

ARTICLES

New Evidence: The Aesthetics of International Law

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Abstract

A war crimes trial embodies a combination of representational and presentational drama. The contemporary war crimes trial owes equal inspiration to the ‘realism’ of Henrik Ibsen and the ‘theatrics’ of Bertolt Brecht. The question for scholars is whether the trial is but a stylized presentation of the ‘real’ events, or a realistic medium through which to eavesdrop on history. This essay explores this question of war crimes and dramatization in the context of *Director of Public Prosecutions v. Polyukhovich*, the one war crimes case ever taken to trial under Australia’s War Crimes Amendment Act of 1988.

Key words

war crimes; theatre; drama; aesthetics; trial

I. AESTHETICS OF THE LAW

Despite the number of prosecutions underway in The Hague, Arusha, Sierra Leone, and in domestic courts around the world, war crimes cases remain rarified legal events.¹ As forums for evidencing the extremes of human behavior, each case presents a unique dramatization of wartime actions – reflecting large historic conflict as well as localized incidents of violence.² A war crimes trial, with all of its

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1. For a relatively comprehensive review of cases from international and domestic tribunals, see W. A. Schabas, *Genocide in International Law* (2000), 345–446. See also, T. Meron, *War Crimes Law Comes of Age* (1998); G. Best, *War and Law Since 1945* (1997); M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992); T. L. H. McCormack and G. J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (1997).
2. Much has been written on the relationship between law and theatre, although the focus of much of the scholarship has been on courtroom dramas played out on stage or screen. The distinction between ‘law in theatre’ and ‘law as theatre’ roughly follows the similar distinction found in the ‘law and literature’ scholarship. See I. Ward, *Law and Literature: Possibilities and Perspectives* 3 (1995) (explicating the distinction between ‘law in literature’ and ‘law as literature’). For more theoretical reflections on law and legal process as a form of theatrical communication, see J. E. Simonett, ‘The Trial as One of the Performing Arts’, (1966) 52 *Am. Bar Assoc. Journal* 1145; M. S. Ball, ‘The Play’s the Thing: An Unscientific Reflection on Courts Under

conventions embodied in the law of evidence and the rules of procedure,³ is therefore a special form of theatre.⁴ Like all theatre it can be described, as Aristotle did in his *Poetics*,⁵ as an imitation of human action.⁶ This essay explores the aesthetics of that imitative experience.

In analyzing a trial – especially a complex war crimes trial raising international issues, specific communal conflict, and domestic procedure – lawyers experience the pleasure and pain of interpretation.⁷ Just as one might attend ten Shakespeare festivals in one season and see ten different and equally correct productions of *A Midsummer Night's Dream*,⁸ so might one come away from ten war crimes trials feeling differently about the trial process and the events depicted there. Scholars observe the law like an audience,⁹ through an invisible fourth wall along the curtain line;¹⁰ that is, in their engagement with the subject they are part of the dramatic legal developments even as they are detached observers of the scene. As such they are similar to all theatrical spectators in that they are in a real sense participants in the process that they observe, 'piec[ing] together narrative information to fill in gaps about the past and anticipate the outcome of the plot.'¹¹ More importantly, international lawyers embarking on an analysis of a war crimes trial experience the paradox of all audiences: acknowledging the artificiality of the theatre

the Rubric of Theatre', (1975) 28 *Stanford L. Rev.* 81; K. Sielicki, 'Stagecraft, Rhetoric, Debate', (1990) 2 *Cardozo Studies in Law and Lit.* 217; D. Seymour, 'Letter from Shylock: Reflections on my Case', (1997) 8 *Law and Critique* 215.

3. On the law of evidence as theatrical convention, see J. Cornett, 'The Treachery of Perception: Evidence and Experience in *Clarissa*', (1994) 63 *U. Cin. Law Rev.* 165; J. Mnookin and N. West, 'Theatres of Proof: Visual Evidence and the Law in *Call Northside 777*', (2001) 13 *Yale J. L. & Hum.* 329.
4. On war crimes cases as theatre with a consistent symbolic message, see E. Morgan, 'Retributory Theatre', (1988) 3 *American U. J. Int. Law and Policy* 1.
5. Aristotle, *Poetics*, chs. V, VI (tr. S. H. Butcher) (1995), online: <http://libertyonline.hypermall.com/Aristotle/Poetics.html> ('Comedy is, as we have said, an imitation of characters of a lower type – not, however, in the full sense of the word bad, the ludicrous being merely a subdivision of the ugly . . . Tragedy, then, is an imitation of an action that is serious, complete, and of a certain magnitude; in language embellished with each kind of artistic ornament, the several kinds being found in separate parts of the play; in the form of action, not of narrative.'). See also, C. B. Schmitt, *Aristotle and the Renaissance* (1983).
6. See also the famous description of drama in W. Shakespeare, *Hamlet*, III, ii, 17–19 ('. . . the purpose of playing, whose end, both at first and now, was and is, to hold, as 'twere, the mirror to nature.'). For a contemporary explanation of Hamlet's point, see T. Whitaker, 'Holding up the Mirror: Deception as Revelation in the Theatre', *Social Research* (Fall 1996), online: http://www.findarticles.com/p/articles/mi_m2267/is_n3_v63/ai_18888989 ('. . . the purpose of playing is to hold the mirror up to "playing"').
7. See, most prominently, O. Fiss, S. Fish, R. Cover, and R. H. Weisberg, 'Legal Modes of Interpretation: Principled, Political or Nihilistic?', Panel on Law and Humanities, 1984 AALS Annual Meeting, San Francisco, 7 January 1984; S. Fish, 'Interpretation and the Pluralist Vision', (1982) 60 *Texas Law Review*; O. Fiss, 'Objectivity and Interpretation', (1982) 34 *Stanford Law Review*; W. J. T. Mitchell (ed.), *The Politics of Interpretation* (1983).
8. M. Greenwald, R. D. Pomo, R. Schultz, and A. M. Welsh, *The Longman Anthology of Modern and Contemporary Drama: A Global Perspective*, Appendix B, 'Styles and Conventions' (2004).
9. This seems appropriate considering that scholars often suffer a dearth of audience themselves. J. Unsworth, 'The Crisis of Audience', Annual Meeting of the American Library Association, 2004, online: <http://www3.isrl.uiuc.edu/~unsworth/sparc.2004.html> ('When my daughter Eleanor, now 15, was about three years old, she had an imaginary friend. One day I asked her friend's name. 'Audience,' she said. Today, Eleanor has real friends: it's the humanities scholar who has an imaginary audience.').
10. L. A. Brown, 'The Theatrical Experience', David Lipscomb University, online: http://larryavisbrown.homestead.com/files/IntroTheatre/THEATRICAL_EXPERIENCE.htm; see generally, R. Cohen, *Theatre* (2003), ch. 8 ('Theatre of the Fourth Wall Removed').
11. Brown, *ibid.*

while simultaneously convincing themselves of the stark reality of the re-enacted events.¹²

