

# Judicializing History: Mass Crimes Trials and the Historian as Expert Witness in West Germany, Cambodia, and Bangladesh

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## Abstract.

Henry Rousso warned that the engagement of historians as expert witnesses in trials, particularly highly politicized proceedings of mass crimes, risks a judicialization of history. This article tests Rousso's argument through analysis of three quite different case studies: the Frankfurt Auschwitz trial; the Extraordinary Chambers in the Courts of Cambodia; and the International Crimes Tribunal in Bangladesh. It argues that Rousso's objections misrepresent the Frankfurt Auschwitz trial, while failing to account for the engagement of historical expertise in mass atrocity trials beyond Europe. Paradoxically, Rousso's criticisms are less suited to the European context that represents his purview, and apply more readily to the highly-politicized crimes tribunals outside the continent. Finally, it contends that the importance of the proceedings themselves should be measured in full against the hypothetically corrupting effects of historians' engagement as experts in court.

## Keywords.

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# Judicializing History: Mass Crimes Trials and the Historian as Expert Witness in West Germany, Cambodia, and Bangladesh

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## Introduction

In his 2002 book *The Haunting Past*, prominent French historian Henry Rousso claimed that “historians are no longer in their proper element once they don courtroom robes.”<sup>1</sup> The statement was made in the context of explaining why Rousso defiantly opted not to act as an expert witness in Holocaust perpetrator and collaborator trials held in France in the 1990s. Recognized as a leading specialist in the history of Vichy France, Rousso, in seeking to justify the reasons for his refusal to testify, took the opportunity to eschew the very act of historians stepping into court to provide expertise in criminal trials. The problem was especially acute, argued Rousso, when the proceeding was itself motivated by a desire to remedy a past wrong, a missed opportunity for justice against Holocaust perpetrators decades after the fact, and was highly politicized. Such trials were, according to Rousso, actually “stagings of the past,” viewed by the society in question as a means to achieve national redemption for previously unaddressed sins, and utilized by leaders to build political capital.<sup>2</sup> Yet, Rousso is not content simply to rationalize his own decision to avoid the courtroom, but openly condemned what he termed the “judicialization of the past” and the instrumentalization of historians in the pursuit of justice (whether in service of the prosecution, or the defense).<sup>3</sup>

In Rousso’s mind, the courtroom – and he neglected to acknowledge differences between various legal systems, state courts and international tribunals – is no place for historians. This is particularly the case in criminal trials, where the historians’ testimony invariably has some impact on the verdict reached against an individual. Questions from the court – judge, prosecution or defense – to the expert witness historian are all geared towards achieving an outcome of guilt or innocence. As a result, “consciously or unconsciously,” Rousso contended, “all argumentation... hinges on what would allow us [historians] to come up with an answer, in one direction or the other.”<sup>4</sup> Historians in court were, thus, not free to merely supply the court with the necessary context and historical framework needed to inform a full and fair assessment of the charges and arguments, but were “hostage” to the court and its “line of questioning,” even without realizing it.<sup>5</sup> Most pressingly, it is not the historian’s job to sit in judgment, whether from the witness box or in constructing historical interpretations generally. Their task is to convey an understanding of the past on the basis of available (and often fragmented) evidence – not to absolve or condemn historical actors.

By no means is Rousso alone in his warning that history and law are incompatible exercises, and that historians should be less willing to enter court as expert witnesses. Other historians have likewise highlighted a tendency for courts to misjudge the practice of history, and overestimate the historian’s capabilities.<sup>6</sup> Graeme Davison suggests that once in court, historians can be treated

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<sup>1</sup> Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002), 49.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 49-50.

<sup>4</sup> Ibid., 59.

<sup>5</sup> Ibid., 62.

<sup>6</sup> While the topic of history as it intersects with law in the courtroom has received a great deal of scholarly attention, the specific question of the propriety or otherwise of historians acting in the role of expert witness in mass atrocity trials has not, even within famous works such as those written by Hannah Arendt and Lawrence Douglas. See, respectively, Hannah Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (London: Faber and Faber, 1963); Lawrence

as a “walking repository of facts” rather than an expert whose main function is to reach his or her own conclusions on events.<sup>7</sup> Peter Mandler, too, identifies a similar judicial prerogative in which the establishment of incontrovertible “facts” conflicts with an historian’s instincts to question and interpret their significance. The question of “why” – a vital one in historical discourse and disagreement – Mandler argues, is far less prevailing in court, since it would “paralyse any functioning judicial system,” and be “rightly repugnant to society which looks to the judicial system to decide, not to explain.”<sup>8</sup> According to Hal Rothman, historians in court must present a neutral but “usable past,” one that is both devoid of historical theory and methodology while representing more than “a mere recitation of facts.”<sup>9</sup> Michael Marrus posits a view consistent with Rousso’s criticism that historians can be held “hostage” to a court’s questions, which can differ markedly from the parameter-setting historians typically engage in at the beginning of their research, and which shapes the subsequent narrative.<sup>10</sup> And, in the same unambiguous vein as Rousso, David Rothman contends that “[t]o enter the courtroom is to do many things, but it is not to do history.”<sup>11</sup>

This article tests the claims made by Rousso and others that historians should avoid the courtroom witness box or, at least, be wary of the dangers. Through an examination of three case studies – the Frankfurt Auschwitz trial in West Germany, the Extraordinary Chambers in the Courts of Cambodia, and the International Crimes Tribunal in Bangladesh – this article contends that the role of historians as expert witnesses in mass atrocity proceedings cannot be easily generalized, nor should it be. Analysis of these three case studies provides a more nuanced and complex approach to what are traditionally presented as uncomplicated, universally-applied criticisms of historians. It argues that, on one hand, the objections made by Rousso misrepresent the Nazi crimes trial *sui generis* that was the Frankfurt Auschwitz trial, while failing to account for the engagement of historical expertise in mass atrocity trials beyond Europe in the recent past (and present). This article suggests that, paradoxically, Rousso’s criticisms are less suited to the European context that represents his purview, and apply more readily to the highly-politicized crimes tribunals outside the continent. Finally, it recognizes that the potential and ultimate importance of the proceedings themselves – in advancing citizens’ knowledge, offering victims justice, and politically legitimizing a government – should be measured in full against the hypothetically corrupting effects of historians’ engagement as experts in court.

