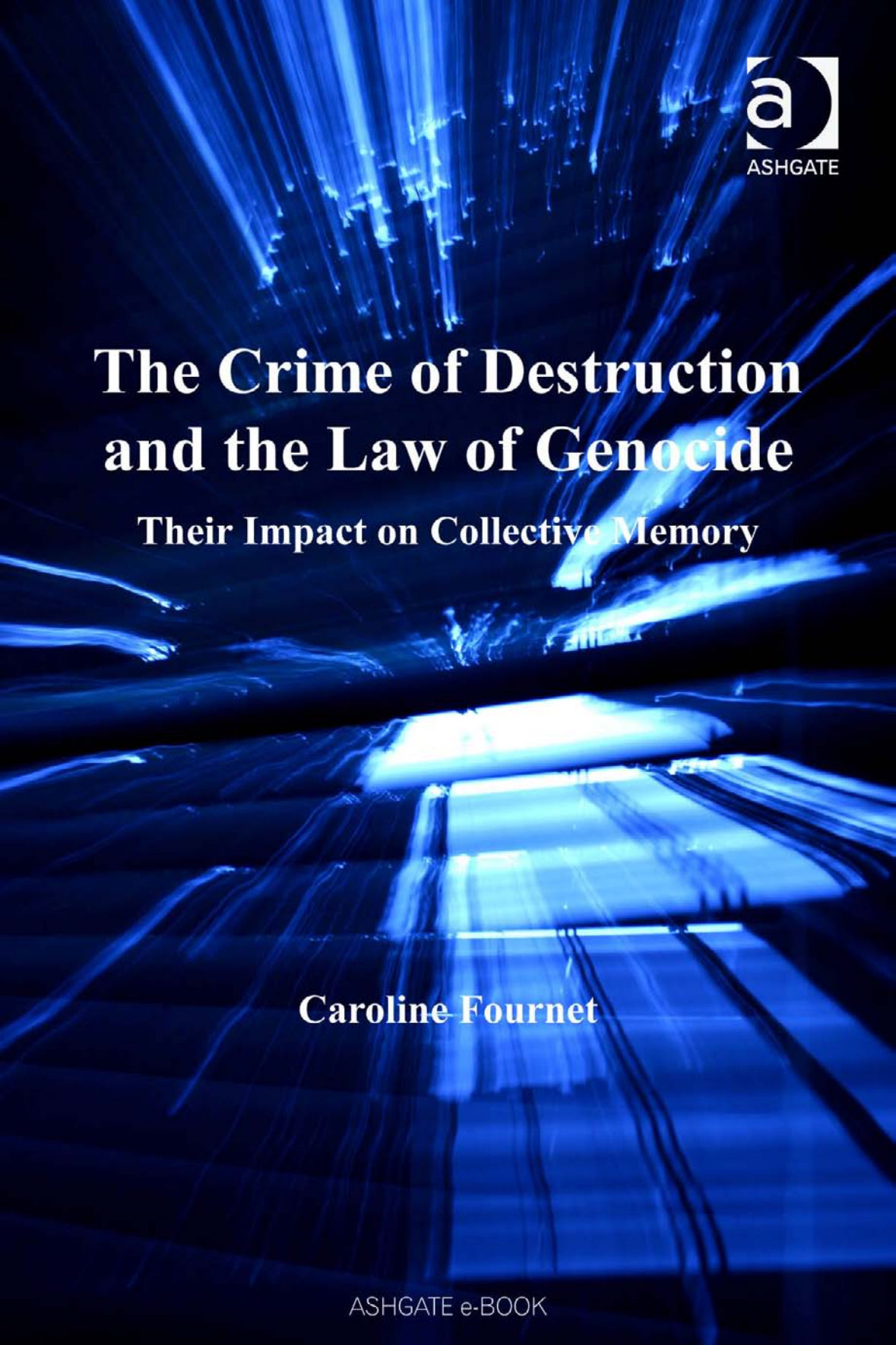
ASHGATE
The Crime of Destruction and the Law of Genocide
Their Impact on Collective Memory
Caroline Fournet
ASHGATE e-BOOK

THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE

INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE

Series Editors:

Mark Findlay, *Institute of Criminology, University of Sydney*
Ralph Henham, *Nottingham Law School, Nottingham Trent University*

This series explores the new and rapidly developing field of international and comparative criminal justice and engages with its most important emerging themes and debates. It focuses on three interrelated aspects of scholarship which go to the root of understanding the nature and significance of international criminal justice in the broader context of globalization and global governance. These include: the theoretical and methodological problems posed by the development of international and comparative criminal justice; comparative contextual analysis; the reciprocal relationship between comparative and international criminal justice and contributions which endeavor to build understandings of global justice on foundations of comparative contextual analysis.

Other titles in the series:

Restorative Justice: Ideals and Realities
Margarita Zernova
ISBN 978 0 7546 7032 2

The Criminal Law of Genocide: International, Comparative and Contextual Aspects
Edited by Ralph Henham and Paul Behrens
ISBN 978 0 7546 4898 7

The Genocide Convention: An International Law Analysis
John Quigley
ISBN 978 0 7546 4730 0

A World View of Criminal Justice
Richard Vogler
ISBN 978 0 7546 2467 7

The Crime of Destruction and the Law of Genocide

Their Impact on Collective Memory

CAROLINE FOURNET
University of Exeter, UK

ASHGATE

Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Fournet, Caroline
The crime of destruction and the law of genocide : their impact on collective memory. - (International and comparative criminal justice)
1. Genocide
I. Title
345'.0251

Library of Congress Cataloging in Publication Data
Fournet, Caroline.
The crime of destruction and the law of genocide : their impact on collective memory / by Caroline Fournet.
p. cm -- (International and comparative criminal justice)
Includes bibliographical references and index.
ISBN-13: 978-0-7546-7001-8
1. Genocide. 2. Genocide--Psychological aspects. 3. Crimes against humanity. 4. Jus cogens (International law). I. Title

K5302.F67 2007
345'.0251--dc22

2006033550

ISBN 978 0 7546 7001 8

Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall.

Contents

Acknowledgements

I would like to express my deepest thanks to Professor Ralph Henham, Professor of Criminal Justice at Nottingham Law School, Nottingham Trent University, and Professor Mark Findlay, Deputy Director of the Institute of Criminology, Sydney Law School, at the University of Sydney for supporting the idea for this book from the very beginning and for accepting to edit it in their series *International and Comparative Criminal Justice*. I would also like to thank the anonymous reviewer who has twice made very constructive and helpful comments, as well as Alison Kirk, Senior Commissioning Editor for Law at Ashgate Publishing, for all her help on this project. As ever, my most sincere thanks are also due to Professor Malcolm N. Shaw Q.C. from the Faculty of Law at the University of Leicester for his invaluable support. Finally, I wish to thank my new institution, the School of Law at the University of Exeter, for giving me the means to pursue my research.

From a more personal point of view, I would like to thank my friends: Christophe for his friendship and incredible support all through the years, Karine for her loyalty through the best and the hardest of times, Delphine for having always been there, Dimitra for her invaluable friendship, Claire for her daily support, as well as Arnaud, Aurélia, Avo, Boudjelal, Cécile, Floriane, Kaye, Salima, Véronique and Zoë. Their continous friendship has been an essential help in the pursuance of my research. My deepest thanks also go to my paternal grand-parents, Georgette and Jean Fournet. I also wish to thank my aunt and uncle, Marie-Christine and Dominique Jérôme, and their children, Aurélie and Sylvain. Finally, I would like to express my most sincere thanks to my maternal grand-parents, Juliette and Paul – clandestine name Matthieu – Langlois for having had the courage to say 'No' in spite of their very young age. I am extremely proud to be their grand-daughter.

Last but definitely not least, I would like to express my deepest thanks and my greatest love to my parents, Christian and Marie-Claude, for their love and support all through the years. They have always shown great interest in my work and have continuously encouraged my research. Their kindness, openness, tolerance, help and love have made me who I am, and the present book would have never seen the day if it had not been for them. I will simply never be able to thank them enough. My greatest thanks also go to my brothers, Antoine and Benjamin, for always being there for me. They have become fantastic young men, loyal and generous, and it truly is an honour to be their sister. To the four of you, thank you.

Caroline I. Fournet
June 2007

This page intentionally left blank

List of Abbreviations

AFDI	Annuaire Français de Droit International
AJIL	American Journal of International Law
American Convention on Human Rights	American Convention on Human Rights ('Pact of San José'), Organization of American States, 1969
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid, United Nations, 1973
BYBIL	British Yearbook of International Law cass. crim. Cour de Cassation, Chambre Criminelle (France)
CCL No. 10	Allied Control Council Law No. 10
Colum L Rev	Columbia Law Review
Crim L F	Criminal Law Forum
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950
EJIL	European Journal of International Law
Elements of Crimes	Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized Draft Text on the Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add.2
ESCOR	Economic and Social Council Official Records
FCA	Federal Court of Australia
G.A.	General Assembly of the United Nations
GAOR	General Assembly Official Records
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 1948
HILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9
ICCPR	International Covenant on Civil and Political Rights, United Nations, 1966

ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, in Security Council Resolution 955
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (also referred to as the International Criminal Tribunal for the Former Yugoslavia)
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia, in Security Council Resolution 808
ILC	International Law Commission
ILC 1954 Draft Code of Offenses	1954 International Law Commission Draft Code of Offenses Against the Peace and Security of Mankind, 28 July 1954, [1954] II *ILC Yearbook*
ILC 1991 Draft Code of Crimes	1991 Draft Code of Crimes Against the Peace and Security of Mankind, 19 July 1991, [1991] II (2) *ILC Yearbook*
ILC 1996 Draft Code of Crimes	1996 International law Commission Draft Code of Crimes Against the Peace and Security of Mankind, 6 May–26 July 1996, [1996] II (2) *ILC Yearbook*
ILM	International Legal Materials
ILR	International Law Reports
ILQ	International Law Quarterly
IMT	International Military Tribunal at Nuremberg
IMT Charter	Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279
IMTFE	International Military Tribunal for the Far East
JICJ	Journal of International Criminal Justice
Law & Contemp Prob	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
National Prosecutions	Post-World War II prosecutions held in different states predicated on the Law of the IMT Charter, but based on national legislation and conducted before military tribunals,

	special tribunals and ordinary courts
Nuremberg Judgment	Trial of the Major War Criminals before the International Military Tribunal (TMWC), 42 volumes, Nuremberg, 1947–1949
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] II *ILC Yearbook*
Nuremberg Subsequent Proceedings	Proceedings by the Allied Powers held pursuant to Control Council Law No. 10. *In* [1950] Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, 15 volumes, Washington: US Department of the Army, Government Printing Office, 1946–1949
PCIJ	Permanent Court of International Justice
RCADI	Recueil des Cours de l'Académie de Droit International
RGDIP	Revue Générale de Droit International Public
RIDC	Revue Internationale de Droit Comparé
Ruhashyankiko Report	Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-first session, E/CN.4/Sub.2/416, 4 July 1978
RTDH	Revue Trimestrielle des Droits de l'Homme
SCOR	Security Council Official Records
SCR	Supreme Court Reports (Canada)
The Raoul Wallenberg Compilation	Melander, Göran and Alfredsson, Gudmundur (eds) (1997), *The Raoul Wallenberg Compilation of Human Rights Instruments* (Martinus Nijhoff Publishers)
Tokyo Charter	Charter of the International Military Tribunal for the Far East, 19 January 1946, *United States Treaties and Other International Acts Series* 1589
Tokyo Trials	Trial of the Major War Criminals, Proceedings of the International Military Tribunal for the Far East at Tokyo. Compiled in Pritchard,

	John R. and Zaide, Sonia Magbanua (eds) (1981), *The Tokyo War Crimes Trial: Proceedings of the Tribunal* (Garland Publishing)
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, 1984
UDHR	Universal Declaration of Human Rights, United Nations, 1948
UN	United Nations
UN Charter	Charter of the United Nations, 1945
UN Convention on Statutory Limitations	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, United Nations, 1968
UNTS	United Nations Treaty Series
US	United States Supreme Court Reports
Whitaker Report	Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr B. Whitaker, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-eighth session, E/CN.4/Sub.2/1985/6, 2 July 1985
Yale LJ	Yale Law Journal

Table of Cases

Australia

Jeremy Jones v Fredrick Töben, Federal Court of Australia [2002] FCA 1,150.

Canada

Regina v IMRE Finta, 92 D.L. R. 4th 1, 84, Ontario Court of Appeal, 1992.
Regina v Imre Finta [1994] 1 S.C.R. 701, Supreme Court of Canada, 24 March 1994.
Regina v Ernst Zündel [1987] 56 C.R. 3d 1, Ontario Court of Appeal, Judgment of 23 January 1987.
Regina v Ernst Zündel [1988] District Court, 1988.
Regina v Ernst Zündel [1990] 37 Ontario Court of Appeal 37 OAC 354, 53 C.C.C. (3d) 161.
Regina v Ernst Zündel [1992] 2 S.C.R. 731.

European Commission of Human Rights

Request 9777/82 v Belgium, Decision of 14 July 1983.

European Court of Human Rights

Lehideux et Isorni case, *Lehideux et Isorni v France*, 23 September 1998, No. 55/1997/839/1045.

France

Barbie (Klaus) case, *Fédération Nationale des Déportés et Internés Résistants et Patriotes et Autres v Klaus Barbie*, Cass. Crim, 6 October 1983. Reprinted in (1984), RGDIP 88, 509.
Barbie (Klaus) case, *Fédération Nationale des Déportés et Internés Résistants et Patriotes et Autres v Klaus Barbie*, Cass. Crim, 20 December 1985. Reprinted in (1986), RGDIP 90, 1024 and in ILR 78, 125.
Brunner (Aloïs) case, Cour d'assises de Paris, 2 March 2001.
Cdca et autres v Editions Robert Laffont, Encyclopédies Quid, Tribunal de Grande Instance de Paris, 17e chambre civile, judgment, 6 July 2005.

Germany

International Court of Justice

International Criminal Tribunal for the Former Yugoslavia

Kolundžija], Case No. IT–95–8, Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001.

Sikirica Sentencing Judgment [*Prosecutor v Dusko Sikirica, Damir Dosen and Dragan Kolundžija*], Case No. IT–95–8–S, Sentencing Judgment, Trial Chamber III, 13 November 2001.

Sikirica Motions for Acquittal Decision [*Prosecutor v Dusko Sikirica, Damir Dosen and Dragan Kolundžija*], Case No. IT–95–8–T, Judgment on Defence Motions to Acquit, Trial Chamber, 3 September 2001.

Sikirica Motions for Acquittal Decision [*Prosecutor v Dusko Sikirica, Damir Dosen and Dragan Kolundžija*], Case No. IT–95–8–T, corrigendum to Judgment on Defence Motions to Acquit, Trial Chamber, 20 September 2001.

International Criminal Tribunal for Rwanda

Akayesu Judgment [*Prosecutor v Jean-Paul Akayesu*], Case No. ICTR–96–4–T, Judgment, Trial Chamber I, 2 September 1998.

Bagilishema Judgment [*Prosecutor v Ignace Bagilishema*], Case No. ICTR–95–1A–T, Judgment, Trial Chamber I, 7 June 2001.

Kambanda Sentencing Judgment [*Prosecutor v Jean Kambanda*], Case No. ICTR–97–23–S, Judgment and Sentence, Trial Chamber I, 4 September 1998.

Kambanda Appeal Judgment [*Prosecutor v Jean Kambanda*], Case No. ICTR−97–23–A, Judgment, Appeals Chamber, 19 October 2000.

Kayishema and Ruzindana Judgment [*Prosecutor v Clément Kayishema and Obed Ruzindana*], Case No. ICT−95–1–T, Judgment, Trial Chamber II, 21 May 1999.

Rutaganda Judgment [*Prosecutor v George Rutaganda*], Case No. ICTR−96–3–T, Judgment, Trial Chamber I, 6 December 1999.

Semanza Judgment [*Prosecutor v Laurent Semanza*], Case No. ICTR−97–20–T, Judgment and Sentence, Trial Chamber III, 15 May 2003.

International Military Tribunal at Nuremberg

Trials of the Major War Criminals before the International Military Tribunal (TMWC), 42 volumes, Nuremberg, 1947–1949.

International Military Tribunal for the Far East

Trial of the Major War Criminals, Proceedings of the International Military Tribunal for the Far East at Tokyo. Compiled in Pritchard, John R. and Zaide, Sonia Magbanua (eds) (1981), *The Tokyo War Crimes Trial: Proceedings of the Tribunal* (Garland Publishing).

Israel

Criminal Case (Jerusalem) 373/86. *The State of Israel v Ivan* (John) *Demjanjuk* (Tel Aviv, Israel Bar Association, 1991).

Criminal Appeal 377/88. *The State of Israel v Ivan* (John) *Demjanjuk*, Judgment of the Supreme Court of Israel (Jerusalem: Supreme Court, 1993).

Attorney-General of the Government of Israel v Adolf Eichmann, 36 ILR 1 (Israel District Court – Jerusalem, 1961).

Attorney-General of the Government of Israel v Adolf Eichmann, 36 ILR 277 (Israel Supreme Court, 1962).

Honigman v Attorney-General of Israel, 7 Piskei Din (Law Reports) 296, 303 [1951] ILR 542 (District Court – Tel Aviv, 1953).

Italy

Priebke case, Military Court of Rome, 1 August 1996.

Nuremberg Subsequent Proceedings

USA v Altsoetter et al., the '*Justice* case', Case No. 3, Military Tribunal III, 3 *Nuremberg Subsequent Proceedings*.

USA v Brando et al., the '*Medical* case', Case No. 1, Military Tribunal I, 1−2 *Nuremberg Subsequent Proceedings*.

USA v Flick et al., the '*Flick* case', Case No. 5, Military Tribunal IV, 6 *Nuremberg Subsequent Proceedings*.