It is the theory of this essay that a war crimes trial embodies a combination of what theatre critics have labeled representational and presentational drama.¹³ That is, the contemporary war crimes trial is a production, a mode of communication, that owes equal inspiration to the ‘realism’ championed by Henrik Ibsen and the ‘theatrics’ championed by Bertolt Brecht.¹⁴ Although the trial process, with its rules of procedure and evidence, is often described in legal literature as designed to unearth the truth,¹⁵ the real challenge for scholars of the field is to identify the theatrical lie that is present in any staged production.¹⁶ Do the rules of evidence, and the process itself, assume center stage, constantly reminding the spectator that the trial is but a stylized presentation of the ‘real’ events; or does the fiction exist in the scholar’s auditorium, the trial submerging its own evidentiary and process rules enough to convince the audience that it is actually eavesdropping on history as it unfolds?¹⁷

In an Ibsen play, not only are previously taboo questions such as political corruption, women’s rights, and health issues addressed,¹⁸ the characters also tend to be ordinary citizens engaged with the challenges of everyday life.¹⁹ As in a war crimes

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12. *ibid.* See generally, J. J. White, *Bertolt Brecht’s Dramatic Theory* (2004); M. Carlson, *Theories of the Theatre: A Historical and Critical Survey from the Greeks to the Present* (2004).
 13. See R. F. Dietrich, *British Drama 1890 to 1950: A Critical History* (1989), online: <http://chuma.cas.usf.edu/~dietrich/britishdrama1.htm>, ch. 1 (‘And although the movement in nineteenth-century drama was generally from a nonrealistic, or presentational, mode to a realistic, or representational, mode, the movement in twentieth-century drama to the present has been from a realistic mode not so much back to a nonrealistic mode as to a latitudinarian attitude that anything is possible in the theatre and that the playwright is free to use realistic or nonrealistic modes, separately or in combination, as appropriate to the play.’); N. Berlin, ‘Traffic of our Stage: Why *Waiting for Godot*?’ *Massachusetts Review* (Autumn 1999), online: <http://www.samuel-beckett.net/BerlinTraffic.html> (‘The theatrical and the authentic, the representational and the presentational, uncannily came together in that performance [of Samuel Beckett’s *Waiting for Godot*] of 1956.’).
 14. C. A. Heijbroek, ‘Theatrical Styles’, online: http://www.heijbroek.com/projectfolder/english_1essay.html (‘Ibsen employs realistic characters to allow his audience to connect emotionally with them and consequently his thesis . . . At the other end of the spectrum Brecht employs sets traditional to epic theatre that estrange the audience for the purpose of conveying his opinions on capitalism through symbolism.’); R. Williams, *Drama from Ibsen to Brecht* (1987).
 15. See, e.g., J. W. Strong et al., *McCormick on Evidence* (1992), s. 185, Art. 389 (distinction between direct evidence and circumstantial evidence in unearthing the truth); O. G. Wellborn, ‘The Definition of Hearsay in the Federal Rules of Evidence’, (1982) 61 *Texas L. Rev.* 49; J. H. Wigmore, *Evidence* (1974), s. 1367 (cross-examination as ‘the greatest legal engine ever invented for the discovery of the truth.’); R. Friedman, ‘Truth and Its Rivals in the Law of Hearsay and Confrontation’, (1998) 49 *Hastings L. J.* 545.
 16. See Review, ‘Martin Scharnhorst: The Itinerary of Ants or Life Like Theatre on Stage in Rhode Island’, *Domain of Culture*, 2002, online: http://www.cultureguide.gr/events/details.jsp?Event_Id=46617&catA=1 (‘At this point the spectators get involved in this exposure game; a game that turns life to theatre or theatre to life, a game played in all the venues of the theatre, a game that becomes an itinerary of actors and spectators through the theatrical “lie” and the truth of life.’).
 17. Greenwald, *supra* note 8.
 18. H. Ibsen, ‘Speech to the Norwegian Students, September 10, 1874’, *Speeches and New Letters* (tr. A. Kildal). (Boston. Richard G. Badger, 1910), p. 49 (‘But no poet lives through anything in isolation. What he lives through all of his countrymen live through with him.’); E. Goldman, *The Social Significance of Modern Drama* (1914) (‘Uncompromising demolisher of all false idols and dynamiter of all social shams and hypocrisy, Ibsen consistently strove to uproot every stone of our social structure.’); E. Trumbull, ‘Realism’, in *Introduction to the Theatre*, online: <http://novaonline.nv.cc.va.us/eli/spd130et/realism.htm> (‘His plays attacked society’s values and dealt with unconventional subjects within the form of the well-made play (causally related)’).
 19. M. F. Bellinger, *A Short History of Drama* (1927), 320 (‘The action is still for the most part concerned with men’s deeds and outward lives, in connection with society and the world; and his themes have largely to do with the moral and ethical relations of man with man.’).

case, the subject matters span large societal themes and small-scale interpersonal conflicts.²⁰ The theory of realism put forward by Ibsen holds that the dramatist can examine life as a scientist does,²¹ highlighting all of its beauty and its ugliness without the falseness of gimmickry that characterized the theatre of his contemporaries.²² Thus, Ibsen seeks to depict life on stage without artifice,²³ although, as in the best tradition of trial lawyering, the incidents are carefully arranged so that each action exudes purpose in conveying the message of the whole.²⁴ It is the most modernist of approaches to theatre,²⁵ inviting the audience to relate to its logic and measuring its success by how closely the setting, characters, and drama reflect 'real' life outside the theatre.²⁶

By contrast, in a Brecht play there is no attempt to have the audience identify with the dramatic situation of the characters.²⁷ Rather, Brecht's theory of theatrics holds that spectators must be made to distance themselves from the events taking place on stage,²⁸ and to remain detached and analytic rather than emotionally involved with the characters and their plight.²⁹ Although the real world of social justice and injustice is the frequent theme of the work,³⁰ the idea is that the author/director presents 'reality' as he sees it and the audience is not to lose itself in the stage illusion.³¹ Thus, stage settings are bare or consciously artificial,³² and the actors

