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The Holocaust in Court: History, Memory & the Law

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The Holocaust in Court: History, Memory and the Law

Ladies and Gentlemen. I am very grateful for the honour of being asked to give the third in what is already I think a distinguished and important series of lectures. This evening, I am going to talk about my involvement in the sensational Irving/Lipstadt libel trial that happened three years ago in London, to talk about the trial itself, and to offer some general reflections about its significance, particularly in terms of history, the denial of history, history and memory and history and the law.

The trial had its origins in a book published by an American academic, Deborah Lipstadt, who teaches at Emory University, in Atlanta, Georgia. The book, called *Denying the Holocaust: The Growing Assault on Truth and Memory*, was published in America in 1993, and identified a thin but more or less continuous stream or rivulet of writing which began shortly after the Second World War and which, the author said, constituted what she called Holocaust denial, a term which Lipstadt did not invent but certainly I think put very much on the map with her book. Starting in France with Paul Rassinier and continuing through his Robert Faurisson, it spread to the United States, where it found a base particularly in the so-called self-styled Institute for Historical Review in California, the home of all wacky ideas.

This stream of thought, she argued, had four main components; and in this she was in agreement with some other literature that had appeared or subsequently appeared on the subject as well. There is a general consensus that Holocaust denial consists first of all in the assertion that the number of Jews who were killed by the Nazis or as a direct result of their actions during the Second World War amounted not to - as is conventionally believed - almost or around six million, but many, many fewer, perhaps, some have said, one or two hundred thousand.

The second strand in Holocaust denial, Lipstadt argued, is the assertion that the means by which this relatively small number of Jews was killed was not through the deliberate use of mass gassing in concentration camps, but mainly through starvation and neglect, and by shooting. In other words, this was, as it were, a series of casualties, a series of atrocities such as regrettably occur in almost any war and commensurable certainly with the killing for example of German civilians by Allied bombing raids.

The third strand of Holocaust denial, Lipstadt said, is that they claim there was no deliberate plan, program, or co-ordination of these killings,

simply isolated, sometimes major, sometimes minor incidents which cumulatively accounted for this number of deaths.

Finally, according to Lipstadt, when the Holocaust deniers asked themselves how then it was that majority opinion amongst historians and indeed across the world had always believed that these three assertions were untrue, why there had always been a virtually universal acceptance that the number killed was six million, that gas chambers were used, and that there was a central co-ordination of the killings, they had replied that the evidence was manufactured during but particularly after the war, first by the Allies and then by Jews across the world in order to support and give legitimacy to the state of Israel; and they went on then to argue, in a way that betrayed their fundamental racism and anti-Semitism and their close connections with the extreme right, that of course Jews controlled the media, Jews controlled academia; and the whole paranoid ideology of anti-Semitism came out once more to try and explain why the Holocaust deniers' own views were not being listened to.

Denying the Holocaust was, and is, a scholarly rather than a sensational political or popular book, and it rested on a good deal of careful research. In 1994, the year after it came out in America, Penguin Books UK decided it was a solid and interesting piece of work and they bought the rights to it and published it in England. And this is where the trouble began. On six out of the three hundred-odd pages of the book, Lipstadt dealt with the British writer David Irving, and alleged that he was a Holocaust denier, according to the generally accepted meaning of the term; and that like other Holocaust deniers he falsified the evidence, he invented, he misconstrued, he mistranslated, he manipulated, bent the source material, and generally doctored the historical record in order to come to these strange and offensive conclusions.

David Irving was and indeed is someone who has never had an academic post, indeed not even a degree. He is a self taught historian and has published since the early 1960s a long series of about thirty books on the Second World War and in particular on Hitler and his entourage during this period. These books established in the 1960s & 70s a substantial reputation for Irving as something of a maverick but as someone who nevertheless made important, sometimes less important, but always interesting discoveries of new documentation, often by visiting elderly relatives, widows of old Nazis or old German generals and prising out of them diaries, letters, and memoirs, interviewing old associates of Hitler, and bringing a lot of new material to light. Some of the books, particularly *The Destruction of Dresden*, published in 1963, and *Hitler's War*, published in 1977, sold very well indeed, in hundreds of thousands

of copies. Many of them were translated into German, some into other languages too. Irving lived almost entirely off his writing and selling his books, to some extent off journalism and to a smaller degree out of giving speeches. For someone who makes a living out of a kind of history that made a point of presenting new documentary evidence and arguing that conventional historians had got things wrong while he had got everything right, to be accused of falsifying material and denying the Holocaust was clearly a serious offence, a serious blow.

Irving therefore wrote to Penguin Books and Lipstadt, asking them in 1995 to withdraw the book; and when they refused, in September 1996 he filed a writ with the High Court in London for defamation, arguing that he was not a Holocaust denier and that he did not manipulate material. There were one or two other minor allegations that Lipstadt had made about his political activities which he also denied. Penguin Books and Lipstadt didn't really have much option but to fight this case. After all, the alternative was to agree to withdraw the book and have it pulped, and to apologise and to promise never to publish anything like it again; and this they were unwilling to do, very much I think to Penguin's credit in particular.

