among them, including the first witness at the first trial, Professor James Gow in *Prosecutor vs. Duško Tadić*, were historians or did testify on historical subjects. Historians have delivered many oral testimonies and submitted a number of expert reports, and the hope was that their impartial account might contribute to the goals of the tribunal. This optimism was challenged, however, as far as the contribution of expert historians is concerned. Already in *Prosecutor vs. Tadić* Professor Gow's testimony was contested by the expertise delivered for the defense by an anthropologist and a legal scholar, Professor Robert Hayden. Such antagonistic couplets became a trend in the trials to come, giving rise to yet another public debate over the meaning of this practice. Historical expert witnessing is expectedly championed by historians who did testify at the tribunal, particularly the ones called upon by the prosecution. Less enthusiastic are the expert witnesses of the defense. The rest of the scholarly community is echoing those disturbances.⁷⁴

⁷⁴ Accounts of expert witnesses supportive to the practice: Robert Donia, "Encountering the Past: History at the Yugoslav War Crimes Tribunal," *The Journal of the International Institute*, 11 (2004), <http://www.umich.edu/~iinet/journal/vol11no2-3/donia.htm>; James Gow, Ivan Zveržhanovski, "The Milošević Trial: Purpose and Performance", *Nationalities Papers*, 32 (2004) : 898-919. Voices of criticism of the defense witnesses: Mladen Ancic, *Ideoloski svjedoci*, [Ideological Witnesses] <http://www.hercegbosna.org/ostalo/ideoloski.html>, 2.3.2006; *The Witness Expert Mladen Ancic on the role of the prosecution in the ICTY*, The Hague, <http://www.hercegbosna.org/engleski/ancic.html>, Robert Hayden, *UN War Crimes Tribunal Delivers a Treavesty of Justice*, http://www.d-n-i.net/fcs/international_criminal_tribunal_critique.htm, 12.3.2006. Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia", *Human Rights Quarterly*, vol.27, (2005), 908-942.

Meanwhile, war crimes deniers in Serbia and Croatia exploit the courtroom appearance of historians to sustain the claim that the Tribunal is judging Serbian and Croatian past by putting the entire nations on trial. They allege “the pretension of that Court: not just to judge men, but also to judge history.”⁷⁵ Human rights promoters are divided on the issue as well. Some of them are worried that historical excurses are sinking proceedings into history, hence blurring the appalling nature of committed crimes. The others find this broader approach indispensable in the wider agenda of facing the past.⁷⁶ However, this problem is as a rule seen as a unique phenomenon related to the ICTY practice, and its troubled century-long history is altogether omitted.

Complexities and tensions in the field in which the ICTY historians are operating could partly explain the strong voices of criticism directed towards their performance, but do not help much in assessing their contribution. A number of such points have to be taken into account in order to assess the meaning of historical expert testimony at the ICTY, and particularly to make sense of the antagonistic couplets of historical testimonies.⁷⁷ The ICTY is operating in a mixed legal regime which combines elements of both common and continental law. It is an international criminal court in which individuals are being tried for serious violations of international humanitarian law. In its setting it leans more towards adversarial than inquisitorial mechanisms, at least as far as

⁷⁵ Kosta Čavoški, *Presudjivanje istoriji u Hagu [Judging History at The Hague]*, (Beograd: Hrišćanska misao, 2001), 5

⁷⁶ Vojin Dimitrijevic, “Justice has to be done and seen to be done: the Milosevic trial”, *East European Constitutional Review*, Vol.11, No.1/2, Winter/Spring 2002, http://www.law.nyu.edu/eecr/vol11num1_2/special/dimitrijevic.html; Attempt to differentiate the Serbian human rights activists approaches in facing the past: Margaret Hagan, *Facing the Past in Post-Milosevic Serbia: The Public Relations of Post-Conflict Human Rights Activism*, MA Thesis (Budapest : CEU, 2004), <http://www.ceu-budapest.edu/nation/theses/hagan0304.pdf>

⁷⁷ Such attempt was made by Ksenija Turković, “Historians in Search for Truth about Conflicts in the Territory of Former Yugoslavia as Expert Witnesses in front of the ICTY”, *Časopis za suvremenu povijest*, 36, (2004), 41-67.

the law of evidence, including the issue of expert witnessing, is concerned. Having only bench trials, the judges need not to perform the classical gatekeeping duty, as there are no jurors to be protected from the possibly misleading effect of the problematic evidence. In its practice the ICTY has kept a relatively low threshold in admission of evidence: “To adopt strict rules on admissibility of evidence in these circumstances would complicate the task of the Tribunal tremendously when its lack of coercive powers already makes gathering of evidence very difficult.”⁷⁸

Such practice squared with the most important *differentia specifica* of the ICTY, that is, its international character. As its full name reveals, the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is an international judicial body with jurisdiction which is temporally, spatially and substantively limited. As an international tribunal, the ICTY cannot rely on investigating mechanisms equivalent to the ones at the disposal of the state.⁷⁹ In such circumstances, adversarialism is one of the approaches which would be a substitute for the fact-finding difficulties. In dealing with the mass crimes committed in the course of the collapse of the former Yugoslavia, the internationally composed panels, with the judges coming from different locations worldwide, needed to be provided with a broader context in which crimes took place. That meant that the experts from the field of “softer” sciences, such as history, would be given prominence. However, in an adversarial setting,

⁷⁸ Almiro Rodrigues, Cecile Tournaye, “Hearsay Evidence”, in: *Essays on ICTY Procedure and Evidence in Honor of Gabrielle Kirk McDonald*, (The Hague: Kluwer Law International 2001), 297. General information about the Tribunal’s foundation in Michael Scharf, *Balkan justice : the story behind the first international war crimes trial since Nuremberg*, (Durham, N.C. : Carolina Academic Press, 1997)

⁷⁹ More on the ICTY’s rules of procedure and law of evidence: Gideon Boas, *Creating laws of evidence for international criminal law: the ICTY and the principle of flexibility*. *Criminal Law Forum* 12 (2001). 41-90

it also meant that the parties would use the opportunity of challenging each other's experts and their accounts.

Experts are only briefly mentioned in the ICTY rules of procedure. They can be summoned by the parties, as well as by the judges themselves. However, in the practice that prevailed so far, only the parties were providing the expert reports and witnesses. For historical expert reports as well as any other, the procedure is as follows: the party calls upon an expert who is submitting the report to the Trial Chamber and discloses it to the other side as well. The other party has the opportunity to challenge the report on the basis of its content or the credibility of its author. The panel, consisting of three judges, decides on the admissibility of the report. In case the report is deemed admissible, and the other Party is still questioning it, the expert is summoned to the courtroom where he testifies about the content of the report and gets cross-examined by the opposing party.⁸⁰ This was usually the case in the ICTY practice, almost without an exception when historical expert testimonies were at stake. The adversarial setting took its toll: "Whenever the prosecution has called a historian as an expert witness, the defense has responded in kind."⁸¹ Therefore, from the very beginning, the ICTY has found itself confronted with antagonistic interpretations of the past of the former Yugoslavia. As David Chuter notes "The Kordic trial featured a lively debate about the existence of a Bosnian national consciousness in early modern times. But such debates are unlikely ever to be settled. This is partly because debate is fundamental part of academic research, but mainly

⁸⁰ As far as experts are considered, the rules are very scarce. ICTY, Basic Legal Documents, *Rules of Procedure and Evidence*, Rule 94 bis, <http://www.un.org/icty/legaldoc-e/index.htm> In the case law, the most elaborate guideline appeared in the *Prosecutor vs. Galic*: ICTY, *Judicial supplement 39*, <http://www.un.org/icty/Supplement/supp39-e/galic.htm>, 12.3.2006. About the general ICTY standing towards the role of the expert witnesses see Kimberly M. Miles, Memorandum for the Office of the Prosecutor, Issue: Expert Witnesses, <http://www.nesl.edu/center/wcmemos/2001/miles.pdf>, 29.5.2005.