USA v Greifelt et al., the '*RuSHA* case', Case No. 8, Military Tribunal I, 4−5 *Nuremberg Subsequent Proceedings*.

USA v Krauch et al., the '*Farben* case', Case No. 6, Military Tribunal VI, 7−8 *Nuremberg Subsequent Proceedings*.

USA v Krupp et al., the '*Krupp* case', Case No. 10, Military Tribunal III, 9 *Nuremberg Subsequent Proceedings*.

USA v Milch et al., the '*Milch* case', Case No. 2, Military Tribunal II, 2 *Nuremberg Subsequent Proceedings*.

USA v Ohlendorf et al., the '*Einsatzgruppen* case', Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings*.

USA v Pohl et al., the '*Pohl* case', Case No. 4, Military Tribunal II, 5 *Nuremberg Subsequent Proceedings*.

USA v Von Leeb et al., the '*High Command* case', Case No. 12, Military Tribunal V, 10−11 *Nuremberg Subsequent Proceedings*.

USA v Von List et al., the '*Hostage* case', Case No. 7, Military Tribunal V, 11 *Nuremberg Subsequent Proceedings*.

USA v Von Weizsaecker et al., the '*Ministries* case', Case No. 11, Military Tribunal IV, 12−14 *Nuremberg Subsequent Proceedings*.

Switzerland

Niyonteze case, *Public Prosecutor v Fulgence Niyonteze*, Jugement du Tribunal militaire d'appel 1A du 26 mai 2000.
Niyonteze case, *Public Prosecutor v Fulgence Niyonteze*, Military Tribunal of Cassation, 27 April 2001.

United States of America

Demjanjuk v Petrovsky, 776 F. 2d 571 (6th Circ. 1985), 79 ILR 535.
Doe v Karadzic, 866 F. Supp. 734 (SDNY, 1994).
Mel Mermelstein v The Institute for Historical Review, Superior Court of the State of California for the County of Los Angeles, pre-trial hearings, 9 October 1981.

Table of Authorities

Treaties, Conventions and Other International Instruments

Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919. Reprinted in Bevans, C.F. (ed.) (1970), *Treaties and Other International Agreements of the USA, 1776−1949, Volume 2*.

Treaty of Peace Between the Allied Powers and Turkey, Signed at Sèvres, 10 August 1920 (Supp, 1921), AJIL 15, 179–295.

Treaty with Turkey and other instruments signed at Lausanne, 'Treaty of Lausanne', 24 July 1924 (Supp., 1924), AJIL 18, 1–116.

Charter of the United Nations, 1945. Signed on 26 June 1945, San Francisco (Entry into force: 24 October 1945).

Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279. Reprinted in (Supp., 1945), AJIL 39, 257.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946. Excerpts reprinted in Ratner, Steven R. and Abrams, Jason S. (2001), *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 2nd edn (Oxford University Press), pp. 350–2.

Charter of the International Military Tribunal for the Far East, 19 January 1946, *United States Treaties and Other International Acts Series* 1589.

Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, 1948. Approved and proposed for signature, ratification or accession by the General Assembly of the United Nations, Resolution 260 A (III) of 9 December 1948 (Entry into force: 12 January 1951). Reprinted in *The Raoul Wallenberg Compilation*, pp. 575–8.

Universal Declaration of Human Rights, United Nations, 1948. Adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948. Reprinted in *The Raoul Wallenberg Compilation*, pp. 27–32.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950. Adopted by the Council of Europe on 4 November 1950 (Entry into force: 3 September 1953). Reprinted in *The Raoul Wallenberg Compilation*, pp. 81–96.

Convention relating to the Status of Refugees, United Nations, 1951. Signed in Geneva on 28 July 1951 (Entry into force: 22 April 1954). Reprinted in *The Raoul Wallenberg Compilation*, pp. 343–59.

International Convention on the Elimination of All Forms of Racial Discrimination,

United Nations, 1965. Adopted by the General Assembly of the United Nations, Resolution 2106 A (XX) of 21 December 1965 (Entry into force: 4 January 1969). Reprinted in *The Raoul Wallenberg Compilation*, pp. 255–66.

International Covenant on Civil and Political Rights, United Nations, 1966. Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, Resolution 2200 A (XXI) of 16 December 1966 (Entry into force: 23 May 1976). Reprinted in *The Raoul Wallenberg Compilation*, pp. 43–60.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, United Nations, 1968. Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, Resolution 2,391 (XXIII) of 26 November 1968 (Entry into force: 11 November 1970). Reprinted in *The Raoul Wallenberg Compilation*, pp. 579–82.

Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/CONF.39/27 (23 May 1969). Reprinted in (1969), AJIL 63, 875–903.

American Convention on Human Rights ('Pact of San José'), Adopted by the Organization of American States on 22 November 1969, San José, Costa Rica (Entry into force: 18 July 1978). Reprinted in *The Raoul Wallenberg Compilation*, pp. 155–77.

International Convention on the Suppression and Punishment of the Crime of Apartheid, United Nations, 1973. Adopted and opened for signature, ratification or accession by the General Assembly of the United Nations, Resolution 3068 (XXVIII) of 30 November 1973 (Entry into force: 18 July 1976).

European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Council of Europe, 25 January 1974, *European Treaty Series* 82.

Convention on the Elimination of Discrimination of All Forms of Discrimination against Women, United Nations, 1979. Adopted by the General Assembly of the United Nations, Resolution 34/180 of 18 December 1979 (Entry into force: 3 September 1981). Reprinted in *The Raoul Wallenberg Compilation*, pp. 237–47.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, 1984. Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, Resolution 39/46 of 10 December 1984 (Entry into force: 26 June 1987). Reprinted in *The Raoul Wallenberg Compilation*, pp. 549–61.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, 1987. Adopted by the Council of Europe on 26 November 1987 (Entry into force: 1 February 1989). Reprinted in *The Raoul Wallenberg Compilation*, pp. 563–8.

Convention on the Rights of the Child, United Nations, 1989. Adopted and opened for signature, ratification or accession by the General Assembly of the United

Nations, Resolution 44/25 of 20 November 1989 (Entry into force: 2 September 1990). Reprinted in *The Raoul Wallenberg Compilation*, pp. 279–97.

Statute of the International Tribunal for the Former Yugoslavia, United Nations, 1993. Approved by the Security Council of the United Nations in Resolution 827 of 25 May 1993. Reprinted in *The Raoul Wallenberg Compilation*, pp. 583–92.

Statute of the International Tribunal for Rwanda, United Nations, 1994. Decided by the Security Council of the United Nations, Resolution 955 of 8 November 1994. Reprinted in *The Raoul Wallenberg Compilation*, pp. 593–602.

Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Cruiminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 1998. Reprinted in Bassiouni, M. Cherif (ed.) (1998), *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, Inc.), pp. 39–114.

National Legislation

Australia

Genocide Convention Act No. 27, 1949.

War Crimes Statute, 1988.

War Crimes Amendment Act, 1989 Australian Acts No. 3.

Austria

Law No. 148, Federal Law – Amendment of the Prohibition Law, 1992.

Belgium

Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions, 16 June 1993.

Law on the repression of the denial of the genocide committed by the German National-Socialist regime during the Second World War, 23 March 1995.

Loi relative à la répression des violations graves de droit international humanitaire, 10 February 1999.

Canada

War Crimes Statute, 1987.

China (Republic of)

War Crimes Statute, law of 24 October 1946, 14 War Crimes Report.

Costa Rica

Artículo 127 del proyecto del Codigo Penal (14 de abril de 1998).

Ethiopia

Article 281 of the Penal Code (1957).

France

Code de Procédure Pénale
Article 7.

Nouveau Code Pénal
Article 211–1 du Code Pénal.
Article 213–5 du Code Pénal, Loi n°. 64/1326 tendant à constater l'imprescriptibilité des crimes contre l'humanité, 26 December 1964.
Loi n° 96/432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats Voisins. *Journal Officiel*, 23 May 1996, p. 7,695.
Loi n° 2001/70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915.
Loi n° 2001/434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité.
Texte adopté n° 610 – Proposition de loi tendant à réprimer la contestation de l'existence du génocide arménien, 12 octobre 2006.

Germany

Criminal Code
Article 130.
Article 131.
Article 185.
Section 78.
1985 law on the Auschwitz lie.
2002 International Crimes Code (Völkerstrafgesetzbuch).

Israel

Nazis and Nazi Collaborators (Punishment) Law, Israel, 1950, 5,710/1,950, 57 Sefer Hachukim, 9 August 1950.
The Crime of Genocide (Prevention and Punishment) Law (1950, p.42) Sefer Hachukim 137, 7 April 1950.
Denial of Holocaust (Prohibition) Law 5,746–1,986.

Italy

Article 157 of the Penal Code.

Peru

Ley No. 26926: Artículo 319 del Codigo Penal.

Romanian Socialist Republic

Article 356 of the Penal Code (1976).

Switzerland

Article 261b of the Penal Code.

United Kingdom

War Crimes Act, 1991, c. 13, § 1(1). Reprinted in Evans, Malcolm D. (1994), *Blackstone's International Law Documents*, 2nd edn (London: Blackstone Press Limited), pp. 407–08.

Significant Official Reports and Documents

This table lists only those official reports and documents which are recurrently referred to throughout the book.

European Parliament Documents

Resolution on European and International Protection for Nazi Concentration Camps and Historical Monuments, Resolution No. B3-208, 0218, 0219, 0228 and 0283/93, European Parliament, Minutes of the Proceedings of the Sitting of 11 February 1993, Item 3.
Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of right-wing Extremist Violence, No. A3-0127/93, European Parliament, Minutes

of the Proceedings of the Sitting of 21 April 1993, Item 19.

United Nations Documents

General Assembly Resolution 96 (I), UN Doc. A/231, 11 December 1946.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal [1950] II *ILC Yearbook*.

ILC (1954) Draft Code of Offenses [1954] II *ILC Yearbook*.

Principles of International Cooperation for the Arrest, Extradition and Punishment of War Crimes and Crimes Against Humanity, Resolution 3074 (XXXVIII), 28 UN GAOR Supp. (No. 30), UN Doc. A/9030 (3 December 1973). Available at: <http://www.unhchr.htm>

Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study prepared by Mr Nicodème Ruhashyankiko, Special *rapporteur*, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-first session, E/CN.4/Sub.2/416, 4 July 1978.

Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr B. Whitaker, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Thirty-eighth session, E/CN.4/Sub.2/1985/6, 2 July 1985.

ILC (1991) Draft Code of Crimes [1991] II (2) *ILC Yearbook*.

United Nations Human Rights Committee, General Comment No. 20, regarding Article 7(15) ICCPR, UN Doc. CCPR/C/21/Rv 1/Add 3 (7 April 1992).

Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, Annex I (1993).

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 and Annex (3 May 1993). Reproduced in Bassiouni, M. Cherif (ed.) (1999), International Criminal Law, Volume III: Enforcement, 2nd edn (New York: Transnational Publishers, Inc.), pp. 519–47 (Appendix 15).

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (27 May 1994). Reproduced in Bassiouni, M. Cherif (ed.) (1999), *International Criminal Law*, *Volume III: Enforcement*, 2nd edn (New York: Transnational Publishers, Inc.), pp. 433–87.

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN Doc. S/1994/1405 (9 December 1994).

ILC (1996) Draft Code of Crimes [1996] II (2) *ILC Yearbook*.

Report on the Diplomatic Conference of the United Nations Plenipotentiaries on the Creation of an International Criminal Court, A/CONF.183/C.1/L.76, 1998.

Report of the Group of Experts for Cambodia Established Pursuant to General

Assembly Resolution 52/135, UN Doc. A/53/850-S/1999/321 (16 March 1999).
Report of the Preparatory Commission for the International Criminal Court:
Part I: Finalized Draft Text of the Rules of Procedures and Evidence, 2 November 2000, PCNICC/2000/01/Add. 1.
Part II: Finalized Draft Text of the Elements of Crimes, 2 November 2000, PCNICC/2000/01/Add. 2.

This page intentionally left blank

To my parents, Christian and Marie-Claude,
and to my brothers, Antoine and Benjamin

For memory is a blessing: it creates bonds rather than destroys them. Bonds between present and past, between individuals and groups. It is because I remember our common beginning that I move closer to my fellow human beings. It is because I refuse to forget that their future is as important as my own. What would the future of man be if it were devoid of memory?

Élie Wiesel (1990, p.10)

Introduction: Memory and Genocide

O you who know
did you know that hunger makes the eyes sparkle that thirst dims
them
O you who know
did you know that you can see your mother dead
and not shed a tear
O you who know
did you know that in the morning you wish for death
and in the evening you fear it
O you who know
did you know that a day is longer than a year
a minute longer than a lifetime
O you who know
did you know that legs are more vulnerable than eyes
nerves harder than bones
the heart firmer than steel
Did you know that the stones of the road do not weep
that there is one word only for dread
one for anguish
Did you know that suffering is limitless
that horror cannot be circumscribed
Did you know this
You who know.

Charlotte Delbo (1995, p.11)

To Charlotte Delbo's poignant poem, to her questions directly addressed to 'you who know', to us who know, there is only one possible answer: 'No, we do not know.' We do not know and we cannot even begin to imagine your pain, your sufferings, the extreme horror you and all victims of genocide went through and still endure. We do not know simply because we *cannot* know. In the words of Blanchot, '[t]he wish of all, in the camps, the last wish: know what has happened, do not forget, and at the same time never will you know' (1986, p.82).

This is precisely why the present work is not 'yet another book on genocide'. And in fact, there are no '*other* books on genocides'; there are just books – whether academic works or memoirs – attempting to contemplate and explore the unexplorable, the unbearable, the unthinkable, the unspeakable. In the words of Wiesel, 'how should we read all those books, all the novels, accounts, studies? Haven't they so much as lifted the veil? Pointed out the wounds? Indicated the graveyard? Naturally,

witnesses must write and readers must read. And yet, I know that their secret cannot really be transmitted' (1990, p.35). The present book is not an exception: it is simply a study of the 'unstudiable'. And yet, such books are necessary, necessary to try to promote the memory of the past crimes and to ensure their non-repetition.

The terms 'memory' and 'genocide' have been linked together in a number of scholarly works, and this linkage suffices to emphasize the importance of the remembrance of past occurrences of genocide. But why remember? Why this urge to establish and maintain the memory of past events? The answer is simple: because such past events do not belong to the past. And indeed, if one considers one of the largest genocidal enterprise of all times – the destruction of the European Jews, to employ the expression used by Hilberg (1985) – it is obvious that this event is part of our so-called modern age. Auschwitz was not, is not, 'an accident of History'; it is *part* of the history of the twentieth century, century which has undergone fantastic progress and great evolution and which is generally seen as one of the most 'civilized'. But notwithstanding such progress and evolution, the twentieth century has also witnessed some of the worst crimes ever committed, 'Auschwitz' being a terrible symbol of these crimes. This is why the present book, although it deals with memory, does not however focus on the past *per se*. Past occurrences of genocide do not belong to the past but are, on the contrary, extremely current. They have shaped our societies into post-genocidal societies in which the trauma of these genocides is very much present.

In spite of the different works on the subject and of the recurrent imperative related to the 'duty of remembrance', it nonetheless appears that, once committed, crimes of genocide are too rapidly forgotten and soon fall into oblivion. In other words, the huge amount of literature – whether academic or not − of films – whether documentaries or fictional movies – of museum exhibitions, of monuments, of celebrations and so forth, are in fact nothing but screens behind which there is more often than not both indifference and ignorance. Such an assertion might seem incongruous in the context of our globalized society, in which the 'duty of remembrance' – or 'devoir de mémoire' as the French call it – truly represents an unavoidable social imperative: society as a whole *has to remember*. This expression is nonetheless problematic as it could be seen as focusing exclusively on the past and on its memory, and could thus be interpreted as referring only to a duty to remember past events. But if one considers one the origins of the concept of Memory and thus the Hebraic term *Zakhor*, it is noteworthy that it does not only mean 'you will remember' but rather 'you will continue to tell', to recount, to testify (Ricoeur in Académie Universelle des Cultures, 1999, p.80). The obligation of remembrance is thus not turned towards the past; it is on the contrary an injunction to the future. Behind the expression 'duty of remembrance', there is therefore a wider imperative: although it does obviously encompass the obligation to recall past occurrences of genocide, it in fact only acquires its full meaning if understood as also implying the obligation to use such recollection of the past to act both in the present and for the

future.[1] In the words of French President Chirac, 'to remember is to be present. But it is also to act' and 'to act, today and tomorrow, is to build a society in which this monstrous and criminal enterprise will simply be unthinkable' (2005).[2]

In other words, *with remembrance comes action and prevention*. Memory is in fact nothing but a future. According to Rabbi Nahman of Brastlav, 'memory solely exists in the forthcoming world … remember your future' (see Melka, 2005, p.24).[3] Remember your future …. It is thus the recollection of the past, the memory of the past, which will shape the future and, if the past is forgotten, the future is bound to witness the repetition of past mistakes. If past genocides fail to be remembered, they are bound to happen again. It is on the memory of the crimes that any hope for the future, any hope of civilization, any hope of peace all rely.

In a rather astonishing fashion, although genocide is widely acknowledged as 'the ultimate crime in the evolution of modern human conflict' (Dadrian, 1993, p.173), this crime, once committed, seems nonetheless to fall into oblivion. And indeed, 'mankind is deeply limited in its readiness to experience and take action in response to genocidal disasters. Most events of genocide are marked by massive indifference, silence, and inactivity' (Charny, 1982, p.284). Accordingly, this work focuses on the reasons for this 'social amnesia' and, to this end, adopts a legal perspective. The rationale of this study is to show that genocide fails to be adequately remembered due to the inherent defects of the law of genocide itself. As a matter of fact, the 1948 United Nations Convention on the Prevention and the Punishment of the Crime of Genocide, although recognized as the 'centrepiece in any discussion of the law of genocide' (Schabas, 2000, p.3), is so inherently defective that it has been absolutely unable to achieve what it is supposed to achieve, namely, the prevention and the punishment of the crime of genocide. In other words, the lack of prevention and of punishment of genocide is nothing but a direct consequence of the Genocide Convention itself. The Convention has overall remained *not enforced* because *not enforceable*, both in terms of prevention and punishment, and has thus completely failed to ensure the memory of this most atrocious crime.

