

## Book Review: Writing History in International Criminal Trials

by Blog Admin

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*In this engaging and accessible book, **Richard Ashby Wilson** addresses key questions related to the legal relevance of history in international criminal trials. Should history play a role in trials, what form should it take, and why does it matter? What can history explain about criminal accountability, crimes under international law, and conflict? Reviewed by **Tara O'Leary**.*



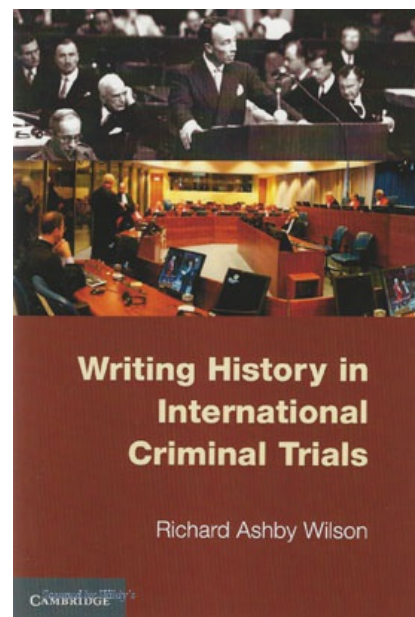
**Writing History in International Criminal Trials. Richard Ashby Wilson. Cambridge University Press. March 2011.**

International criminal law has a simplistically noble aim: to determine whether suspected perpetrators are criminally responsible for crimes under international law – crimes including genocide, crimes against humanity, war crimes, torture and enforced disappearance, amongst others. International criminal trials have been marked by the formalisation of legal institutions, improved allocation of resources, increased frequency and an ever-greater visibility in the 20 years since the atrocities of Bosnia and Rwanda shocked us all, but this relatively new area of legal practice is often misunderstood, and has been subject to unprecedented degrees of criticism and continuous accusations of politicisation.

Burdened not only by accusations of victors' justice dating back to the Nuremberg trials, but by the mythologizing, rhetoric and denials of many accused perpetrators, international justice efforts have been applauded and discredited in equal measure. Whether crimes of this magnitude are tried at international courts, such as the tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), or at the International Criminal Court (ICC), or by national courts under domestic legal proceedings, the trials remain controversial. Serious ethical, social and political questions are raised by the spectre of passing judgment on the larger historical events which give rise to such crimes: unspeakable acts which often take place during unimaginable conflicts, seemingly beyond any rational explanation.

Against this background [Richard Ashby Wilson](#), Director of the Human Rights Institute at the University of Connecticut, attempts to assess the specific role of history in the phenomenon of international criminal justice. Questioning the general consensus of commentators "that courts of law produce mediocre historical accounts of the origins and causes of mass crimes", Wilson spans the range of caselaw from Nazi figures at Nuremberg to Charles Taylor at The Hague, builds on extensive interviews and surveys carried out with staff of international tribunals, and draws on social science methodology (he freely admits that he is "neither a lawyer nor a historian") to evaluate critically the many and varied forms by which history interacts with law, conflict and atrocity.

On one side, legal practitioners fear that judicial attempts to write history will interfere with the exceptionally high standards of procedural fairness required from international criminal trials. At the same time, historical scholars argue that any court attempting to define history will fail due to the inherent limitations of the legal process. Wilson's description of systematic state interference in the work of the



ICTY and ICTR demonstrates that some concerns are well-founded: detailed discussion of reprehensible conduct by Serbia and Rwanda, in particular, illustrates the devastating impact of national policies of mythmaking on impunity and accountability.

However, the immensely complex forms, arguments, intentions, outcomes and legacies to which history can contribute become abundantly clear throughout the course of the book. Wilson's basic argument is that some form of historical inquiry and context is simply unavoidable. This is partly related to the inherently collective nature of the crimes concerned: it is difficult to imagine proving the special intent and discriminatory intent required of a perpetrator of genocide, for example, without "an account of intergroup relations over time".

Complex and highly specific forms of intent, burdens of proof and modes of liability make historical inquiry unavoidable because both prosecution and defence teams will logically draw on background information to advance their respective cases. One of Wilson's central findings is that where additional elements of intention are required of a perpetrator – as for genocide or crimes against humanity, for example – a trial is more likely to feature historical evidence, and that evidence to be "intensely contested by the opposing parties".

Wilson's detailed analysis of the use and role of history at the ICTY, particularly in *Tadić*, its first case, is instructive and possibly unusual in the literature of the Tribunal's work. The first 69 pages of the judgment of the Trial Chamber in *Tadić* dealt with Balkan history, as "based entirely on expert-witness testimony", setting out a grand narrative of the Balkan conflicts which was later relied upon in successive cases. Wilson points out that historical evidence was, appropriately, given "little casual or determinative weight" by judges, but later notes heavy reliance upon it in relation to genocide charges against Milošević. Ultimately, the specific extent to which historical evidence impacted upon determination of the guilt or innocence of the accused at the ICTY remains elusive, alongside the question of to what extent judges themselves can be influenced by historical testimony and debates.

Wilson wisely refuses to advocate for an increased role for history or historians in international trials; he recognises the potentially contradictory functions of law and history which, if expanded, could run the risk of clouding legal mandates, sapping scarce court resources and further delaying already lengthy proceedings. While seeking to analyse and improve upon the existing framework of historical inquiry, he argues that international courts in their current form are ill-equipped to implement mandates other than strict determinations of individual criminal responsibility, such as conflict-resolution, reconciliation and deterrence, perhaps a disappointing conclusion from the perspective of the victims of such crimes.

That the book raises far too many issues and questions than can be referenced in a single review stands as testament to Wilson's prolific research and the creativity of his approach. His investigation of the roles of expert witnesses and his practical recommendations for the improved creation, presentation and reception of historical evidence are particularly constructive. However, in addition to procedural intricacies Wilson develops rich, multi-faceted perspectives on justice, conflict, narratives of ethnicity, nationalism and mythmaking as well as the role of the international community, which will be of as much interest to onlookers as to those already working inside the sphere of international justice.

Why does any of this matter? As put by a prosecutor involved in the trial of General Radislav Krstić, a senior figure in the Bosnian Serb army who was convicted of aiding and abetting genocide for his role in the Srebrenica massacre: "The judges looked to history to make more sense of the crimes [...]. It is an appropriate backdrop, since you just don't kill that many people without a context."

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