### The Frankfurt Auschwitz Trial, 1963-1965

Beginning in December 1963, the trial of 22 men – former personnel of the Auschwitz death camp – in Frankfurt am Main, was a major event in West German history. A media sensation until its conclusion in August 1965, the Frankfurt Auschwitz trial was attended by over 20,000 people, and for many West Germans was the first time they discovered the extent of National Socialist crimes – and the word “Auschwitz.”<sup>12</sup> For contemporary West German historians, too, the trial proved to be a boon for the advancement of their profession. Engaged by the Hessian State Attorney-General Fritz Bauer, four professional historians – Martin Broszat, Hans Buchheim, Hans-Adolf

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

<sup>7</sup> Graeme Davison, “History on the Witness Stand: Interrogating the Past,” in *Proof & Truth: the Humanist as Expert*, ed. Iain McCalman, et al. (Canberra: Australian Academy of the Humanities, 2003), 56.

<sup>8</sup> Peter Mandler, “The Responsibility of the Historian,” in *Contemporary History on Trial: Europe Since 1989 and the Role of the Expert Historian*, ed. Harriet Jones et al. (New York: Manchester University Press, 2007), 15-16.

<sup>9</sup> Hal K. Rothman, “Historian v. Historian: Interpreting the Past in the Courtroom,” *The Public Historian* 15, no. 2 (Spring 1993), 53.

<sup>10</sup> Michael Marrus, “History and the Holocaust in the Courtroom,” in *Lessons and Legacies V: the Holocaust and Justice*, ed. Robert Smelser (Evanston: Northwestern University Press, 2002), 232.

<sup>11</sup> David Rothman, “Serving Clio and Client: The Historian as Expert Witness,” *Bulletin of the History of Medicine* 77, no. 1 (Spring 2003), 44.

<sup>12</sup> Devin Pendas, “I didn’t know what Auschwitz was:” the Frankfurt Auschwitz Trial and the German Press, 1963-1965,” *Yale Journal of Law & the Humanities* 12, no. 2 (2000), 397-446; Irmtrud Wojak, “Die Mauer des Schweigen durchbrochen’ Der erste Frankfurter Auschwitz-Prozess 1963-1965,” in *Gerichtstag halten über uns selbst...: Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses*, ed. Irmtrud Wojak, et al. (Frankfurt am Main: Campus, 2001), 23.

Jacobsen, and Helmut Krausnick – provided detailed written expert reports to the Frankfurt court, and appeared in the witness box to give testimony and to respond to the court’s questions. Indeed, it is widely known that the historians’ reports for the trial formed the acclaimed and influential book *Anatomy of the SS State*, published in the immediate aftermath of the trial, and which stood as a pioneering text for many decades.<sup>13</sup> For Rousso, the Frankfurt Auschwitz trial stands as an odd exception to his generalized rule that history and law were a corruptive mix. In defending his own decision not to act as an expert witness, Rousso contends that the judicial and political situation in West Germany in the 1960s created an altogether different situation to 1990s France. Contemporary history in West Germany, Rousso maintains, was “still in the midst of substantial evolution,” which at the time “had not reached a degree of maturity sufficient for this history to be able to provide magistrates with tried and true interpretative grids.”<sup>14</sup> Historians, Rousso claims, were involved at a “very early” stage of the trial in a “collaboration” with jurists, and both “were seeking a truth that they helped elaborate *together*, each with their respective methods and objectives.”<sup>15</sup> The following examination will show that these assertions – and a number of observations Rousso makes about historians as expert witnesses in court generally – are largely inaccurate.

This central argument notwithstanding, Rousso is correct that contemporary history was in its infancy in West Germany during the period leading up to the Frankfurt Auschwitz trial. Where it was attempted, historians put to one side the problematic subject matter of Jewish persecution, the research on which was severely restricted by the dearth of vital archival documents that remained in external control.<sup>16</sup> Similar problems struck the few West German prosecutors attempting to pursue justice against Holocaust perpetrators – distance from the crime scene, Cold War geographical realities, a spread of eyewitnesses throughout Europe, and populace unwilling to face its past in court.<sup>17</sup> Still, by the late 1950s, West Germans’ memories of the postwar, allied-imposed and run Nuremberg proceedings against major war criminals, and subsequent cries of “victor’s justice”, had begun to fade. In 1958, the founding of the Central Office of the State Justice Administration for the Investigation of National Socialist Crimes unveiled a renewed governmental and judicial willingness to resume prosecution of alleged Nazi criminals. In the same year, the Ulm trial of *Einsatzkommando* (members of a mass shooting squad charged with the murder of Jewish civilians in Lithuania in 1941) acted to directly link the goals of prosecutors and historians in what became a watershed event.<sup>18</sup> For the West German public, this trial heightened awareness of Nazi crimes, and, given their horrific extent, graphically illustrated the pressing need for further, domestically-run trials of Nazi criminals.

The social, political and legal context of West Germany in the late 1950s, thus, had consequences for the practices of contemporary historians. The Ulm trial required prosecutors to understand and convey to the court the unfathomable scale of killing, and the seemingly impenetrable historical background within which the crimes were perpetrated. While the scene of the crime itself was remote, and inaccessible, the *institutional* context could be reconstructed through documentary evidence.<sup>19</sup> Prosecutors faced an extraordinary task as a result. Establishing an individual’s

<sup>13</sup> The book was originally published in German as a two-volume work titled *Anatomie des SS-Staates*. Hans Buchheim, *Anatomie des SS-Staates*, vol. 1 (Munich: Deutscher Taschenbuch Verlag, 1965); Martin Broszat, et al. *Anatomie des SS-Staates*, vol. 2, (Munich: Deutscher Taschenbuch Verlag, 1965).

<sup>14</sup> Rousso, *The Haunting Past*, 65-66.

<sup>15</sup> *Ibid.*

<sup>16</sup> Astrid Eckert, *Kampf um die Akten: die Westalliierten und die Rückgabe von deutschem Archivgut nach dem Zweiten Weltkrieg* (Stuttgart: Franz Steiner Verlag, 2004).

<sup>17</sup> Werner Renz, “Auschwitz vor Gericht: Zum 40. Jahrestag des ersten Frankfurter Auschwitz-Prozesses,” *Hefte von Auschwitz* 24, (2009), 192.

<sup>18</sup> The Ulm trial of *Einsatzkommando* differed markedly from the trial of *Einsatzgruppen* (an overarching term for the killing squads) leaders held in Nuremberg in 1947-1948, imposed by American occupation authorities, and in which defendants were charged with Crimes Against Humanity. Those on trial in Ulm were not leaders of the SS, their offences relates to a single – though large-scale – crime, and faced charges of murder under West German law. Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History* (New York: Cambridge University Press, 2009).