The present book thus links the social phenomenon to the legal theory – the legal norms – as well as to the legal practice – the trials. Its main argument is that the social, or collective, memory – here understood as the merging of the different individual memories and thus as the predominant understanding of past events within the same group, namely, the global society – of the crimes is necessarily linked to their legal memory – here understood as the impact of trials on the global society. If this legal memory remains absent, the emergence of social or collective

---

1 This is why the expression 'duty of remembrance' [devoir de mémoire] has been gradually replaced by the term 'work of remembrance' [travail de mémoire]. See Ricoeur, 'Débat' in Barret-Ducrocq (1999, pp.79–80).

2 Translation by the author. The original version reads as follows: 'Se souvenir, c'est être là. Mais c'est aussi agir …. Agir, aujourd'hui et demain, c'est construire une société dans laquelle cette entreprise, monstrueuse et criminelle sera simplement impensable.'

3 Translation by the author: 'il n'y a de mémoire que dans le monde qui vient … souviens-toi de ton futur.'

memory will either prove impossible or will, at best, encounter serious obstacles and difficulties. The lack of trials or their clear shortcomings have indeed degenerated into legal oblivion, soon followed by social and collective amnesia. As a matter of fact, the impunity generally granted to genociders has all too often been interpreted as *de facto* forgiveness for the crimes perpetrated. This apparent forgiveness then automatically – and wrongly – remains in collective memory as a 'legal forgiveness', which in turn paves the way for both general forgiveness as well as forgetfulness.

This is not to say that trials do not have their own defects and trying genociders indeed raises a series of problematic questions. The role of victims, the reliability of witnesses, the powers of courts to put History on trial, the incapacity of trials to ensure reparation, the inability of sentences ever to be appropriate and adequate compared to the enormity of the crimes committed, are all legal shortcomings which cannot be overlooked. This is also not to say that trials are the only vectors of memory and that collective memory exclusively relies on legal memory. Rather, it is to stress that, in the absence of trials and thus of legal memory, the emergence of the collective memory of the crime will be greatly impeded.

If social memory is a concept difficult to control, it can nonetheless be triggered by legal memory which, on the other hand, can rather easily be achieved through the conduct of trials. These trials, taking place in official and impressive arenas, will in turn contribute to the more general historical memory and will thus pave the way for the emergence of a collective memory. It has indeed to be remembered here that justice is based on an ancestral maxim – *res judicata pro veritate habetur* – according to which what is tried must be considered as the truth. The lack of trials will therefore be interpreted as the truthful affirmation that there were no criminals to be tried while, conversely, the conduct of trials will be considered as the confirmation that the crimes did happen and that the criminals deserved to be tried. This confirmation will remain in social memory as 'the truth' and will thus participate in the collective recollection of past events.

Social, or collective, memory therefore relies on legal memory and its importance is underlined when one recalls that, in turn, historical memory – here understood as the academic recollection of past facts and events – depends on social, or collective, memory. According to Greek mythology, Memory – personified by *Mnemosyne* – is mother of History – personified by *Clio* (or *Kleio*) (see Apollodorus, 1997, pp.27–30; Buxton, 2004, p.85, Price and Kearns (eds) 2003, p.360). History is thus the product of Memory itself – and without Memory there would be no History. Ultimately, the concepts of legal memory, social memory and historical memory are therefore very closely linked and a relationship of interdependence between the three notions can be inferred: with legal memory comes social memory and with social memory comes historical memory.

The purpose of the present book is therefore to demonstrate that the legal memory of the crimes will prove an essential tool in both the emergence of a global social memory of these crimes and their perpetrators as well as in the creation of their historical memory. To this end, the first part will deal with the crime of genocide and with its specificity compared to all other crimes. As will be stressed, the uniqueness

of genocide is not based on the presupposition that it is more serious than other crimes, but simply that it is different. The second part will contemplate the legal recognition of such uniqueness and difference as embodied in the 1948 Genocide Convention and will thus explore the failure of this instrument to adequately achieve such recognition. Consequently, the third part will focus on the consequences of the shortcomings of the Genocide Convention, with respect to both genocide trials – or lack of – and to the collective memory of the crimes. Ultimately, it will be emphasized that this lack of trials – or their defects – instead of generating collective social memory of the crimes and their perpetrators, has in fact degenerated into collective amnesia, forgetfulness and forgiveness – precisely for what is and remains unforgivable. In the words of Élie Wiesel,

> 'Memory' is the key word. To remember is to create links between past and present, between past and future. To remember is to affirm man's faith in humanity and to convey meaning on our fleeting endeavours. The aim of memory is to restore its dignity to justice (1990, p.194).

This page intentionally left blank

Part I

Specificity and Uniqueness of Genocides

As the above title unequivocally states, the first part of the present book will explore the concept of the uniqueness of genocides. It is true that, in some respects, this title might seem slightly paradoxical and incongruous – if not grammatically incorrect – to the reader: and indeed, why employ the plural for something that is unique? Shouldn't this title be phrased: 'The Specificity and Uniqueness of Genocide', thus emphasizing the speciality of the crime of genocide compared to any other crime?

As a matter of fact, the crime of genocide – understood here as a generic term for all occurrences of genocides – is unique and specific compared to all other international crimes. This does not imply that the crime of genocide is more serious, or more important than, for instance, a crime against humanity or a war crime; it just means that it is *different*. And indeed, establishing a sordid hierarchy between these crimes, setting up a pyramid of various crimes with the crime of genocide morbidly enthroned at the top, would ultimately make a mockery of all the victims of these different crimes by prioritizing their sufferings according to the legal qualification of the criminal acts perpetrated against them.

Not only can the specificity of the crime of genocide be established in comparison with other international crimes, but this specificity also attaches to each and every occurrence of genocide. This is precisely why genocides *are* unique: even if they fall into the same generic legal category, they are intrinsically different. Again, this does not presuppose in any way that some genocides are more serious than others but simply that they are different, and therefore unique. It will nonetheless appear obvious – even from a rapid glance at the book as a whole – that much emphasis is put therein on the genocide against the Jews perpetrated by the Nazis during the Second World War. Again, the reason behind this particular emphasis is not that this genocide is more serious or more important than the other genocide perpetrated by the Nazis against the Roma population, or than any other genocide committed elsewhere at another time in history. Rather, the prominence of the analysis of the destruction of the European Jews is due to both the quantitative and qualitative value of testimonies – including judicial testimonies – which the present book heavily relies on. And in fact, the vast amount of literature generated by the genocide committed against the Jews of Europe, as well as the importance of the trials held against its perpetrators, will be used throughout this study to highlight the necessity for the memory of the crime of genocide, memory which finds itself heavily impeded, if not totally impossible, when testimonies of the victims stay in the dark, and when prosecutions of the perpetrators remain sporadic and lenient, or even completely absent.

The aims of the following developments are to analyze the specificity of the crime of genocide in terms of its theoretical meaning and of its practical consequences, as well as to demonstrate how the crime of genocide is different compared to any other crime. To this end, the first chapter analyzes the word ‘genocide’ itself, thus focusing on the terminology employed to qualify this particular act of destruction and addressing the crucial question whether this crime should ultimately remain nameless. The second chapter subsequently explores the specificity of the crime of genocide with respect to its perpetration and to the intent of the perpetrators, as well as with respect to victims of genocides, and notably to their need to testify and speak out in a society that more often than not remains completely deaf.

Chapter 1

The Crime of Genocide: ‘A Crime Without a Name’?

> The aggressor … retaliates by the most frightful cruelties. As his Armies advance, whole districts are being exterminated. Scores of thousands – literally scores of thousands – of executions in cold blood are being perpetrated by the German Police-troops upon the Russian patriots who defend their native soil. Since the Mongol invasions of Europe in the sixteenth century, there has never been methodical, merciless butchery on such a scale, or approaching such a scale.
>
> And this is but the beginning. Famine and pestilence have yet to follow in the bloody ruts of Hitler’s tanks.
>
> We are in the presence of *a crime without a name*.
>
> Winston Churchill[1]

Although this is not expressly mentioned in the above quote, Churchill here described the mass executions of Jews and Jewish ‘Bolshevists’ in the Soviet Union by what he called the ‘German Police-troops’, which were in fact the *Einsatzgruppen*, the Nazi killing squads which carried on the extermination of the Jewish and Roma populations of Eastern Europe. His expression ‘crime without a name’ thus directly describing the crimes perpetrated by the *Einstazgruppen*, it is safe to use it as a designation of the Nazi genocides as a whole. Although his statement dates back to 1941, Churchill’s qualification of the Nazi crimes as ‘crimes without name’ raises the still unresolved – maybe because unresolvable? – question of which terminology is to be used to describe precisely what cannot be described, to talk about the untalkable, to express the inexpressible, to write the unwritable, to think the unthinkable. And indeed, many authors have addressed the question without finding an appropriate answer. For instance, Kofman has poignantly expressed her incapacity to talk about her father’s death in Auschwitz:

---

1 Churchill, Winston, *on the mass executions of Jews and Jewish ‘Bolshevists’ killed in mass throughout the occupied territory of the Soviet Union*, August 1941. Emphasis added. Churchill’s information was directly based on German sources as, on 9 July 1941, British cryptographers broke the *enigma* code used by the Nazis to communicate with the Front in Eastern Europe and were then able to pick up the *Einsatzgruppen*’s regular reports which contained detailed accounts of their crimes and precise numbers of their victims. See Fussell (2006).

> Because he was a Jew, my father died in Auschwitz: How can it not be said? And how can it be said? How can one speak of that before which all possibility of speech ceases? Of this event, my absolute, which communicates with the absolute of history, and which is of interest only for this reason. To speak: it is necessary – *without* (the) *power*: without allowing language, too powerful, sovereign, to master the most aporetic situation, absolute powerlessness and very distress, to enclose it in the clarity and happiness of daylight. And how can one not speak of it, when the wish of all those who returned – and he did not return – has been to tell, to tell endlessly, as if only an 'infinite conversation' could match the infinite privation? (Kofman, 1998, pp.9–10).[2]

Marienstras also expressed the idea that the genocide orchestrated by the Nazis remains out of the sphere of human language and that, consequently, one has to tell, one has to read while still remaining unable to tell or to read: 'so one must read, one must tell and, at the same time, one cannot tell nor read …. The unnameable world of the carnage … : that one cannot, one must not, one dares not, one does not want to name' (1994, p.69).[3]

Our inability to find words to qualify the crimes is further enhanced by the fact that, if we had to put words on them, these would necessarily belong to a terminology which existed before the crimes actually took place, to a pre-existing vocabulary. We would use already-existing words to describe and qualify unprecedented crimes and there would thus be a total inadequacy between the acts described and the words employed to designate them. In the words of Wiesel, 'language failed us. We would have to invent a new vocabulary, for our own words were inadequate, anemic' (1990, p.245). Ertel has expressed this idea in the following way: 'whatever we do, whatever we say, we are led to use pre-existing forms of expressions to tell an unprecedented cataclysm' (1993, p.10).[4] Antelme also developed this impossibility to deal with 'the disproportion between the experience [he] had lived through and the account [he was] able to give of it', this impossibility to fill in the distance between the language and the experience of Nazi crimes, this impossibility to tell *without suffocating*:

> Two years ago, during the first days after our return, I think we were all prey to a genuine delirium. We wanted at last to speak, to be heard. We were told that by itself our physical appearance was eloquent enough; but we had only just returned, with us we brought back our memory of our experience, an experience that was still very much alive, and we felt a frantic desire to describe it such as it had been. As of those first days, however, we saw that it was impossible to bridge the gap we discovered opening up between the words at our disposal and that experience which, in the case of most of us, was still going forward within our bodies. How were we to resign ourselves to not trying to explain how we had

---

2 Footnote omitted.

3 Translation by the author. The original version reads as follows: 'Alors, il faut dire, il faut lire, et en même temps on ne peut ni dire ni lire … Le monde innommable du carnage … : qu'on ne peut, qu'on ne doit, qu'on n'ose, qu'on ne veut nommer.'

4 Translation by the author. The original version reads as follows: 'quoi qu'on fasse, quoi qu'on dise, on est amené à se servir de formes d'expressions préexistantes pour dire un cataclysme sans précédent.'

> got to the state we were in? For we were yet in that state. And even so it was impossible. No sooner would we begin to tell our story that we would be choking over it. And then, even to us, what we had to tell would start to seem *unimaginable* (1992, p.3).[5]

Ultimately, the problem of designating the unspeakable through the use of pre-existing common vocabulary is that it implies a 'banalization' of the crime. If the crime can be termed using common language, it then becomes part of our everyday vocabulary and hence a banality. On the other hand, if the genocide is however kept under silence, if no one talks about it, it is then destined to fall into oblivion and to be forgotten (Rinn, 1998, p.22). According to Wiesel, the Nazis intended to bring their crimes far beyond the linguistic limits, to push them away from any human perception, so that they could not be told, so that they could not be worded – so that they would be forgotten:

> To forget would be an absolute injustice in the same way that Auschwitz was the absolute crime. To forget would be the enemy's final triumph.
>
> The fact is that the enemy kills twice – the second time in trying to obliterate the traces of his crime. That is why he pushed his outrageous, terrifying plan to the limits of language, and well beyond: to situate it out of reach, out of our range of perception. 'Even if you survive, even if you tell, no one will believe you', an SS told a young Jew somewhere in Galicia (1990, pp.187–8).

In other words, and even if it proved to be an impossible task, a word had to be found to qualify the crimes perpetrated by the Nazis, a word which could subsequently be used to qualify all other similar occurrences, even if retrospectively, such as the Armenian case which had been referred to by the Allies in a 1915 joint declaration as 'crimes against humanity and civilization' (see Schwelb, 1946, pp.178–81).

Consequently, Polish lawyer Raphael Lemkin coined the word 'genocide' in 1944 (Lemkin, 1944) by putting together the Greek term 'genos' with the term 'cide', which originates in the Latin 'caedere' meaning 'to kill'. It is this term which stayed on and which was subsequently legally acknowledged with the adoption of the 1948 United Nations Convention on the Prevention and the Punishment of the Crime of Genocide.

As previously explained, finding a word to qualify such crimes – although necessary in order not to let the crimes be forgotten – would prove impossible not only because pre-existing terminology would necessarily be inadequate but also because, as the following development will highlight, even new vocabulary would fail to be suitable. The crimes, precisely because they go beyond human imagination, beyond human perception, will never be appropriately termed, *can never be* appropriately termed. There is simply no possible word.

Yet, Lemkin coined the word 'genocide' and this word, like any other, is far from satisfactory when it comes to describing the specific criminal acts. And indeed, as mentioned earlier, the word 'genocide' was created with two different words of both

5 Emphasis in original.

Greek and Latin origins. As a matter of fact, the word 'cide' finds its origins in the Latin term 'caedere', 'to kill', and thus means 'killing' while the Greek term 'genos' refers to people sharing the same genetic features and, consequently, to both the notions of 'group' and of 'race'. These two concepts of group and of race, which we therefore rely on when employing the term 'genocide', raise a series of problematic issues.

First of all, and as will be subsequently analyzed, the notion of 'groups' in the context of 'genocide' is far from objective as the targeted groups might only exist as groups in the minds of the genociders: the existence of a 'group' as such might not have any basis in reality and it is the genocider's fanaticism which will create this group as such. In other words, the crime of genocide aims at the destruction of a group *arbitrarily defined by the genociders*, and the perpetration of the crime of genocide therefore does not necessarily imply the existence of a group, of a *genos*. Chaumont expressed this idea in the following terms:

> Last but not least, *victimized* 'groups' *may only exist in the mind of the perpetrators*. This is the reason why the demarcation of groups to be protected is so delicate and, to tell the truth, impossible to fix *a priori*. This argument in itself suffices to radically contest the validity of the current approach of the concept of genocide. As incongruous as it may seem, *genocide does not presuppose the existence of a constituted* genos, understood as a group conscious of its existence in the eyes of its members. This was the case even during the judeocide as, on one hand, some individuals who did not consider themselves as Jews, or who had ceased to do so, were persecuted as such while, on the other hand, others which were often considered as Jews were spared because they were not Jews according to the Nazi pseudo-racial sense (2002, p.11).[6]

And indeed, the Nazis arbitrarily and artificially defined the concept of 'Jew' and proceeded to the mythical edification of a religion – the Jewish religion – into a race. Under the Nazi criminal ideology, individuals could not choose to be Jewish or not; this characteristic was arbitrarily and artificially imposed on them and no one but the Nazis could actually determine who was a Jew under the Nazi regime. As a matter of fact, the Nuremberg laws gave a precise – although illogical – definition of who should be considered as Jewish and who should not, depending notably on the ascendance and on obscure hereditary rules. It did not matter whether individuals

6 Translation by the author. Emphasis in original. The original version reads as follows: 'Enfin et surtout, *les « groupes » victimisés peuvent n'exister que dans la tête de leurs bourreaux*. C'est pourquoi la délimitation des groupes à protéger est tellement délicate et, à vrai dire, impossible à fixer a priori. Cet argument à lui seul suffit pour contester radicalement la validité de l'approche courante du concept de génocide. Aussi étrange que cela puisse paraître, *le génocide ne présuppose nullement l'existence d'un* genos *constitué* au sens d'un groupe conscient d'exister aux propres yeux de ses membres. Ce fut le cas même durant le judéocide, en ce sens que, d'une part, certains individus qui ne se considéraient pas ou plus comme des Juifs furent persécutés comme tels tandis que, d'autre part, certains autres qui étaient souvent considérés comme tels furent épargnés parce qu'ils n'étaient pas juifs au sens – pseudo-racial – où les nazis l'avaient défini.'

had the feeling of being Jewish or not, whether they saw themselves as being Jewish or not, whether they wanted to be considered as Jewish or not. They had no say, no choice, in the definition of their own identity. In other words, by using the word 'genocide' and by relying on the subjective notion of 'groups', we do nothing but acknowledge the genociders' own fantasy.