When somebody files a libel writ, organising a defence in England is rather difficult. In the United States if you want to win a libel suit you have to prove that the person you are suing got things wrong, that their statements are false and that they acted with deliberate malice. In other words, what they were writing was not fair comment, they were writing it to deliberately bring you down and to damage your reputation. In English defamation law you don't have to do these things. The law assumes the person suing has a good reputation unless proven otherwise, so the consequence is that the person issuing a writ for defamation does not have to prove anything at all. The entire burden of proof lies on the defence. In the United States you can use the defence of fair comment if the person who is suing you is a public figure, which in a minor way Irving certainly is and was at that time. In England this is a much more difficult defence, relying on a rather complicated and risky procedure known as qualified privilege, which lawyers are very reluctant to use because it is so uncertain. In the USA there is, finally, a basic presumption in favour of freedom of speech created by the First Amendment to the Constitution, making it difficult in principle to restrict someone's freedom to say what they want to; no such presumption exists in England. That of course is why Irving waited until the book came out in the UK before filing his writ and did not sue in the year 1993 when the book was only available in America.

The defence was organised by a team representing in effect both Penguin and Lipstadt, at Mishcon de Reya, a large firm of London solicitors whose best known partner, Anthony Julius, had made a name for himself in winning a record divorce settlement for Princess Diana against Prince Charles, and at the time of the trial was also involved in getting what you would I suppose call a non-divorce settlement for Jerry Hall from Mick Jagger. He is also, apart from being very well known and acquainted with the rich and famous, an intellectual who had written a book on T.S. Eliot and anti-Semitism, he reviews regularly for the Sunday papers and he is very widely read, in history as well as literature. Julius decided that the line the defence would take would be what's called justification. When defending yourself against a libel writ you can argue that the words complained of don't mean what the complainant says they mean; but in this case Lipstadt's prose was extremely clear and vigorous and unambiguous, and there was no doubt that she was calling Irving a Holocaust denier and a falsifier of history. You can say that the words are not damaging, they clearly were damaging to Irving's reputation in the way that they were put. So what remained was justification. That is to say, yes, the words do mean what the complainant says they mean, yes, they are defamatory; but the crucial fact about them is that they are true, so the defendant is justified in making them.

The catch with this kind of defence is that you have to prove that the words complained of are true. So, in this case the defence had to prove that Irving was a Holocaust denier and that he was a falsifier of history. It was important that this argument didn't have to relate just to the period before Lipstadt wrote her book; Lipstadt's statements were general claims about Irving, so they could be defended by being referenced to any period of Irving's writing and speaking. That was the line that was taken.

It would clearly require quite a considerable number of experts, a lot of hard work and a great deal of historical knowledge to prove these assertions. First of all the defence looked to political scientists to provide expert evidence on whether or not Lipstadt was justified in claiming that Irving had close connections with far-right, neo-Nazi and neo-fascist organisations and was himself a racist and an anti-Semite. This proved unexpectedly difficult. Political scientists, it turned out, are much more used to making generalisations about what kinds of neo-fascism there are, how you define neo-nazism and what exactly is racism and so on, than they are in gathering and presenting empirical material. Whereas what the defence wanted of course was concrete statements of the sort that on this particular date, Mr Irving checked into this hotel in Germany and somebody else checked in who is known by this document to be a neo-Nazi, the two were seen talking in the lobby, therefore, we can see that he

has contacts with neo-Nazis. In the end therefore some of the political scientists who were asked to contribute, couldn't really bend their kind of knowledge to the kind of knowledge that the law requires. One report was used, compiled by Hajo Funke, Professor of Political Science in Berlin, who is a specialist in neo-Nazi organisations and knows them in great detail. That was submitted to the Court.

The defence also commissioned expert testimony on Nazi policy towards the Jews. Christopher Browning, a distinguished American historian, was asked to provide a report detailing the evidence for the Holocaust. Peter Longerich, the author of a major recent study in German of the decision-making process and the implementation of decisions in the Holocaust in what the Nazis called the final solution of the Jewish question, was asked to provide a report on Hitler's role in that process and on the question of the co-ordination and programming of the process. Robert Jan van Pelt a Dutch architectural historian working in Canada, and the world's leading expert on the building plans and installations in Auschwitz, was asked to provide a report on the gassing facilities at Auschwitz, which both sides in the case agreed would stand for the wider question of whether or not gas was used.

These experts provided as it were reports detailing the evidence which Lipstadt accused Irving of falsifying, so that it was there before the Court, and the Court knew what the allegations were about. Finally, I was asked to write a report for the Court and the defence on whether Irving was a Holocaust denier and whether or not Lipstadt was justified in accusing him of falsifying history. I was asked because I have specialized all my working life on Modern German History, I am familiar with the sources, I can read the archaic German handwriting which was in use at the time and which now very few Germans themselves can read as they have changed to conventional Roman handwriting after the Second World War. I have researched for at least one book I have written in German archives for the Third Reich. I have taught a course for a long time on Nazi Germany. I have also written and published a book called *In Defence of History* which is about the problem of knowledge in history and where do you draw the line between as it were an imaginative but legitimate interpretation of the sources on the one hand, and deliberate falsification on the other. That of course was a key issue before the Court: precisely what is falsification of history and can you distinguish it from just mistakes, sloppiness and carelessness?