<sup>19</sup> Eric Haberer, “History and Justice: Paradigms of the Prosecution of Nazi Crimes,” *Holocaust and Genocide Studies* 19, no. 3 (Winter 2005), 503.

culpability within an intertwining, dynamic, frequently incomprehensible institutional and command structure proved to be exceptionally challenging.<sup>20</sup> Yet, such a delineation would be essential in order to counter defendants' inevitable pleas that they acted under "superior orders" (*Befehlsnotstand*) that they were compelled to obey. For these reasons there was a pressing need to utilize historical knowledge and expertise to inform the court and to assist the prosecution in proving their case. The nature of West German law, however, only added to the complexities. There was no provision to convict individuals of crimes against humanity in West Germany – as there had been to charge those on trial at the post-war International Military Tribunal in Nuremberg – and it seems, no resolve on the part of the West German judiciary to contemplate the drafting of a new penal code that encompassed such a charge.<sup>21</sup>

As a consequence, the sole option for prosecutors seeking to convict Holocaust perpetrators was a charge of murder, or "accomplices to murder" (*Beihilfe zum Mord*). This limitation brought with it a number of unique impediments. Under section 211 of the West German Criminal Code, a murderer is defined as "anyone who kills a human being out of blood lust, in order to satisfy their sexual desire, out of greed or other base motives, maliciously or treacherously or by means dangerous to the public at large or in order to enable or conceal another crime."<sup>22</sup> Proving that the accused had followed orders to kill, irrespective of the horrific scale of the killing, would not suffice to demonstrate that murder had been committed as defined under the code. The prosecution would have to show that alleged perpetrators had killed in contravention of orders, or shown excessive brutality in carrying out their allotted tasks – even in the case of mass killings. It created a seemingly perverse situation whereby those who committed murder without demonstrating particular malice fell outside its strict legal definition. To help overcome these difficulties, the Ulm prosecutors engaged the services of two historians as expert witnesses in the trial: Hans-Günther Seraphim and Helmut Krausnick. The trial both represented the first instance in which the expertise of West German historians was utilized in Nazi crimes trials, and highlighted some of the ways in which these historians might continue to serve judicial ends. Importantly, the Ulm trial increased West Germans' reception to further trials, and led to a refusal to allow the mere passage of time to stand as a reason for inaction.<sup>23</sup> Calls to seize the immediate and diminishing opportunity of trying perpetrators on their own soil received a boost owing to a peculiarity in West German law: a 20-year statute of limitations effectively meant that after 1965, any offences committed prior to 1945 would be exempt from prosecution.<sup>24</sup>

It was within this historical context that the initial prosecutorial investigations began into crimes committed by personnel of the Auschwitz death camp. Led by Fritz Bauer and his team of prosecutors, over a two-year period from June 1959 a list of suspects was whittled down to the 22 men who would ultimately stand trial in Frankfurt. Krausnick, Broszat and Buchheim met with the Frankfurt prosecutors on November 7, 1962, prior to the beginning of the Auschwitz trial just over one year later.<sup>25</sup> Bauer – a lawyer of peerless reputation and near-public celebrity – saw the trial not only as a means to seek justice for mass murder, but as a didactic opportunity to teach the West German public about Nazi atrocities. The historians were to play a critical role in this judicial-educational process. At the November 1962 meeting, Bauer informed the three historians present that they would be invited to attend the trial by prosecutors, and from the witness box

<sup>20</sup> Adalbert Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978: eine Dokumentation* (Karlsruhe: Müller, 1979), 84.

<sup>21</sup> Rebecca Wittmann, "Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial," *German History* 21, no. 4 (2003), 508.

<sup>22</sup> Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-65: Genocide, History and the Limits of the Law* (New York: Cambridge University Press, 2006), 56; "Strafgesetzbuch (StGB) § 211 Mord," Bundesministerium der Justiz und für Verbraucherschutz, accessed September 28, 2018, [http://www.gesetze-im-internet.de/stgb/\\_211.html](http://www.gesetze-im-internet.de/stgb/_211.html).

<sup>23</sup> Renz, *Auschwitz vor Gericht*, 403; Rebecca Wittmann, "The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-65," *Central European History* 35, no. 3 (2002), 346.

<sup>24</sup> Marc von Miquel, *Ahnden oder amnestieren?: westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren* (Göttingen: Wallstein, 2004).

<sup>25</sup> A copy of this document is housed at the Fritz-Bauer-Institut. See Johannes Warlo, "Vermerk über eine Besprechung der altpolitischen Dezernenten der Staatsanwaltschaft bei dem Oberlandesgericht und der Staatsanwaltschaften Frankfurt (M.) und Wiesbaden am 7. November 1962 bei Herrn Generalstaatsanwalt Dr. Bauer," Fritz-Bauer-Institut, FAP1/BA-9.

would provide the court with “the necessary summary and classification of the entire scheme of political events at that time.”<sup>26</sup> Historians were instructed, directly, not to mention the defendants or their crimes, but to leave these parts “missing” in the historical narrative for the prosecution to fill in the trial itself.<sup>27</sup> The historians were also to produce written reports, on topics specified by the prosecution and deemed most relevant to the trial.

Though prescriptive, do the conditions under which these historians operate signify they were somehow “hostages” of the court, or of the prosecution? While Bauer’s instructions set the boundaries – the defendants were clearly off-limits – the topics suggested were broad and otherwise left entirely up to the historians to research and write. According to Gerhard Wiese, the last surviving prosecutor of the Frankfurt Auschwitz trial, it remained the prosecution’s option not to tender an historian’s report as evidence – were it viewed to be irrelevant to the matter at hand or detrimental to their case.<sup>28</sup> To this extent, the historians did need to construct what Hal Rothman terms a “usable past,” though the prosecution were no more held hostage to the historians, than the latter were to the court. The reports were pieces of supporting evidence that provided what the prosecution viewed as critical background for the case. The question of defendants’ guilt or innocence – which Rousso trumpeted as the central problem of historians in court – did not fall within the boundaries of this analysis. Indeed, Bauer deliberately excised not only this question, but any details about the defendants from the historians’ considerations.