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20. B. Hemmer, *The Dramatist Henrik Ibsen*, Ministry of Foreign Affairs (Norway), February 1996, online: <http://odin.dep.no/odin/engelsk/norway/history/032005-990396> ('Ibsen's demands to dramatic art: it should as realistically as possible unify three elements: the psychological, the ideological and the social.'). Henrik Ibsen (1828–1906), online: <http://faculty.marymt.edu/hopper/TMMU101/ThHistory.htm> ('Ordinary people populate Ibsen's realistic world, and the issues addressed in these dramas affect ordinary husband–wife, mother–son, and brother–brother relationships and are played out in the interiors of ordinary homes.').
21. H. A. E. Zwart, 'The Birth of a Research Animal: Ibsen's *The Wild Duck* and the Origin of a New Animal Science', (2000) 9 *Environmental Values* 91 ('Ibsen's play [*The Wild Duck*] stages the clash between a scientific and a romantic understanding of animals ...').
22. M. A. Orthofer, 'The scientist on the stage: A survey', (2002) 27 *Interdisciplinary Science Rev.* 173 ('The society Ibsen portrays is a modern, democratic, and seemingly enlightened one ...').
23. G. Bouchard, 'Ibsen Gets Upset in Studio Theatre Season Launch', *Express News*, University of Alberta (2004), online: http://www.expressnews.ualberta.ca/expressnews/articles/news.cfm?p_ID=6082&s=a (Ibsen 'was quite distressed at the layers of artifice that both men and women laboured with.'). A. Moore, *Studying Bertold Brecht*, online: <http://www.universaltteacher.org.uk/drama/brecht.htm> ('[Brecht] believes that the audience should be made not to feel, but to think.').
24. See *United States v. Abbott*, Case No. 97-6199, 97-6206 (10th Cir.), citing J. Wigmore, *Evidence* (1976), § 1871, at 644 (order of presentation of evidence at discretion of counsel). See also, *Geders v. United States*, 425 US 80 (1976) (order of evidence is considered an abuse and subject to change by trial judge only if presentation is done to confuse jury).
25. W. Martin, *The 'New Age' Under Orage* (1967), 81 ('The discussions of the new drama appearing in *The New Age* show that it traced its origin to Ibsen.').
26. Brown, *supra* note 10.
27. B. Brecht, 'Theatre for Learning', (tr. E. Anderson), in C. Martin and H. Bial (eds.), *Brecht Sourcebook* (2000), 24 (new epic or didactic theatre creates distance between audience and events on stage).
28. *ibid.* ('[Theatrical] presentation expose[s] the subject matter and the happenings to a process of defamiliarization.').
29. J. Hatzenbeller, *Beckett and Brecht: Keeping the Endgame at a Distance*, online: http://www.cord.edu/faculty/steinwan/nv12_hatzenbeller.htm, ('Brecht's alienation effect was a direct means of evoking this participation – the audience is emotionally distanced from characters to allow objective observation.').
30. See generally, B. N. Weber and H. Heinen, *Bertolt Brecht: Political Theory and Literary Practice* (1980).
31. J. Dawson, *Brecht*, Charles Sturt University, Australia, online: <http://hsc.csu.edu.au/drama/hsc/studies/brecht/2758/Brecht.htm> ('Brecht's theatre sought, therefore, to alienate or estrange the audience from everyday reality so that it could be reinterpreted in a new light.').
32. See J. Michaels, 'Bertolt Brecht', in F. N. Magill (ed.), *Critical Survey of Drama: Foreign Language Series*, Vol. 1 (1986), 241 (describing devices employed by Brecht to create sense of alienation).

dramatize events as if they are demonstrating what happened without actually impersonating the people who took part in the staged incidents.³³ It is at once a highly contemporary and a classical approach to theatre,³⁴ inviting the audience to judge the setting, characters, and dramatic action without losing objective perspective.³⁵

War crimes trials, and their constituent motions, voir dire, pre-trial skirmishes, sub-plots, and plots within plots,³⁶ exude elements of engagement and detachment. On one hand, they strive to represent the reality of the witnesses' accounts³⁷ and expect the audience to relate to the testimony as a scientist does to life in the Petri dish once she has placed her eye on the lens and allowed herself to forget about the microscope. At the same time, they strive to ensure that the spectator cannot immerse herself in the emotional lives of the witnesses and expect the audience to preserve clinical rationality about the subject and the characters they present in strict laboratory-like conditions.³⁸ The scholar may be a clinician vis-à-vis the trial, but the experiment is performed at least partly on herself.³⁹

War crimes cases are therefore a hybrid mode of theatre,⁴⁰ seeking a truthful account from the players but staged in a mode that is carefully circumscribed by convention.⁴¹ They are neither documentary nor feature film, Ibsenian 'slice of life' nor Brechtian artifice; rather, they are both.⁴² And like all theatre, they cannot be fully explained, but must be experienced.⁴³ One can understand the subject matter of a war crimes trial, and one can equally understand the legal process by