When you are asked to be an expert witness in a Court case you are in a somewhat ambivalent position. On the one hand you are an expert whose duty is to the Court, and you have to advise the Court on matters of which

it can't be expected to have expert knowledge itself. The classic example is always in the Inspector Morse kind of situation, where a pathologist comes into the witness box and says the wound was at such-and such an angle and so many centimetres deep and therefore it must have been a left-handed man who was six foot six who committed the murder, or whatever it might be. In other words, your position is absolutely neutral. You have to sign an affidavit attached to your report which says that you have been entirely neutral and objective, you have not been influenced by the fact that you have been hired and paid by one side, and when you defend your report in the witness box you have to swear the usual oath to tell the truth, the whole truth and nothing but the truth. On the other hand, the defence wouldn't hire you if it didn't think you were going to report in a way that would favour its case, and obviously everyone is aware of this fact.

There are however two let-outs which do enable you in the end, I think, to be as neutral as you can. The first is that you are paid by the hour, not by results. If I had turned around and said, "sorry Anthony, but Irving is a wonderful historian and Lipstadt has just made a huge mistake, he is not a Holocaust denier or a falsifier of history", they couldn't have said, "well sorry Richard, in that case we won't pay your fee". The fact that you are paid by the hour is a guarantee I think that you can be immune to that kind of pressure, and indeed I wasn't put under any pressure at all by the defence lawyers during the whole process of carrying out my research and compiling my report. The only thing they tried to do was to get me to number the paragraphs, which I refused to do because it interrupted my flow of thought as I wrote it; so they numbered the paragraphs themselves when I gave them the copy; otherwise there was no interference of any kind.

The second let-out for the defence is that if they don't like your report for any reason, then they can choose not to call you to the witness box. It is up to the defence barrister to call or not to call witnesses. If you are not called to the witness box , then the Court cannot take cognisance of your report; and that is what indeed happened to a couple of the reports prepared by political scientists, not because they reported in a way that was unfavourable to the defence, but because the way that they compiled their reports was not likely to be very useful to the Court.

With these two provisos in mind, then, having figured out that I wasn't really beholden to the defence in any intellectual or even financial sense, I set to work. I could do what I liked and since I hadn't met Irving before or indeed Lipstadt and I wasn't familiar with Irving's work, I didn't really know what I was going to find. I had at my disposal Irving's published

works - thirty books, some of them in many different editions. I sent somebody to collect copies of all thirty-two editions in English and German of his book on Dresden for example, there is a lot of new material in some of the editions. So I had plenty of published material to look at.

But there is also a rule of Defamation cases called "discovery" meaning that each side has to disclose to the other all evidence that it has of material bearing on the case; and if you think the other side is not doing so, then you can go to Court and get a Court order to oblige them to disclose the material that they are withholding. And that is what the defence did when the initial discovery of material, which Irving supplied, was found not to be very adequate. You go to an official called a Master of the Queen's Bench. It's a curious experience. You go along this gothic corridor in the Law Courts on the Strand, and there are doors on either side which say "Master Smith" and "Master Jones", and you expect them to open and little boys in shorts to come out; but in fact these are very experienced Judges.

The judge that we had, Master Trench, made a series of Court Orders which obliged Irving to make available to the defence all the video cassettes and audio cassettes of his speeches that he had in his possession - two hundred and fifty or more of them. The defence obtained all the private diaries that he had kept for the previous thirty years, on the grounds that they might have a material bearing on his contacts with neo-fascists, or on his political beliefs - both of which turned out to be true. Irving handed over all the research notes which he had kept, his transcripts of interviews with old Nazis, his correspondence with his publishers, the log that he kept of telephone calls he made, and much more.

All of this arrived in truckloads of boxes at the defence lawyers, an overwhelming amount of material impossible for one person to master, especially because time was very limited. From starting work in January 1998 I had until July 1999 to hand in my report. Now as we all know, when a Lecturer or Professor sets an essay deadline, you can always go and ask for an extension. But when it is a High Court judge who's setting a deadline you've just got to keep to it. So eighteen months or so is what I had; and clearly I had to be selective. I was fortunate enough to persuade the lawyers to engage two of my PhD students as research assistants on the case, and they worked very hard for the following year or more on the case. They had to go through the dreary experience of watching and transcribing the videotapes of Irving's speeches. I got them to collect copies of Irving's books, we had extensive correspondence with archives

and visits to archives in Moscow, Berlin, Munich, Washington, many different places, and archivists everywhere were extremely helpful in supplying material. So even more came in.