⁸¹ Robert Donia, op.cit.

because the sort of questions that academic historians address are complex and multifaceted, and in most cases the evidence – such as it is- is not conclusive ... In principle, therefore, investigators must address issues that are more normally the province of historians. But the opposite is also true: books, whether by academic historians or journalists, are often believed to contain evidence that can be useful in trials. This is sometimes true, but it often amounts to what philosophers call a category error: books might be written to elucidate, to draw attention to problems, or to promote particular agendas, but few are ever written to offer proof of misdeeds beyond a reasonable doubt.”⁸²

The courtroom interplay of competing historical narrative was to an extent unavoidable. It appeared for the first time in the first case of the Tribunal, largely because of the matters in connection to its jurisdiction and applicable law. As the ICTY has jurisdiction over the breaches of the laws and customs of war, breaches of Geneva Convention and crimes against humanity, it had to be determined if the accused, Duško Tadić, committed crimes that fall into those categories. For the violations of the laws and customs of war, it was necessary to prove that the crimes occurred in an armed conflict. For determining if Tadić’s victims were protected persons under the Geneva Convention, it was necessary to prove that this armed conflict was international. For crimes against humanity it was necessary to prove that the crimes Tadić committed were conducted in the context of a systematic policy of persecution. Therefore, these issues were calling for the assessment of the wider context in which the crimes occurred. It was essential for the prosecution to prove that in 1992 conflict in Bosnia was an international armed conflict, rather than a civil war. “This kind of factual assertion is not the standard fare of criminal

⁸² David Chutter, *op.cit.*, 153.

trials as we know them and would typically be documented by historians and military analysts, rather than by criminal lawyers”, noted Louise Arbour, former Chief Prosecutor of the ICTY.⁸³

And this is exactly what happened. Both prosecution and defence opened their cases by putting expert witnesses on the stand. Their goal was, among others, to argue for a specific view of the nature of the conflict. The issue of contestation was basically the scope of the involvement of the Federal Republic of Yugoslavia in different regions and different phases of the war in Bosnia. Both experts, Dr James Gow of the Department of War Studies of Kings College (the prosecution’s witness) and Dr Robert M. Hayden from the University of Pittsburgh (the defence’s witness) approached the problem from a historical perspective. The presentation of the prosecution’s expert was set to prove the international character of the conflict, i.e. the involvement of Serbian armed forces in the war in Bosnia at the time of the Tadić’s crimes. The defense witness was emphasizing the internal aspects of the conflict in Bosnia.⁸⁴ Both experts were largely basing their reports on the constitutional aspects of the collapse of Yugoslavia. Both of them had a foothold in the analysis of the 1974 Yugoslav constitution, its deficiencies and ultimate disfunctionality.⁸⁵ Moving to more factual assertion, Gow based his testimony on the analysis of the military operations in Bosnia in 1992 and the connections between the

⁸³ Louise Arbour, *War Crimes and the Culture of peace*, (Toronto: Published in association with Victoria University by University of Toronto Press, 2002), 37.

⁸⁴ Testimonies of both witnesses are available at ICTY, Cases and Judgments, Tadic (IT-94-1), Transcripts, www.un.org/icty/cases-e/index-e.htm, Gow’s testimony, pp.52-387. Hayden testimony: pp.5590-5648.

⁸⁵ Much of their assertions were based on linguistic interpretations of this long, complicated document, but the conclusions had great importance for their assessment of the nature of conflict in Bosnia. The issue of contention was related to the question of who was the bearer of the sovereignty in a Yugoslav federal framework, and if those were the constitutive republics or constitutive people in those republics. The question revolved around the interpretation of the word “narod” which could be translated in English both as people and nation. The alternative interpretations of Gow and Hayden: ICTY, Cases and Judgments, Tadic (IT-94-1), pp.148-151; pp.5594-5560.

troops of Bosnian Serbs with plans and instigations from Belgrade, which was giving the conflict an international outlook. But, while Gow was emphasizing the blow delivered to the federation by the policies of Serbia in the late eighties, Hayden was insisting on the decisive role of policies of ethnic constitutionalism, through which the country fell apart along the lines of ethnic loyalties. Although none of the experts was a historian by training, much of their testimony was overwhelmingly historical: “Although experts are not usually asked directly to state what they believe to have happened in some historical time and space, their views on such questions of historical truth often form an inevitable part of expert testimony.”⁸⁶

The panel of judges has decided (with 2 of 3) that, although the conflict itself was an international one, the time, place and context of Tadić criminal actions does not suggest that he and the armed forces he belonged to were acting as agents of the government of Federal Republic of Yugoslavia. Therefore he was acquitted for the charges concerning the breaches of Geneva Convention. This decision of the Trial Chamber from 1997 was reverted on the appeal and he was eventually found guilty on those counts as well.⁸⁷ Testimonies given by experts have been admitted, and some of their findings entered the judgement: “Expert witnesses called both by the Prosecution and by the Defence testified in regard to the historical and geographic background and such evidence was seldom in conflict; in those rare cases where there has been some conflict the Trial Chamber has sought to resolve it by adopting appropriately neutral language. It is exclusively upon the evidence presented before this Trial Chamber that

⁸⁶ Marianne Wesson. “Historical Truth, Narrative Truth and Expert Testimony”, *Washington Law Review*, 60 (1985): 331.;

⁸⁷ Judgments of both Trial Chamber and Appeal Chamber are available at: ICTY, Cases and Judgments, Tadic (IT-94-1), www.un.org/icty/cases-e/index-e.htm, 12.3.2006.

this background relies, and no reference has been made to other sources or to material not led in evidence.”⁸⁸ Consequently, a considerable part of the judgement (20 out of around 300 pages) contained an overview of Bosnian history from Middle Ages until the dissolution of Yugoslavia, containing passages as the following, adopted from the Gow’s report: “for more than 400 years Bosnia and Herzegovina was part of the Ottoman Empire. Its western and northern borders formed the boundary with the Austro-Hungarian Empire or its predecessors; a military frontier along that boundary was established as early as the sixteenth century to protect the Hapsburg lands from the Ottoman Turks”.⁸⁹

Adversarial system in which the expert plays the role of an advocate to the party, rather than the role of an adviser to the court, was setting scholars in rather defined roles. Although it might seem that there was no intrinsic problem in it, both sides having been heard, allowing the court to make sense out of their interpretations, the legal “straitjacket” was hence both echoing and widening the polarisation within the academia. The courtroom became a podium for a scholarly debate, much of which was continued afterwards in the scholarly journals.⁹⁰ Consequently, according to the recent assessment by Sabrina Ramet, “the field of ‘Yugoslav’...studies has again been divided largely between two camps...On the one side are those who have taken a moral universalistic

⁸⁸ ICTY, Judgements, *Prosecutor vs Dusko Tadic*, <http://www.un.org/icty/tadic/trialc2/judgement/tad-ts70507JT2-e.pdf>, p.20.

⁸⁹ ICTY, Cases and Judgements, *Prosecutor vs. Duško Tadić, Opinion and Judgement*, 7 May 1997, <http://www.un.org/icty/Tadić/trialc2/judgement/tad-ts70507JT2-e.pdf>, p.20. (May 29, .2005)

⁹⁰ Hayden-Gow debate continued well after trial: Robert M. Hayden, “Bosnia’s Internal War and the International Criminal Tribunal”, *Fletcher Forum of World Affairs* 22 (Winter/Spring 1998): 45-64 and Robert Hayden, *Blueprints for the house divided: The constitutional logic of Yugoslav Conflicts*, (Ann Arbor: The University of Michigan Press 1999). James Gow reflected on the courtroom encounter in a book, largely composed of his ICTY expert report: *The Serbian Project and its Adversaries. A strategy of War Crimes*, (London: Hurts & Company, 2003), 20. Hayden’s review of Gow’s book in: *Journal of Southern Europe and the Balkans*, 5 (2005).

perspective...On the other side are authors who reject the universalistic framework and who, in their accounts, embrace one or another version of moral relativism.”⁹¹ In addition, the impression spread that, besides punishing individual perpetrators, the ICTY strives for a settlement of historical facts. That has aggravated an already very complicated problem of the relation of the legal developments in The Hague with their perception in the region of the former Yugoslavia. As noted by Christian Gordano, “the case of antagonistic truths with respect to even a distant past is a good illustration of the powerful role which the symbolic sphere may assume as a potential source of conflict. Its disruptive potential is something which must be taken into serious consideration when discussing conflict prevention, peace/building, or reconciliation.”⁹²

4.2.3 Historical Expert Witnessing in Antagonistic Couplets

This initial cleavage was further seized upon by the defendants in the cases to come and has led to even more irreconcilable interplay, this time between international and national historical narratives. In the international criminal setting of the Tribunal, a prosecutor is charging the individuals in the name of mankind for the breaches of international humanitarian law. However, it became apparent that in a number of cases the accused persons were not defending themselves only in their individual capacity. Many of them were defending the policies of their states, or at least attempting to avoid responsibility by legitimizing their actions through those policies. Therefore, although the

⁹¹ Sabrina P.Ramet, *Thinking about Yugoslavia: Scholarly debates about the Yugoslav breakup and the wars in Bosnia and Kosovo*, (Cambridge : Cambridge University press, 2005), 1-2.

⁹² Christian Giordano, “Dealing with the past, dealing with History”, in: Mo Bleeker, Johantan Sisson, *Dealing with the past*, Swisspeace, KOFF Series 2/2004. 2005, 59.

court is primarily concerned about their conduct in the course of war, the issue of context, or how the war came into existence, became an important issue of contention, and history proved to be a fruitful playground for such an exercise. The respective states often offered indirect support to the defendants, contributing to the courtroom establishment of facts by offering alternative accounts.

Historians are not the exclusive transmitters of those narratives. As already mentioned, the historical testimony of James Gow was confronted by the anthropologist of law. Similarly, the evidence pushed forward by historian Robert Donia and sociologist John Allcock were contrasted by sociologist, Stjepan Meštrović and historian Mladen Ančić. Historical narratives are also entering the courtroom through the testimonies of high-profiled eyewitnesses, the statesmen who were in position to observe this history unfolding. Lawyers themselves were also disseminating historical narratives in the legal framework at their disposal, such as the opening statements, closing arguments.⁹³

This diversity is revealing yet another problem surrounding historian expert witnessing, that is, the issue of several authoritative sources of witnessing about history - expert witnesses merely being one among many. However, this implied that, within the sensitive area of historical witnessing, the exchange of mutually incompatible interpretations was to be expected, polarized along the lines of universalism and particularism, but also originating from different academic traditions. The prosecutors were typically finding their experts in the Western academia, among specialists for Yugoslavia or the Balkans, the defence was usually opting for scholars from the region, and the tensions, as well as misunderstandings, were to be expected.