The meeting between historians and prosecutors in November 1962, moreover, lays waste to Rousso’s claim that the two were in a “collaboration,” or that historians “helped to collect evidentiary documents.” Historians met, were issued with their brief for the trial, given instructions around boundaries, and independently conducted their research thereafter. The construction of expert reports and the indictment, by the historians and prosecutors, respectively, was barely a consultative exercise, let alone a collaborative one. Even the historians themselves adopted contrasting strategies and approaches to the construction of their reports. Buchheim’s report on the SS was, for example, cobbled together from several reports he had written over the course of the preceding decade; while Broszat’s report on the concentration camp system was original and necessitated archival research.<sup>29</sup> The prosecution, for their part, drafted the indictment – a 700-page document that contained detailed historical context, biographical particulars of the defendants, their alleged crimes and incriminating evidence – without input from the historians. For prosecutors, the indictment was *the* key piece of evidence against the defendants, while historians prepared their reports in response to specified topics and in accordance with the methods and expectations of their discipline. Evidently, historians and lawyers were not, as Rousso claims, “seeking a truth that they helped elaborate together.”<sup>30</sup>

Certainly, greater care needs to be taken not to cast the Frankfurt Auschwitz trial as a joint historical and legal endeavor. It is true, however, that the reports historians produced for the trial reflected the legal requirements Bauer faced in proving murder, surveying the overall historical context, as well as specific details that the prosecution could relate to the alleged crimes of those on trial. Where Bauer ensured that historical and legal lines of demarcation were clear, the trial process and importance of the indictment in framing the charges reinforced the trial’s historical strictures. Despite these conditions, once in court the historians were by no means at the mercy of its “line of questioning.” Indeed, a reconstruction of the historians’ time in the stand, through contemporaneous newspaper reports and other evidence, reveals that, with few exceptions, defense lawyers did not quiz the experts on the content of their reports in great detail.<sup>31</sup> Furthermore, if

<sup>26</sup> Ibid., 3.

<sup>27</sup> Ibid., 4.

<sup>28</sup> Gerhard Wiese (former Frankfurt Auschwitz trial prosecutor), interviewed by Mathew Turner at Frankfurt am Main, September 16, 2014.

<sup>29</sup> “Tätigkeitsbericht für die Zeit vom 1. Juli 1962 bis zum 30. Juni 1963,” N 1213/44, Bundesarchiv Koblenz, 7-8.

<sup>30</sup> Rousso, *The Haunting Past*, 65-66.

<sup>31</sup> Mathew Turner, *Historians at the Frankfurt Auschwitz Trial: Their Role as Expert Witnesses* (London: I.B.Tauris, 2018), 71-98. This work examines the relationship between the Frankfurt Auschwitz trial and subsequent book, *Anatomy of the SS State*, rather than the specific question of whether historians have a place in court as experts, to which this article

the historians felt pressured to respond definitively and quickly to defense lawyers' or judges' questions, and bore the weight of influencing a defendant's guilt or innocence – one of Rousso's fundamental misgivings – it was revealed neither in their responses given to the court, nor reflected in the day's press coverage.

To the extent that Rousso's cautionary approach to history and the courtroom should be applied, it is to prosecutors in the course of the trial, not historians as experts. Prosecutors in the Frankfurt Auschwitz trial, via the comprehensive written indictment, suggested that Nazi crimes were best understood through a "top down" framework. Within this model of explanation, Hitler was the architect of Nazi crimes, and Himmler, Heydrich and Eichmann (amongst others) their organizers, and subordinates – typified by the Auschwitz trial defendants – their perpetrators. This form of explanation is held by Irmtrud Wojak and Dieter Pohl as the "standard" for West German courts in the early 1960s, the subjects of which were the crimes of middle and lower ranking officials.<sup>32</sup> Legal imperatives, such as understanding where individuals fitted within Nazi power structures, overrode historiographical ones – understanding how those structures operated in practice. Ultimately and effectively, in his written judgment Presiding Judge Hans Hofmeyer determined that the genesis of the Final Solution was immaterial to the considerations of a murder trial, even one in which the killings took place within the most murderous Nazi death camp. Establishing the contribution of individuals other than those on trial was, according to the judgment, "not the task of a jury court," which was satisfied with the explanation that the "main perpetrators" (*Haupttäter*) planned, generated the conditions for, and directed the course of the Final Solution.<sup>33</sup> Still, Hofmeyer saw much to praise about the historians' role in the trial, describing their reports as "well-founded and convincing explanations" with which the court "fully concurs."<sup>34</sup> Although the ultimate findings of guilt hinged not on the historians' reports, but primarily on eyewitness testimony, Hofmeyer saw much to praise about the historians' role in the trial. He described their reports as offering "well-founded and convincing explanations."<sup>35</sup>

Perhaps even more important than the singular example of the Frankfurt Auschwitz trial, the grouping and prosecution of former personnel of particular centers of extermination – or "murder complex" – resulted in the collation of evidence and testimony that provided, and continues to provide, historians with considerable insight into other sites of atrocity such as Treblinka, Sobibor and Belzec death camps.<sup>36</sup> The historical understanding would undoubtedly have been severely limited were these trials restricted to single defendants without extrapolation of context. The post-trial book derived from historians' reports, *Anatomy of the SS-State*, proved to be one of the most influential works by German historians in the post-war era. It would be wrong, however, to expect that the authors of this work viewed the influence and imposition of the law on its structure and content in a negative light. In his introduction to *Anatomy*, Buchheim praised what he called "[t]he strict rules of the judicial proceeding" that his work and that of his fellow expert witnesses were subjected to in the Frankfurt Auschwitz trial. These rules, according to Buchheim, imposed a "standard of rationalism" on the practice of history that resulted in *Anatomy*, of which he claims historians "are in dire need."<sup>37</sup> Needless to say, such an opportunity would have been lost had

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turns.

<sup>32</sup> Irmtrud Wojak, "Die Verschmelzung von Geschichte und Kriminologie: Historische Gutachten im ersten Frankfurter Auschwitz-Prozeß," in *Geschichte vor Gericht: Historiker, Richter und die Suche nach Gerechtigkeit*, ed. Norbert Frei et al. (Munich: Beck, 2000), 34; Dieter Pohl, "Prosecutors and Historians: Holocaust Investigations and Historiography in the Federal Republic 1955-1975," in *Holocaust and Justice: Representation and Historiography of the Holocaust*, ed. David Bankier, et al. (Jerusalem: Berghahn Books, 2009), 124.

<sup>33</sup> "Urteil des Landgerichts Frankfurt am Main in der Strafsache gegen Mulka und andere vom 19./20. August 1965" in *Der Frankfurter Auschwitz-Prozess (1963-1965): Kommentierte Quellenedition*, vol. 2, ed. Raphael Gross, et al. (Frankfurt am Main: Campus Verlag, 2013), 642.

<sup>34</sup> *Ibid.*, 646.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Adalbert Rückerl, *Nationalsozialistische Vernichtungslager im Spiegel deutscher Strafprozesse: Belzec, Sobibor, Treblinka, Chelmo* (Munich: Deutscher Taschenbuch Verlag, 1977).

<sup>37</sup> Buchheim, *Anatomie des SS-Staates*, 8.

the historians involved chosen to heed the admonishments issued by contemporaries, the tone of which was not dissimilar to Rousso's view expressed 30 years later.