Secondly, by depending on the concept of 'race' to legally define the crimes, the law is totally oblivious to the fact that the notion of 'race' is an anthropological fantasy inherited from the previous centuries: the law thus admits the reality of a 'race' and employs a 'racist' language. Coquio has analyzed this legal inheritance of the criminal language in the following terms:

> We can see these difficulties lexically condensed in the word genocide, which shows that the law is compelled to inherit the criminal language. A possible misunderstanding indeed takes root in the etymology of the word 'genocide', which takes note of the 'race'. This must nevertheless be carefully defined and one must not act as if the race existed. As absurd as it may seem, this unconscious takeover of racism impregnates current discourse. What about the law? The 'race', ideological concept ratified by nineteenth-century anthropology, and then interpreted by Hitler regarding Jews, is one of the criteria used for the definition of the target group under the 1948 Convention. Law therefore borrows its concepts, if not to the criminals, at least to the ideologies they had inherited and which, today, disqualify them as reliable concepts. The three other criteria – nation, ethnicity, religion – seem to conceptualize from the exterior the nature of target groups, with a statutory ambiguity for the unclear concept of 'ethnicity', located halfway between the scientific and the criminal discourse, similarly to the 'race' a century ago (1999, p.48).[7]

As will be subsequently explained, the specificity of the crime of genocide lies precisely in the racialization of a group to eradicate it. The crime of genocide is perpetrated against a group pre-defined by the genociders through a 'hereditarization' of specific features – whether ethnic, national, religious, political, social and so forth – of the members of this group artificially created. This implies that, if the concept of 'race' is to be deleted from the definition of the crime, this definition would fail

---

7 Translation by the author. The original version reads as follows: 'On peut voir ces difficultés se condenser en quelque sorte lexicalement dans le mot génocide, qui montre le droit forcé d'hériter du langage criminel. Un possible malentendu s'enracine en effet dans l'étymologie du mot 'génocide', qui prend acte de la 'race'. Reste à délimiter soigneusement cet acte: à ne pas faire comme si la race existait pour autant. Si aberrante qu'elle semble être, cette relève inconsciente du racisme imprègne aujourd'hui les discours. Qu'en est-il pour le droit? La 'race', concept idéologique entériné par l'anthropologie du XIXe siècle, puis interprété dans les termes qu'on sait par Hitler à propos des Juifs, est un des critères de définition du groupe-cible dans la Convention de 1948. Le droit emprunte donc ses concepts, sinon aux criminels, aux idéologies dont ceux-ci ont hérité, et qui les disqualifient comme concepts fiables aujourd'hui. Or, les trois autres critères – nation, ethnie, religion – semblent conceptualiser de l'extérieur la nature des groupes-cibles, avec une ambiguïté statutaire pour le concept trouble d' "ethnie", placé à mi-chemin entre discours scientifique et discours criminel, à peu près comme la "race" il y a un siècle.'

to include the conceptual element which makes this crime so specific. According to Coquio, the specificity of the crime of genocide should not be defined in terms of the racial identity of the targeted group but in terms of an annihilating identification process orchestrated by the perpetrators of a genocide:

> The status of these categories seems therefore to waver between the legally standardized world and the criminal's norm. Law should choose but is unable to do so, as it must adopt the criminal's category in order to incriminate him. As the criminal creates his own categories, and racializes his pseudo-enemies whoever they are, law should integrate all possible definitional criteria of the target groups so as to anticipate future criminal inventiveness. This is precisely what the 1992 French Penal Code intended to do when foreseeing the criminal's margin of 'arbitrariness'. But this definition – which has so far remained unused – generates other problems as one thereby loses, apart from the exterminatory 'intent', the specific feature of genocide: to dehumanize by *racializing*. Genocide proceeds to both a horizontal and a vertical cut into the population: it targets births and filiations to eliminate all descendants, to genealogically eradicate a sub-humanity. This operation does not need to be justified to be efficient: the criminal invents a race. And he can do so with respect to any group as long as it is fictionalized not only as an enemy to be eradicated, but also as a sub-human to exterminate for eternity …. The specificity of the genocidal crime must not be defined in terms of the racial *identity* of the target group, this identity being generated by a delirium, but in terms of an annihilating *identification* process (1999, pp.48–9).[8]

But if the crime of genocide does not presuppose the objective existence of a *genos* while still relying on an artificially created *genos*, reliance which will in fact give the crime its unique dimension, should the term used to describe this crime embody the concept of *genos* or not? Either it does, and the term used will acknowledge the genociders' fanaticism, or either it does not, and the term used will fail to recognize the specificity of the crime. Furthermore, even if it could be argued that the specificity

8 Translation by the author. The original version reads as follows: 'Le statut de ces catégories semble donc flotter, osciller entre le monde normé par le droit et la norme du criminel. Le droit devrait choisir mais ne le peut pas, devant retenir la catégorie du criminel pour l'incriminer. Il faudrait donc, puisque le criminel crée ses propres catégories, et racialise ses pseudo-ennemis quels qu'ils soient, que le droit intègre tout critère de définition possible des groupes-cibles, afin d'anticiper l'inventivité criminelle qui fera encore brèche dans l'histoire. C'est ce qu'a voulu faire le code pénal français de 1992, en prévoyant la marge d'"arbitraire" du criminel. Mais cette définition − jusqu'ici inutilisée – pose d'autres problèmes: on y perd, outre la notion d'"intention" exterminatrice, la marque spécifique du génocide, qui consiste a déshumaniser en *racialisant*. Le génocide opère dans la population une coupe non seulement horizontale, mais verticale, c'est-à-dire vise les naissances et les filiations pour éliminer une lignée, éradiquer généalogiquement une sous-humanité. Cette opération n'a pas à être fondée pour être efficiente: le criminel invente une race. Et il peut le faire à l'égard de n'importe quel groupe dès lors que celui-ci est fictionnalisé non seulement comme ennemi à éradiquer, mais comme sous-homme à exterminer pour l'éternité …. La spécificité du crime génocidaire ne doit pas être définie en termes d'identité raciale du groupe-cible, cette identité relevant d'un délire, mais en termes de processus d'identification annihilante.' Emphasis in original.

of all genocides should be acknowledged through the use of different words to qualify the different instances of genocides, and that the crime should thus remain without a generic 'catch-all' name embodying all the different cases of genocides, the same linguistic problem arises. Should a genocide be 'named' in the perpetrators' language and the term used, although highly immoral, might nonetheless have the advantage of recognizing the uniqueness of this particular criminal instance? Or should a genocide be termed without any reference to the perpetrators' plan, with the consequence that the word employed will omit the particular feature of the crime? Will it omit precisely what made this crime a genocide?

The Nazi genocide against the European Jews here deserves special attention due to the rather large number of words used to describe it, and it is most probable that this extended linguistic panel is symptomatic of the incapacity to find the right word. And indeed, different terms – pertaining either to the language of the perpetrators or to that of the victims – have been used and commented upon. For instance, 'final solution', or *Endlösung*, was the term used by the Nazis to designate their anti-Jewish policies and, unequivocally from 1941 onwards, to qualify the genocide. Although these terms perfectly describe the acts perpetrated, to use them is highly problematic as we would then use the genociders' language, thus triggering an identification process with them: by using the expression 'final solution' we would indeed implicitly – and obviously unwillingly – acknowledge the existence of a 'problem', and this makes the perpetrators' vocabulary clearly unusable.

In common language, the genocide perpetrated by the Nazis against the Jews of Europe is generally referred to as the 'Holocaust', with a capital 'H' to assert the uniqueness of the event. This term, of Greek origins, is defined in the *Concise Oxford Dictionary* as a 'Jewish sacrificial offering burnt on the altar' (Pearsall, 2001, p.678), while the Greek version of the Bible translates the Hebrew word 'olah' – which literally means 'what is offered' – by 'holocaust'. It is obvious that, by referring to a burnt offering, the term 'Holocaust' is highly problematic as it in no way reflects the reality of the facts: the Jews did not offer nor sacrifice themselves, nor were they offered to anyone … and the term 'Holocaust' should thus never ever be used to qualify the cold-blooded, organized and systematic murder of entire families for the only reason that they were born Jewish. Further, when one reflects on the reasons why the term 'Holocaust' has been so widely used, this reflection might lead to a rather worrying conclusion. And indeed, the popular use of the term 'Holocaust' is due to a television film shown in the 1970s which, although it did contribute to establishing the memory of the crimes committed by the Nazis, has been heavily criticized (see Wieviorka, 2006, pp.98–102). In any event, whether this film triggered controversy or not, it still is the case that we use a term simply because it was the title of a television series without thinking what this term actually means and without having the slightest problem in using, to qualify the Nazis' atrocious acts, a word employed in Hollywood to make a movie marketable. Finkielkraut protested against what he called the 'Holocaust effect' (1998, p.49) and against the misleading aspect of the term 'Holocaust':

> It was in order to respond to the success of *Roots* on a competing channel that one of the major American television networks decided to produce *Holocaust*, an undertaking requiring a family, a minority, and tears. The principle of equivalence was inscribed in the project from its very inception. And what was its most tangible result? The replacement of the word 'genocide' with the word 'holocaust' in everyday vocabulary. The massacre of a people became its immolation to God; a primary metaphysics took possession of an event that should have silenced any and all words of justification; irremediable horror was surreptitiously cloaked in sacrificial significance. Just what, in fact, is a holocaust? 'A religious sacrifice in which the victim is totally consumed by fire', according to the dictionary. And the Bible specifically indicates, 'This combustion has an odor that is pleasing to the Lord.' One could argue that the theological meaning has disappeared and only the idea of consummation subsists today. Maybe so. The fact remains that we now use a *misleading* term to refer to the genocide. We can only hope that the word's original meaning has been forgotten and that it does not *completely* distort the reality it now denotes (1998, pp.134–5, n. 16).[9]

In France, since Lanzmann's seminal film-documentary *Shoah*, the word 'Shoah' has penetrated scholarly language. The Hebrew word 'Shoah' has different meanings as it signifies 'catastrophe' as well as 'destruction' and is certainly much more appropriate than 'Holocaust' to qualify the Nazi crimes against the European Jews. Another possible alternative could be the use of the term 'Hurbn' which is the Yiddish term for destruction (Wieviorka, 2006, p.4). If some might here argue that many victims did not speak Yiddish, it may nonetheless be recalled that:

> Yiddish was the tongue of many, if not most, of the Jewish victims who perished during the dark period when the Angel of Death seemed to have replaced God in too many hearts in this country [Germany]. Yiddish too was their target and their victim (Wiesel, 1990, p.192).

Accordingly, Wiesel also stressed that Yiddish is the most appropriate language to evoke the genocide:

> It is perhaps necessary to emphasize that there is no language like Yiddish for remembering the dead. Without Yiddish, the literature of the Destruction would be without a soul. I know that we write in other languages, but no comparison is possible. The most authentic works about the Destruction, in prose and poetry, are in Yiddish. Is it because the majority of the victims were born into and lived in this language? (cited in Wieviorka, 2006, p.45).

Furthermore, according to Ertel, Yiddish is

> the only language that shared its fate with its speakers. Even though it survived here and there, with some individuals or some marginal groups, it died at Auschwitz, Majdanek, Treblinka and Sobibór with the people that spoke it. Yiddish writers and poets are thus the only ones who speak from the depths of the death of their people, and from the depths of the death of their language. They are the only ones to write in a world of deafness,

9 Emphasis in original.

> with the consciousness of being without a family lineage, the only ones to write in no one's language. The death of a language is irremediable. If the Yiddish literature of the Disappearance is not comparable to any other, as Elie Wiesel says, it is not because it is more authentic, but because it speaks from within a double death (cited Wieviorka, 2006, p.33).

In this respect, Douglas recalls of one particularly important moment during the *Eichmann* trial, moment that underlined the importance of the language used, creating an 'acoustical impact':

> To find a moment of equivalent dramatic force, one must turn to an earlier point in the Eichmann trial, the morning of 28 April 1961, some 10 days after Attorney General Hausner had begun his opening statement with the words, 'When I stand before you here, Judges of Israel, to lead the prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: "I accuse". For their ashes are piled up on the hills of Auschwitz and the fields of Treblinka, and are strewn in the forests of Poland. The graves are scattered throughout the length and breadth of Europe. Their blood cries out, but their voice is not heard.'[10] On the morning of the twentieth-eighth, then, the court *heard the first murmurs of the voiceless dead*.[11] For on this day the prosecution called to the stand the first survivor witness, Ada Lichtmann, a woman of fifty originally from the Polish town of Wieliczka near Cracow, who offered testimony on the 'small-scale terror in the occupied areas of Poland'.[12]
>
> ... The first effect was linguistic as the official language of the trial [Hebrew] was dropped in an effort to accommodate the witness [for Yiddish] …. Suddenly, the language of the exterminated Jewish population of Europe filled the courtroom. As one observer commented, 'You shivered on hearing the words of the language of the slaughtered and the burned.'[13] (2001, pp.101–3.)

The different occurrences of 'genocides' could therefore be designated through the use of the language of the victims in order for them – and for their language, symbol of a humanity that was once the target for destruction – never to be forgotten. It is possible that the word 'destruction' could be used as a more generic legal term to qualify these crimes.[14] This same word 'destruction' could then be translated into the different languages to qualify the destruction perpetrated against the targeted victims, thus describing the crime while respecting the specificity of each occurrence

---

10 Trial of Adolf Eichmann (vol. 1, p. 63). Footnote in original.

11 Emphasis added.

12 Trial of Adolf Eichmann (vol. 1, p.323). Footnote in original.

13 Alterman, N., quoted in Segev, *The Seventh Million*, p. 350. Footnote in original.

14 As previously mentioned, a generic word applicable to all instances of genocide raises a series of problems and of questions but it is nonetheless acknowledged here that for legal purposes, notably in terms of prosecution, such a term might still be necessary. Throughout the present book, both the terms 'destruction' and 'genocide' will be used to designate the crimes, while the word 'Shoah' will generally be employed to qualify the destruction of the European Jews.

of this crime through the use of the victims' language. The legal qualification of the crime would then hold an important symbolic value, probably facilitating its entry into collective memory.

But using the victims' language is far from appropriate, as if such words pertaining to the language of the dead were to be used we would then be faced with yet another ethical dilemma. And indeed, whereas, as mentioned earlier, the use of the perpetrators' language through such terms as 'final solution' is highly questionable, the use of the victims' discourse might also prove problematic. Can we use their language to qualify such terrible acts? Can we soil their language, can we pervert their culture, by referring to the most atrocious crimes committed against them in their very own words? And, ultimately, if we cannot accept adopting the genociders' semantics and if, simultaneously, we are unable to use the victims' language, while still wanting to use a word that would recognize the specificity of the crime, there might just be no solution at all – unless we accept that the crime can only remain 'without a name'.

Chapter 2

Dehumanizing Intent and Destruction

The verb 'to dehumanize' is defined in the *Concise Oxford Dictionary* as the act of 'depriv[ing] of positive human qualities' (Pearsall, 2001, p.377). Using this definition as its analytical basis, this chapter focuses on the dehumanizing intent of genociders rather than on 'dehumanization'. And indeed, although the will of the perpetrators is clearly to succeed in their intent to dehumanize their victims, it is here submitted that this project is bound to fail. This does not mean that perpetrators do not try to achieve the dehumanization of their victims, but that their victims remain human no matter what. Reaching a contrary conclusion would mean adopting the genociders' views according to which their victims are not human beings and are not worthy of being considered as such. If anything, the dehumanized individuals, the ones deprived of human and humane qualities, are the perpetrators – and arguably the bystanders – not their victims.

An overview of the literature rapidly shows that the term 'dehumanization' has more often than not been used with reference to the destruction of the European Jews by the Nazis during the Second World War. And indeed, in his poignant book, Frossard referred to the Nazi crimes as 'the greatest enterprise of dehumanization of all times' (1987, p.42).[1] Nonetheless, as this chapter will demonstrate, this willingness to deprive victims of 'positive human qualities' is at the heart of every genocidal plan and of every genocide because it totally corresponds to the perpetrators' genocidal intent. In other words, the dehumanizing intent is the very essence of the crime of genocide as this particular intent contains within itself the destruction of the group: not only does it embody the destruction of the lives of the victims; it also orchestrates the annihilation of the social memory of these victims.

Dehumanizing Intent and Death by Destruction

Death by destruction – or genocidal death – contains within itself the destruction not only of the victims as human beings but also of the group as a whole. And indeed, by culminating in the total destruction of the victims' bodies and physical appearances, the extreme violence of genocidal death is more than a pathological outburst of violence. It is in fact a very specific genocidal act carried out with a particular intent: to destroy the existence of the victims as individual human beings, to annihilate their identities and, therefore, to erase them from both individual memories and collective

1 Translation by the author. The original version reads as follows: 'la plus grande entreprise de déshumanisation de tous les temps.'

memory. The murders of the victims, the destruction of their bodies, their eradication from memory are all acts committed with the intention of completing the destruction of the group as a whole. Not only does genocidal death imply the destruction of life; it also involves the destruction of death and, once both the lives and the deaths of the victims are destroyed, the whole existence of the group targeted is annihilated.

Dehumanizing Intent, the Destruction of Life and the Destruction of Death

History has shown that, in all cases of genocides, the perpetrators of the crimes made sure that the human bodies of their victims were totally destroyed in order for them to be unrecognizable. The purpose of this destruction is two-fold: not only did the criminals want to erase all traces of their crimes but they also wanted to continue in their destructive behaviour. And indeed, beyond the barbaric and obvious violence of the acts perpetrated, this destruction of human corpses has a very well-defined purpose: the destruction of the group as such.