⁹³ See the recollections of the officials of the Tribunal reveal their understanding of historical role of the trials: Florence Hartmann, *Paix et chatiment* (Paris : Flammarion 2007). Carla Del Ponte, Chuck Sudetic, *Madame Prosecutor*: (New York : Other Press 2008)

The pattern set by Hayden-Gow encounter continued, and grew even more obvious in cases which were in need for the historical contextualisation in a larger frame. For instance, a number of cases which were investigating into crimes occurred in the course of the Croatian armed involvement in Bosnia and Herzegovina (*Prosecutor vs. Tihomir Blaškić, Prosecutor vs. Naletilić and Martinović, Prosecutor vs. Dario Kordić and Mario Čerkez*) triggered series of expert testimonies delivered by sociologists and historians (Robert Donia, professor of Balkan history at University of Michigan and John Allcock, professor of sociology at the University of Bradford for the prosecution, professor of sociology at Texas A&M University Stjepan Meštrović, academician Dušan Bilandžić, professor at University of Zagreb and Mladen Ančić, history professor from University of Zagreb for the defence).⁹⁴ The content of those testimonies shifted significantly from the events in the 1990's to the history of Bosnia and Herzegovina, and even beyond – towards the debates over the specificities of Balkan identities and their (in)compatibility with the European culture.

Such broadness was furthering antagonistic couplets through the confrontation of experts and their cross-examination. The dynamics are discussed by a protagonist of such occasion, Professor John Allcock, who refers to it as “an ordeal ... what determines the likelihood of the expert surviving as a witness, in the face of this ordeal, and validating the claim to be a credible witness, has little to do with his or her expertise as such. One of

⁹⁴ All of the testimonies are available in respective case transcripts at ICTY, Cases and Judgments, <http://www.un.org/icty/cases-e/index-e.htm>, 12.3.2006. Reports, as well as the preparatory briefs of both prosecution's and defense's experts in *Kordić and Čerkez* case are available in “ICTY and the Historians”, *Časopis za suvremenu povijest*, 36, (2004): Robert Donia, Statement of Expert Witness, 107-142; Mark Almond, Expert report, 177-210; Davor Marijan, Expert Opinion: On the war connections of Croatia and Bosnia and Herzegovina 1991-1995, 249-292; Mladen Ancic, Society, ethnicity and Politics in Bosnia-Herzegovina, 331-360; Dalibor Cepulo, Continuities and discontinuities: the constitutional and political development of Bosnia and Herzegovina to 1990, 361-415. Lasva cases are commented in David Chuter, *Crimes Confronting Atrocity in the Modern World* (Boulder : Lynne Rienner Publishers, 2003, 120-9)

the central problems here is the manner in which, particularly under the adversarial system adopted by the ICTY, the hurdle which any witness invariably has to cross first is that of the challenge to his or her credibility as a witness. This was certainly my own experience. The defense attorney began by questioning my credibility on at least two grounds. The diversity of my publications about Yugoslavia possibly indicated that I was a bit of a dilettante, rather than a serious expert. Especially damning was my interest in tourism—surely not a serious matter for a social scientist to make a central topic for research! This assault on my credibility was halted mercifully by Judge Bennouna, who cut into the examination by ruling that I was a “generalist” rather than a specialist.”⁹⁵ Allcock’s sentiment is seconded with the experience of Professor Nicholas Miller, historian versed in the Serbo-Croatian contemporary relations, testifying in the case of *Prosecutor v. Prlić*: “I found the experience of testifying (cross-examination, to be precise) to be extremely unpleasant. The basic problem was that courtrooms (especially this one) do not follow the same logic as scholarship. When you and I sit around discussing our work, or even when I give a paper at an academic conference and you are in the audience and ask questions, we converse as friends, or respected colleagues. We ask each other questions, and we may change our minds mid-conversation. In other words, we discuss, openly. One does not ‘discuss’ in the courtrooms of the ICTY – one is asked a question, gives an answer, and is not really allowed to say, ‘well, it could be this or it could be that.’ Such an answer invites ridicule. Of course, it was also new to me to be in such a generally adversarial situation. I found it extremely tense.”⁹⁶

⁹⁵ John B.Allcock, *The Social Scientist as Expert and as Witness*, Paper delivered at the conference on the reception of the ICTY, Paris 2006, 6-7.

⁹⁶ Interview with Nicholas Miller, 25.3.2009.

Similar doubts about the appropriateness of appearing in such a setting were in the minds of both scholars who testified and refused to do so. “Both social science and the law are concerned to establish *the truth*. At first sight it might appear, therefore, that in the judicial process social scientists and lawyers are natural allies. Nevertheless, even as I accepted the invitation from The Hague, I was aware that this alliance is not without its problems. Consequently, when I was approached by the ICTY to act as an expert witness, at first I was reluctant to accept.”, writes Allcock.⁹⁷ “I had doubts – mostly passing. Should a historian take sides? Wasn’t I “corrupting my scholarly mission” or something like that by being involved? But I really never felt truly conflicted. I knew enough about Herceg-Bosna and Prlic to calm those doubts. In any case, I wasn’t asked to draw conclusions about Prlic et al. But, I do have a bias. For instance, I know that I probably would never have testified for the defense in any case.”, adds Miller.⁹⁸ Even Robert Donia, who testified consecutively, concluded that “if historians and lawyers were lined up on opposite ends of the field, John Madden could say these teams don’t like each other.”⁹⁹

This trend grew further in the Milošević case, which as Sabrina Ramet assesses, “serves to write (or rewrite) the history of the War of Yugoslav Succession (1991-95) and the War for Kosovo (1998-99)...It is also a drama, over which Milošević and

⁹⁷ John B.Allcock, *The Social Scientist as Expert and as Witness*, Paper delivered at the conference on the reception of the ICTY, Paris 2006, 1

⁹⁸ Interview with Nicholas Miller, 25.3.2009.

⁹⁹ **Adam Supernant, Historian discusses experience with int'l**

war tribunal, *The Michigan Daily*, 12.2.2006.

prosecutors...are competing for the right to compose the script.”¹⁰⁰ It seems, however, that in the Milošević case the prosecution became aware of the dangers inherent to moving the testimonies in the direction of a remote past. In the prosecution’s opening statement firm distinctions have been drawn alongside with the justification for historical excurses: “This trial...will not be making findings as to history. Matters of history always leave scope for argument, for doubt between historians. But history, even distant history sometimes available to this Court through the witnesses, will have a relevance from time to time in showing what the accused thought, what those identified in indictments as his co-perpetrators thought, what his compliant supporters thought, and what was available in history to fire up the emotions, particularly nationalist emotions, however little this particular accused might personally and genuinely have held those nationalist views.”¹⁰¹

However, the unprecedented scope of the Milošević trial was calling for historical assessments. Milošević seized the opportunity given to him by the prior practice of the ICTY and was set to base as much of his defense as possible on historical arguments. “There are true historical facts that speak of all of this, and it is nonsensical to accuse the wrong side...Scholars will be coming here, academicians, if they dare come.”, he announced.¹⁰² Along those lines, he proposed an extensive list of experts. Some of those witnesses submitted reports which were deemed inadmissible, the others were admitted.¹⁰³ Eventually, historical testimonies were delivered for the prosecution by

¹⁰⁰ Sabrina P.Ramet, “Martyr in His Own Mind: The Trial and Tribulations of Slobodan Milosevic”, *Totalitarian Movements and Political Religions*, 15 (2004): 114, 117.

¹⁰¹ ICTY, Milošević case (IT-02-54), Transcripts, Prosecution’s Opening statement, 12. February 2002, p.2 <http://www.un.org/icty/transe54/020212IT.htm>, (March 29.2005)

¹⁰² Defense’s opening statement, 14. 2. 2002, <http://www.un.org/icty/transe54/020214IT.htm> p 246-248.

¹⁰³ Example of the decision on the inadmissibility of experts testimony on the case of the report of Belgrade historian Vasilije Krestić: <http://www.un.org/icty/milosevic/trialc/decision-e/051207.htm>

Audrey Budding from the Harvard Academy for International and Area Studies and Robert Donia, history professor at University of Michigan. The testimonies for the defence were delivered by academician Čedomir Popov, retired professor of the University of Novi Sad and Slavenko Terzić, director of the Historical Institute of the Serbian Academy of Sciences.¹⁰⁴

From the point of view of the collision between international and national historical interpretations, the contributions of Audrey Budding and Čedomir Popov are paradigmatic and worthy of detailed elaboration. Dr Budding defended her dissertation entitled “Serb intellectuals and the National question” in 1998. She was invited by the Office of the Prosecutor to write an expert report. “The prosecution initially called on Budding to be an expert witness in the hope that she would provide the historical context and help the trial chamber understand the circumstances in which Milošević initiated his deadly reign over Yugoslavia. It subsequently tried to strike Budding from the list of appearances because it is working under severe time constraints and has had to limit the number of witnesses it would like to question. The trial chamber, however, apparently wanted more historical context and specifically asked the prosecution to question Budding“, observed Emir Suljagić.¹⁰⁵

Her testimony came under pressure in the course of the cross-examination performed by Milošević. Namely, both the bulk of Budding’s testimony and her report were concerned with the second half of the 20th century and especially with the 1980’s.