The four historians contributed their expertise to the Frankfurt Auschwitz trial within its opening weeks, offered scholarly authority to the legal charges, legitimacy to the government's political prerogatives, and corroboration of victims claims. While much of what Rousso has to say about the trial is inaccurate, the example more broadly suggests that historians can play a role beyond the four walls of academia, one that may advance causes greater than the mere defense of history's disciplinary boundaries: informing a nation's judicial confrontation of the past; achieving justice for victims and survivors; and raising the public's awareness of hitherto obscured mass atrocities committed in its name. Moreover, this argument is not limited or even most relevant to a single murder trial of Holocaust perpetrators within a domestic setting in the 1960s – but applicable to the many and varied tribunals and proceedings that take place around the world in response to mass atrocities committed in the twentieth century.

### **The Extraordinary Chambers in the Courts of Cambodia**

A hybrid domestic/international court, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established via an agreement between the Cambodian government and the United Nations.<sup>38</sup> It began operating on the outskirts of Phnom Penh in 2006. Its ongoing task is to try “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” of Cambodian and international law during the Khmer Rouge's regime from April 17, 1975 to January 6, 1979.<sup>39</sup> So far it has convicted three people (Kaing Guek Eav, Nuon Chea, and Khieu Samphan) of crimes against humanity, and sentenced each to life in prison. Although his focus was on Nazi crimes and Europe, Rousso warned that it was these types of trials that could be used to build the political stature of national leaders, and could be viewed as a means to restore a nation. While he intended that they apply to France, Germany, and other central and western European countries, Rousso's concerns are especially relevant to Cambodia. Where it was the prosecutorial endeavor of Bauer and others who overcame the initial public and political opposition to the Frankfurt Auschwitz trial, the ECCC was established by a government decision after negotiations with the United Nations Secretariat. Undoubtedly, the ECCC has made important strides for victims, notably through its civil party system. Yet, the establishment of the ECCC was fundamentally motivated by the Cambodian government's desire to benefit from a tribunal. This government has built much of its political legitimacy on its opposition to, and role in overthrowing, the Khmer Rouge. This point notwithstanding, many of its leaders are themselves former members of the regime. Strict limits are imposed on who can be prosecuted at the ECCC – to protect both specific individuals and the overarching narrative that only the very senior leaders of the Khmer Rouge were responsible for the crimes of the regime.

This level of politicization, however, has not dissuaded academics, including historians, from becoming involved in what amounts to a project of Khmer Rouge accountability.<sup>40</sup> Scholars had campaigned for a tribunal to try the Khmer Rouge leaders, have assisted judges during its establishment, been employed by both the prosecutors' and investigating judges' offices, and testified before the court. Indeed, some academics have fulfilled a number of these roles at different times. Prior to the ECCC, historians acted to oppose the Khmer Rouge though rarely made judgments of individual culpability. One report, *Seven Candidates for Prosecution*, was authored in 2004, before the ECCC came into being. As its title suggests, the report examined the possible evidence against seven suspects, although it did not make an explicit pronouncement of guilt.<sup>41</sup> Since the Khmer

<sup>38</sup> “Home page,” Extraordinary Chambers in the Courts of Cambodia (ECCC), accessed August 13, 2018, <https://www.eccc.gov.kh/en>.

<sup>39</sup> Kingdom of Cambodia, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/1004/006, 27 October 2004.

<sup>40</sup> It is difficult to limit this discussion to only those who identify as historians since the expert witnesses involved have applied history, political science, and anthropology to their studies of the Khmer Rouge past.

<sup>41</sup> Stephen Heder with Brian Tittamore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2004).

Rouge were afforded Cambodia's seat at the UN throughout the 1980s, an academic interest in Cambodia also took on an advocacy dimension at this time for many scholars. Some of this activism evolved into seeking justice for the crimes of the Khmer Rouge years before the creation of the ECCC. Still, it was not clear precisely what role historians would play in the proceedings themselves. Certainly, the ECCC was not preceded by an equivalent of Bauer's explicit instructions issued to historians prior to the Frankfurt Auschwitz trial. No particular report or document set out and limited the role that historians' might play in the ECCC proceedings. Although the role of individual historians remained uncertain, the existing historical scholarship on the Khmer Rouge was placed on the case file before the court.

Primarily structured along the lines of a civil law system, under the ECCC expert witnesses are called by the Trial Chamber rather than by the prosecution or defense teams. While the parties may recommend individual experts, the judges decide whom to call, and they themselves conduct the initial questioning. The role of historians has often been to give the broader picture, to discuss nationwide policies, and (in direct contrast to their role in the Frankfurt Auschwitz trial) to elaborate on the role of the accused. With expertise in Khmer Rouge prison networks and political slogans, historian Henri Locard appeared before the Trial Chamber.<sup>42</sup> Specifically, Locard was questioned on the different categories of prisons around the country, their similarities and differences, the few archives that remain from some prisons, and the role and importance of political slogans in Khmer Rouge ideology. Since the Khmer Rouge was a secretive and paranoid regime, historians have played an important role in establishing the specific responsibility of the leaders on trial. David Chandler, in particular, testified during a phase of the Case 002 trial – one that focused on the nationwide political, military and communication structures that existed during the Khmer Rouge period.<sup>43</sup> As well as addressing the subject of his expertise – security centers – his testimony revealed the code names of various individuals, helped to determine the authorship of key Khmer Rouge documents, and examined how the regime's Central and Standing Committees functioned. It was especially important to set out the role of Khmer Rouge leaders for the court, since the death of Pol Pot in 1998 had provided an opportunity for surviving leaders to claim that responsibility for killings lay solely with the former Communist dictator. As a case in point, one of the defendants, Khieu Samphan, asserted that his role as head of state was largely symbolic. To this end, historians such as Chandler helped enable the court to establish defendants' leadership roles within complex structures.

Not only has historians' knowledge been used to build a case against defendants in a highly politicized trial of national redemption – surely Rousso's worst historico-judicial nightmare – the ECCC has also served as a forum to play out longstanding disputes within Cambodian historiography. For instance, historian Michael Vickery was known for his vocal criticism of what he termed the "Standard Total View" of the Khmer Rouge period: presenting the Khmer Rouge as a homogenous monolith within a national story of victimhood that ignored regional variations. Vickery was hired as a consultant by the defense team for Ieng Sary, the Khmer Rouge's foreign minister.<sup>44</sup> The impact of Vickery's advice was felt keenly and came to be reflected in defense questioning of academics such as Chandler and anthropologist Alex Hinton. In so doing, the ECCC became an opportunity to add a legal framework to these existing historiographical debates.<sup>45</sup> Although the court made no explicit judgment on these arguments, it did largely endorse current – and predominant – historical interpretations. Additionally, despite the ECCC being a court located in Cambodia, with a majority of Cambodian judges, there has been only limited involvement from Cambodian historians. Partly, this stems from the ongoing

<sup>42</sup> Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 431," Case File 002/19-09-2007-ECCC/TC, E1/450.1, July 28, 2016.