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33. J. Willett, *Brecht on Theatre: The Development of an Aesthetic* (1964), 142–7 (chapter entitled 'Notes on a Description of a New Technique of Acting').
 34. Y. Hu, *The Modern Theatre* (1985), 169 ('Today some techniques in the theatre of the Absurd are influenced by those of the epic theatre.'). E. Wright, *Postmodern Brecht – A Re-Presentation* (1989).
 35. O. Brockett, *The Theatre: An Introduction* (1974), 365–6 ('Brecht suggested a system of productive participation, in which the spectator actively judges and applies what he sees on stage to conditions outside the theatre').
 36. On the rules of evidence applicable to the determination of the admissibility of evidence, and on the conduct of motions within mid- and pre-trial motions, see T. K. Maher, *Basic Evidence Procedures*, North Carolina Office of Indigent Defense Services, Defender Training, 1 ('He who hesitates is lost, or at least overruled.').
 37. The hearsay rule, for example, is designed to restrict witness statements that might lead to misstatements of a purported truth. See *R v. Sharp*, [1988] 1 WLR 7, at 11 (HL) (hearsay evidence excluded when its object is to establish the truth of what is contained in the statement, but not when its object is to establish by the evidence, not the truth of the statement, but the fact that it was made).
 38. A. Selby, *Pattern Based Reason* (1996), ch. 15 ('Objectivity'), online: <http://whyslopes.com/volume1a/ch15.html> ('The ideal or goal of objectivity is represented in the legal system by the idea of impartiality. Lawyers, juries and judges interpret evidence and laws. One aim is to obtain impartial, objective verdicts of guilt or innocence, and assignments of blame, damages and punishments.').
 39. See 'Our Beliefs', in: *sprung*, online: <http://www.sprungtheatre.com/index.html> ('Theatrical metaphor requires the imagination of the audience.').
 40. See Blanche Dubois in Tennessee Williams' most 'realistic' drama: T. Williams, *A Streetcar Named Desire and Other Plays* (E. Martin Brown (ed.)) (1959), scene 9, 204 ('I don't want realism.').
 41. J. Mortimer, *Clinging to the Wreckage* (1991), 233–4 ('Judge: "Am I not to hear the truth?" Objecting Counsel: "No, Your Lordship is to hear the evidence."').
 42. The sheer complexity of a war crimes case makes the hybrid a virtual necessity. See S. Waters, 'The Truth Behind the Facts', in *The Guardian*, 11 February 2004, online: <http://www.guardian.co.uk/arts/features/story/0,11710,1145870,00.html> ('The resurgence of the theatre of fact is perhaps suggestive of a deeper problem for writers, namely that modern life in its unimaginable complexity seems to defy invention itself.').
 43. A. Wesker, 'The Smaller Picture', in *The Guardian*, 15 March 2003, online: <http://www.guardian.co.uk/arts/features/story/0,11710,914322,00.html> ('The best artists are driven by their experience to reflect that experience. Few artists worth their salt begin work with a theory of art.'). Of course, Brecht's use of artifice suggests a self-consciousness about theatrics and theoretical theory; the audience nevertheless must experience the play rather than the critical musings in order to be simultaneously engaged and disengaged.

which the wartime conduct is tried,⁴⁴ but one cannot fully understand the peculiar combination of these two without appreciating the theatrical package that the trial production represents.⁴⁵

2. THE *POLYUKHOVICH* CASE

During the 1980s, in keeping with a trend in other western countries,⁴⁶ the government of Australia began pursuing Nazi-era criminals whose presence had been previously overlooked.⁴⁷ Under the *War Crimes Amendment Act* of 1988,⁴⁸ Australian prosecutors were authorized to bring charges against anyone who, between September 1939 and May 1945, committed a serious crime 'in pursuing a policy associated with the conduct of a war or with an occupation.'⁴⁹

In 1992–93, Ivan Polyukhovich, a resident of Adelaide, South Australia, became the first person tried under the new legislation.⁵⁰ The indictment alleged his participation in the extermination of some 850 Jews in the town of Sernik, in Western Ukraine, in September 1942, and detailed a number of crimes against specific individuals.⁵¹ The original charges included two counts of murder for the deaths by shooting of two young boys who attempted to flee the execution, whose names

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44. Understanding, however, is not the same as full appreciation. The point is made in a study of Eduoard Manet's painting 'The Execution of Maximillian', in M. Battin, A. Silvers, J. Fisher, and R. Moore, *Puzzles about Art: An Aesthetics Casebook* (1989), 64–5. The painting is based not on the artist's first-hand witnessing of Emperor Maximillian's execution in Mexico in 1867 but rather on third party accounts of the event as reported in the contemporary press. The authors ask whether the cognitive value of Manet's painting would diminish if the newspaper reports that informed him were false. One could equally ask whether the evocative accounts of political turmoil surrounding Maximillian's demise would diminish if Manet's accompanying rendition were a poor one.
45. There is, of course, a traditional cleavage between those engaged in the study of aesthetics and those who engage in artistic expression. Much has been written about teaching theory to artists; less has been done to introduce theorists to art. See D. Arrell, *Teaching Aesthetics to Artists*, American Society for Aesthetics, online: <http://www.aesthetics-online.org/ideas/arrell.html> ('Give a group of artists a copy of the latest issue of the *Journal of Aesthetics and Art Criticism*, and their response is likely to be that it simply doesn't interest them, that the issues discussed are not ones that they face as artists, and that it seems to consist mainly of academic nit-picking and hair-splitting which has little to do with the real worlds of art.')
46. See, e.g., Government of Canada, *Commission of Inquiry on War Criminals Report* (J. Deschênes, commissioner) (1986); D. Matas, *Justice Delayed: Nazi War Criminals in Canada* (1987); *War Crimes: Report of the War Crimes Inquiry* (T. Hetherington and W. Chalmers, members) (1988); L. S. Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', (1994) 32 *Colum. J. Transnat'l L.* 289; M. Lippman, 'Nuremberg: Forty-Five Years Later', (1991) 7 *Conn. J. Int'l L.* 1; M. C. Bassiouni, 'Nuremberg Forty Years After: An Introduction', (1986) 18 *Case W. Res. J. Int'l L.* 261; 'Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law', April 1986, *Proceedings of the Eightieth Annual Meeting of the American Society of International Law*; E. Steiner, 'Prosecuting War Crimes in England and France', (1991) *Crim. L. Rev.* 180; M. Zaid, 'Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Civil and Criminal Liability', (2001) 35 *New Eng. L. R.* 447.
47. See G. Triggs, 'Australia's War Crimes Trials: A Moral Necessity or a Legal Minefield?', (1987) 16 *Monash U. L. Rev.* 382.
48. War Crimes Act 1945 (Cth) (as amended by the War Crimes Amendment Act 1988), 1989 Aus. Acts 926 (Act No. 3 of 1989, assented to 25 Jan. 1989). See generally, 119 Parl. Debate, S. 497 (1987), 157 Parl. Debate, H. R. 1613 (1987).
49. *ibid.*, s. 9.
50. For the preliminary challenge to the constitutionality of the war crimes legislation, see *Polyukhovich v. Commonwealth of Australia*, 172 Cth Law Rep. 501 (1991) (Aus. HC).
51. *Director of Public Prosecutions v. Polyukhovich* (No. 2), No. S 4067 (S. Ct. South Australia). For a journalist's account of the investigation and trial, see D. Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (1994).

remain unknown.⁵² Due to insufficient evidence, a stay of proceedings was issued for these two counts prior to trial.⁵³