We decided therefore to be selective. We would first of all take Irving's books and speeches and look at the question of Holocaust denial, that was not too difficult. Secondly, that we would look at what Irving called the only authentic documents on Hitler's attitude to the anti-Semitic policies of the Nazis and then to the extermination of the Jews. These cumulatively showed, to quote Irving, that "Hitler was probably the best friend that the Jews had in the Third Reich". Irving said he had gone through the whole process of authenticating the documents, and this chain of evidence was all that there was on the subject that could be relied upon. It was, in a way, his strongest point. There was a collection of a couple of dozen or so different documents or in some cases whole bundles of documents, so we thought we would look at each link in the chain in turn. Thirdly, as a sort of check or control, we decided to look at Irving's account of Dresden, the bombing of Dresden by the Allies on 13 & 14 February 1945, just to see if it was only in terms of his writings about Hitler that he distorted - or, as the case might have been - the evidence or whether this went on in other areas that he was writing as well.

So we set to work and what did we find? It's impossible in the short time that I have here to go through all of the findings or even a sample of them; but let me just give you one or two examples. In terms of Holocaust denial, it very quickly became clear that Irving's career fell into two phases. Before 1988 he had been a Holocaust denier only in the limited sense that he had always denied Hitler's involvement in or knowledge of the so-called final solution at least up to October 1943, but also, he said, quite possibly beyond that. So that it followed that he did not argue that the extermination of the Jews was centrally directed by the Nazi leader. But after 1988 he did become a fully-fledged Holocaust denier in Lipstadt's sense.

That's because in 1988 he was asked to appear as an expert witness by the defence in a criminal prosecution brought by the Crown in Canada against a man called Ernst Zündel, a German-Canadian anti-Semite and Holocaust denier. Zündel was accused under an archaic law, eventually declared to be unconstitutional by the Canadian Supreme Court, that made it illegal to spread false news. The Canadian government thought it could prosecute him for denying the Holocaust under this statute. Zündel made his name as the author of a book called *The Hitler We Loved and Why* and another one, uniquely I think combining two different paranoid

fantasies to be found amongst some North Americans: *UFOs - Nazi Secret Weapons?* - a book to which he had the grace to add a question mark at the end, alleging that the Nazis were maintaining secret bases underneath the Antarctic Ice from which every now and then they sent flying saucers to spy out the land to see if it was safe to come back again.

Despite these elements of buffoonery, Zündel nevertheless was a serious right wing extremist and he called a whole series of people like Faurisson and indeed Irving to testify that the Holocaust did not happen. Irving was converted by a report commissioned by Faurisson from a self-styled self-appointed engineer and specialist in lethal injections and gas machines for American executions called Fred Leuchter. Leuchter went to Auschwitz where he secretly took scrapings off the inside of the walls of the crematorium, which most - all - historians agree, was the gas chamber where a very large number of Jews died. He then sent the scrapings to a chemical analyst without telling the analyst what they were or where they were from. The analyst concluded that the cyanide residues were extremely low. Leuchter concluded that this meant that the chamber could only have been used for de-lousing clothes and not for killing human beings.

There were two elementary mistakes in this procedure. First of all, it takes twenty two times' greater concentration of the Zyklon B gas to kill a louse than it does to kill a human being. So he got the proportions exactly reversed. Secondly, he didn't take little tiny scrapings but great chunks out of the walls; the precipitation was only on a minutely thin outer layer, so no wonder that the residues were quite low. But this didn't deter Irving, who declared that this was irrefutable scientific proof that there had been no gassings and went over to what I think one might call hard line Holocaust denial as a consequence.

It was indeed as a result of his evidence in the Canadian court and subsequent writings and speeches that Irving was then increasingly shunned by mainstream publishers and the mainstream press. Penguin themselves had published his books earlier but now a variety of publishing houses refused to bring his work out. He was obliged to publish his own books since the beginning of the 1990s under his own imprint. He was banned from one country after another, he was fined for defaming the memory of the dead in Germany and he became a banned entrant to Canada, Australia, New Zealand, Germany and France.

In 1992 Irving started to publish in *The Sunday Times* translations of newly discovered parts of the Goebbels' diary from the KGB Special Archive in Moscow. (The KGB and its predecessor the NKVD had captured large amounts of German documents during the war and these

came to light after the fall of communism). The paper's editor Andrew Neill was forced to abandon the project after public objections to the fact that a respectable quality newspaper was publishing the work of a Holocaust denier. Essentially Irving did not find a voice in the press after that. The libel suit was from his point of view an opportunity to bring his views before the public once more after this long period of enforced silence, and to present for the public his view that this enforced silence had been imposed by a world-wide Jewish conspiracy co-ordinated by the Board of Deputies of British Jews to shut him up, an attempt which the Judge at the very beginning of the trial very quickly made clear would not succeed and was not relevant to the issues at hand.

Irving's speeches from the late 1980s and early 1990s were very clear in their claims: that he did not believe that there had been gassings except at most on an experimental scale, that the number of Jews deliberately and directly killed by the Nazis was only one or two hundred thousand, that there had been no co-ordinated programme of extermination, and that the evidence for these things had been fabricated. He produced a second edition of his 1977 book *Hitler's War* in 1991, from which all reference to gas chambers and mass extermination had been expunged. It is very easy to compare the same pages and to come up with that result. So it was clear that Irving was a Holocaust denier in the generally accepted sense of the term, as Lipstadt had indeed claimed.