<sup>43</sup> Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 79," Case File 002/19-09-2007-ECCC/TC, E1/91.1, July 18, 2012.

<sup>44</sup> Post Staff, "Historian Joins Ieng Sary Defense Team," *Phnom Penh Post*, February 8, 2008, accessed August 13, 2018, <https://www.phnompenhpost.com/national/historian-joins-ieng-sary-defense-team>.

<sup>45</sup> Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 383," Case File 002/19-09-2007-ECCC/TC, E1/402.1, March 15, 2016, 114.

political sensitivity of the Khmer Rouge era, one that is potentially dangerous for local academics to explore. One exception is the Documentation Center of Cambodia (DC-Cam), a local NGO that has conducted research into the Khmer Rouge era and supplied many documents to the ECCC. The DC-Cam director Youk Chhang and deputy director Dara Peou Vanthan have testified before the court in January and February 2012, primarily on questions surrounding chains of custody and authenticity of documents. This testimony did include a contentious discussion of whether it was possible that Vietnamese officials had destroyed documentary evidence during the 1980s, a period in which they had a strong tutelary relationship with the Cambodian government.<sup>46</sup> Similar questions arose during the testimony of other experts, including Locard, but the court has shown little interest in unravelling the complex issues, and, at times, has acted to shut down such exchanges.<sup>47</sup> Nonetheless, while the ECCC's work has political undertones and implications, and these elements have impacted the contribution of historians to the proceedings, the engagement of such experts has brought some benefits.

Indeed, and in a rather stark contrast to the Frankfurt Auschwitz trial's written judgment, at least two cases tried at the ECCC reveal the extent to which historians' expertise contributed to the judicial outcome. The judgments for Case 001 and Case 002/01, respectively contain 72 and 117 references to Chandler's testimony.<sup>48</sup> The latter trial's judgment, moreover, contains 149 references to Stephen Heder's scholarship, and 142 references to the testimony and work of historian-cum-journalist Philip Short and his book *Pol Pot: Anatomy of a Nightmare*.<sup>49</sup> These references occur most frequently in parts of the judgment that address national-level policies and structures. The role of historians, additionally, cannot be neatly separated from that of the ECCC itself as a mechanism for justice and contributor to a national narrative. For decades, no one was held to account for the crimes of the 1970s, and there was no real attempt to gain a greater understanding. One consequence is that many younger Cambodians know very little about the Khmer Rouge regime. Even amongst those who lived through it, one question persists: "why did Khmer kill Khmer?" It reflects a fundamental lack of historical understanding as to how more than a quarter of the country's population could have been killed by their own leaders. This was quantified through a 2008 survey, which found that 82% of participants stated they wanted to know more about what happened during the Khmer Rouge regime, with a similar number agreeing that there cannot be reconciliation without knowing the truth.<sup>50</sup> Within this context, then, the role of history and historians at the ECCC takes on a significance beyond the trial of mass murder.

The ECCC appears to embody many of the concerns voiced by Rousso and other historians. The Cambodian government is actively working to mold the history of the Khmer Rouge period for its own ends, and the ECCC has formed one critical element of this process. It is also the case that the judicial setting shapes and, at times, restricts, what historians can and cannot say, including deeper examination of profound historiographical questions. Most concerning for Rousso, perhaps, would be the extent to which historians have directly commented on the role and culpability of those individuals on trial – well and truly exceeding what Rousso has set out to be the historian's mandate. Many of the most prominent historians of the Khmer Rouge period have testified as expert witnesses, yet there has been no signs that these engagements have led to any corruption of historical scholarship on the subject. Perhaps far more significantly, the ECCC has opened up space for conversations at individual and societal levels about the past. The change is tangible. In the early 1990s, Khmer Rouge history disappeared from the school curriculum as a result of political

<sup>46</sup> Trial Chamber, ECCC, "Transcript: Day 27," 002/19-09-2007-ECCC/TC, E1/39.1, February 6, 2012, 28-33.

<sup>47</sup> Trial Chamber, ECCC, "Transcript: Day 433," 002/19-09-2007-ECCC/TC, E1/452.1, August 1, 2016, 76.

<sup>48</sup> Trial Chamber, ECCC, "Judgement," 001/18-07-2007/ECCC/TC, E188, July 26, 2010; Trial Chamber, ECCC, "Case 002/01 Judgement," 002/19-09-2007/ECCC/TC, E313, August 7, 2014.

<sup>49</sup> Trial Chamber ECCC, *Case 002/01 Judgement*.

<sup>50</sup> Phuong Pham et al., *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Center, University of California, Berkeley, 2009), 26; Phuong Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Center, University of California, Berkeley, 2011), 31.

considerations. Just a year after the ECCC began its operations, in 2007, DC-Cam published its own textbook about the Khmer Rouge period. This work has since been progressively integrated into the Cambodian high school curriculum.<sup>51</sup> Importantly, the presence of the ECCC in Cambodia – within which historical experts play a substantial role – has created space for history itself, and historical education, to be part of the justice process.

### International Crimes Tribunal in Bangladesh

There are both remarkable similarities and striking differences between the ECCC in Cambodia and the International Crimes Tribunal (ICT) established in Bangladesh. Both began operating around the same time – the year 2009 in the case of the ICT – with the aim of trying crimes committed in the 1970s. Specifically, the ICT was created to investigate atrocities committed during the 1971 Liberation War, during which Bangladesh became independent from Pakistan. The Bangladeshi government claims that three million people were killed by the Pakistani army and the local militia groups they recruited.<sup>52</sup> As a result of domestic and international factors, it was only the ascension of the Awami League-led coalition into power in 2008 that proved to be the catalyst for the ultimate formation of the ICT.<sup>53</sup> As well as undertaking as part of its electoral platform the establishment of a war crimes tribunal, to a large extent the Awami League draws its political legitimacy from its role as a leading force in the liberation movement. How the Liberation War is and should be remembered in Bangladesh remains a dominant issue in the country's politics. For its part, the ICT is thoroughly enmeshed in this political environment. The politicization of trials – or the allegation of it – has continued to shadow the Tribunal. Notably, accusations of political opportunism have been leveled because members of the opposition political parties – the Bangladesh Nationalist Party and Jamaat-e-Islami – have been the Tribunal's primary defendants.