¹⁰⁴ Some of those expert reports are available at Milosevic Trial Public Archive, ICTY Expert Report, http://hague.bard.edu/icty_info.html. Expert Report of Robert Donia, "The Assembly of Republika Srpska, 1992-995, Highlights and Excerpts", submitted August 1, 2003, Expert Report of Audrey Budding, "Serbian Nationalism in the Twentieth Century" submitted May 29, 2002, http://hague.bard.edu/icty_info.html, 29.5.2005.

¹⁰⁵ Emir Suljagic, The Seeds of Yugoslavia’s downfall, IWPR Reporting, http://www.iwpr.net/index.pl?archive/tri/tri_322_2_eng.txt, 29.5.2005.

However, as her report was also giving an overview of Serbian intellectual history of 19th century, it provided the defence with a possibility to pose questions about that period. Interested vitally to divert attention from the period of his reign, this was an occasion of very strange exchanges in which Milošević utilized substantially on some of the reoccurring critiques about the applicability of the scholarly historical research in the courtroom:

Milosevic: This report that you produced here was prepared by you as commissioned by the side opposite. Is that true? And I suppose that your doctoral thesis was the result of your free and independent scholarly choice; correct?

Budding: Yes.

Milosevic: Just one general question that I will come back to in the course of my cross-examination. Are you aware of the differences between your report, the one you prepared for these purposes here and your doctoral thesis, although both deal with the identical topic, the Serb national question?

Budding: Certainly in many ways they deal with the same subject matter, and as I state in the report, parts of -- substantial parts of the report are adapted from my dissertation. Although they obviously serve different purposes, I, to the best of my ability in both of them follow the same standards of scholarly objectivity.

Milosevic: All right. But I hope we can agree that the purpose of developing a scholarly paper cannot jeopardise the standards of scientific objectivity and change the opinion of the same author, depending on the purpose?

Budding: I can not...enter into a theoretical discussion of that point, but I can state that in the preparation of my report, which I viewed as a piece of scholarly work, that I did my very best to present matters objectively and on the basis of available evidence.¹⁰⁶

The other exchanges were based in the questioning of different methodological approaches in historiography and their courtroom applicability, to the dismay of judges:

Milosevic: Yes, but if we stencil one situation from one century onto another century, do you as an historian believe that this amounts to one of the gravest methodological mistakes in -- for an historian?

Judge May: What do you mean?

Milosevic: Well, precisely what I said, Mr. May.

Judge May: No, it's not clear. I don't follow. What do you mean?

¹⁰⁶ ICTY, Cases and Judgements, Milošević case, Transcripts, 23.7.2003 (Budding), p. 24838-24839. The same tendency of presenting the methodological differences between a doctoral dissertation and an expert report as a sign of bias was repeated by Kosta Čavoški, *Budding versus Budding. Two faces of the same author in the case of Slobodan Milošević* (Beograd : Nikola Pašić 2006).

Milosevic: The copying of a historical situation from the end of the twentieth century onto the first half of the nineteenth century, does it amount to the phenomenon of copying, a stencilling of a situation? So I'm asking Ms. Budding is it considered to be one of the gravest methodological mistakes in the science of history?

Judge May: It seems to be absolute nonsense what you're saying. Would you give us -- and explain what you mean by concrete terms. What are you saying that this historian has done which you describe as a grave methodological mistake? What is the mistake, so that we can follow it?

Milosevic: Well, I said that the mistake consists in projecting a historical situation from the -

Judge May: Stop there. Which historical situation are you talking about?

Milosevic: I said as an example, Mr. May, that the historian blames Serbian nationalists for using Garasanin's Nacertanije, as she writes in her report, from the Second World War, claiming Muslims, Montenegrins as Serbs or blaming Vuk Karadzic for counting as Serbs everyone who uses the Stokavian dialect. That is a projection of a historical situation onto another period which amounts to the gravest methodological mistake in the science of history. If you don't understand this, I have to move on to my next question.

Judge May: No, because it's rubbish. I don't know what you're talking about. If you don't make the question clear, the witness can't possibly answer it. I mean, are you saying that -- is this the point: That historians or people at this period are using Vuk Karadzic, for instance, as an example of Serbian nationalism? Are you saying it has no relevance now? What are you saying?

Milosevic: I want to say that the projection of one historical situation from the end of one century to the first half of another century is a methodological mistake in the science of history, and I'm asking an historian about it, she who knows --

Judge May: Let's try and make sense of this, Dr. Budding. Can you use, I suppose a simpler way of putting it is, can you use a situation that occurred, say, in the nineteenth century when dealing with a situation, say, at the end of the twentieth century? Is it possible to draw parallels between the two, and is it an error if you do?

Budding: I think that in certain instances it can be valid to draw parallels between different historical eras. I think that such parallels should always be made very specifically, but I don't understand what use Mr. Milosevic believes I am making of the Nacertanije in my report.¹⁰⁷

The core of Professor Popov's testimony was dedicated to the refutation of Dr Budding's report. His testimony is interesting for it shows the endless resources which the historical method of contextualization might offer for the purposes of defence. Professor Popov was disqualifying Dr Budding in very harsh words, labeling her report as pseudoscientific. He questioned her methods on the basis of lack of archival research: "I have a complete opposing view to Ms. Budding, because I consider that the events that

¹⁰⁷ Budding, p.24865-24869

started in 1962 and 1963 and culminated in 1966 were the beginnings of the disintegration of the Yugoslav state. And I'm very sorry that Ms. Budding, who had previously written a very good doctoral thesis, sees a process of a state's disintegration which led to the disbanding of the state, and that she says this -- she calls this a process of democratisation...As I was saying, this impression that Ms. Budding has gained is not based on archival research, and I conducted research in the archives and reconstructed in detail when, in what way, and with what political goals in mind the process of decentralisation began or, rather, the destruction of the Yugoslav state, and ultimately this is what was borne out by the 1990s. The start of the country's decentralisation began in 1966.”¹⁰⁸

Further, Professor Popov questioned Dr Budding's theoretical approach, discarding it as presentism and opposing it to his own views embedded in historicism: I don't know whether Ms. Budding is a member of the academy, perhaps she is, but her writings are a confusion, in fact, because she is mixing up certain medieval criteria and historical criteria from the 19th century and 21st century criteria. And it is a basic rule, or one of the basic rules of historical methodology as formulated by Dukaj (sic! Dilthey), the philosopher of history, whereby every historical appearance must be looked at from the context of its own times and not from our times, because we make different judgements based on our times when we know some of the consequences of those phenomena, but they must be explained on the basis of the contemporary times. So the historian must try to relive those times, and I feel that that is lacking with Ms. Budding, and I think that that is the basic shortcoming of her work submitted to this Tribunal, because she makes a

¹⁰⁸ ICTY, Cases and Judgements, Milosevic case, Transcripts, 15. December 2004, (Popov), 34380-34381 <http://www.un.org/icty/transe54/041215IT.htm>, 29.5.2005.

judgement of Garasanin's Nacertanije or design or plan, or Sardusin's [phoen] writings form the aspects of the 20th century and the process of globalisation, which is an ongoing one at present.”¹⁰⁹ He continued to elaborate his vision of the history of the Balkans, embedded in a positivistic narrative of Serbian national historiography, contextualized in the wider framework of European history.

Even within a single legal framework provided by the ICTY, it is difficult to draw generalized conclusions about the nature and meaning of all the historical testimonies, but it proves the more applicable the more the content of the testimonies gets remote from the subject matter of the trials. Still, the clash between Dr Budding’s and Professor Popov’s interpretation of Serbia’s 19th and 20th century history was probably the example of courtroom historical witnessing at its worst. Being an exchange of interpretations of the subject-matter far removed from the case between the protagonists who are simply not functioning in the same epistemological regime, it could have hardly be of much use. It also directs to the crucial problem with historical testimonies. In the absence of even the least elementary philosophical common ground, exchange of historical testimonies becomes fruitless. Intellectually disappointing, the clash of ‘international’ and ‘national’ interpretations of the past is posing as much obstacle seemingly endless appropriation of human rights discourse in the nationalism versus communism debates, or distasteful competition in collective victimhood. However, this clash needs to be addressed, as it resonates greatly with one of the core sources of uneasiness on the human rights agenda – the cleavage between universalism and particularism.¹¹⁰ Although in the courtroom this

¹⁰⁹ Popov, 34569-34570

¹¹⁰ More on the cleavage: Abdulahi Ahmed An-na’im, *Human Rights in Cross-Cultural Perspectives*, (Philadelphia: University of Pennsylvania Press, 1992), Jessica Almqvist, *Human Rights, Culture and the Rule of Law*, (Oxford and Portland : Hurt Publishing, 2005); Christopher L.Eisgruber, Andras Sajó (ed.),

rupture is resolved in favor of standards provided by international criminal law, it still remains questionable whether such resolution has a lasting impact in the region of the former Yugoslavia, and other places in which beneficiaries of justice dwell.