First of all, the savage destruction of human corpses is nothing but a destruction of the individual identities of the victims as human beings. One must indeed remember that the massive feature of the crime of genocide implies that bodies are not just destroyed but that they are *en masse* destroyed. Means of destruction may vary – bodies are burned in great numbers or are thrown into mass graves – but, in any event, the method chosen by the perpetrators will ensure that the bodies lose all individuality and human aspect. The victims' bodies consequently and automatically become unrecognizable and unidentifiable, and their destruction thus denies the victims any belonging to both the targeted group and the wider group of human beings. By excluding their victims from the human sphere through the destruction of their physical appearance and human features, genociders erase all traces of existence of their victims to facilitate their total eradication from both individual memories and collective memory. And indeed, if the victims are completely physically destroyed, if their bodies become unrecognizable and unidentifiable and thus do not allow their uniting to the human *genre*, their whole existence will disappear with their bodies. And if they never existed, it is in fact the targeted group as such which is denied its existence: if there were no victims, it is because there was no group in the first place. Consequently, how can there be any descendants of the victims? How can the group continue to exist through new generations if there never was a group? According to Piralian, in her analysis of the Armenian Genocide,

> The breaking up of the corpses into unnameable, that is to say unidentifiable, unattributable, pieces means that these pieces cannot be reunited in a nameable corpse of a 'has-been-alive' to whom a history could be given back. *This breaking up is pivotal for the perpetration of genocide as it concretely orchestrates the pulverization of the identities, excluding the targeted being from the human order as well as all possibility for him of any descendance. The crucial matter here is, therefore, far beyond the incorporation of a loved one for whom mourning was made impossible (due to the misfortunes of his family's history), the pulverization and the destruction of the very link which unites a subject to his loved ones as, in the place of loved ones, only remains an anonymous corpse, the same for all, made*

> *of all these disparate pieces which strew the deportation paths*. Under the weight of this violence, of this willingness of destruction, it is then the whole personal genealogical link of the individuals which finds itself broken and unreachable and the total link with the past is destroyed. In other words, *it is the scattering of unrecognizable corpses which makes impossible the constitution of identification links* (1994, p/33).[2]

With respect to the destruction of the European Jews by the Nazis, Arendt has analyzed the issue in a similar fashion, acknowledging the fact that death in the Nazi extermination camps was very specific, in that it was more than murder, more than a destruction of life, in that it was the destruction of the victims' very existence:

> … [A]s we know today, murder is only a limited evil. The murderer who kills a man – a man who has to die anyway – still moves within the realm of life and death familiar to us; both have indeed a necessary connection on which the dialectic is founded, even if it is not always conscious of it. The murderer leaves a corpse behind and does not pretend that his victim has never existed; if he wipes out any traces, they are those of his own identity, and not the memory and grief of the persons who loved his victim; he destroys a life, but he does not destroy the fact of existence itself (1966, p.442).

Therefore, by totally negating the victims' past – and thus present – existence, the destruction of the victims' human corpses destroys both their lives as well as their deaths. And indeed, the necessary implications of the absence of victims are that not only did these victims never actually live on Earth but also that they never died. How could someone who never existed die? If there was no life, there can be no death. In the words of Piralian,

> Therefore, what genocide makes impossible and destroys is, we have to repeat it: Death itself, that is to say the possibility to symbolize death, the death of a has-been-alive who, after being part of the community of the living, would be part of that of the dead, thus

2 Translation by the author. The original version reads as follows: 'Le morcellement des corps en morceaux innommables, c'est-à-dire non identifiables, non attribuables fait que ces morceaux ne peuvent être réunis en un corps nommable d'un "ayant-été-vivant" à qui pourrait être rendue une histoire. *Ce morcellement est un des pivots du génocide en ce qu'il est mise en place concrète de la pulvérisation des identités, excluant celui qui en est l'objet de l'ordre de l'humain comme de toute possibilité pour lui de descendance*. *Ce dont il s'agit est donc, bien au-delà de l'incorporation d'un être cher dont le deuil aurait été rendu* (à cause des avatars de son histoire familiale) *impossible pour un sujet, la pulvérisation et la destruction du lien même qui unit un sujet à ses êtres aimés puisqu'en place des êtres chers de chacun ne reste plus qu'un corps anonyme, le même pour tous, fait de ces morceaux disparates qui jonchent les chemins de déportation*. Sous le poids de cette violence, de cette volonté de destruction, c'est alors tout le lien généalogique personnel des sujets qui se trouve brisé et hors d'atteinte et le lien total au passé emporté. Autrement dit, c'est *l'éparpillement des corps rendus ainsi méconnaissables qui rend impossible la constitution des liens identificatoires*.' Emphasis in original.

> making his death and mourning possible for his children who may then take over from him, as is the destiny of all humans (1994, pp.33–4).[3]

In the same vein, Kalfa has analyzed the massive industrialization of death as orchestrated by the Nazis in the extermination camps by emphasizing the fact that it proceeded both to the 'desindividualization' of the individuals and to the destruction of death. She indeed stressed the importance of the terminology employed by the genociders in order to destroy death: for instance, the words 'victims' or 'dead' were not used by the Nazis, who preferred to refer to their victims' bodies as abstract entities, notably through the use of terms such as 'Figuren' or 'Stück'. The victims' bodies were thus not considered as bodies of dead human beings but as things. In this respect, Kalfa rightly asserted that this destruction of death corresponds to both the physical annihilation of millions of individuals as well as the annihilation of the very idea of humanity itself:

> The industrial production of death where individuals are disindividualized, where subjectivity is annihilated, shows that death has become very different. Because what can the facts of transforming individuals into living skeletons and of reducing living human beings to ashes and smoke actually mean? What can the fact of erasing all traces, 'the memory and grief of the persons'[4] who have loved those who have died signify? What is the sense of the censorship of the terms 'death' or 'victim' and of the imposition of the word 'Figuren' as a substitute, if it is not the sentencing to death of death, which is neither a metaphor nor a linguistic figure, but the physical annihilation of the existence of millions of individuals, and thus of the very idea of humanity itself (2004, pp.139–40).[5]

Again, this destruction of death fits in perfectly with the more general intent of destruction of the whole group: there is no death because there were no bodies, no victims, and, in fact, no group in the first place. The annihilation of the victims of

---

3 Translation by the author. The original version reads as follows: 'Ainsi, ce que le génocide rend impossible et détruit c'est, répétons-le: la Mort même, c'est-à-dire la possibilité de symbolisation de la mort, celle d'un ayant-été-vivant qui, après avoir fait partie de la communauté des vivants, ferait partie de celle des morts permettant que, pour ses enfants, sa mort et son deuil soient possibles et qu'ainsi ils puissent lui succéder, comme c'est le destin de tout humain.'

4 Arendt, H. (1968, p.442). Footnote in original.

5 Translation by the author. The original version reads as follows: 'La production industrielle de la mort où les individus sont désindividualisés, la subjectivité anéantie, montre que la mort est devenue tout autre. Car, que peut signifier le fait de transformer des individus en cadavres vivants, et des êtres humains vivants en cendre et en fumée? Que peut signifier le fait d'effacer toutes les traces, "le souvenir et le chagrin des personnes" [Arendt, Hannah, *Le système totalitaire*, 179. Footnote in original] qui ont aimé ceux qui sont morts? Quel est le sens de la censure du terme de "mort" ou de "victime", et du fait d'imposer celui de "Figuren" comme substitut, si ce n'est la mise à mort de la mort, ce qui n'est pas une métaphore, ni une figure de style, mais l'anéantissement physique de l'existence de millions de personnes et par la même de l'idée d'humanité.'

genocide is thus complete and the destruction of the group is nothing but its logical terrible consequence.

Second, by denying the existence of the victims through the destruction of their physical human aspect, the perpetrators leave the door open for the continued perpetration of the crime through its denial. And indeed, as will be further analyzed, the denial of a genocide is the denial of the crime and of its victims. By denying the crime, deniers deny that there ever were victims and consequently annihilate their existence. In turn, the denial of the victims' very existence denies the existence of the group as such – and the destruction of the group – or genocide – continues. According to deniers, the absence of human bodies necessarily implies the absence of crimes. *This reasoning will either minimize the real number of victims, or bring about the conclusion that genocide was in fact never committed, paradoxically allowing it to continue*. And indeed, both the reduction of the number of victims – which denies the reality of some victims and thus of some crimes – as well as the blatant and flagrant denial of the whole genocide proceed of the same intent: to ensure the ongoing annihilation of the group. According to Piralian:

> As a matter of fact, this disappearance of the dead, which consists in pretending that no living human being is dead but that, as having never existed, cannot be dead, casts new light on the burning controversy surrounding the number of dead caused by a genocide so as, in this case, to reduce the number of dead amounts to reducing the number of livings who had existed, to sustain their disappearance and to not register their death. The reduction of the number of dead should therefore not be understood as the parameter of a disaster but as an indirect means of continuing the disappearance of as many individuals as possible from the having-been-alive so that they also disappear from memories. Because how could we remember individuals who have never existed and how could one deprived of antecedents in turn exist? Where would he come from? … In that sense, the denial of the number of dead is part of the genocidal project as this backwards interpretation of time is nothing but an attempt to erase the origins (1994, p.52).[6]

Therefore, through the dehumanization enterprise concomitant with the perpetration of genocide, both the victims' life and death are ultimately destroyed. Nonetheless,

---

6 Translation by the author. The original version reads as follows: 'En effet, cette disparition des morts qui consiste à faire en sorte qu'il n'y ait pas mort de vivants mais que ceux-ci n'ayant jamais existé ne puissent être morts, éclaire d'un jour nouveau la brûlante polémique autour du nombre des morts d'un génocide, puisqu'en ce cas, réduire le nombre des morts, c'est réduire le nombre des vivants ayant existé, soutenir leur disparition et non inscrire leur mort. La réduction du nombre des morts ne serait plus alors à entendre comme le paramètre d'un désastre plus ou moins grand mais bien comme une manière détournée de continuer à faire disparaître le plus de personnes possibles des ayant-été-vivants pour qu'elles disparaissent également des mémoires. Car comment pourrait-on se souvenir de personnes n'ayant jamais existé et comment celui qui n'a pas d'antécédent pourrait-il exister à son tour? D'où viendrait-il? … En ce sens, le déni du nombre des morts fait bien partie du projet génocidaire, puisqu'en prenant ainsi le temps à rebours, c'est bien d'une tentative d'effacement des origines mêmes dont il s'agit.'

it seems important to stress that the 'destruction of death' here directly relates to the victims' death and not to the concept of 'Death' itself. In other words, the expression 'destruction of death' should be understood as the 'destruction of the dead and of their death' and thus as a part of the destruction of the victims' life, and not as 'disappearance of Death' itself. Within the context of genocide, it is indeed an understatement to affirm that Death is omnipresent and that genociders use it as their primary destructive tool.

Dehumanizing intent and the industrialization of death

By focusing on what is here referred to as 'the industrialization of death', the following paragraphs will explore the specificity of the Nazi extermination machine, a machine which, until now, has remained a unique feature of the Nazi destructive enterprise. As a matter of fact, this 'enterprise' mainly relied on a system of death camps, some of which are known as 'concentration camps' and some as 'extermination camps'. In everyday language, such camps are generally referred to as 'Auschwitz', the name of one of the extermination camps which has been erected as a symbol of the Nazi death camps. Nonetheless, it has to be recalled here that Auschwitz (and we here essentially refer to Birkenau) was not the only extermination camp designed by the Nazis for the sole purpose of destroying lives and we should equally remember all the victims of such death sites as Treblinka, Bełżec, Sobibór, Chełmno, or Majdanek.

The camp system created by the Nazis is highly representative of the uniqueness of the crimes they perpetrated. As a matter of fact, one unique aspect of the destruction of the European Jews by the Nazis during the Second World War is the fact that it was systematically orchestrated and bureaucratically organized. And indeed, a whole system was established by the Nazis to achieve the destruction of the groups they had targeted. In this respect, some authors have argued that the uniqueness of the Nazi crimes relies on the fact that they tried to 'determine who should and should not inhabit the world' (Arendt, 1963, p.279). In the same vein, Friedländer wrote that:

> This, in fact, is something no other regime, whatever its criminality, has attempted to do. In that sense, the Nazi regime attained what is, in my view, some sort of theoretical outer limit: one may envision an even larger number of victims and a technologically more efficient way of killing, but once a regime decides that groups, whatever the criteria may be, should be annihilated there and then and never be allowed to live on Earth, the ultimate has been achieved. This limit, from my perspective, was reached only once in modern history: by the Nazis (1993, pp.82–3).

Nonetheless, it is not totally certain that this is where the specificity of the Nazi crimes lies, as all perpetrators of genocides actually decide who should have the right to live and define their targets for extermination. Rather, the uniqueness of the Nazi genocide is more to be found in the fact that the Nazis, once they had determined who should be exterminated, built up a whole complex machinery to implement such a decision. In other words, the specificity of the genocide perpetrated by the Nazis

lies not so much in their genocidal intent as in the methods they used to achieve their criminal aims.

The Nazi methods and system notably relied on the concentration and extermination camps which were unprecedented death firms and whose sole point and purpose was the death of the detainees. If there is a distinction to be made between concentration and extermination camps – the former being horrific work camps where victims were forced into labour until their death and the latter being nothing but death machines where victims were brought to in order to be systematically murdered – both types of camps aimed at bringing about the death of the victims. As a matter of fact, it is probably here that the uniqueness of the genocide perpetrated by the Nazis resides: the creation of a whole system revolving around the death of particular groups determined by the perpetrators. This genocide was the first and only instance to date in which *both the intent and the motives were perfectly identical*; *there was no other motive apart from to the genocidal intent*. Both the intent and the motives were to destroy the groups targeted, obviously in spite of all human logic, but also in defiance of all military strategy. In this respect, Jankélévitch has defined the destruction process orchestrated by the Nazis and the extermination of the European Jews as a 'metaphysical crime' against the 'human of every human being' and has qualified the crime perpetrated by the Nazis against the Jews as an 'unmotivated' crime, 'product of pure wickedness':

> It was the very being of humanity, *esse*, that racial genocide attempted to annihilate in the suffering flesh of these millions of martyrs. Racist crimes are an assault against the human being as *human being*, not against such and such a person, inasmuch as he is this or that (quatenus) – communist, Freemason, or ideological adversary, for example. No, the racist truly aimed at the beingness of the being, that is, at the human of every human being. Anti-Semitism is a grave offense against human beings in general. The Jews were persecuted because it was them, and not at all because of their opinions or their faith. It was existence itself that was denied them; they were not reproached for professing this or that, they were reproached for being …. Thus, the extermination of the Jews is the product of pure wickedness, of *ontological* wickedness, of the most diabolical and gratuitous wickedness that history has ever known. This crime was not motivated, even by 'villainous' motives. This crime against nature, this unmotivated crime, this exorbitant crime is thus to the letter a *metaphysical* crime; and the criminals guilty of this crime are not mere fanatics, nor simply blind doctrinaires, nor simply abominable dogmatists – they are, in the proper sense of the word, *monsters* (1996, pp.555–6).[7]

And indeed, the destruction of the victims was not a means to an end; it was the end. In other words, *the specificity of the destruction of the European Jews lies in the perfect coincidence between the motive and the intent of the genociders*, for the simple reason that there was no motive. It is this very coincidence which gives the crime its unprecedented and unique dimension. Traverso has expressed this idea in the following terms:

---

7 Emphasis in original.

> Even if it is not adhered to unanimously, the thesis of the singularity of Auschwitz is today shared by the majority of modern contemporaneous historians. Briefly, this thesis could be summed up in the following terms: the Jewish genocide is the only one in history to have been perpetrated with the aim of biologically remodelling humanity, the only one totally deprived of an instrumental nature, the only one in which the extermination of the victims was not a means but the end itself (cited in Coquio (ed.) 1999, p.129).[8]

Charny has also described this distinctive aspect of the Nazi crimes:

> Never was there a society so totally committed to an ideology of the total destruction of another people; never were the near-total resources and the organizational genius of a modern society devoted toward creating an actual 'industry of death;' never were the tools of science and engineering harnessed so extensively for making more efficient deaths of civilians in assembly-line machinery that transformed people into disposable refuse to be burned in ovens; and never were a people persecuted so relentlessly as sub-human, degraded, and tortured cruelly and systematically for long periods of time on their way to their tormented 'appointments' with their death (2004, pp.xiii–xxiv).

Although less expressly, this idea also lies behind Jäckel's position on the matter when he explained that the decision of the Nazis to annihilate a whole group was put into application with all the means available to the Nazi State:

> The National Socialist murder of the Jews was unequalled because never before has a State, with the authority of its responsible leaders, decided and announced the total killing of a certain group of people, including the old, the women, the children, the infants, and *turned this decision into fact, with the use of all the possible instruments of power available to the State* (cited in Friedländer, 1993, p.40, n. 7).[9]

As previously mentioned, to achieve their end – the destruction of the groups they had targeted for no other motive than their destruction – the Nazis created a whole industrialized system of death: the concentration and extermination camps. These camps were not only death sites; they were also dehumanization centres created to annihilate all human features of the victims before actually murdering them. It should be stressed here that this does not in any way imply that the Nazis succeeded in dehumanizing their victims, but it means that this was their intention. As a matter of fact, the whole destruction process established by the Nazis revolved around their enterprise of dehumanization, an enterprise which, although it reached its climax in

---

8 Translation by the author. The original version reads as follows: 'Même si elle ne fait pas l'unanimité, la thèse de la singularité d'Auschwitz est aujourd'hui partagée par la majorité des historiens du monde contemporain. En deux mots, cette thèse pourrait se résumer ainsi: le génocide juif est le seul, dans l'histoire, a avoir été perpétré dans le but d'un remodelage biologique de l'humanité, le seul complètement dépourvu d'une nature instrumentale, le seul dans lequel l'extermination des victimes ne fut pas un moyen mais une fin en soi.'