To date, the ICT has convicted and executed six people, with more than 50 others convicted and sentenced to terms of imprisonment, or to death.<sup>54</sup> Despite its name, the ICT is a domestic court trying international crimes, and only has jurisdiction over perpetrators in Bangladesh.<sup>55</sup> It has largely been maligned internationally owing to its application of the death penalty, and to what is viewed as a low standard of procedural justice.<sup>56</sup> Witnesses have been intimidated, laws have been changed retroactively, and people outside the court have contributed to its verdicts.<sup>57</sup> Domestically, however, the ICT has been the subject of impassioned, divisive and bloody confrontation. Mass protests against what were viewed as overly lenient or excessively severe sentences have brought tens of thousands of people into the streets, and led to 78 deaths.<sup>58</sup> Since these verdicts are in some way influenced by historical experts, for those who argue that historians should excuse themselves from court the ICT may well be seen as the singular expression of their every argument.

Nonetheless, it would be an error – one committed all too readily by Rousso and others – to generalize about the impropriety of historians acting as expert witnesses in trials of national

<sup>51</sup> Pin Sisovann, "Prime Minister Orders Recall of Textbooks," *Cambodia Daily*, April 29, 2002, accessed August 13, 2018, <https://www.cambodiadaily.com/news/prime-minister-orders-recall-of-textbooks-31833/>; Dy Khamboly, *A History of Democratic Kampuchea (1975-1979)* (Phnom Penh: Documentation Center of Cambodia, 2007).

<sup>52</sup> Suzannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation," *Criminal Law Forum* 21 (2010), 194.

<sup>53</sup> Morten Bergsmo and Elisa Novic, "Justice after Decades in Bangladesh: National Trials for International Crimes," *Journal of Genocide Research* 13, no. 4 (2011), 503.

<sup>54</sup> PTI, "Bangladesh Sentences to Death Six 1971 War Crimes Accused," *The Indian Express*, November 22, 2017, accessed March 16, 2018, <https://indianexpress.com/article/world/bangladesh-sentences-to-death-six-1971-war-crimes-accused-4949505/>.

<sup>55</sup> The International Crimes (Tribunals) Act 1973, Act No. XIX of 1973, July 20, 1973; The International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14th July, 2009).

<sup>56</sup> See, for example, Human Rights Watch, "Bangladesh: War Crimes Verdict Based on Flawed Trial," March 22, 2016, accessed August 13, 2018, <https://www.hrw.org/news/2016/03/22/bangladesh-war-crimes-verdict-based-flawed-trial>.

<sup>57</sup> Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (Sarajevo: International Forum for Democracy and Human Rights) 2015.

<sup>58</sup> Julfikar Ali Manik and Jim Yardley, "Islamist's Death Sentence Sets Off Riots in Bangladesh," *New York Times*, February 28, 2013, accessed March 19, 2018, <http://www.nytimes.com/2013/03/01/world/asia/islamic-leader-sentenced-to-death-in-bangladesh.html>.

importance without scrutiny of individual examples. In part, and in relative terms compared to the previous two examples, the history of the Liberation War and the roles of the accused have been largely known. Though infrequent, historical experts have testified before the tribunal. Muntassir Mamoon, professor of history at Dhaka University, gave expert testimony from July 1, 2012 in the case against former Jamaat-e-Islami leader Ghulam Azam. He particularly discussed the relationship between the accused, local paramilitary groups, and the Pakistani army, including the power of political speeches in encouraging violent acts.<sup>59</sup> War crimes researcher Shahriar Kabir testified in August and September 2012 in the case against Jamaat-e-Islami Secretary General Ali Ahsan Mohammad Mojaheed. Kabir's testimony examined how the identity cards carried by members of paramilitary groups, and signed by Jamaat-e-Islami leaders, linked the two organizations. Moreover, Kabir set out historical evidence that, in his view, demonstrated that the accused attended rallies and urged people to join paramilitary groups.<sup>60</sup> Thus, historians at the ICT have not restrained themselves from pronouncements about defendants' guilt or innocence, the organizations to which they belonged, and the role of the tribunal itself. During his testimony, for example, Kabir characterized Jamaat-e-Islami as "an organisation of war criminals, mass murderers and people who committed crimes against humanity."<sup>61</sup> He urged the tribunal to put the organization itself on trial.<sup>62</sup> In media commentary after the verdict was read in a different case, historian Muntassir Mamoon thanked the protestors who had mobilized in support of the death penalty at the tribunal.<sup>63</sup> Such a gesture indicates that Mamoon was not concerned with keeping a neutral public stance on what he thought should be the role of the tribunal. These types of comments have drawn defense counsel scorn, with both Kabir and Mamoon accused of a political bias against Jamaat-e-Islami that was reflected in their testimony and post-verdict pronouncements. While both scholars – prominent historians of the Liberation War – deny any accusation of political bias, they also clearly reject the type of concerns voiced by Rousso and others that historians should avoid, at all costs, involvement in highly politicized trials. On the contrary, they have embraced the ongoing judicialization of the past through the ICT, and sought in the most vocal ways available to highlight its political and social necessity.

Not all public figures have had such a positive relationship with the ICT, however. In 2014, British journalist David Bergman, who writes for a Bangladeshi English-language newspaper, was found to be in contempt of court for blog posts he wrote about one of the tribunal's judgments. The point of discontent was, namely, that Bergman had questioned the government-approved death toll of the Liberation War. He was fined and briefly detained. In response, 52 Bangladeshi scholars and activists from backgrounds including history, political science, and law, penned a statement opposing this ruling and its impact on freedom of expression.<sup>64</sup> The ICT, in turn, demanded an explanation from those who signed the letter for this action they claimed "belittled the authority and institutional dignity of the Tribunal."<sup>65</sup> Some signatories chose to withdraw their support and apologize, but others – including academics who had authored expert reports for the tribunal – had contempt proceedings brought against them. All were ultimately acquitted and issued with a caution.<sup>66</sup> The severity of the ICT's response to this criticism is indicative of the central place

<sup>59</sup> Staff Correspondent, "Peace Committee got Support from Pakistan Govt," *The Daily Star*, July 5, 2012, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-240977>.

<sup>60</sup> Staff Correspondent, "Razakars had ID cards Signed by Nizami," *The Daily Star*, September 11, 2012, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-249302>.

<sup>61</sup> Staff Correspondent, "Jamaat a Party of War Criminals," *The Daily Star*, February 13, 2013, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-268926>.

<sup>62</sup> Ibid.

<sup>63</sup> "Best Verdict So Far," *The Daily Star*, May 10, 2013, accessed March 16, 2018, <http://www.thedailystar.net/news/best-verdict-so-far>.

<sup>64</sup> "Bangladesh: Statement of Concern from Scholars, Writers and Activists Regarding Tribunal's Contempt Judgment on David Bergman," *South Asia Citizens Web*, December 19, 2014, accessed March 16, 2018, <http://www.sacw.net/article10212.html>.