The balance of this essay delves into the aesthetic that makes the experience of a war crimes case possible.⁵⁴ It accepts as its starting point the reversal of Paul Cézanne's famous comment that there is 'truth' in art,⁵⁵ and proceeds on the theory that there is 'art' in truth.⁵⁶ It attempts to do so in a direct way, by re-creating and demonstrating part of the war crimes drama.⁵⁷ Indeed, it is the aspiration of this essay to present new scholarly evidence that is at least the equal of the new testimonial and documentary evidence tendered in the *Polyukhovich* proceeding considered within.⁵⁸ It is a dramatized account of a dramatization,⁵⁹ hopefully presenting some new evidence of the new evidence and in the process shedding some light on the conventions and reality surrounding its re/presentation.⁶⁰

The following narrative relates to a ruling in the *Polyukhovich* case rendered on 3 March 1993, in which the court considered reinstating the murder charges for the two unnamed boys.⁶¹ According to the original indictment, they were part of a crowd of people being paraded out of Sernik when they ran across a bridge in an attempted escape. As with other renowned war crimes trials,⁶² the case did not go

52. *ibid.*

53. *Polyukhovich*, *ibid.*, 3 March (per Cox, J.).

54. This essay posits the unity, or wholeness of the truthful/dramatic process that is the war crimes trial as part of its essence, much as the Greek concept of *symmetria* posited conceptual unity as an essential ingredient in beauty. For a discussion of Greek aesthetics, see J. J. Pollitt, *The Ancient View of Greek Art: Criticism, History, and Terminology* (1974); esp. at 162 ('*symmetria*' means 'commensurability of parts', not 'symmetry' in its English sense).

55. French painter Paul Cézanne wrote to fellow artist Emile Bernard on 23 October 1905: 'I owe you the truth in painting and I will tell it to you.', quoted in J. Derrida, 'Passe-Partout', in *The Truth in Painting* (tr. G. Bennington and I. Mcleod) (1987), 2.

56. The identification of art in truth is paradoxical. On one hand, it undermines the notion of a singular rational meaning to legal 'truth', opening meaning to subjective judgement. On the other hand, it injects into the critique the problem of politics in art, opening critique itself to the imposed and pseudo-objective politics of the critic. See T. Eagleton, *The Ideology of the Aesthetic* (1991), 281 ('The aesthetic, then, is from the beginning a contradictory, double-edged subject. On the one hand, it figures as a genuinely emancipatory force – as a community of subjects now linked by sensuous impulse and fellow-feeling rather than by heteronomous law ... On the other hand, the aesthetic signifies what Max Horkheimer has called a kind of "internalized repression", inserting social power more deeply into the very bodies of those it subjugates ...').

57. It is therefore a form of demonstrative evidence of its own point about evidence. *Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476 (6th Cir. 1945) (holding that drawings, charts and physical models, and by analogy animation and video models, all share the common purpose of being demonstrative evidence).

58. There has been some recent writing on evidence in war crimes trials. See, e.g., P. M. Wald, 'Dealing with witnesses in war crime trials: lessons from the Yugoslav Tribunal', (2002) 5 *Yale Hum. Rts. & Dev. L.J.* 217–39; G. Boas, 'Developments in the law of procedure and evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court', (2001) 12 *Crim. L. F.* 167–83.

59. In Stanley Fish's terms, Part I is a performative speech act – i.e. a promise or creation of a debt. Whether Part II is a constative speech act – i.e. the fulfilment of that promise – is for the reader. S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980), 198 (describing the distinction between performative utterances and constative utterances). See also, J. Searle, *Speech Acts: An Essay in the Philosophy of Language* (1969).

60. Stargazer, 'Dramatization of a Drama', in *Spyder's Poetry Empire*, online: <http://www.spydersempire.com/forum/poetry/messages8/30416.htm> ('A casualty/a prisoner of war. Held captive in an unfamiliar place/that seems yet so familiar/to the parts of me that suffered wounds/inflicted during previous wars.').

61. *Polyukhovich*, *supra* note 51 ('"Permanent" is not the language of absolute finality in this area ... A stay may be forever but not forever no matter what. The circumstances on which the stay was predicated might change dramatically.').

62. The two most prominent examples that come to mind are from Canada and Israel, respectively. *R v. Finta*, [1994] 1 SCR 701; *Demjanjuk v. State of Israel*, [1993] 47(4) Isr. SC 221.

well for the prosecution. Ivan Polyukhovich was ultimately acquitted of all charges against him on 18 May 1993.⁶³ It is now more than 60 years since the death of the boys and over ten years since their story was aired in court.⁶⁴ It seems that in every generation there will be a need for new evidence.⁶⁵

3. NEW EVIDENCE

‘A stay may mean forever but not forever no matter what.’

Judge Brian Rothwell Cox of the Supreme Court of South Australia piled his words carefully on top of the historical record. There was nothing written on the defendant’s face. All of the best witnesses were gone. The prosecutors, however, had forced their optimism on the courtroom audience. A drawing of the 1942 town – a new old Sernik town plan, as it were – would be tendered as new evidence. What the court needs, the prosecutors explained, is a second take showing the original bridge where the two boys’ last scene was shot. Would this be the thing that lets memories go free, or would they stay permanently on hold?

Milton Turk, a 64-year-old real estate developer in Toronto, Canada, was drafted as a draftsman into the prosecution’s plans. Milton’s plan of the town where he was born took shape as a sketch he drew when first interviewed by the Australian investigators on their world tour of Sernik survivors. Milton may have done it from memory of the years when he was still a young Motl Turkienicz, but it was fairly impressive with its details of streets, houses, police station, cemetery, church, and the old bridge. This ‘new evidence’ would get even better once the Australians took him back to the old town.

‘Don’t worry’, Milton had told his family, ‘I’m going to teach those Australians a thing or two about putting a *bandit* away.’ The prosecutors were fairly sure of themselves as well; how could the judge not reinstate the charges once the new evidence was properly introduced?

Ivan Timofeyevich Polyukhovich, better known as Ivanechko the forester, was charged by the government of Australia with a number of murders in the town of Sernik. Included in the indictment were the deaths of two young, unnamed boys in the fall of 1942. The killing of the boys allegedly took place three days before *Rosh Hashanah*, during the round-up and exit parade of the town’s Jewish ghetto. Of Sernik’s 1,000 Jews, all but 150 of them who had fled into the woods were paraded across the bridge and out of town for the last time that day.