9 Emphasis added.

the camps for all the detainees, whether 'racial' or 'political',[10] had very well pre-defined stages when it came to the one specific Nazi target: the Jewish population.

And indeed, for the Jews, the Nazi dehumanization plan started much before the victims entered the death camps. As soon as Jews were legally denied any rights as individuals and became second-class citizens deprived of the most basic freedoms such as sitting on a bench in a park or going to a restaurant, as soon as they were forced into wearing the outrageous yellow star, as soon as Jewish children were barred from going to school, the destruction process had started, through humiliation pushed to its worst extremes, through atrocious discrimination to which the rest of society did not appear to pay much attention, by which the rest of the world stood passively and against which it did not react.

The following stage of the dehumanization process applied indiscriminately to all victims of Nazism following their arrest and, at this point, no victims were more 'privileged' than others. The continuation of the extreme humiliation suffered by the victims can notably be exemplified by the atrocious deportation trains, packed with innocent civilians *en route* for their death. Victims were violently pushed into these horrific wagons – wagons which have often been described as, and compared to, wagons designed for transporting cattle or carrying goods, but this description is incorrect. And indeed, if these wagons were initially usually used for animals or merchandise, neither animals nor merchandise have ever been submitted to the transport conditions victims of Nazism had to endure. They would never have been packed to the point that no breathing space was left, they would never have been squeezed into wagons in which proximity was such that many victims died before reaching their fatal destination, they would never have been subjected to unbearable travelling conditions. It would indeed have been highly problematic to cause the death of cattle and, in times of war and of restrictions, it would have been economically disastrous to cause damage to goods. For the victims of Nazism, pushed into the trains right under the eyes of numerous witnesses and bystanders who – it should be recalled here – used the same train stations for their 'normal' journeys, whether they lived or died had absolutely no importance. As soon as they were in the trains, they officially ceased to be individual human beings; they became 'sub-humans' who failed to rank in the hierarchy of living creatures as high as animals, who in fact failed to be as worthy as merchandise.

Upon arrival at the camp, the victims were yet again forced into losing more of their humanity. And indeed, the whole camp system, 'l'univers concentrationnaire', as David Rousset called it (1965), revolved around the idea that the detainees were not human beings and, therefore, everything was done to bring humiliation and degradation to their paroxysm to ensure dehumanization. Some victims were sent directly to the gas chambers, and died in the horrific conditions that we know – or, rather, that we do not know, that we cannot know, that we cannot even begin

10 One crucial difference, though, is the difference between crimes against humanity and genocide: 'racial' detainees had to endure being detained with their families and thus witnessed the destruction of their loved ones while 'political' detainees were generally detained on their own.

to imagine. Those victims who were not directly selected for extermination were heavily brutalized, dispossessed of their personal belongings and of their clothes, their hair was shaved and their names were replaced by numbers. In other words, they were being deprived of both their human aspect and of all their characteristics as individuals. This probably worsened during detention in the camp as the human appearance of the victims rapidly degraded. And indeed, victims soon became so underweight that they ceased to look like living human beings – they simply ceased to look alive. Not only did the Nazi camps system deprive the victims of their *human aspect*; it also deprived them of their *living aspect*. Detainees were transformed into walking skeletons with a deathly appearance. The Nazi camps system thus blurred the line between life and death, all this to deny the victims any dignity and thus any humanity. This aspect of the camps was notably identified by Kalfa:

> What is new and specific to concentration camps is the transformation of human beings into living skeletons. The frontier between life and death having ceased to be identifiable, man loses all dignity (2004, p.138).[11]

Kalfa further analyzed the anonymity of death in Nazi camps and the impossibility of differentiating the living from the dead as worse than death itself and as a core element in the wider enterprise of dehumanization of victims and in the massive industrialization of death:

> The anonymity of death in Auschwitz, the impossibility to distinguish if a prisoner was alive or dead, all this is worse than death and pushes the prisoner into the 'sub-humanity' to which Nazism destined him (2004, p.139).[12]

To achieve the dehumanization of their victims, the disorganization of their personalities, the Nazi camps system organized Death and erected it as a principle of life. In the words of Antelme,

> All of us are here to die. That's the objective the SS have chosen for us. They haven't shot us, they haven't hanged us; but, systematically deprived of food, each of us, whether it be sooner or later, must become the dead man they have aimed at. So each of us has as his sole aim to prevent himself from dying. The bread we eat is good because we are hungry. But while it assuages hunger, we also know, we also sense that with bread life maintains itself in our bodies. The cold is painful, but the SS want us to die from the cold, and we have to protect ourselves from it, because death is what's in the cold. Work is exhausting and – for us, it is absurd – but its effect is to wear, and the SS want us to die from work,

11 Translation by the author. The original version reads as follows: 'Ce qui est nouveau et spécifique aux camps de concentration est le fait que des êtres humains soient transformés en cadavres-vivants. La frontière entre la vie et la mort n'étant plus identifiable, l'homme perd toute dignité.'

12 Translation by the author. The original version reads as follows: 'L'anonymat de la mort à Auschwitz, l'impossibilité de distinguer si un prisonnier était mort ou vivant, tout cela est pire que la mort, et fait basculer le prisonnier dans la "sous-humanité" à laquelle le nazisme le destinait.'

> and so it is that when we work we must be sparing of ourselves, because death is what's in the work. And then there's time. The SS believe we'll end up dying from not eating, or from working; the SS believe they'll get us through weariness – that is, through time. Death is what's in time (1992, pp.39–40).

Ultimately, in the words of Adorno, 'since Auschwitz, fearing death means fearing worse than death' (cited in Kofman, 1998, p.76, n. 10). By perpetrating their crimes, by attempting to dehumanize their victims, genociders have achieved the unthinkable, the unimaginable: they have created and orchestrated a new form of Death – a death worse than Death itself. And in fact, is death by destruction, or genocidal death, Death? Or are we here again faced with a linguistic impossibility? With an insurmountable semantic obstacle? With a concept 'without a name'?

The Specificity of Victims of Genocide

If the crime of genocide is by essence unique, the victims of genocide are also unique. The purpose of the following paragraphs is certainly not to create an artificial difference between victims of genocides by arguing that some might be more unique than others. Rather, the purpose here is to emphasize the differences between victims of the same genociders, differences orchestrated by the genociders themselves. The following paragraphs essentially focus on Nazi crimes, not to disregard other instances of genocide but because the Nazis retain the sad record of having targeted clearly defined different groups.

As a matter of fact, the Nazis had established a hierarchy between the groups they targeted and thus prioritized their victims. At the top of their exterminatory hierarchical pyramid was the Jewish population. Again, this does not mean that no other groups were targeted; it just means that, in the eyes of the Nazis, the first priority was the extermination of the Jews. Not only was this hierarchy between targets obvious in everyday 'civil' life in which Jews were being discriminated against; it was also flagrant within the camp organizational system itself. And indeed, most of the Jewish prisoners were exterminated upon arrival at the camp. A rapid glance at statistics highlights the fact that Jews who survived Nazi camps are exceptions: out of all the individuals deported from France for political and other reasons, 59 per cent came back while, out of the 76,000 Jews deported from France, 31 per cent came back (Parrau, 1995, p.88). This is in no way intended to suggest that the fate of political prisoners was good or better in any way, but it merely emphasizes the preference of the Nazis when it came to deciding who to destroy first (Parrau, 1995, p.86).

The differences among victims established by the Nazis in their extermination scheme have not been without consequences, notably with respect to the collective memory of the crimes. As a matter of fact, in the direct aftermath of the war, Jewish victims of the Nazi genocide were rapidly forgotten by society and Jewish survivors were cast aside, remaining unheard. If it has been argued that the silence of victims was due to their unwillingness to talk about their traumatizing experience,

such an assertion is completely and utterly wrong. It is perfectly true that some Jewish survivors decided not to speak out after the genocide because they might have perceived and experienced their Jewish identity as being the cause of their sufferings. But if such was the case, their decision not to speak out, their choice not to testify was not a free decision; it was not a real choice but a genocidal symptom. The decision not to speak out was made out of fear and out of shame and was in fact imposed *a posteriori* by both the attitude of the bystanders during the commission of the genocide and the crimes of the genociders. Ultimately, the silence of the survivors was due to the unwillingness of society to hear their stories. Simone Veil poignantly explained this social reaction by the fact that Jews were not heroes, they were only victims –'Nous n'étions que des victimes, non des héros' (cited in Chaumont, 2002, p.34). At the time, society was willing to celebrate the memories and courageous deeds of its heroes, while it considered Jews as victims who passively went to their death, without a protest, without a fight (Chaumont, 2002, pp.34–5). This social reaction calls for different remarks which are now made here.

First of all, although it must be stressed that the celebration of heroes, of *Résistance* fighters who chose to risk their lives to fight for freedom, can only be supported and encouraged, and although it should obviously be emphasized that one cannot be grateful enough to them for their courage, bravery and sacrifices, it remains a fact that, for society as a whole, the celebration of war heroes operated as an illusion mechanism. As a matter of fact, it must be recalled that the societies analyzed here are those societies that went through Nazi occupation and that either stood by the commission of the genocide or, in some cases, actively participated in it. The Nazis once defeated, these societies were more than willing not only to erase their shameful past but also to re-invent it by pretending they had, as a whole, been brave and heroic societies who resisted to – and ultimately defeated – the Nazi occupier. To better re-write historical facts, these societies relied on the memory of their war heroes, of their *Résistance* fighters, falsely claiming that, as a whole, they had always supported – if not actively contributed to – the opposition to Nazism. On the contrary, Jews were a constant reminder of the crimes committed by these same societies, whether it was indifference to the commission of the crimes or active criminal participation in their perpetration. The memory of the Jewish victims symbolized the shameful acts perpetrated by these societies, it represented an unbearable truth, it could have ruined the collective social effort to change the past, and, ultimately – it must here be acknowledged – it was a disturbing nuisance in the lives of people who could not care less.

Second, the fashionable affirmation that has often been made that Jews went passively to their death is, and rightly so, extremely controversial. The first problem with this allegation is that it totally dismisses the fact that a substantial number of Jews did join *Résistance* movements. It also omits the fact that insurrections did happen, as in the Warsaw ghetto, but also as in Treblinka as well as in Sobibór. Finally, it is totally oblivious to the existence of non-violent forms of resistance. As Wiesel poignantly recalls,

> The Jews who lived in the ghettos under the Nazi occupation showed their independence by leading an organized clandestine life. The teacher who taught the starving children was a free man. The nurse who secretly cared for the wounded, the ill, and the dying was a free woman. The rabbi who prayed, the disciple who studied, the father who gave his bread to his children, the children who risked their lives by leaving the ghetto at night in order to bring back to their parents a piece of bread or a few potatoes, the man who consoled his orphaned friend, the orphan who wept with a stranger for a stranger – these were human beings filled with an unquenchable thirst for freedom and dignity. The young people who dreamed of armed insurrection, the lovers who, a moment before they were separated, talked about their bright future together, the insane who wrote poems, the chroniclers who wrote down the day's events by the light of their flickering candles – all were free in the noblest sense of the word, though their prison walls seemed impassable and their executioners invincible (1990, pp.221–2).

The second problem with this assertion is that it does not consider at all the identity of the victims: unlike *Résistance* fighters who chose to become Resistance fighters, Jews did not choose to be Jews, they were born Jews. In other words, they were targeted as a group, as families, with elderly, children and babies. It is all very well for society – again, and this cannot be stressed enough, this same society which participated in the crime, whether passively or actively – to accuse Jews of not fighting back but, in doing so, society rapidly forgets two things: first, the Jewish victims were whole families and it is slightly difficult to imagine how babies, children, elderly people and, in any event, unarmed civilians could actually fight back; second, this moral and heroic society was itself so brave that it also failed to fight back. Ultimately, maintaining that Jews went passively to their death and that there is therefore no need to celebrate their memories is turning victims into accomplices of the crimes committed against them; it is shifting the guilt from the perpetrators – and, very conveniently, from the bystanders – onto the victims themselves.

The Transfer of Guilt

With respect to the genocide perpetrated by the Nazis, the literature is fairly abundant and survivors' testimonies constitute a great part of this literature, not only in terms of the numbers of books which were written by survivors but also in terms of their quality. Different angles and standpoints could be adopted to analyze these testimonies but the focus of the following paragraphs will be limited to the expression of guilt felt by the victims.

The transfer of guilt from the perpetrators to the victims is quite a common feature of all crimes and it has indeed been thoroughly studied in psychology and psychiatry. Victims tend to feel guilty for the crimes perpetrated against them; they tend to feel that they should have prevented the crime and that somehow they triggered its commission, no matter how irrational and unjustified this feeling is. Victims of crimes against humanity and of genocide are no exception to this psychological reaction but, in such cases, the reaction is extremely specific as victims, while not generally feeling guilty for the commission of the crimes themselves, feel guilty for being

survivors. This reaction was in fact foreseen by the perpetrators themselves ,who here again pushed the boundaries of destruction to their very limits. They indeed created the victims' guilt to better destroy them. For instance, in occupied territories, they would respond to *Résistance* fighters' attacks by murdering hostages randomly chosen among the population, thus making them feel guilty for their actions, no matter how justified these were in reality. The same process was organized in the camps system as detainees could be executed or sent to the gas chambers as a punishment for another detainee's actions. Through this system, the survivors were bound to feel guilty for being alive as 'being alive' means for them 'being alive in place of somebody else'. The transfer of guilt and the guilt consequently felt by the survivors for still being alive was thus part of the wider destruction plan: this guilt would indeed impede survivors from being completely free, even once the crime had ceased. For instance, Primo Levi, who committed suicide in 1987, expressed this guilt in the following terms: 'The worst survived – that is, the fittest; the best all died' (1988, p.63). This is probably where the climax of Nazi perversion and destruction of humanity was reached: in making the survivors feel guilty simply for being alive, even after the Nazi reign over Europe had ended. Nazis had orchestrated the destruction of targeted groups arguing that they should not have the right to live – and somehow managed to succeed in convincing their own victims with this atrocious argument.

This perversion did not end there and, in some cases, not only did the Nazis make the victims feel guilty for being alive, but also managed to trigger debates within the social and collective memory over the possible guilt of some victims. This is again a distinctive feature of the Nazi crimes and of the Nazi system. And indeed, in this system, perversion culminated in effectively forcing Jews themselves to be responsible for the extermination of victims. Primo Levi has referred to these prisoners as belonging to the 'Grey Zone'. According to him, the *Sonderkommandos* – or Special Squads – represented an 'extreme case of collaboration' as they were in charge of the ovens (1988, p.34). As he further explained,

> Conceiving and organizing the squads was National Socialism's most demonic crime. Behind the pragmatic aspect (to economize on able men, impose on others the most atrocious tasks), other more subtle aspects can be perceived. This institution represented an attempt to shift on to others – specifically the victims – the burden of guilt, so that they were deprived of even the solace of innocence. It is neither easy nor agreeable to dredge this abyss of viciousness, and yet I think it must be done, because what it was possible to perpetrate yesterday can be attempted again tomorrow, can overwhelm ourselves and our children. One is tempted to turn away with a grimace and close one's mind: this is a temptation one must resist. In fact, the existence of the squads had a meaning, contained a message: 'We, the master race, are your destroyers, but you are no better than we are; if we so wish and we do so wish, we can destroy not only your bodies but also your souls, just as we have destroyed ours.' (1988, p.37).

And indeed,

> [O]ne is stunned by this paroxysm of perfidiousness and hatred: it must be the Jews who put the Jews in the ovens, it must be shown that the Jews, the sub-race, the sub-men, bow to any and all humiliation, even to destroying themselves (1988, p.35).

The existence of the Special Squads was indeed a very convenient tool to shift the blame from the genociders to the victims, to turn the Jews into accomplices of the Nazis. As Jankélévitch sarcastically wrote, this was all the more convenient as

> Never having found, as everyone knows, Christian accomplices in the occupied countries, the Germans thus found some among the Jews? What a windfall for a good conscience that, in spite of everything, feels a bit heavy and even vaguely guilty! One can imagine the enthusiasm with which a certain segment of the public rushed to that attractive perspective – were the Jews perhaps themselves collaborators after all? Now there is a providential discovery! And if by chance the Jews exterminated themselves? If by chance the deportees shut themselves into the gas chambers? These Jews are so bad that they are capable of having themselves incinerated in the crematoria on purpose, out of pure wickedness, to be as disagreeable as possible to us their unfortunate contemporaries (1996, p.559).

Ultimately, one must not forget that '[t]hese Special Squads did not escape everyone else's fate; on the contrary, the SS exerted the greatest diligence to prevent any man who had been part of it from surviving and telling' (Levi, 1988, p.34). Members of the Special Squads were victims, victims of the most perverse and atrocious system, victims of the inhumanity of man, victims of the most repulsive crime. In the words of Primo Levi,

> I believe that no one is authorised to judge them, not those who lived through the experience of the Lager and even less those who did not live through it. … Each individual is so complex an object that there is no point in trying to foresee his behaviour, all the more so in extreme situations; and neither is it possible to foresee one's own behaviour. Therefore, I ask we meditate on the story of 'the crematorium ravens' with pity and rigour, but that a judgement of them be suspended (1988, pp.42–3).

The Need to Testify

The other distinctive feature shared by victims of genocide is the urge to talk, to testify, to tell their stories, to give an account of their experiences, whether within a strictly personal family sphere or to a wider audience, to society at large. This need to speak out felt by an overwhelming majority of survivors may be due to different reasons, which are not necessarily exclusive: to exorcize their own pain, to celebrate the memories of those who did not come back or to ensure that, through the telling of their experiences, the crime would not be committed again. These testimonies may take different forms (Wieviorka, 2006, pp.xi–xii), such as books, journal articles, newspaper articles, conferences in schools and universities, video tapes, audio tapes, but they may also take a judicial form when survivors are brought to testify before a court of law, the importance of which will be analyzed further in this book, the purpose of this development being to concentrate on written testimonies. And indeed, the genocide perpetrated by the Nazis against the European Jews has generated the

greatest amount of written testimonies compared to any other historical event, and this is why we will focus exclusively here on the testimonies of the survivors of the Nazi extermination enterprise.