IV.2.4 Local Interiorization of the Global Legal Activity

In the light of the described tension inherent to historical expert witnessing, it is worth asking if its proliferation contributed to the overall goals of the ICTY. It is hard to imagine how the region of the former Yugoslavia would look like if International Tribunal was not set up. Many atrocities would pass unpunished, and many a perpetrator would walk freely. Still, if the culture of impunity was shattered by the activity of the ICTY, can the same be said about the culture of denial? Richard Wilson recently argued that the very international perspective taken by the court has helped to overcome the problems posed by the local hegemony of the narratives pursued by national governments. He ranked very highly ICTY's efforts to create a lasting historical record in the process of rendering justice. Much of this success in his account resulted from acquiring expert knowledge from different branches that allowed for constructing a balanced, impartial and just account of the criminal aspects of recent past.¹¹¹ Equally enthusiastic is Robert Donia: "The Tribunal is gradually fulfilling one of its major tasks in providing to mankind an empirically verifiable account of what transpired amidst the

Global Justice and the Bulwarks of Localism: Human rights in Context, (Leiden, Boston: Martinus Nijhoff Publishers 2005). Closer to the legal aspects of the cleavage: George P. Fletcher, "Parochial versus Universal Criminal Law", *Journal of International Criminal Justice* 3, (2005) 20-34; Maria Cristina Redondo, "Legal Reasons: Between Universalism and Particularism", *Journal of Moral Philosophy* 2.1 (2005): 47-68.

¹¹¹ Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia", *Human Rights Quarterly*, 27 (2005): 908-942.

horrors of war in the former Yugoslavia.”¹¹² His statement is tackling precisely the crux of the matter. The record created by the ICTY is supposed to provide an account to mankind. To invert the famous Hegel’s phrase, this time world’s court is acting as world’s history.¹¹³

There are, however, alternative histories, which are obstructing the interiorization of the Tribunal’s activity in the region. For example, Iavor Rangelov observed that “politics and public debate in Serbia are torn between two competing conceptions of ‘dealing with the past’: international criminal law with its liberal insistence on individual criminal responsibility, and local nationalism defined in terms of group ethnicity and collective victimization”.¹¹⁴ This cleavage reflects Mark Osiel’s conception on the conflict between the *Vernacular Memory* and the *Official Story*, distorted though as the proponents of vernacular version of history still rely on powerful vehicles of promoting it, including state controlled media. Subsequently, they can still count that their version will significantly resonate with their audience, because it will better reflect both local stereotypes and remnants of war-time propaganda. Naturally, the Tribunal is neither conceived nor expected to counter such pressures. As noted by Eric Gordy: “It might be sufficient to say that even the most perfectly designed tribunal would be unable to change the popular understanding of recent history. The main actors in this process must come

¹¹² Robert J. Donia, “Encountering the Past: History at the Yugoslav War Crimes Tribunal,” *The Journal of the International Institute*, 11 (2004)

¹¹³ A puzzling concept of the world’s history (Weltgeschichte) as a world’s court (Weltgericht) is introduced in Georg Wilhelm Friedrich Hegel, *Osnovne crte filozofije prava [Elements of the philosophy of right]*, Sarajevo : Svjetlost, 1989), 459-460, c.340-342.

¹¹⁴ Iavor Rangelov, “International law and Local Ideology in Serbia”, *Peace Review* 16/3, (2004): 331. On the low level of interioration of Tribunals achievements in the region, particularly in Serbia Judy Batt, *The Question of Serbia*, Institute for Security Studies, Paris, Chaillot Papers 81 (2005): pp.60-65

from inside.”¹¹⁵ However, several authors note that such change happens neither spontaneously nor lightly, but is, as in the case of Germany, a matter of painstaking effort to bring justice home. As much indispensable role has been played in this transfer by the ICTY, it is difficult not to observe that creating a lasting historical record is not high on the agenda of evolving national judiciary specialized in prosecuting war crimes.¹¹⁶

Exactly in the light of the problem of interiorization, it is appropriate to ask if historians are useful carriers of that purpose. Paradoxically, they might not necessarily be the best candidates for establishing a historical record, which is, as noted by John Allcock, “involves more than just a listing of facts.”¹¹⁷ As seen, the practice of putting historians on stand is considered quite controversial in far more stable legal environments. Measures of limitation and precaution against the abuse of expert testimony are a matter of common procedure and are usually keeping historians out of the courtroom.¹¹⁸ Indeed, the worldwide shift towards legal reading of the past has induced wider usage of historians as expert witnesses. In this respect, the International Criminal Tribunal for the former Yugoslavia is not an exception. But the international character of the Tribunal is adding a novel controversy to the ever present problems with historical testimonies, posed by the adversarial context, exacerbated through the flexibility in the admission of evidences. Namely, if there is no jury in the ICTY to protect, there is an audience, and a very interested one. This audience is still inclined to agree with

¹¹⁵ Eric Gordy, “Rating the Slobo Show. Will Justice be served?” *Problems of Post-Communism*, 50, (2003):55.

¹¹⁶ Cf. Diana Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY on Serbia*, (Budapest Open Society Justice Initiative, 2008). Vladimir Petrović, *Gaining the Trust through Facing the Past? Prosecuting War Crimes Committed in the former Yugoslavia in National and International Legal Context*, v3.cas.bg/cyeds/downloads/Vladimir%20Petrovic%20-%20Shaken%20Order%20Final%20Report.pdf

¹¹⁷ John B. Allcock, op.cit, 4.

¹¹⁸ John William Strong, “Limiting Expert Testimony by Restrictions of Function, Reliability and Form”, *Oregon Law Review* 71 (1992) 349-369; Carol Garcia, “Expert Witness Malpractice: A solution to the problem of the negligent expert witness”, *Mississippi College Law Review* 12 (1991), 22-44.

whomever participant in the proceedings who is telling ‘their story’; this is particularly unhelpful with a view to the interiorization of the achievements of the Tribunal and it is proving extra fodder to the anti-Hague sentiments, particularly in Serbia. Courtroom disagreements between historians are leaving a similar impression. They might have been helpful to the judges in the early stage of the ICTY activity. However, as Richard Wilson notes, “on the other hand, where there is a ‘war of experts’, when each is more or less credible, neither side can win outright and the war ends in stalemate. When asked how judges decide between two more or less equally competent experts with diverging views, one prosecutor told me ‘They don’t’. Judges avoid taking a view, and indicate that they see the matter as a waste of time.”¹¹⁹ Such wars have also added to the perpetuation of a peculiar bland of epistemological nihilism, which is typical for the traumatized postconflict societies.¹²⁰

As those quarrels are tackling crucial identity issues, they are extremely difficult to settle through the amassing of facts. In the absence of an authoritative global community of historians, who are still largely operating within the framework of national historiographies, the multitude of interpretations is likely to persist. The clashes of frequently irreconcilable visions of the past displayed by the experts are therefore posing a puzzling query that will most probably persist in the activity of the International Criminal Court as well (ICC). Such danger was noted in a policy paper the ICTY’s prosecutor Minna Shrag has written for the ICC. She recommended that the investigations should be limited in scope in order to allow for a due process. Hence, the

¹¹⁹ Richard A. Wilson, ‘The Role of Expert Witnesses in International Criminal Tribunals’, *ISA Conference Panel* on February 16, 2009, 10-11.

¹²⁰ Sabrina Ramet, ‘The Denial Syndrome and Its Consequences: Serbian Political Culture since 2000’, *Communist and Post-Communist Studies* 40/1 (2007): 41–58.

experts, particularly the once who testify about context, should not come to usurp the courts time and ought to be controlled by the lawyers. As she warns, “too much focus on the events themselves may be conducive to producing a history of a particular place, rather than on creating a strategy to pursue the most senior persons responsible for the crimes’.¹²¹ Even more to the point was Nicola Piacente, prosecutor with both anti-mafia and ICTY experience, who reflected on the role of investigators and experts, recommending that the experts, including historians should work in teams and assist both the investigational stage and the trial stage under the guidance of the senior trial attorney.¹²² Recently, Richard Wilson went even further to propose “a potentially radical solution. We might envisage a new structure for historical and social science research, a structure that sits institutionally between the OTP and Defense Counsel ... Could we begin to think of an independent research unit where expert witness reports might be commissioned by both parties and where expert research could be conducted on the massive levels of archival documentation that have come to the Tribunal from the former Yugoslavia over the past 8-9 years and where a sterile ‘war of experts’ might be avoided, thus avoiding the scenario where judges set aside difficult questions of historical import?¹²³

Such concerns were also raised at the conference of the International Society for the Reform of Criminal Law held in The Hague in 2003 under the telling title

¹²¹ Mina Shrag, Lessons Learned from the ICTY Experience. Notes for the ICC Prosecutor, *Journal of International Criminal Justice* 2004 2(2):427-434

¹²² Nicola Piacente, Establishment and operation of the ICC Office of the Prosecutor, www.icc-cpi.int/otp/otp_input.html&l=en

¹²³ Richard A. Wilson, ‘The Role of Expert Witnesses in International Criminal Tribunals’, *ISA Conference Panel* on February 16, 2009, 12.