<sup>65</sup> Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment," *Journal of Genocide Research* 17, no. 2 (2015), 216.

<sup>66</sup> Bina D'Costa, "Of Impunity, Scandals and Contempt: Chronicle of the Justice Conundrum," *International Journal of*

the Liberation War, and concurrent Bangladeshi suffering, occupy in the nation's recent history. Judgments have referred to the "undisputed" or "settled" history, asserted that local collaborators "acted as traitors," and maintained that this claim needed "no further document to prove."<sup>67</sup> The emotional value attached to these events is also reflected in the language of the written judgments, one of which refers to the Liberation War as the "blood-soaked history of the birth of our dear motherland."<sup>68</sup> These snippets reveal the degree to which the ICT is willing to openly acknowledge history's role in its functions.

The witness box in such a courtroom, it might be assumed, would be avoided at any cost by historians. The example of the ICT in Bangladesh, arguably, embodies all that Rousso and others counseled against. It is a series of highly politicized and publicized trials, which act to appropriate, legitimize, and endorse particular national histories. Professional historians willing to offer expertise to this body may – and, for the most part, are expected to – comment on guilt or innocence of defendants, even at the risk of inciting widespread and deadly violence. Moreover, the historians themselves face the possibility of criminal charges, even imprisonment, should they be seen to undermine the "authority" and "dignity" of the Tribunal. Yet, some of the most prominent historians of the Liberation War have not merely and openly expressed fervent support for the Tribunal, but called for its mandate to be extended beyond individual defendants, to encompass the prosecution of entire political organizations.<sup>69</sup> Though clearly emotionally-laden, even politically motivated, the historians' comments and pronouncements by members of the Tribunal do not necessarily diminish its overall value – neither as a means to reckon with the violent past from which the Bangladeshi state was created, nor that of the ostensibly blinkered historical narratives that emerge from its expert witnesses or written verdicts. Some of the Tribunal's methods – and particularly the use of legal force to inhibit external discussion of its role and accuracy of its historical conclusions – must be roundly condemned. Tellingly, although there could scarcely be a more hostile environment for the practice of history than the ICT witness box, their commentary after the fact suggests none of the historians who entered it would likely describe their experiences as akin to having been "held hostage" to the court's questioning, as Rousso graphically portended might be the case. For the historians who did appear at the ICT, admittedly, their job has been made easier by the reality that their historical views largely squared with those advocated by the Tribunal itself. Nonetheless, as was the case in West Germany and Cambodia, the ICT's dispensing of (albeit procedurally flawed) justice, its further raising of public awareness of the events in question, judicial redemption on a national level, and promotion of further academic enquiry into the events, represent potentially beneficial outcomes that may be aided through the injection of historians' expertise.

## Conclusion

Rousso's decision not to testify in trials for French Vichy-era crimes and his public writings setting out a rationale for this stance are well-known. In fundamental ways, Rousso's position has shaped the ensuing debate around the involvement of historians in mass atrocity trials, one that played out mostly in a European context. Through an examination of three case studies, this article tested Rousso's thesis that such proceedings are anathema to the practice of history and that, consequently, historians should avoid the witness box and the role of courtroom expert.

This article contends that the situation is more complex than that presented by Rousso, who overlooks a number of considerations. Not all tribunals and trials of mass atrocities are the

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*Transitional Justice* 9 (2015), 359; *The State v. Editor, the Daily Prothom Alo and Others*, ICT-Bd, Miscellaneous Case No. 04 of 2014.

<sup>67</sup> International Crimes Tribunal-2, "The Chief Prosecutor vs. Ali Ahsan Muhammad Mujahid," ICT-BD Case No. 04 of 2012, July 17, 2013, 124; ICT-1, "The Chief Prosecutor vs. Obaidul Haque alias Taher and Aatur Rahman alias Noni," ICT-BD Case No. 04 of 2014, February 2, 2016, 42, 252; ICT-2, "The Chief Prosecutor vs. Syed Md. Qaiser," ICT-BD Case No. 04 of 2013, December 23, 2014, 7.

<sup>68</sup> ICT-1, "The Chief Prosecutor vs. Md. Moslem Prodhan and Syed Md. Hussain alias Hossain," ICT-BD Case No. 01 of 2016, April 19, 2017, 251.

<sup>69</sup> Staff Correspondent, *Jamaat a Party of War Criminals*.

same. There are considerable differences between legal systems, rules of evidence, definitions of criminal offenses, overarching political and social goals, and the use of expert witnesses – historian or otherwise. Moreover, Rousso’s argument that an historian’s duty is to enhance historical knowledge, rather than to judge individuals on trial, neglects the understandings of the past that have been developed from proceedings to which historians have – to various extents and in different ways – contributed their expertise.<sup>70</sup> Mass atrocity trials and tribunals have opened up discussions about national histories within public and private spheres, as well as at international and domestic levels. Such proceedings have led to the unearthing of evidence and reinvigoration of scholarship. Through their testimony, historians have revealed much about where individuals and organizations fit within complex structures of power. Historians can offer a judge or jury insight into such matters – as they have in all three case studies presented – and such outcomes can also immensely benefit historical scholarship. Where evidence has failed to emerge it is that which might be used to support a view that history has been corrupted, or that historians have been “held hostage” by the court. That this has proven not to be the case even in highly politicized trials of contemporary relevance, in which deliberate attempts are made to cultivate a particular narrative, adds further doubt to the claim by Rousso and others that history stands to lose from the engagement of its practitioners in court.

Certainly, the situation is more complicated than many of the warnings issued by Rousso and others might indicate. The three case studies examined in this article suggest that it is unhelpful to generalize about the social, political and historiographical value of mass atrocity trials in which historians’ expertise is sought and utilized. Neither a blanket condemnation nor an unqualified endorsement can be issued. Trials that are designed to engender national catharsis – the very kind that Rousso advocated historians avoid – will inherently judicialize the past, and may instrumentalize historians’ expertise and testimony. It is too simplistic, however, to denounce such instrumentalization outright: even where a proceeding is intentionally designed to endorse a narrative that serves the political legitimacy of an authoritarian party, as in the case of Cambodia. Plainly, this is not the only use to which history has been put in these nations. The tribunals also provide a means to deepen general and scholarly understanding of mass crimes, including genocide, to recognize past wrongs, acknowledge forgotten victims, and to mete out long-awaited justice. Clearly, and if nothing else, a robust and instinctive defense of what may be seen as the limits of historians’ public and professional responsibilities, and boundaries of their craft – such as that undertaken by Rousso – must simultaneously take into account these potentially constructive outcomes.

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<sup>70</sup> For one example see Regina Rauxloh, “Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining,” *International Criminal Law Review* 10 (2010), 739-770.

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