The issue of falsification was more complex. What Irving did was to produce and write books which had an elaborate apparatus of footnotes referring to original documents and giving the impression that his arguments were well supported by the evidence. But when we checked out the documents listed in the footnotes by going to the archives or by looking them up in Irving's own notes, transcripts and photocopies, it was clear that he manipulated them on a grand scale. Let me give you just a couple of examples.

On 30 November 1941, Himmler the Head of the SS, in charge of the overall co-ordination of the extermination of the Jews, which at that time was well under way, noted down in his phone log a call to his second-in-command, Heydrich, saying: "*Judentransport aus Berlin - keine Vernichtung*" ("Jew transport from Berlin - no annihilation"). Irving claimed in *Hitler's War* in 1977 that this was a command from Hitler that no Jews anywhere should be exterminated. Somehow those two words *aus Berlin*, from Berlin, had disappeared from his account of this document. At one point in the trial Irving even tried to maintain that there had been the letter *e* on the end of *Transport* turning it into the plural; but it was quite clear that it referred only to one train load of Jews to Riga

(who were in fact shot on arrival despite the order having been transmitted that they should not be).

Irving also of course claimed that the order had come from Hitler. There was of course a paradox in this: if, as he claimed, Hitler knew nothing of the extermination programme before October 1943, then why did he think it necessary to order it to stop in November 1941? But in any case, Himmler does not mention Hitler anywhere in the phone log. He made the phone call from the bunker, "*aus dem Bunker*", but this could have been of course any one of a number of bunkers on the site of Hitler's field headquarters. Moreover, in the mid 1990s Himmler's appointment diary turned up in the Moscow KGB archive. It was clear that Hitler had only met Himmler half an hour after Himmler made the phone call. Himmler arrived by train and he worked, as he said, in his study, and then he made the phone call to Heydrich. Only after this did he talk with Hitler. He mentions every time that he sees Hitler in the appointments book, so although Irving tried to maintain that he might have bumped into him in the corridor, there is absolutely no evidence for this and it is in fact extremely unlikely. So it's quite clear that the order came simply from Himmler and not from Hitler. This document said nothing at all therefore about Hitler's involvement or non-involvement in the extermination of the Jews. Irving did note the new document but within a very short space of its being discovered he maintained once more that Hitler most probably did give the order so it didn't make that much difference in the end.

We found this kind of doctoring of the documents all the way through Irving's work and much more crassly in his speeches. Another example was that he discovered in an American archive the notes made by Judge Biddle, one of the American Justices at Nuremberg during the trials of the major war criminals in 1946. There was relatively little evidence brought about Auschwitz at the trials, but there was one testimony by a French woman, Marie-Claude Valliant-Couturier, who had been an inmate and gave a long description of Auschwitz selections, the gas chambers, the brutalities and all the other horrors that she had observed. At one point she said towards the end of her testimony that the SS had kept a camp brothel in which women were forced to perform sexual services for the SS men. After this Biddle put, in brackets, ("this I doubt"). When Irving came to quote this in writing about the trial the brackets somehow disappeared and the word "all" appeared, so after recounting Valliant-Couturier's evidence Judge Biddle wrote "all this I doubt". In a speech, Irving actually quoted Judge Biddle as writing: "I don't believe a word of what she is saying, I think she is a bloody liar". When asked in the trial why he thought it legitimate to insert a word into this quotation - "all" - he claimed author's licence because he was writing a work of literature.

But it was a clear manipulation. Its effects in any case were limited, since one Judge's opinion would not necessarily have discredited the evidence that was presented anyway.

There were many more such falsifications. Each one of these links in the chain of so called evidence that Irving brought forward to show, as he alleged, that Hitler had had no part in the extermination of the Jews and tried to stop anti-Semitic actions every time he had come across them, consisted of one or often quite a number of manipulations of the documents. When we looked at Irving's work on the bombing of Dresden, we found that the number of dead that were killed in Dresden by the Allied bombing raids in February 1945 fluctuated between one hundred thousand and two hundred and fifty thousand. This latter figure emerged in his book when he printed as an appendix to one edition of the book a document called "Tagesbefehl 47", TB47, which was a police report he said he'd discovered in Germany. TB47 put the death toll at 202,040, and claimed that the number would probably rise in a few weeks to about one quarter of a million.

Now, the interesting thing about this claim was that Irving had not seen the original document; he had a copy of a copy of a copy of a copy, it was several times removed from the original. There were no authenticating marks, no classification of security level, no heading on the note, nothing at all. Usually in those circumstances, particularly if it was a document whose contents he didn't like, Irving discredited it as a forgery on such grounds; but he accepted this as a genuinely authentic document.

Crucially, before he had obtained a copy of it a few years previously, he had agreed with another author who was aware of the existence of this document and who had seen it, that it was an out-and-out forgery. The figure of 250,000 was extremely unlikely in any case, since the population of Dresden was about six hundred thousand, and to argue that a third or more of the entire population of the city had been killed was totally implausible. In the 1943 bombing raid on Hamburg, for example, when half the building fabric of the city was destroyed, the death-toll reached 3.3 per cent of the population, or a tenth of what Irving was claiming for Dresden.