‘Convergence of Criminal Justice Systems – Bridging the Gaps.’¹²⁴ The urgency which sprung from the title of this conference relates well to the time and the place of this gathering. By 2003, The Hague became host to not only the International Court of Justice and International Criminal Tribunal for the former Yugoslavia, but also of the International Criminal Court, becoming hence the informal capital of international justice. More importantly, the creation of the International Criminal Court through the 1998 conference in Rome in which 120 members of the UN adopted the statute of the tribunal, with 7 against and 21 abstaining, meant that the recommendations of the UN’s International Law Commission, shelved for more than 40 years of Cold war, were becoming a reality.¹²⁵ As by mid 2002 more than 60 countries had ratified its statute, the ICC came into existence, acquired rules of procedure, inaugurated judges, formed the Office of the Prosecutor and launched its first investigations regarding breaches of international humanitarian law in Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. Investigations led to indictments, extraditions and detentions, and in January 2009 the first trial began to Thomas Lubanga Dyilo, Congolese rebels’ leader.¹²⁶ Twelve other warrants for arrest were issued until this date regarding the four locations. The International Criminal Court was created through a multilateral treaty, but some of the largest countries of the world (United States of America, Russian Federation, People’s Republic of China, India) are not the part of this agreement and hence are out of the created consensus. Still, the ICC has a global

¹²⁴ Sarah Campbell, “The Rule against Hearsay: an English Desire for and International Criminal Court Approach?” *International Society for the Reform of Criminal Law* www.isrcl.org/Papers/YLP_England.pdf

¹²⁵ Rome Statute of the International Criminal Tribunal
http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm

¹²⁶ Mike Corder, “[International court begins case of Congo warlord](#)”. *The Associated Press*, 26 January 2009

jurisdiction, and is very much in needed to obtain knowledge in order to render credible justice. Therefore the issue of expertise resurfaced through the tension between global and local. Such problems, rooted in different cultural interpretations of legal activity, transgress borders as quickly as international law.

“Cultural and ideological diversity will also create problems in the process of globalizing criminal justice”, warned Vladimir Tochilovsky. He reminded that “decade-long experience of the ICTY suggests that the newly operational International Criminal Court will inevitably face challenges to its credibility and effectiveness.” He particularly cautioned about drawing “the prosecution into endless and expensive historical research instead of focused criminal investigations” as “the necessary involvement ... of historians and international lawyers on the staff of the Office of the Prosecutor may also contribute to such distraction.” In his view, “the court, with its scarce resources, cannot afford endless research into the history of various conflicts. These matters should be left to historians as philosophers.”¹²⁷

On the other hand, addressing the same problem in a very important report on the rule of law and transitional justice in conflict and post conflict-societies, Koffi Annan, Secretary General of the United Nations on 23 August 2004 gave a strong boost to the internationalization of rendering justice. Withstanding all the differences of specific national and cultural contexts, he suggested a context-sensitive, but persistent rendering of transitional justice. Regarding the importance of experts in such an undertaking, he stated that “in the process of learning from the ad hoc criminal tribunals UN should ‘build its own roster of experts’, a mix of expertise that includes knowledge of the UN

¹²⁷ Vladimir Tochilovsky, *Globalizing Criminal Justice: Challenges for the International Criminal Court, Global Governance* 9 (2003): 291, 293.

norms and standards, for the administration of justice, experience in post-conflict settings, an understanding of the country's legal system, familiarity with the host contrary culture, an approach that is inclusive of local counterparts.”¹²⁸

How are those somewhat conflicting expectations to be accommodated by the International Criminal Court? Judging according to the Regulations of the Court, adopted in 2004, and amended on two occasions since, the Judges are encouraged to take a more proactive role in comparison to the adversarial character of the proceedings in front the ad hoc international tribunals. In regards to expert witnessing, Regulation 44 provides that “the Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar. 2. The Chamber may direct the joint instruction of an expert by the participants. 3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert. 4. The Chamber may *proprio motu* instruct an expert. 5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.”¹²⁹

In an attempt to follow those footsteps, and to create an extensive list of experts covering the possible fields of interest to the Court, the Registry of the ICC had sent a world-wide call for registration of experts. Expert witnesses are required to be available

¹²⁸ S/2004/616, Kofi Annan, Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, 20. <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> 20

¹²⁹ ICC, Regulations of the Court http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf

to provide objective evidence on aspects of proceedings before the Court. They must be accessible to the Court and its composite organs, including the prosecution, as well as to participants and defendants in court proceedings. Experts are placed on the list for an initial period of five years with the option of re-registration. Applications are open to both individuals and expert bodies, and by the time I was finishing the dissertation draft, one copy arrived at the desk of the Institute of Contemporary History in Belgrade, at which I am employed. It says: “Registration is open to all candidates with expertise in one of the following fields: medicine or forensic medicine, ballistics, military science, policing, linguistics, finance, forensic handwriting, analysis, psychology and reparations. Although limited to the four situations (Democratic Republic of the Congo, Uganda, Darfur, Central African Republic), registration is also open in the fields of politics and geopolitics, judicial systems and history.”¹³⁰ This move is indeed a great shift in expert witnessing in front of international tribunals. The call has resulted in the creation of an extensive list of experts before the International Criminal Court, covering a wide range of fields of human knowledge.¹³¹ The inclusion of history in the list of disciplines whose expertise will be needed ensures that the controversies regarding historical expert witnessing will transpire in the 21st century as well. Although the current list of experts has no historians, they are likely to appear, in the line with the commitment expressed by the Secretary General of United Nations Kofi Annan that in regards to the crimes of the age of extremes, “it is up to us to provide the history, both current and future, with the

¹³⁰ International Criminal Court, Circular letter, October 23 2007, NV/DCS/206/MD/ab <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Experts/> More in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights. The role of the International Criminal Court*, (New York: Transnational Publishers, 2000).

¹³¹ List of experts before the International Criminal Court as of 28 August 2008. <http://www2.icc-cpi.int/NR/rdonlyres/045C6DC2-9E7E-4F20-A5CF-6C1F8959B908/279743/ICCExpertsListENG.pdf>

answer to the question why they had happened, who committed them, to punish the perpetrators and to renew the faith in justice of victims and their families”. What role there is for historians in such an important, but so elusive a venture remains to be seen.

By the end of the 20th century, both the writing of history and the rendering of justice often transcended national frontiers. Universal consensus over the importance of upholding basic human rights, evolving from 1945 resulted in attempts to create a common culture of memory. The revisionist challenge of this growing consensus provoked reactions which overcome the confinements of national jurisdictions, bringing expert historians from different countries into various courtrooms. At the same time, the re-emergence of international criminal law revealed some of the tensions accompanying this globalization. Competition between the universal paradigm of human rights and local historical narratives exacerbated many of the tensions inherent to expert witnessing, which transpired in the course of the activity of the ICTY and might well persist in the activity of ICC. Coincidental trends in international cooperation in the realm of historiography are met with similar challenges, torn between the spearheading strives toward substantiation of global and transcultural history and no less influential attempts to localize the production of historical narratives.

Conclusion

It would be convenient to conclude the research with a number of proscriptive statements about the past, present and future of historical expert witnessing. Such a conclusion, however, would not do justice to the complexity of the phenomenon, as the key issues of the topic are simply not for a researcher to resolve. Should historians decide to write expert reports and testify is, and will remain, their own choice. The relevance of this witnessing is, and will be assessed by the judges and juries, and its social impact will be scrutinized by the general public and interested professionals. This is, as Peter Mandler observes “not to say that historians have no place in the courtroom; only that they ought to go in without illusions about their place and authority there.” Expectedly though, it is exactly the illusions which frequently prevail, both among the historians and jurists. They range from the vision of a historian as an ideally impartial expert to the image of a biased witness who compromises his professional standards for the sake of unscholarly gratification or publicity. Such staunch notions, sometimes justified, but often preconceived, were bound to shape dynamic, interesting and occasionally enraged, but generally ineffective and disconnected discussions. In the hope that a contribution to the comparative history of historical expert witnessing might improve the understanding of the topic, it is the purpose of the conclusion to summarize a number of points of relevance, aimed at refocusing the debate in order to foster informed decisions in the participants of this venture.