Nevertheless, it must be pointed out from the outset that, although the number of testimonies written by survivors is extremely high, these testimonies are generally far from being best-sellers and their sales sadly indicate the disinterest of society as a whole in the subject. These books will thus generally only be read by exactly those people who might not actually need to read them for educational purposes, by those people who are already aware of the gravity of the crime, such as other survivors, families of victims – whether they survived or not – but also academics, researchers, and human rights activists, for example. In other words, the public at large is not necessarily aware of this literature; the educational vocation of which is thus doubtful. More specifically, in the direct aftermath of the war and of the genocide, the collective reaction was one of mere indifference to the literature on the extermination. And indeed, Wieviorka rightly recalled that the only exceptions to this general disinterest were Anne Frank's *Journal*, published in 1952,[13] and the memoirs of Gerda Weissmann Klein, published in 1957. Other publications which have now become essential contributions to the literature on the extermination, such as the seminal work of Raul Hilberg[14] or the poignant testimony of Élie Wiesel,[15] were published later and not without difficulties for their authors in finding editors and publishers (Wieviorka, 2006, p.49).

As previously mentioned, the collective reaction in the aftermath of the war was one of general disinterest, most probably due to the willingness of society to forget a shameful past and to start anew. This would then explain the disinterest in the type of literature studied here at the time – but is seems that the general reaction has not evolved much. And indeed, as Rérolle and Weill (1994) found, only very few recently published testimonies have sold more than 1,000 copies. And in fact, they further noted the extremely low number of published copies of some crucial works, such as *Le Mémorial de la déportation des juifs de France* (Klarsfeld, 1978) 10,000 copies of which were published or *Le Calendrier de la persécution des Juifs de France, 1940–1944, éphéméride relatant les étapes de la Shoah en France* (Klarsfeld, 1993), of which only 3,000 copies were published. If it is true that some of Klarsfled's works have been reprinted (see Klarsfeld, 2001a, 2001b, 2001c)[16], it is still extremely worrying, to say the very least, that they failed to attract a great number of readers. One would have legitimately thought that, at least in France, all school and university libraries would have had these books on their shelves, but the

13 Frank, A., (1947), *Journal*. The Journal was rapidly followed by a film (1959) and by a play which both also generated great interest. See *infra*.

14 See his autobiography, *The Politics of Memory – Experiences of a Holocaust Researcher* (1994).

15 *La Nuit* (1958).

16 It may also be noted that *Le Mémorial de la déportation des juifs de France* is currently being re-edited. It may still be recalled that *The Destruction of the European Jews* (Hilberg, 1985) has been re-edited three times.

publication numbers clearly show that this was too high an expectation. These low statistics thus indicate that research work on the subject, even when published by a famous and highly respected figure of the fight for the remembrance of victims such as Serge Klarsfeld, not only fails to attract the public at large but also fails to appeal even at a more elitist level.

As asserted earlier, the overwhelming majority of the Nazi camps literature reveals the compelling need felt by victims to testify. Antelme referred to this need as a 'veritable hemorrhaging of expression' (cited in Wieviorka, 2006, p.127), as a 'frantic desire' to tell the experience (1992, p.3). But this need, this 'hemorrhaging', this 'frantic desire' to testify and thus to communicate, had, like any other form of communication, a necessary corollary: the need not only to be heard but also to be listened to. One would have legitimately thought that society at large, this same society which allowed the crime to happen in the first place, would at least seek repentance by simply listening to survivors – but this was yet again too high an expectation and, astonishingly, when survivors came back from the Nazi camps, no one was ready to listen to them. Simone Veil, deported to Auschwitz when she was seventeen, has expressed the collective unwillingness to listen to survivors' testimonies, emphasizing not only the social but also the familial unreadiness to hear and listen:

> I have always been disposed to talk about it, to testify. But no one was willing to listen to us. This incomprehension, these difficulties, we also experienced them with our families. Maybe mostly with our families, it is silence. A real wall between those who had been deported and the others (cited in Wieviorka, 1992, p.170).[17]

Therefore, the silence of survivors in the aftermath of the war was not due to their inability to talk but to the wall of indifference they faced. According to Finkielkraut,

> Thus if there was a silence about the 'racially deported' in the years following the war, it was not because they were unable to speak (as a melodramatic and untrue cliché would have us believe) but because no one wanted to hear them. Beware of the pathos of the ineffable! The survivors of the Final Solution were not reduced to aphasia by a nameless misfortune, by an experience that no words could express; they had, on the contrary, an irrepressible need to bear witness, if only thereby to pay their debt to those who had perished. What was missing was an audience. 'No sooner did we begin to tell our story', said Simone Veil recently, with undiminished anger, 'than we were interrupted, like overexcited or overly talkative children, by parents who are themselves burdened down with real problems.' (1992, p.18).

And indeed, as Dori Laub, one of the founders of the 'Cinematic Project on Holocaust Survivors', explained,

---

17 Translation by the author. The original version reads as follows: 'J'ai toujours été disposée à en parler, à témoigner. Mais personne n'avait envie de nous entendre. Cette incompréhension, ces difficultés, nous les retrouvions en famille. Peut-être même surtout dans nos familles, c'est le silence. Un véritable mur entre ceux qui ont été déportés et les autres.'

> Lying is toxic and silence suffocates. There is, in every survivor, an imperative need to *tell* and thus to come to *know* one's story, unimpeded by the ghosts from the past against which one has to protect oneself. One has to know one's buried truth in order to be able to live one's life. It is a mistake to believe that silence favors peace. The 'not telling' of the story serves as a perpetuation of its tyranny. The events become more and more distorted in their silent retention and pervasively invade and contaminate the survivor's daily life …. The unlistened-to story is a trauma as serious as the initial event (cited in Wieviorka, 2006, p.109).[18]

Poignantly, Simone Veil also equated her sufferings at the hands of the Nazis and the subsequent general unwillingness to listen to her story by using, to qualify these two different events, the same defining terms of 'permanent humiliation' – thus stressing the pain imposed on survivors by the lack of a willing audience (see Chaumont, 2002, p.35). In the words of Wiesel, 'the people around us refused to listen; and even those who listened refused to believe; and even those who believed could not comprehend' (1990, p.245). Ultimately, the refusal of society as a whole not to listen to the survivors' stories represents yet another victimization of the victims who found themselves imprisoned with their own experience, society being unable – because unwilling – to establish communication, to create a space of psychological freedom in which victims could have expressed themselves, and in which society at large could have received their stories and acknowledged their pain and sufferings:

> Precisely because it is located at the intersection between the individual and the collective, the testimony is the intermediary space where are articulated the psychic needs of the subject and those of the group he belongs to. Nonetheless, for such an articulation to be possible, the testimonial space must be a space of psychic freedom able to welcome the words of the testifier, with its silences, lacunae and incongruities (Waintrater, 2003, p.236). [19]

Furthermore, not only were survivors repressed in their desire to testify and to tell their stories and experiences but their own feeling of guilt for having survived and for being alive was reinforced. As a matter of fact, the social indifference to the urge felt by victims to tell their stories was also based on – and, thus, in the eyes of the deaf community, justified by – the general idea that, precisely because survivors had survived, the crimes cannot have been so terrible as they were claiming – and, if they were, this necessarily implied that those who survived had had illegitimate privileges. In other words, society in general saw survivors as either liars or profiteers. This was notably expressed by Charlotte Delbo: '[y]ou don't believe what we say / because / if

---

18 Emphasis in original.

19 Translation by the author. The original version reads as follows: 'Précisément parce qu'il se situe à l'intersection de l'individuel et du collectif, le témoignage est l'espace intermédiaire où s'articulent les besoins psychiques du sujet et ceux de son groupe d'appartenance. Cependant, pour qu'une telle articulation soit possible, il faut que l'espace testimonial soit un espace de liberté psychique capable d'accueillir la parole du témoin, avec ses silences, ses lacunes et ses incongruités.'

what we say were true / we wouldn't be here to say it' (1995, p.276), and further explained by Chaumont in the following terms:

> To put it differently, if existence in the camps had really been as terrible as survivors had claimed, they should have perished. Therefore, if they are alive, there are only two possible conclusions: either they lie or, which is even worse, they have been among the profiteers of the system. This insidious suspicion has been endured most particularly by numerous Jewish survivors … Jewish survivors found themselves enjoined to prove that they owed life to chance rather than to the sacrifice of others. The Jewish survivor therefore often appears as a morally degenerate being in need of a complete re-education …. We understand that this more or less tacit presumption of guilt has maintained in the *Lagermenschen* a deep and lasting shame (2002, pp.31–2).[20]

In the same vein, Arendt has written that 'anyone speaking or writing about concentration camps is still regarded as suspect; … the very immensity of the crimes guarantees that the murderers who proclaim their innocence with all manner of lies will be more readily believed than the victims who tell the truth' (1966, p.439).

Thus, survivors were faced with having to justify their own survival and therefore their right to still be alive, with having to prove that they did not survive to the detriment of other victims. But not only were the living stigmatized for still being alive, as previously mentioned, the dead were equally stigmatized as consenting victims, as victims who passively went to their death without a protest, without a fight (see Chaumont, 2002, pp.32–3). No need to explain then why the memory of the Shoah was, until recently, a 'shameful memory' (Chaumont, 2002, p.33), a memory that brought guilt onto the victims of the crime.

Ultimately, the urge to testify encountered yet another obstacle as it raised the question, if not of the legitimacy of the testifier, then certainly of the identity of the testifier. To put it differently, the issue of the concept of 'witness' proved extremely problematic for the testifier. In the words of Primo Levi,

> We, the survivors, are not the true witnesses. This is an uncomfortable notion, of which I have become conscious little by little, reading the memoirs of others and reading mine at a distance of years. We survivors are not only an exiguous but also an anomalous minority: we are those who by their prevarications or abilities or good luck did not touch bottom. Those who did so, those who saw the Gorgon, have not returned to tell about it or have

---

20 Translation by the author. The original version reads as follows: 'Autrement dit, si vraiment l'existence dans les camps avait été aussi terrible que les rescapés le prétendaient, ils auraient dû y succomber. Dès lors, s'ils sont vivants, de deux choses l'une: ou bien ils mentent, ou bien, ce qui est encore plus grave, ils ont été parmi les profiteurs du système. Ce soupçon insidieux, particulièrement nombreux sont les survivants juifs à l'avoir enduré …. [L]es rescapés juifs se voyaient enjoint de prouver qu'ils devaient la vie au hasard plutôt que d'avoir sacrifié autrui. Le survivant juif apparaît dès lors souvent comme un être moralement dégénéré qu'il faudra complètement rééduquer …. On comprend que cette présomption plus ou moins tacite de culpabilité ait alimenté chez les *Lagermenschen* une honte profonde et durable.'

> returned mute, but they are the 'Muslims', the submerged, the complete witnesses, the ones who deposition would have a general significance. They are the rule, we are the exception (1988, pp.63–4).

In a similar vein, Jorge Semprun wrote that the specificity of the annihilation of European Jews lied in the absence of direct witnesses, of survivors from the gas chambers who would have been the only ones able to testify on the ultimate stage of the extermination:

> The experience of the annihilation of the European Jews has this tragically specific particularity that there are no survivors who can testify. There are of course survivors of Auschwitz …. But there are no survivors of the gas chambers. No one can tell us that he was there, no one could ever, through the truthfulness of his story, make us say: It is as if I was there! … All the massacres throughout history have spared survivors, direct witnesses: they were there. Our imagination, our compassion, our anger also while listening to their stories may make us say: It is as if I were there! … In the experience of the gas chambers, such a thought would be indecent. So scandalous, it would be astonishing. Hundreds of thousands of Jews of all social conditions, all ages, men and women, children and elderly people are dead in the gas chambers, and no one can testify. We have the proofs, but not the testimonies. In Humanity's collective memory, legendary or historical, fable or document, there will always be this ontological vacuum, this lack of being, this appalling emptiness, this infected and poisonous wound: no one could ever tell us that he has been there (1998, pp.60–1).[21]

Consequently, testifiers are faced with the problem of adequately expressing the pain and sufferings endured by victims – their own pain and sufferings as well as those inflicted upon others.

The lack of direct, or true, witnesses, the guilt felt by the survivors, the shame they experienced, reinforced by the collective indifference of society as a whole, the difficulties of expressing their pain – all these elements astonishingly culminated in the silencing of survivors, in spite of their will, and need, to testify. Obviously, the

---

21 Translation by the author. The original version reads as follows: 'L'expérience de l'anéantissement des Juifs d'Europe a ceci de singulier, de tragiquement spécifique, qu'il n'y a pas de survivants qui puissent en témoigner. Il y a des survivants d'Auschwitz, bien sûr: nous en avions précisément un devant nous, qui nous parlait. Mais il n'y a pas de survivants des chambres à gaz. Personne ne peut nous dire qu'il y était, personne ne pourra jamais, par la véracité féroce de son récit, nous faire dire: C'est comme si j'y étais! … Tous les massacres de l'histoire ont épargné des survivants, des témoins directs: ils y étaient. Notre imagination, notre compassion, notre colère aussi en écoutant leurs récits peuvent nous amener à dire: C'est comme si nous y étions! … Dans l'expérience des chambres à gaz, une telle réflexion serait indécente. Inouïe à force d'être scandaleuse. Des centaines de milliers de Juifs de toute condition sociale, de tout âge, hommes et femmes, enfants et vieillards sont morts dans les chambres à gaz, et personne ne peut en témoigner. Nous en avons les preuves, mais pas les témoignages. Dans la mémoire collective de l'Humanité, légendaire ou historique, fable ou document, il y aura toujours ce vide ontologique, ce manque d'être, cette béance abominable, ce fer rouge dans la plaie: personne ne pourra jamais nous dire qu'il y a été.'

problem here is not that victims did not speak out but that they were silenced, which is completely different. And indeed, it is crucial here to recall that survivors are not only victims, that they are human beings before being victims and society should thus respect their possible choice to remain anonymous or silent. As Waintrater reports, one witness poignantly stated: 'Je ne suis pas né à Auschwitz' ['I was not born in Auschwitz'],[22] thus refusing to be defined only through persecution and victimization (2003, pp.233–4). And indeed, to consider a human being exclusively as a victim is extremely restrictive as it denies all other characteristics that precisely make this individual an individual: '[t]o see someone from this unique point of view is to deny him all specificity, the social recognition being complemented by a simplistic approach'[23] (*ibid.*). Also analyzing this 'myth of origins', Wieviorka reported a similar instance, writing that 'Ruth Klüger is, to my knowledge, the only one to have protested against this image of the former inmate' (2006, p.139), although she subsequently acknowledges that '[o]thers have perhaps protested through their silence. In certain refusals to testify, might there not be something other than the fear of awakening memories that are too painful, namely, the fear of being trapped in an image in which one does not quite recognize oneself?' (2006, p.140). In the words of Ruth Klüger,

> And yet in the eyes of many, Auschwitz is a point of origin for survivors. The name itself has an aura, albeit a negative one, that came with the patina of time, and people who want to say something important about me announce that I have been in Auschwitz. But whatever you may think, I don't hail from Auschwitz, I come from Vienna. Vienna is a part of me – that's where I acquired consciousness and acquired language – but Auschwitz was as foreign to me as the moon. Vienna is part of my mind-set, while Auschwitz was a lunatic *terra incognita*, the memory of which is like a bullet lodged in the soul where no surgery can reach it. Auschwitz was merely a gruesome accident (cited in Wieviorka, 2006, pp.139–40).

In this respect, the now fashionable expression 'duty of remembrance' can be seen as problematic as it could be interpreted as implying a constraint, an order directed at all survivors, to testify, all in the name of memory. It is the role of society, this very society which allowed the crime to happen in the first place, to accept and respect the desire of the survivors not to testify. And ultimately, as Lyotard noted, not to speak out is part of the capacity to speak out: and indeed the capacity involves a possibility and this possibility implies not only the possibility to speak out but also the possibility to remain silent. In other words, survivors should have not only the right to testify freely but also the right to remain silent:

> Not to speak is part of the ability to speak, since ability is a possibility and a possibility implies something and its opposite …. It is in the very definition of the possible to imply

22 Translation by the author.

23 Translation by the author. The original version reads as follows: 'Définir quelqu'un sous ce seul angle, c'est nier tout ce qui fait sa spécificité, la reconnaissance sociale s'accompagnant alors d'un regard réducteur.'

> opposites at the same time. That the opposite of speaking is possible does not entail the necessity of keeping quiet. To be able not to speak is not the same as not to be able to speak. The latter is a deprivation, the former a negation …. If the survivors do not speak, is it because they cannot speak, or because they avail themselves of the possibility of not speaking that is given them by the ability to speak? Do they keep quiet out of necessity, or freely, as it is said? (1988, p.10).

The problem here thus evolved with time: while, at the end of the Second World War, survivors were silenced, they are now pushed into testifying. In other words, society never granted them the freedom to choose whether to talk or not about their experience. Never did the survivors have a choice to make as society always made it for them, whether by forcing them into silence or by constraining them into testifying. As Wieviorka explains,

> The injunction to former inmates to testify, to tell their story to the young, to 'package' their history so that their testimony can serve posthumously to educate future generations, also includes, however, an imperative that irritates certain of them. 'Be Deported and Testify': that is the provocative title Anne-Lise Stern gave to her contribution to a recent colloquium. There is in this title a rejection of a double constraint: to be enclosed within a single identity, that of the inmate; and to be, as an inmate, nothing but one who testifies. Anne-Lise Stern is uncomfortable with being thus trapped in a set of demands greater than her, that causes her in some sense to lose her freedom, and whose ends are not unproblematic:
>
> 'The pedagogy of memory, its necessity, can also have perverse effects. Survivors wish more and more to unburden themselves of their history, to unburden and soothe their close family, to universalize that history. Interviewers who may or may not be trained to listen, historians, sociologists, filmmakers, philosophers, or other intellectuals – they take up this task, or seize hold of it, by necessity and often with noble intentions. But then some start accusing the others of claiming a "copyright" on Auschwitz. It could be that all sides, psychoanalysts among them, in fact dispossess the survivors and the dead. Will we become, all of us, nothing more or less than "ragpickers of History"?' (Wieviorka, 2006, pp.128–29).