63. M. Rojansky, ‘Obstruction and Delay: The Hunt for Nazi War Criminals’, 22 *Harv. Int’l Rev.* (Winter 2000), online: <http://hir.harvard.edu/index.html?issue=47> ([T]he first person ever tried for war crimes in Australia, Ukrainian-born Ivan Polyukhovich, was acquitted on May 18, 1993. “Polyukhovich walked out of the Adelaide courtroom a free man,” [Nazi hunter Ephraim] Zuroff warned, “and dozens, if not hundreds, of Nazi war criminals living in Australia breathed a sigh of relief.”)

64. The narrative that follows is based on courtroom testimony and witness interviews conducted in Adelaide, South Australia in March 1992 and February–March 1993.

65. Passover *Haggadah* (1973), 23 (‘In every generation one must look upon himself as if he personally had come out from Egypt’); see also, Morgan, ‘Retributory Theater’, *supra* note 4 (analogizing war crimes cases to annual ritual celebrating freedom from oppression).

The charge relating to the two boys was one of many, but it was an important one for the prosecution. As a forest ranger, Ivanechko had never worn a uniform but he had carried a gun. The other charges against him told of shooting stragglers in the woods, but it had become hard to see the forester for the trees. This one, on the other hand, would place him clearly inside Sernik, at the scene of the critical pre-holiday events.

Judge Cox presided over the testimony in which the story of Ivan was told. He sat poised between the random and the patterned, the monster and the machine, the crime and the war crime. Were Ivan's activities the local sort, of interest only to Ukrainian law, or were they the international sort, of interest to everyone's law? Was he just a ranger, or even a hunter, or was he something more? For the Australian court to take notice, small stories of far away had to become part of the history we all share.

As most of those testifying relayed it, the two boys had been conspicuous that pre-*Rosh Hashanah* morning, running and shouting as they reached the bridge at the edge of Sernik. To some already hiding in the woods, and to many who were sitting in the courtroom, the commotion could still be heard. They were the only ones in the ghetto round-up to run or make a scene. It was their parting gesture to the large, dazed crowd marching slowly across the bridge and onto the mud road leading out of town. Was it evidence? According to one account, bullets were at a premium in rural Ukraine, and the boys consumed one closely rationed shot each. Happy new year.

If it had not been for the case, Milton never would have gone back to Sernik. 'Forty years in the construction business, I guess I know how to draw a pretty good set of plans', he told the Australian police.

Milton had paced out the distance from where Chochom's shed used to stand to the old bridge. Was he really the 14-year-old boy who had walked this road half a century before? Most of the buildings in town had been burnt down by the nationalist police hunting for Red Army and partisans toward the end of the war. But Chochom's place (as opposed to his real name – was he a wise guy or a fool?) was well remembered. A detailed plan would be the new evidence the courtroom sought, the key to resurrecting events thought permanently stayed. 'You don't have to be a *chochom* to figure that one out,' Milton remarked.

As it turned out, there was no question about lines of sight. The visibility from the shed should have been clear if you looked through a hole. The only question was: what did the one eyewitness, Dimitri Kostyukhovich, actually see? He had told the lawyers who interviewed him that he had stared through a peephole in Chochom's shed as the two boys met their end. The trouble was that for the trial in Australia he had to peer through a haze of culture and time. Judge Cox thought Dimitri's testimony was at best confused.

'He was perplexed and impatient and it was often difficult for the cross-examiner to get a direct answer to his questions. There were a lot of things that the witness could not remember', His Honor observed.

For a person who had never gone beyond the dirt roads of Sernik, Dimitri did as could be expected on his trip to Australia. His flight had left from Kiev, which he

saw for the first time, and stopped in Bangkok for a day on the way to Sydney. By the time he reached the green lawns and courthouse of Adelaide, Dimitri's mind had been stirred and fried. And besides, cross-examination is not a test taken lightly in a culture where even the not so smart are smarter by half than the system they confront.

The prosecutor confided, 'every time Dimitri tells his story, Chochom's shed gets closer to the bridge'.

Dimitri was about 17 years old at the time he saw the two (forever) young boys on the bridge. His Sernik dialect was to Ukrainian what Milton's Yiddish was to German. Dimitri grew up on a farm but as an adult has had to learn a trade. There haven't been Jews in the town for half a century, so somebody has to make the pants. Dimitri remembered Ivanechko as Sernik's Mr Hyde, the forest ranger that came out of the woods with the Germans and haunts the rebuilt town until now. The war years are a lot closer over there, and besides, life in Sernik has always given too much time to sit and think. For Dimitri, like just about everyone else he knows, two or three fingers of vodka did their trick several times a day.

Milton, on the other hand, grew up in downtown Sernik. His elixir is the one-liner. He is three years younger than Dimitri but took the stand as a partisan in the forest, not a babe in the woods.

'Everyone knew about the forester', Milton asserted with an air that made the whole case seem obvious. He prepared for his trip to Australia by telling anyone in range how he should have been a town planner or, for that matter, a lawyer. Hadn't he been the one who suggested drawing a plan in the first place? Milton had to do everyone's work, and for nothing: 'Back home they used to say that all of the body's organs want to *pish*, but the one they pull out is the *schmuck*'.

Judge Cox, on the other hand, was grave. 'A stay of proceedings is a solemn order', he opined.

After 50 years, the court took no view of the site. Chochom's shed, with its famous hole, is long gone. The topography seemed in doubt, and the witness's line of vision needed to be confirmed. Moreover, Ivanechko was to his congenial hosts a gray retiree caught in a skinhead's world. The Australian criminal courts deal with young tattooed defendants, not old tattooed witnesses. 'Adelaide pensioner charged', the local newspapers had announced. A reliance interest has been built up, Judge Cox explained, and an accused person is entitled to think that he can at some point get on with his life. Quasi-contract for a Quasimodo.

To lift the heavy stay, the evidence had to be new. Milton, already familiar with the judicial process, was keenly aware of his role: 'Do you know what they spent taking me to Sernik?'

He didn't know about the two boys or the charges that remained, but he did recall the road facing the river and the line of buildings ending with Chochom's recessed house and his backyard shed. He could even recollect the field behind the house where cucumbers hung on vines, corroborating witnesses waiting to be pickled. He had to admit he had no memory of the gap in the shed where Dimitri had stood, and which the prosecutors had dubbed 'Chochom's hole'. But he drew up quite a good plan, if he could say so himself.