Firstly, there is nothing inherently wrong with historical expert witnessing. Claiming a *prima facie* case against it amounts to professional narcissism. There is hardly a branch of scholarship which did not at one time assume its forensic application, and this forensification as a rule produced fierce debates. Disputed courtroom expertise is as old as expert witnessing, and neither ‘hard’ nor ‘soft’ sciences are spared such feuds. Glancing at the rapid professionalization of human knowledge around the turn of the century, coupled with the standardization of the legal process, one observes a general tension between the law and science. This tension appears in recognizable, but diverse shapes, and reaches its height in the institution of expert witnessing. The institutionalization of the tension amounts by no means to an ideal solution, but rather presents an open quest towards functional rectification of law and science. Those shifting modes of human experience are powerful forces which shape contemporary societies. Therefore, in the constant flux of their refinements, many inconsistencies of the legal process are revealed, as well as methodological uncertainties of scientific knowledge, particularly in the realm of social sciences and humanities. The discussions within social sciences on the legal merits of their contribution are even more vehement due to the stricter adherence to both theory and method and their shorter academic record. Hence the debates over the forensic application of sciences tend to turn into the battle for legitimacy of any given branch of human knowledge. Much of the *Sturm und Drang* surrounding historical expert witnessing comes from the absence of readiness to plunge methodically into the general history of expertise, and its particular manifestations in different legal and historical contexts.

Only against such a background could one plausibly assess if historical expertise brings any specificity into the general discussion. There are good reasons to assume that history was introducing a particular edge to the strained relationship between science and law. Aside from the sporadic assistance in the authentication of documents, history was among the last of the humanities to take the stand, and the debates on the merit and the purpose of such practice do stand out even within the quarrelsome world of expert witnessing. Repetitive and disconnected, these discussions are echoing throughout the age of extremes, during which historical expert witnessing never normalized itself completely. It is therefore safe to conclude that history took the stand belatedly and faced more obstacles.

Where do they come from? Rather a self-evident but too frequently overlooked point is that law and history are intrinsically intertwined, for better or for the worse. Unlike relatively novel sciences, history was 'out there' from the very beginnings of civilization, and so were laws. Hence the multilayered relationship: laws are both shaping and reflecting reality. They are at the same time agents and outcomes of history. Legal systems are both bearing witness to past developments and breaking a path for future ones. Similar duality is maintained in the course of trials, as the paramount means of rendering justice. Trials both use and produce historical documents, and consequently both revisit and create history. Their rules and procedures, rulings and judgments are, furthermore, history in themselves, and are hence subject to historical scrutiny which, *inter alia*, aims to account for such changes. Those multiple junctions are very sensitive, and frequently tempt jurists to act as historians, or lure historians to assume the role of judges, advocates and prosecutors.

It would be hasty to conclude that the confusion would be resolved if jurists and historians would stick to their own area, because those overlaps are not occasional disciplinary trespassing. They reflect deep structural connections, traceable from the emergence of both law and history in Antiquity and their reemergence in the Renaissance. The implications of this connection remained out of sight due to the compartmentalization of knowledge production characteristic of the 19th century. They became visible by the beginning of the 20th century, with landmark trials (e.g. Dreyfus case), crucial legal documents (e.g. Versailles treaty) and important historical debates (e.g. Kriegsschuldfrage). All those issues were resolved at the brink between history and law, however in an openly antagonistic manner. The high political stakes which characterized those formative conflicts of the age of extremes necessarily had instrumentalizing effect both upon legal process and historical scholarship. Hence the events of the 20th century brought the activities of history writing and justice rendering back together, frequently on a collision course characterized by deep misunderstanding. In a strange battle for primacy historians started commenting on legal affairs, which have in turn spread to the fields traditionally explored by history. The response to this utilization came in the shape of the prevalence of the attempts to keep history and law apart. Such a response, formulated in this thesis as *the theory of incompatibility*, consisted of implicit defining history and law as too intimate to merge. Considering those two important pillars of the Western world as “odd bedfellows” delayed the forensification of historiography. The more this world was fragmenting in a violent conflict, the stronger was the urge to salvage its intellectual foundations, to leave history to deal with past Truths, and restrict law to rendering present Justice.

The first cracks in this theory of incompatibility seem to have been inbuilt in its very foundations, as even their strongest proponents, such as Karl Friedrich or Hannah Arendt, felt uneasiness regarding the possibility of complete divorce between history and law. Undermined by pressure of the mutual connections of the disciplines, this crack was further exacerbated with the global change of sensibilities following the Second World War. Terrible crimes, frequently conducted within the boundaries of the legal systems of totalitarian states called for a response. How to account for those atrocities is a question which bothers the historiography of the age of extremes until this day. How to punish them presents an even larger challenge for the law. That field became wide open in the aftermath of the Second World War, prompting strong remoralisation of history, expressed in a collapse of the customary disciplinary notion of historical distance, and the similar changes in the law, expressed through the advent of international criminal law and through the re-emergence of theories of natural law in different forms. A firmer common ground for the two to meet was created through a decision to bring the evil past to trial, with rapid legal development and a number of trials, starting from Nuremberg, dubbed appropriately as “the greatest historical seminar ever held.” This postwar sensibility, symbolized by the creation of the United Nations, was characterized by the furthering of the institutionalization of international law and with the gradual advent of the civil rights movement. It was a strong initial boost to the conceptualization of trials as a means of addressing the bad past and an attempt to undo its wrongs. Over time, it transformed into a demand for a massive rereading of history in accordance with the concept of universal human rights.

Such background presents more than a general historical context, for this paradigmatic shift was one a strong driving force behind the appearance of historians as experts in postwar proceedings. As history entered the courtroom, historians were to follow, sooner or later. Both in United States, Germany and Israel, historians came forward with expert reports and took the stand in the courtrooms in the late fifties and early sixties, in the proceedings either related to the war crimes of the Second World War or to the defense of civil rights. This happened somewhat strangely belatedly, as the very term historian in ancient Greek, among other meanings, also stands for *witness*, and also oddly as historians were frequently helping the rendering of justice, usually through help in establishing the authenticity of the documents used as evidence. However, their appearance on the stand provoked a number of controversies. The first very visible historians as witnesses appeared in the Frankfurt Auschwitz trial and in the Eichmann case. They were deployed by the prosecution, in an overall effort to provide the background for the crimes committed by the Nazis. This enormous change in the nature of historical expert witnessing, moving from authentication of documents to the contextualization of events, attracted considerable attention as well as the criticism. Historians who testified in the Holocaust-related trials were presenting the crux of their research. The prosecutors were, however, interested in painting a broad canvas on which the systematic nature of the criminality of the Nazi state would be made obvious. They envisaged historians as experts whose role would be to fill in the blanks created by the limitations of a single criminal trial. Harsh criticism of this practice came both from the liberal left of Hannah Arendt and the conservative right of Ernst Forsthoff, seemingly strengthening Karl Friedrich's positions on the incompatibility of history and law.

However, this ‘German’ debate got another angle in the United States, where less visible, but more profound changes happened during 1950s. Historians and social scientists alike took part in the antidiscrimination litigation. Slow and gradual admittance of historians in American courtrooms in antidiscrimination cases, from *Brown v. Board of Education* to the Indian claims cases was received with mixed reactions, but as most of the criticism was directed towards the expert contribution of ‘novel’ social sciences, historical expert witnessing became fully institutionalized, if not recognized as such by the mid 1960s. In what at first glance seems a major coincidence, historians became experts in the courtrooms on both sides of the Atlantic. However, although these circumstances and bore no immediate connection, they undoubtedly bore much resemblance. Both in Germany and in the United States, historians stepped into the courtroom to testify about the evil past. Witnessing about the grim realities of racism, they aimed to contribute in undoing its consequences. On the wave of the proclaimed struggle toward universal human rights, historians were mitigating between this present commitment and the cultural habits of past times. As the legal system attempted to reconcile ‘what is’ and ‘what ought to be’, historians had an even more difficult task to put this trend in a historical perspective by displaying ‘what was’. Their factual findings from recent or more distant past were tracking the elusive trends of human rights and their breaches, and exposing the cleavage between the proclaimed standards and their neglect in reality. Institutionalized at the brink of this cleavage, both inquisitorial and adversarial paradigms of historical expert witnessing were bound to trigger major controversies.

Instead of alleviating the complex interrelationship between history and law, historical expert witnessing has added new controversies to the old ones. In time, not only legal scholars, but also historians grew dissatisfied with the fruits of this tense collaboration. The field of commentators of the practice was getting increasingly polarized, and historical expert witnessing was, and largely still is, perceived as a holistic practice, having as a consequence a debate unnecessarily burdened with either/or answers. Such an approach seemed unhelpful as this institutionalization appeared in at least two distinguishable paradigms, one of which was predominant in Continental, and the other in Common law. The difference was stemming from the structures of those legal systems, the former relying on the inquisitorial nature of the process, and the later on the adversarial. Such a setting had an enormous impact on the position of expert witnesses, historians among them. As the adversarial system relies on the parties to gather and present evidence, with a judge as a detached guard of the admissibility of the material, experts were likely to be hired by the parties. In the inquisitorial system, experts were most frequently called by the court, with the judges defining their position and questions they addressed. Therefore, expert witnessing in the adversarial paradigm was likely to induce battles of historical experts in the courtroom, as well as the debates on the merit of the practice outside the court. On the other hand, the inquisitorial paradigm was not likely to produce contradictions between historians in the court, but rather confrontations between advocates of the parties and the expert, leading to the out-of-the-courtroom debates on the meaning of historiography imposed by the judge. Therefore the proposals to alleviate those problems appeared alongside with the historical experts in both systems.