Sometime later the original was discovered and other supporting documents, and they showed that the police had reported a death-toll of 20,040, rising possibly to 25,000. The report had gone to Goebbels' Propaganda Ministry, where some bright spark had added a nought to each of the figures and then leaked it to the foreign press, trying to get sympathy for Germany in the last weeks of the war. It was a clear forgery. Nevertheless, Irving persisted in putting it in as an appendix to his book

on Dresden and in putting the death-toll at many times higher than what German historians generally estimated - and it is an appalling enough figure - around 25,000 to 35,000. So he was manipulating statistics as well.

Well, my report eventually ran to 740 pages and there were dozens of examples of this sort. The key point of course was that if you have a sloppy historian who just makes mistakes and is rather careless, then these mistakes will be all over the place in terms of their effects on that historian's interpretation, but in this case, all the mistakes, all the errors, all the mistranscriptions, mistranslations and so on, served the same argument. They all exonerated Hitler, they all made it look as if the Allies' war crimes, as Irving called them, were as great as if not greater than those of the Germans or the Nazis. And that, it seemed to me, was clear evidence that they were deliberate. Irving knowingly used documents he knew to be forgeries, he used mistranslations of German documents which he also knew to be wrong, he even mistranscribed some of his own notes on interviews when it came to publishing them in his books.

The expert reports were presented to the Court in July 1999, the case came to trial on 11 January 2000, and the trial lasted exactly three months. It had some unusual features: first of all the two sides agreed that it should be held before a judge; there should be no jury. This shortened proceedings considerably. All I had to do was present my report and be cross-examined on it. If there had been a jury I would have had to spell out every paragraph verbally to them. This saved a lot of time, and time is money.

Irving thus agreed to the defence's suggestion that the matters that the trial dealt with were too technical to be understood by a jury. Certainly I think that this view was probably correct if one looks at the way in which journalists dealt with the trial. They found it very difficult to follow because a lot of it depended on German documents, sometimes in a difficult handwriting, of which they didn't have copies, and if they had copies in the courtroom and the press benches most of them didn't read German so they couldn't have understood them anyway. They found it easy to grasp the issues of racism and anti-Semitism, and very difficult to grasp the issues of falsification of history. Even the judge found it, as he later admitted, taxing, but he mastered the issues and if he wasn't clear he would ask participants to clarify matters for him. He showed in the end, I think, an extraordinarily mastery of the detail which came forward in the trial.

The second curious feature of the trial was that Irving represented himself. Either he couldn't afford to have a barrister or he couldn't trust a barrister to gain the necessary knowledge - a mistake I think - that he had or he couldn't trust a barrister to gain the necessary publicity for him from the trial. Whichever it was, he represented himself and that meant of course that the judge and the defence QC, Richard Rampton, the libel specialist, were leaning over backwards all the time to help him and be fair to him so that he would not be disadvantaged by not knowing the law and not being experienced in bringing a case. It also gave the proceedings at times an unusually personal note. It was the man who brought the action who was cross-examining me and the other witnesses and who was himself initially then cross-examined by Richard Rampton QC. The trial took the normal format and each side presented its case and then Irving was put into the witness box for about three weeks by Rampton and subjected to an extended cross-examination: courteous, no shouting or histrionics, very patient but also very remorseless.

I was concerned to start with about whether the Court could actually grapple with historical issues and historical knowledge in a sensible way; but very soon after the trial began it became clear that my worries were unfounded. In a criminal action, you have to prove an issue beyond reasonable doubt; but this was a civil action, which depended on the balance of probabilities, which of course is what historians are used to dealing with. We weigh up the two sides and we come down on one or the other. So the criteria that were being applied, although rigorous, were familiar.

Moreover, we had as much time as we wanted to discuss the issues. In a lecture or a seminar you have about an hour, an hour and a half, and then the discussions are brought to an end. In court we could discuss everything for as long as we wanted to until either we had exhausted the subject or the judge had got impatient and interrupted suddenly and said he had grasped the issue and could we please move on. Journalists complained that we had spent half an hour once discussing the place of a full stop in a document and they got extremely frustrated by the whole proceedings. But it did mean in the end that everything was discussed exhaustively, indeed more than once, because most issues were touched on both in the cross-examination of Irving and in his cross-examination of the expert witnesses. So this was a case in which historical knowledge and legal standards of knowledge dove-tailed quite neatly.

It was also of course not about the Holocaust; it was about Irving's writing about the Holocaust; and therefore it was not, as had been the case in some of the trials of Holocaust perpetrators, a matter of trying to

reconstruct in detail what had happened sixty-odd years before, which had proved often extremely difficult and frustrating. It was, rather, a case of looking at the evidence, which Browning, Longerich and Van Pelt presented and that Irving had used, and then looking at how Irving dealt with the evidence.