Sernik's biggest story was almost but not quite admitted. It started with the pogrom of January 1941, when Stepan Bandera's Ukrainian nationalists – *Banderavtses*, as they became known to the Yiddish speakers in town – first arrived in their yellow shirts. Milton remembered their speech. It wasn't a good day to be a Russian, Pole, Jew, communist, etc., but some people were inspired. The *Banderavtses* sensed the tough times and made them their own. The prosecutors could be excused for fanning the background flames: the statute made them do it.

The story then progressed through the round-up of a small group of Jewish men in August of that year when the Germans first arrived. Milton's father was among the first selected; who knows why. Milton saw his father with a group of men in the market place a couple of days after he was taken from their home. They then headed off toward the old cemetery, and have been lying there ever since. Everyone told Milton that the Germans wanted the men in order to work. No objection was taken in defence. This was still before the mass killings in the larger Ukrainian towns from Rovno to Kiev. When Milton went back to Sernik with the Australians, he was impressed and depressed by the elaborate Jewish memorial in Rovno. There was no such memorial at the old cemetery or anywhere else in Sernik. In fact, there was nothing left to remind anyone that the spot had ever been a burial ground.

'You see', Milton explained as he displayed his photos, 'it even matters who you are and where you're from when they kill you'. Jews from Berlin, Warsaw, and Budapest had memorials in Jerusalem and museums in Washington, and now even those from Rovno and Pinsk had their place in history. Sernikers had been at the bottom rung of the status ladder ever since Milton could remember. The Australians and Ivanechko did what no one else had ever done just by putting the town on the Holocaust's map. For history's sake, that might be new evidence enough.

During the second half of 1941 and the first half of 1942, Sernik's market and adjacent area were transformed into the repository for all of the Jews in the region. At one point that winter the entire ghetto, one thousand strong, was marched on foot to the neighboring town of Wisotsk to be registered. One at a time they gave their name, age, occupation and religion to a German officer flanked by guards, who carefully wrote it all down at a desk set up outside the police station. Obviously, the witnesses testified, the stories that had started to come from Poland about deporting and killing Jews were nothing to worry about. The Sernik ghetto was registered; they were meant to stay alive.

On the stand the prosecutor asked Milton if to this day he knows why the Jews were registered in Wisotsk. He didn't have a clue, nor did any of the others that remembered the incident. The big picture was hard to come by in Sernik. It was an obscure spot on the world war's charts. The ghetto would have to wait its turn. No one came to liquidate it until mid-way through the war.

Jews from the surrounding countryside were brought to the Sernik ghetto and made to live there with relatives or in whatever accommodations they could find. Among them were Abe Dinnerman and his family, who lived in the nearby rural village of Zelin. After the war, Abe became a loner in a New York suburb, who took to American fitness by walking everywhere he possibly could. He had spent his days alone during the trial in Australia, pacing in circles around the crowded hotel pool.

He walked counter-clockwise, with the old times constantly circling back through his mind.

'Abe was always like that', said a *landsman* as he waited for his own turn to testify. '*Mishugenah*'.

Back in Sernik, Abe was a teenager who, unlike most of the Jewish kids in the town, was well known and liked by the Ukrainian farmers. He testified that his family were farmers, while most of the Jews were tradespeople like carpenters, tailors or shopkeepers. 'No plumbers', explained Abe. 'There was no plumbing in Sernik.'

Most Jewish kids went to school learning Polish before 1939 and Russian after 1939. Some of the older ones even excelled and had the good fortune of leaving for bigger schools in Lodz or even Warsaw, but ending up you-know-where. Abe, on the other hand, wasn't so lucky. He stayed on the farm and shoveled it with the best of the Ukrainian youth. He skipped over Auschwitz, ending up in Connecticut.

After being moved to Sernik from his home on the outskirts, Abe supported his brother and mother. He was able to get odd jobs tending cows for the farmers and cleaning up stacks of hay in their barns. The Germans wouldn't have liked this coming and going from the ghetto, but they left it to the nationalist police (the town's former riff-raff) and they had neglected to build a fence. So Abe was able to leave whenever there was work. He would sometimes stay out of the town for several days on end, sleeping at the farms of his various employers.

Abe passed the better part of 1942 half in and half out of the Sernik ghetto. He was out working in the fields of a local farmer just before *Rosh Hashanah*. Three days before the holiday, the farmer, who usually gave him milk to drink at lunch, gave him a bottle of water instead. Waste not want not. He told Abe to take his lunch and literally get lost. Abe was annoyed to lose his job, but he got the message that something big was going to happen. He spent that night in a nearby barn just 10 kilometers from town.

At about the same time that Abe bedded down with the cows, approximately 150 Jews were making a run for their lives from the ghetto to the darkest parts of the surrounding forest. The same word that Abe got from his employer had gone out to several houses. The main break was by a group of people gathered at Yankel Kaz's place on the outer edge of the town. Yankel was a well-known figure in the ghetto. He was the patriarch of a prominent family and had lost one leg fighting for someone (Poland, Russia, what's the difference) in the First World War. His wooden leg made him larger than life, but in the end it had the court stumped. The witnesses wanted to tell more about Yankel but the law had no medicine for his amputated fame. Is there a doctrine in the house?

Not only did the evidence have to be new to lift the stay, it had to be evidence. The game is only worth playing by the rules. Pepe Kaz, Yankel's cousin, knew what happened to her mother, her older sister Luba, and her baby niece Tsila, because a local farmer had told her the story. She ran away with them from Sernik the night before the ghetto was emptied of its contents. Of course she didn't see them meet their end herself, or the hearsay wouldn't be here.

According to several of the witnesses, Pepe and her sisters were the prettiest girls in Sernik when they were teenagers. Pepe herself made it to the safety of a

partisan group with most of the escapees. Pepe's mother was not a fast runner and Luba was slowed down by the baby in her arms, so they had agreed to go their separate ways. The plan was for them all to meet near the family's old house in Alexandrovo, Ivanchenko's own tiny village a couple of kilometers down the road. Pepe said a small goodbye to her Momma and Luba instead of a big one. That was a mistake.

Pepe has never had children of her own, and so no one is named after them. The farmer who brought Pepe the bad news explained that ammunition must have been rationed carefully. He also didn't yet realize they were saving up for something big. The two women were pressed together, baby in the middle, so that only one bullet was used. They were buried together between some trees at the side of the road. Talk about having no case to meet. Pepe had been anxious to testify. She had something to say about having something to say. But she could only say so much.