The problematization of historical expert witnessing grew in the 1980s and 1990s, but the practice mushroomed nonetheless. A number of carefully devised criteria set to define expert witnessing could just partially alleviate such clashes over their role. The theory of incompatibility was not succeeded by the theory of compatibility, but rather by the haphazard development and practice which largely differed from country to country and from case to case, frequently to be met with strong resistance. In the United States, the practice spread from antidiscrimination in order to cover many other legal aspects, with performances of experts frequently considered problematic. Battles of expert historians were spilling out of courtrooms and influencing the developments in mainstream academia, such as the Sears case. The other less notable but not less important cases paved a way for the new market of 'litigant historians', specialized in offering their expertise. One thing was certain: history was no more alien to legal procedure, and historians were not strangers in the courtroom. Once a blasphemous sight, the participation of a historian in a complex context in which law, politics, history and memory intertwined attracted considerable attention. Litigant character of expert witnessing was prone to give experts a bad name in the United States and beyond. Despite quite a number of precedents, each new case was containing a potential to trigger a controversy. However, this potential expressed itself to the outmost degree in the realm of Continental law, in the course of the Second World War related trials in France. The advent of historical expertise in these trials was occasionally even attributed to the influence from the United States, as the performance of experts was rather adversarial in outlook.

This theory of imported expert witnessing, as tempting as it might sound, is hardly likely. The struggle to renegotiate the historical narratives about the Second World War appeared in all of Europe. This shift is usually considered to have been prompted by the collapse of Communism, which has indeed triggered an unprecedented scope of legal activity, ranging from truth commissions and parliamentary inquiries to criminal investigations and war crimes trials. Such massive renegotiation of history followed by the transition towards democracy led many to the conclusion that an explosion of memory is happening. The belated Second World War trials were considered as important vectors of such memory, which were by no means restricted to France. Similar legal action were undertaken elsewhere in Europe, particularly in its Eastern parts, whose transitional governments were attempting to create a sustainable historical foothold, devising different ways to tackle the layers of bad past. The actual outlook of those proceedings varied, expressing the specificities of given national contexts, but the common tendency to righten the wrongs of the past seems to be shared, as well as the vehement debates over the control of the past. Even in the region of the former Yugoslavia, devastated by atrocious warfare of the 1990s, Second World War was experience was problematized and acquired its legal dimension through belated trials and rehabilitations. Controversial attempts of legal systems to intervene into the realm of contemporary and not so contemporary past were dragging historians both into the public debate and into the courtrooms. Therefore, continental legal system presented no barrier to historical expertise, which appeared as an expression of local dynamics, not necessarily connected to the models offered by previous American and German experience with historical expert witnessing.

Still, global interest in righting the wrongs of the past through historical expertise was expressed in distinctively different outlook in Common and Continental law. However, those differences are not restricted to the issue of the adversarial versus inquisitorial practice. Important in its own right, this difference has generated much debate. In the American context, which is shared throughout the common law realm, adversarialism was pushing hostile experts into the courtroom and into mutual wars. These competitions were in turn spreading disbelief into the legal value of their testimony and of the use juries could extract from the experts. Similarly, in many European jurisdictions this competitiveness of expertise was not perceived so critically. Europeans are in fact growing suspicious with inquisitorial practices, which are enabling the judges to choose experts to their liking, pose questions as suggestive as they please and receive answers which might do no more than reaffirm the judges' preconceived opinion, or unburden the bench of unpleasant obligations. In the field of historiography, such setting could amount to judicial imposition of a given historical narrative, which is causing as much discomfort as the site of negotiated, contested and undermined historical narratives typical for a courtroom in the United States. The other related difference concerns the type of trials historians are engaged in – they were predominantly civil in the USA and largely criminal in continental Europe. The difference is striking in terms of law on evidence, as in the civil case it seems enough to persuade the court that one side is right on the basis of probabilities, but a criminal trial would in fact demand a proof beyond reasonable doubt. Whether historians could ever produce one was, and still is, a question to problematize in the debates surrounding their expert witnessing.

What might be said in respect to the meeting of the adversarial and inquisitorial paradigms, is that it was neither a clash nor a merger, but a certain amalgamation, as in the course of the 1990s many Continental legal systems acquired some adversarial aspects, which also had an impact on the role of historical expert witnessing. Paradoxically, on both sides of the Atlantic there is a recent outcry aimed at reforming expert witnessing, albeit in different directions. In the United States and to a degree elsewhere in the Common law world, legal scholars are arguing for the stronger role of judges in the process of the selection of expert witnesses, and particularly in regards to scrutinizing the admissibility of their findings. The logic behind this reasoning is that the jury should be somehow protected from the malpractice consisting of intellectual output produced by experts hired by the parties. The fear is that in the vulnerable fields of human knowledge, such as history, such a partisan approach amounts to an epistemological nihilism and does not assist those trying the facts. Whereas such concerns are behind the attempt to reform historical expert witnessing in the United States, through the imposition of court-appointed experts, continental Europe is experiencing completely the opposite development. Dissatisfaction with the expertise contracted and directed by the judge who chooses the expert as well grows particularly in the field of history. The lack of competing narratives in the courtroom leaves a bitter taste of imposed historical accounts, strengthened by the wave of ‘historical legislation’, seen by many liberal observers as a straightjacket for intellectual freedom and a danger towards the very nature of the craft of historians. Therefore, continental countries are experiencing strive towards the adversarialisation of criminal proceedings, and European courtrooms might well become historical classrooms.

However, contemporary historians do not necessarily work within the confines of a given legal system. In fact, the most recent cases are showing a dramatic amount of internationalization in historical expert witnessing, particularly regarding Second World War related cases. They are treated in various jurisdictions in both criminal trials and civil suits, and are a tempting field for comparative studies. Connections between the cases are not only topical, but frequently also personal. For example, David Irving who served as historical expert witness in a criminal trial in Canada himself launched a civil suit against the American Deborah Lipstadt in Great Britain, and was eventually sentenced to jail in a criminal trial in Austria. This kind of amalgamation is most obvious in transnational topics, such as the Holocaust and its denial, but also in topics which are posed by legal activities after the end of the Cold War. If those events are proof of ongoing global historical activity, they still hardly support the conclusion that there is global history writing, let alone a global community of historians. Working predominantly in national frameworks, investigating into the past which was all but good, historians have problems stepping out of the method of the contextual explanation of past wrongs. A new realm of the internationalization of historical expert witnessing opened up through the renaissance of international criminal law. Through the foundation of *ad hoc* international tribunals for Rwanda and the former Yugoslavia, the process of maintaining universal human rights standards through rendering international justice emerged in courts with limited jurisdictions. This tension between global and local, exacerbated through the mixed legal system of international criminal law, led to the wide but controversial deployment of historical expert witnessing, and debates which are bound to grow in scope in the course of the activity of the International Criminal Court.

What does it mean for historical expert witnessing? Most importantly, it is here to stay. At least five decades of historical expertise stand as proof that the practice which grew over a century will continue its existence, as well as the debates on its merits it inspires. Therefore, the academic community will have to learn not only to live with it, but also to devise ways to make the best of this critical edge, which poses a challenge to its social role, epistemological privilege, and even its ethics. The cases presented throughout this dissertation are testimonies about the most troublesome events of a century, whose events left no stone unturned. Expert witnessing might therefore be seen as yet another litmus test of the changing role of historians in the age of extremes, and therefore as an example of the transformation of the discipline conceived, but not necessarily conducted as one of the cornerstones of the humanities. No wonder that in the course of debating the effects of historical expert witnessing pleas for an “ethic of history” were followed with the quest for a “conscientious historian”. Still, as much as one sympathizes with this appeal towards an ethical turn, one has to agree again with Peter Mandler that “in a liberal profession in a liberal society, there can be no single definition of that responsibility, and no-one is entitled *ex officio* to decide upon it”. Therefore the field is prone to remain wide open, and the literature would probably continue to be, as Morgan Kousser puts it, “wider than deeper”. However, in regard to this dissertation, such an approach is a conscious choice based on the belief that more ambitious forms of understanding of the phenomenon of historical expert witnessing need to move past the phase of resentment and praise toward integration of the otherwise quite disconnected pieces of this puzzle through setting a stage for less vehement task of a pedestrian mapping of the practice.

Is the debate on historical expert witnessing thereby refocused? Probably not dramatically. The attempt to use historical insights through acknowledging the specificities of each and every case while keeping the integrity of the overall topic might remain no more than a distant ideal. However, it springs right out of the nature of historical scholarship, torn between particularizing research bordering on irrelevance, and equally irrelevant generalizing tendencies. In order to thicken the thin line in between, and to secure safer epistemological ground for the courtroom interpretations of the past, it is neither realistic nor useful to expect more than transparent adherence to one's own methodology, as well as the reflective awareness of its advantages and limitations. This minimalistic disciplinary requirement, suitable for historical expert witnessing and writing about historical expert witnessing as well, is the best readily accessible response to this troubling facet of (in)compatibility between history and law, and the best point of departure in discussing the merits or perversions in the realm of autopsy of the troubled past of the age of extremes.

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