Now this is a very fine distinction of course; and in practice, the boundary between the writing of history about the Holocaust on the one hand, and the Holocaust itself on the other, became very blurred. But as Irving said at the beginning, the case was about what went on in the four walls of his own study. Lipstadt's allegations related to Irving's writing of history, not to the history itself. That also made it I think easier for the court to deal with. We could simply compare documents with the relevant passages in Irving's books.

Under cross-examination, Irving was forced to make one concession after another. The kind of cross-examination he was subjected to could quite often be dramatic. At one point for example Rampton presented him with a document in which there was an account of ninety-seven thousand Jews having been killed in gas vans at Chelmno, and Irving agreed that this was an authentic document and that the SS had clearly done this. Rampton then of course turned to a passage in one of Irving's books were he said gassing was only used on a very limited and experimental scale, and said to Irving "Would you describe it as very limited and experimental?" Irving had to admit that he had been "just plain wrong". On one issue after another he was placed in a position where he had no alternative but to agree that his own account of these events had flown in the face of the evidence and when he tried to retract some of these admissions later on, this only made things worse, because the Judge then said that he was persisting in giving an account which he knew to be falsified because he had earlier admitted that it had not corresponded to the documentary evidence.

The Court, indeed, treats everything that you say in a witness box as being the absolute truth, in a way that initially makes a historian feel rather uncomfortable. We are used to surrounding everything that we say with qualifications, with “probably”, “maybe” and “perhaps”. The Court demanded great clarity on absolutely everything. One example of this was when Irving tried to suggest to the Judge that the document describing the 97,000 deaths at Chelmno had some suspicious features. The judge asked Irving whether he was suggesting that “this is not an authentic document". Irving said "I am trying to plant a seed of suspicion in your Lordship's mind" and the Judge indicated that this was not good enough. Irving then agreed to treat it as authentic “for the purposes of this

morning". This would not do, however, as the defence counsel pointed out: it was necessary to know whether or not Irving accepted the document as genuine as far as the whole trial was concerned, and since Irving had no convincing reasons for it to be considered an outright forgery, he had to accept that it was not; there was no half-way house as far as the Court was concerned. I found that very salutary indeed. Of course, if you don't know something or if you are not sure about something in the witness box, you can say so, and that is accepted by the Court. The Court is not unreasonable, it's not going to ask you to make definitive statements on things that you think are not definitive or where there is no possibility of a definitive answer.

On 11 April 2000, the trial came to an end and the Judge ruled in favour of the defence in respect of Holocaust denial and in respect of the falsification with one very small exception. The Judge rejected Lipstadt's allegation in her book that Irving had contacts with Palestinian terrorists through a planned conference in Stockholm, and in one or two other small things. In terms of the Defamation Act these didn't weigh very heavily at all, because the other allegations that Lipstadt made had damaged Irving's reputation so severely. So Mr. Justice Gray found in favour of the defence, in a three hundred and fifty page Judgement. It was an extraordinary example of judicial clarity and lucidity and was described in the press as devastating. Ironically of course had there been a jury, there would have been no three hundred and fifty pages, there would simply have been a series of yes-or-no answers by the foreman to questions put by the Judge.

The Judgment was seized upon by the Press, and enormous publicity was given to the verdict, although during the trial itself the Press had reported relatively little. Subsequently Irving attempted to obtain leave to appeal but failed to do so. He was ordered to pay the costs and also failed to do so, and was made bankrupt in March 2002. He has now exhausted the further possibilities of the law; no kind of further legal action on the case is open to him. His flat in London has been impounded, though not by Penguin but by the building society, because he had five mortgages on it, and he is spending most of his time in the United States.

What did it all mean? First of all, it was a victory for freedom of speech. After all, here was an attempt to suppress criticism. If Irving had won, then it would have been impossible to criticise Holocaust deniers of any sort let alone just criticise Irving. Lipstadt did not have to pulp the book or apologise. It meant that research, debate and discussion on the Holocaust can go on unimpeded. This doesn't mean that there is any one single particular interpretation or line that has been supported. And

indeed it was part of the defence's tactics to call Christopher Browning and Peter Longerich to the witness stand, two historians who disagree quite sharply on the process of decision-making and above all the date on which the crucial decision to exterminate the Jews of Europe was taken (Browning locates it in September/October 1941, Longerich in April 1942). But these views are based on legitimate disagreements over documents which neither of them is trying to falsify or doctor, and the point of course is that Irving is wholly outside that area of legitimate disagreement. So the trial did not suppress debate, it made its continuation possible, and in this sense it was a victory for free speech.

However, it was only a limited victory for free speech, as I discovered shortly afterwards. I am conscious of course that even at Cambridge we need to continue to get the top rankings for the Research Assessment Exercise, and I also thought that the newspaper reporting had been very poor on the issue of falsification, so I wanted to bring it to a wider audience and after the trial was over, I decided to write a book about it. I boiled down my report into a number of chapters, I added on chapters about the trial itself, its general significance and so on and it was accepted by a publisher. A few months went past, and we had a copy-edited text and suddenly then the publishers, Heinemann of London, a division of Random House UK, turned around and said they couldn't publish it for legal reasons. Irving had made general threats of bringing libel cases against me although he hadn't actually written to Heinemann specifically. Nevertheless, they got a legal reading that they claimed said it was unsafe. In fact I got a copy of this later on and it said the reverse: it said that it was an acceptable risk to publish the book.