By the time Abe woke up in the barn the sun had risen, the houses in the ghetto were empty, the two boys lay under the bridge. Dimitri was safely tucked behind Chochom's hole, Pepe was in the woods and the 850 Jews left in the ghetto were on their way out of town *en masse*. As it would happen, the large procession passed, and then stopped, literally right under Abe Dinnerman's nose. It was still morning, but his day was about to turn dark.

Abe related to the court how he watched from a gap near the top of the peaked roof of the barn where he was resting in the hay. A group of uniformed Germans and Ukrainians in civilian clothes carrying rifles brought the Jews in trucks to an open pit that had apparently been prepared for the occasion. Abe saw the crowd congregated in a clearing a few meters from the pit, but his view of the pit itself was partially blocked by trees. He could see them undress. He could then see them walk naked from the clearing toward the pit, and then he could see no more as he listened to gunshot after gunshot. Abe explained that after a short time he became delirious and wanted to scream; in fact, he testified, until today he's not sure why he controlled himself and didn't run out of the barn. The gunfire – hundreds of single, individualized blasts – lasted all morning and into the early afternoon. It still rings in his ears. Couldn't the courtroom hear it?

The Australian forensic experts who exhumed the mass grave outside Sernik counted 550 bodies before they stopped work. They estimated that a total of 850 people are in the pit. It is precisely 90 feet long by 10 feet wide, the perfect size for the number of bodies it was to contain (with a little room to spare for those that ran away – otherwise there would have been no case at all). The bodies lie in rows shoulder to shoulder, some holding infants in their arms. It's hard now to identify individuals (and who would want to?). But we know that some lay down alone and some were arm in arm; some moved quickly to the bottom and others took their time. Old Yankel's gate to heaven was obviously a little slow. An artificial leg was found near the top layer of skeletons.

Abe testified that in the evening when he climbed down from his loft to look around, the ground on the re-covered pit was pulsing up and down. But with the gases released it soon settled down nicely, as planned. Before digging, the Australian forensic team had to clear away 50 years of pine trees and then cross-examine the

earth. An American rabbi who was visiting Rovno with his congregation at the time of the exhumation was brought to Sernik to say a collective prayer. Pepe said it is her duty to remember them one at a time, although for a long time no one really wanted to hear.

The soil tests showed where the original contours of the pit meet with the undisturbed soil. There is a ramp in the middle for ease of entry. Abe didn't notice it while lying in the hay, but the Jews walked into the pit so that they could be arranged neatly rather than thrown in haphazardly. Each skeleton has a hole in the head. No wonder bullets were rationed. The prosecutors exhibited documents collected from archives in Russia and Germany, including the registration lists from Wisotsk and other Ukrainian towns. Milton may never have realized it, but to the Germans the reason for walking the Sernik Jews to Wisotsk and registering them was obvious. Work may make you free, as the infamous sign says, but you can even have too much freedom. They had to determine in advance the size of the pit.

War crimes are a conundrum for the courts. Pepe and Abe are stories that go in a sidebar; they make a point for history while they miss the point for the law. There simply aren't many holes like the one Dimitri found for himself near the bridge at the entrance (or, for the two boys, the exit) to Sernik. For that reason, its size, shape, height and distance became a matter of great debate. The tale of the unnamed boys was a small window on the day's (and the war's) larger events – a peek through an obscure hole in history's wall. Could a quick peek really abuse legal process?

The death of the two boys came at a crucial moment in Sernik's big day. It had momentum, as part of an unfolding scene that the prosecution needed to play. But after 50 years can any truth be staged? It took four decades to want to even think about these things and another decade to figure out the script. Should Pepe and Abe have played parts in this particular scene? Were Milton's elevations, his designs, as true to history as they are to the readings on his instruments? Chocho's daughter lives in Chicago, but she has turned down better roles and so refused to go to Australia. Chocho himself could have had a couple of big lines had he made an appearance. But Chocho had the same problem as most of the Jews of Sernik: he's in the pit. Forever, no matter what.

And then there is Dimitri. Pushed to the truth recessed in his mind, the truth got pushed farther into the hole. Dimitri had known Ivanechko all of his life. No wonder, then, that he picked him out of the photo spread. But while the story lay dormant elsewhere over the years, it has grown substantially back in Sernik itself. As Dimitri and his neighbors related it, one wonders where Ivanechko the forester ends and Ivanechko the legend begins. The forester policed the woods, of that every witness was certain. But who can police the words? Did the monster swallow Sernik or did Sernik swallow the monster? The war swept over the town before all the diminutive Ivans had time to think. Some stories are bigger than their own protagonists, who then have to expand to fit the bill.

At the end of Milton's visit to Sernik he left \$500 with the mayor for a small monument at the old Jewish cemetery. Pepe told him not to bother, the *Banderavtses* will just tear it down. (Had she heard that Bandera was put under house arrest during the latter half of the war, and that he died under mysterious circumstances, the

leader of a broken movement? But then, had she heard that since independence from the Soviet Union, Ukraine has named streets in his honor?) Meanwhile, the town needs a recreation hall for its youth who otherwise spend time watching the potatoes ferment. The older generation seeks the spirit that only money can buy. The officials of the Ukrainian Ministry of Justice couldn't let their witnesses go it alone, and so from the chief prosecutor in Kiev to the clerks in Pinsk they needed hard currency for their trip down under. Milton's money seems a long way from the memorial it was intended to build.

For the Jews of Sernik, how much more can one say? Milton's father is in good, if unmarked, company. They are remembered in stories that everyone relates and no one under cross-examination definitively saw. After so many decades you can tell but you can rarely show. And in Judge Cox's view, what really would be the point? The boys remain unnamed, just as they were buried. Abe will walk for miles in circles to let off his steam. Pepe will be mother to her memories but will have no children of her own. Milton's plan, for all its detail, was missing the hole. This was not a case for lifting anything. Memories growl, but the court said stay.

The law gives a chance to recount. But only words exist where people and bullets once mixed. And then only some words at that, since even nightmares must conform to the rules. Story fragments have to fit together in a specified way, and the body of evidence may not match what remains of the tale. Since it was wasted on the defendant, one can't help but ask: where will all the testimony go? The evidence is fragile and old, but it's all that there is. Some day it will be a figment. The more we chase it the more elusive it gets.

'As requested', said the prosecutor gingerly, with a quick shot of wry. 'Enclosed herewith Exhibit A: Chochom's hole.'