I then went to another publisher, Granta, who tried to make publication conditional on signing me up for a whole series of other books that would have kept me busy for the rest of my career if not my life. I was unwilling to do this and even though they assured me that the publication of *Telling Lies about Hitler* - that was the title of the book - would not depend on these other contracts, as soon as I said I wasn't going to sign the other contracts they dropped the book. A further publisher, Profile, was even offered free legal representation at least up until the end of a strike-out action (getting a Court to rule that Irving should not bring a libel case because it stood no chance of success). They turned it down too because there remained in their view a tiny kernel of doubt about the legal situation that made it too risky. Nearly eighteen months elapsed between the publication of the book in America where the libel laws are less biased in favour of the claimant, and Britain, where Tariq Ali and Verso Books eventually took up the cudgels and very bravely published it, in June 2002. Publishers were afraid not of Irving winning a libel case

against me, they all said that he was bound to lose. What they feared was the expense involved. Publishing is a precarious business. Penguin are a large company, bankrolled by a large corporation, Pearson's. It had cost them and their insurers well over two million pounds to fight the case and other publishers, even a large one such as Random House, were simply intimidated by the thought of having to spend even a fraction of that kind of money. It showed, I think, that England's libel laws are still seriously biased in favour of claimants, and although there have been some changes in recent years, still seriously damaging to freedom of speech.

The final significance of the case was that it showed that history and historians can reach reasoned conclusions about what happened in the past and in particular in the Holocaust on the basis of a careful and as far as possible unbiased examination of the evidence. Unbiased in the sense that they are not trying to gather evidence to prove a case but will allow the evidence to cause them to abandon cherished ideas if it goes against it. The trial brought an enormous mass of documentation to public notice and particularly the reporting on the verdict was educationally important for large numbers of newspaper readers, particularly for younger readers who may not have been aware of much of the history of the Holocaust. It discredited Holocaust deniers comprehensively and it has seriously damaged Irving's reputation. I had spoken to a number of professional historians before the trial who had expressed surprise at it and thought that Irving couldn't possibly be a Holocaust denier. Afterwards they changed their minds. In particular, amongst the great mass of general readers who had taken Irving's work on trust, he was now revealed to be a falsifier of history. Through him the trial thus did serious damage to the cause of Holocaust denial.

Some said that the trial and the defence's decision to fight the case gave Irving a platform which he used to spread his views. But very quickly after the beginning of the trial it was clear that the publicity was all bad and indeed by about the third week Irving was complaining to the Judge that the Press were printing hostile stories and would he please tell them to stop doing it. But as the judge pointed out, he himself was at the trial every day, and so did not need to read what the papers said about it. Irving's feeling that things were going badly was clearly justified. The tactics that the defence uses in a libel case such as this one are usually to turn the tables on the claimant. If you are using justification as the defence then you have to show that the original libel is true and then you repeat it at enormously greater length and with much, much more evidence. So in place of six pages in Lipstadt's book, which had only sold two thousand copies before the trial happened, there were two thousand pages of expert testimony and three months' worth of trial transcripts, the

gist of which was splashed over the world's newspapers, followed by television programmes, a planned film made for American TV, and enormous publicity which was overwhelmingly hostile to Irving.

The trial, in the end, was about history and not about memory. The defence decided not to bring survivors to the witness box. There were two reasons for this. The first was that subjecting now elderly, sometimes frail people to hostile questioning by Irving himself, by a man who clearly had a great contempt for them and did not believe what they had gone through or the terrible sufferings they had endured, would have been very difficult for them. It would have been an ordeal that we wanted to spare them from. And of course the smallest slip of memory - not impossible, not even perhaps uncommon amongst the elderly - would have been seized upon by Irving to try and discredit their testimony.

But secondly and more importantly in a way, the defence's tactics of course were to keep the focus on Irving right through the trial. Putting Holocaust survivors into the witness box would have taken the focus off Irving and put it onto them. The trial in the end was not about whether the Holocaust happened, but about Irving's writings about the Holocaust, a fine distinction which was sometimes admittedly difficult to maintain, but which nevertheless, as everyone agreed, was crucial to the whole case and its outcome. The trial, in other words, was above all else about history and how it is written.

It showed in the end that there are many serious historians who are producing important and significant work on this difficult and painful subject, that their work is generally reliable, and that the Holocaust deniers are a small minority whose views are not to be taken seriously (opinion polls in the US indeed recently showed that the number of people who believe that there were no gas chambers at Auschwitz is far smaller than those who believe that Elvis Presley is still alive). The trial showed above all that when the survivors are no longer with us, their passing will not have increased the danger of Holocaust deniers gaining credence for their absurd and offensive views, that we can rely upon history when memory has gone. And that is the reason why as the *Daily Telegraph* said at the conclusion of the trial that it "has done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations."

Thank you very much for your attention.