The destruction of victims through the perpetration of genocide has transformed global society into a post-genocidal, if not to say genocidal – as genocides are indeed still being perpetrated – society, into an amputated society. As Wieviorka rightly recalls,

> Who could deny that Auschwitz is the European event *par excellence*? This Europe is based on a vacuum. Six million – maybe a few less, maybe a few more – of Jews have been murdered, one million of whom at Auschwitz. Jews, now absent from most European countries, are the phantom limb of Europe, a limb which has been amputated, but whose presence is still sensitive and, at times, hurts (2005, p.16).[24]

24 Translation by the author. The original version reads as follows: 'Qui pourrait nier qu'Auschwitz est par excellence l'événement européen? Cette Europe est fondée sur un vide. Six millions – peut-être un peu moins, peut-être un peu plus – de Juifs ont été assassinés, dont

All victims of genocide are a missing part of Humanity as a whole and, ultimately, a missing part of our own selves:

> 'A minute can harm a century', wrote Victor Hugo. The Shoah has amputated the human from a part of his humanity, and the millions of victims of Nazism are a missing limb of ourselves that only memory can still animate (Fottorino, 2005).[25]

Although this quote refers explicitly to the destruction of the European Jews, the same can be said regarding all the other occurrences of genocide, which all have mutilated our society –and only the memory of the crimes perpetrated and the remembrance of the victims of such crimes can acknowledge the existence and reality of this amputation, of this mutilation.

According to Bettelheim, 'maybe we would feel better, us ourselves, if we decided to mourn for the terrible losses we have endured because of the Shoah' (in Vegh, 1979, p.210).[26] And in fact, we, as members of the global post-genocidal – and genocidal – society, should mourn all the losses generated by the systematic destruction of other human beings.

---

un million à Auschwitz. Les Juifs, désormais absents de la plupart des pays européens, sont le membre fantôme de l'Europe, un membre dont elle a été amputée, mais dont la présence est toujours sensible et qui, par moments, fait mal.'

25 Translation by the author. The original version reads as follows: '"Une minute peut blesser un siècle", écrivait Victor Hugo. La Shoah a amputé l'humain d'une partie de son humanité, et les millions de victimes du nazisme sont un membre manquant de nous-mêmes, que la mémoire est seule à pouvoir encore animer.'

26 Translation by the author.

This page intentionally left blank

Part II

The Conventional Interpretation of the Specificity of the Crime of Genocide: The Restrictive Approach of the Genocide Convention

As the first part of the present book has demonstrated, the crime of genocide is a very specific crime and this specificity most probably culminated during the Second World War and the simultaneous destruction of the European Jews. The commission of this unprecedented crime prompted the international community to react in order to ensure not only the effective punishment of the crime, but also its prevention. Accordingly, in 1948, the United Nations Convention on the Prevention and the Punishment of the Crime of Genocide was adopted and subsequently entered into force three years later, in 1951.[1] By the mere fact of embodying and defining the crime of genocide in a single international instrument that deals exclusively with the crime of genocide, the international community acknowledged the specificity and uniqueness of this incomparable crime.

Nonetheless, as the following paragraphs will highlight, the legal recognition of the specificity of genocide is far from satisfying. And indeed, it seems that the drafters of the Genocide Convention interpreted the concept of specificity as implying a restrictive definition of the crime. If it is obvious that the crime of genocide needs to be restrictively understood in order to avoid a type of globalization of the word which would then empty it of its meaning, it is nevertheless doubtful whether the crime had to be so narrowly defined that its definition would in fact not cover one single case of genocide. Further, far from fully recognizing and acknowledging the uniqueness of the crime, the different dispositions of the Genocide Convention merely stay on the surface of the concept and miss out on a number of crucial issues: the whole instrument in fact misses out on all the issues analyzed in the first part of the present book, issues which precisely make the crime a unique and specific one. As a result, due to its inherently paralyzing provisions, the Genocide Convention is a

1 See Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, (1948). Approved and proposed for signature, ratification or accession by the General Assembly of the United Nations, Resolution 260 A (III) of 9 December 1948 (Entry into force: 12 January 1951). Reprinted in *The Raoul Wallenberg Compilation*, pp.575–8.

totally inapplicable instrument, unable to respect the promise of its title, incapable of completing the aims of prosecution and prevention it was designed to achieve.

Chapter 3

The Conventional Approach to the Genocidal Pattern of Conduct: The Omission of Dehumanization

The perpetration of the crime of genocide relies on a very particular genocidal pattern of occurrence regarding both the acts committed and the context in which such acts are committed. Accordingly, the following paragraphs analyze the genocidal action by focusing on the conventional requirements this action has to meet in order to qualify as such, as well as on the conventional loopholes regarding the definition of genocidal action.

From the outset, and before any other critical assessment of the Genocide Convention's provisions, it must be pointed out that Article I of this Convention confirms the fact that genocide is a crime under international law 'whether committed in time of peace or in time of war'. This official recognition that genocide could also be perpetrated in time of peace, and the consequent complete deletion of any 'war nexus requirement' for the crime of genocide to be recognized as such, is to be welcomed. Indeed, although History has shown that more often than not war has been an incentive element in the commission of genocide[1] and although it is very hard to imagine how genocide could actually be perpetrated without generating a conflict, not requiring any 'war nexus requirement' as a legal component of the crime is a very realistic position. The contrary would have indeed held the risk of 'freezing' the definition of the crime of genocide by only recognizing past occurrences of the crime and by excluding from the definitional scope of the Genocide Convention future genocides which could be committed in time of 'peace'.

---

1 See for example Whitaker Report, p.6, para. 20, in which it is acknowledged that '[t]hroughout recorded human history, war has been the predominant cause or pretext for massacres of national, ethnic, racial or religious groups'. See also Aly, who explained that 'as amoral and racist as the anti-Jewish policies already were in 1933, the most important prerequisites to the Holocaust did not emerge until the war began. Far beyond the level reached in the first six years of Nazi dictatorship, the war promoted a non-public atmosphere, atomizing individuals and destroying any ties they still had with religious and legal traditions' (1999, pp.1–2). Markusen has also identified several aspects of warfare contributing to genocide (1991, pp.229–47). Finally, see Kuper: 'international warfare, whether between "tribal" groups or city states, or other sovereign states and nations, has been a perennial source of genocide' (1985, p.157).

In other respects, the Genocide Convention is nonetheless very limiting as regards its definition of genocidal action. Not only does it restrictively enumerate the proscribed acts; it also requires these acts to be perpetrated in a very specific context in order for a genocide to be conventionally qualified as such. Consequently, if the action fails to meet the specific conventional conditions, the crime will fall outside the conventional definitional scope and will not be considered as genocide. At first glance, such conditions could be seen as safeguards against any abuses of the concept of genocide which would empty the crime of its meaning and of its specificity. Nonetheless, as the following paragraphs will highlight, the conventionally created requirements are unduly restrictive, so much so that they constitute a clear obstacle to the qualification of the crime of genocide and, in turn, a clear obstacle to its adequate prosecution and effective punishment.

The Conventional Restrictive Enumeration of Acts of Genocide

Due to the fact that 'genocide is a composite of different acts of persecution or destruction' (Lemkin, 1944, p.92), it is here submitted that this particular crime requires a non-limiting definition. Nonetheless, the drafters of the 1948 Genocide Convention failed to take into account this specificity of the crime of genocide and, as a result, the Convention proceeds to an exhaustive, and therefore restrictive, list of acts of genocide. This particular approach adopted by the Convention is far from being a recent matter for legal discussion and debate and, in fact, during the drafting of the text and the debates in the sixth Committee, the question whether to adopt an exhaustive or an illustrative definition of acts of genocide had already been raised. The main reason explaining why the drafters finally decided to opt for an exhaustive list of the different acts which the Convention would cover was their willingness to comply with the *nulla poena sine lege* principle, according to which no prosecution can occur for a crime not expressly specified. Another reason for limiting the conventional list of genocidal acts may also be found in the desire of the drafters to avoid creating variations among different domestic legislations by granting states too much discretion with respect to the definition of such acts. Consequently, Article II of the Genocide Convention exclusively and specifically applies to the following acts:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

The first problem – and probably the most important one in terms of both prevention and prosecution – with this list is that, in the case of genocide, an exhaustive enumeration

of punishable acts is not only self-defeating; it is also impossible to achieve. And indeed, considering the fact that past events have overwhelmingly demonstrated that crimes can clearly go way beyond human imagination, a list of genocidal acts will always necessarily remain incomplete. Law simply cannot penetrate evil minds; nor can it predict the evolution of technical means of destruction to foresee what sort of acts will be used in the future to commit genocide. Consequently, new means of perpetrating genocides might appear but will remain unpunished as acts of genocide, because *not punishable as such*.

In this respect, due to the restrictions of the Genocide Convention, different acts have been discussed both in doctrine and in case-law to assess whether, in some circumstances, they could still be constitutive of genocide. One such discussion arose as regards the crime of rape which, although it has been addressed on several occasions as either a crime against humanity[2] or as a war crime,[3] has also been qualified as an act of genocide, despite the silence of the Convention on this issue. Most notably, regarding the Rwandan context, Trial Chamber I of the ICTR, in the *Akayesu* case, unequivocally found that rape and sexual violence both 'constitute genocide in the same way as any other act as long as they were committed with the specific intent' required.[4] In the *Rutaganda* case, the same Trial Chamber also specifically recognized that rape accorded with 'serious bodily and mental harm', as prohibited by Article II(b) of the Genocide Convention.[5] Furthermore, both legal scholars and social theorists have interpreted Article II(d) of the Convention which incriminates 'measures intended to prevent births within the group' to acknowledge the possibility of qualifying rape, and most particularly forced impregnation, as genocide. Thus, while Wallimann and Dobkowski referred to the deliberate attacks on Bosnian Muslim women as childbearers as 'gynocide' (2001, p.xi), Bassiouni and Manikas also stressed that, in cases of rape, women could be considered as unmarriageable and could thus be less likely to procreate and to bear a child of their own ethnicity, thus ultimately destroying the group as such (1996, p.587). In this respect, Goldstein explained that forced impregnation by Serb forces prevented Bosnian births 'at least temporarily and in many cases permanently' (cited in Neier, 1998, pp.187–8). In other words, and regardless of the conventional silence on the crime of rape as a genocidal act, it is here submitted that, if rape is committed with the intent to destroy the group by enforcing pregnancy or by any other method aimed at preventing women from bearing children who would ensure the continued

2 See Article 5(g) of the ICTY Statute; Article 3(g) of the ICTR Statute; Article 7(1)(g) of the ICC Statute.

3 See Neier (1998, pp.179–83) on the crime of rape as a war crime. It is also noticeable that the Statute of the ICC deals with the war crime of rape in its Article 8(2)(b) (xxii).

4 *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, 2 September 1998, para. 731. For the first time, rapes and sexual violences were included among the acts of genocide, while they are not among those crimes listed in Article II of the Genocide Convention.

5 *Prosecutor v Rutaganda* (Case No. ICTR–96–3–T), Judgment, Trial Chamber I, 6 December 1999, paras 49–53.

existence of the group, rape should be considered as a potential genocidal act. It is perfectly true that such an assertion might seem incongruous now that this was explicitly recognized by the International Criminal Tribunals, but the fact remains that they had to go beyond the letter of the law, beyond the conventional text to reach this conclusion. Had they limited their analysis to the exact wording of the Convention, rape would not have been acknowledged as a potential genocidal act and this is precisely where the problem lies: in the incapacity of the Convention to expressly cover all potential genocidal acts.

And indeed, rape is far from being the only problematic conventional omission. For instance, like rape, the issue of the crime of apartheid as an act of genocide was also debated to such an extent that this crime was in fact specifically examined in relation to the Genocide Convention by an Ad Hoc Working Group of Experts. The Working Group indeed 'defined the elements of apartheid which constitute the crime of genocide',[6] and its report accordingly listed different practices of apartheid regarded as elements of genocide, such as the institution of group areas, the regulations concerning the movement of Africans in urban areas, the deliberate malnutrition policy, the birth control policy, the imprisonment and ill-treatment of non-white prisoners and the killing of the non-white population.[7] Subsequently, the adoption of the 1973 Apartheid Convention, which defines the crime as one against humanity,[8] partially solved the problem – partially because this Convention failed to recognize the possibility of qualifying apartheid as a genocidal policy. And in any event, this means that, during more than 20 years, there has been a *vide juridique* as to the qualification of this crime because the Genocide Convention did not expressly mention it among its exhaustive list of punishable acts.[9]

The cases of rape and of apartheid respectively are just two of the acts that the Genocide Convention omits in its exhaustive list of criminal acts and should therefore be considered as illustrations of the Convention's shortcomings. If perpetrated with the intent to destroy the group as such, any act could amount to genocide, even if such an act is primarily directed at the targeted group's environment,[10] or at this group's culture and cultural institutions.

---

6 See the study concerning the question of apartheid from the point of view of international penal law, UN Doc. E/CN.4/1075.

7 See the report of the Ad Hoc Working Group of Experts, UN Doc. E/CN.4/984/ para. 4.

8 See Article I of the Apartheid Convention.

9 The Group of Experts had indeed made a recommendation to the Commission on Human Rights to make specific proposals concerning a revision of the Genocide Convention, notably 'to make inhuman acts resulting from the policies of apartheid' punishable under that Convention, See UN Doc. E/CN.4/984/Add.18 and UN Doc. E/CN.4/1074, para. 161.

10 The issue of 'ecocide' was raised for the first time by Arthur Galston in 1970. See generally Falk (1974, pp.123–37).

The Conventional Omission of Cultural Genocide

The initial draft of the Genocide Convention – that of the Human Rights Division of the Secretariat – included cultural genocide among acts of genocide and defined it as the destruction of the specific characteristics of the persecuted groups by various means, such as forced exile, prohibition of the use of the national language, destruction of books, and similar acts.[11] The subsequent draft of the Ad Hoc Committee also dealt with cultural genocide in its Article III. The main argument raised in favour of the deletion of this article in the Convention was that the concept lacked a clear definition. Furthermore, the majority of representatives felt that the inclusion of cultural genocide would weaken the Convention, aimed at preventing and punishing mass murder. As a result, the Genocide Convention excludes cultural genocide from its scope of application, and the only reference to it is in the incrimination of the forced transfer of children, as the cultural identity of the group might then be lost.[12] In this respect, the Convention's definition is more restrictive than the definitions proposed by the doctrine, and notably by Lemkin. As a matter of fact, he had identified 'genocide in the cultural field' which consisted of 'the prohibition or the destruction of cultural institutions and cultural activities, of the substitution of education in the liberal arts for vocational education, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking' (1944, pp.xi–xii).

It is perfectly true that the destruction of schools and churches cannot be compared to the physical destruction and to the brutal murder of whole populations. However, History has shown that one does not go without the other, and that the destruction of cultural institutions is more often than not the first step towards physical genocide.[13] Genociders will first burn the books – before burning their victims.

By failing to recognize the concept of cultural genocide, the Convention fails to acknowledge the specificity of genocidal acts, the purpose of whose is the dehumanization of the victims. If the cultural heritage of the group targeted for destruction is eradicated, this group will disappear from collective memory, its whole existence will be eliminated, all traces of this group's life on Earth will be annihilated – and the genocide, the destruction, will be complete. Cultural genocide is more often than not part of the genocidal plan to destroy the group, to deny it any human life, to dehumanize it. By failing to include it among the proscribed acts, the conventional text totally fails in specifying the uniqueness of the crime of genocide.

---

11 UN Doc. A/AC.10/41 and UN Doc. A/362 (Appendix II).

12 An example of such forced assimilation which may be seen as a genocidal policy is that of the 'stolen generation' of Aboriginals in Australia at the beginning of the twentieth century.

13 It can be noted here that Cambodia might be the only case where physical genocide was not accompanied by cultural genocide. As a matter of fact, the Khmer Rouge did not destroy the cultural heritage of Phnom Penh. According to Neier, 'Pol Pot's forces were like a neutron bomb, killing the people but leaving the buildings intact' (1998, pp.119–20).

Moreover, the incrimination of cultural genocide in the Convention would have allowed for better prevention and prosecution of physical genocide, as it could have served as a warning, but also as a tool for effective punishment. According to the ICTY, the proof of attacks directed against cultural institutions and monuments, committed in association with killing, may prove important in establishing the existence of a genocidal intent:

> The Trial Chamber is aware that it must interpret the Convention with due regard for the principle *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group …. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[14]

Thus, even if it maintained that 'an enterprise attacking only the cultural or sociological characteristics of a human group … would not fall under the definition of genocide',[15] the Trial Chamber still recognized the existence of 'recent developments' towards the recognition of the crime of cultural genocide. In this respect, a fairly recent German decision went in contradiction with international law by interpreting the term 'genocide' broadly. Indeed, the Federal Constitutional Court of Germany stated that:

> [T]he statutory definition of genocide defends a supra-individual object of legal protection, *i.e.*, the *social* existence of the group … the intent to destroy the group … extends beyond physical and biological extermination …. The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.[16]

Also, it might be noted here that some scholars have considered interpreting the term 'to destroy' in the conventional definition of genocide so as to include cultural genocide. According to Schabas,

> it can be argued that a contemporary interpreter of the definition of genocide should not be bound by the intent of the drafters back in 1948. The words 'to destroy' can readily bear the concept of cultural as well as physical and biological genocide, and bold judges might be tempted to adopt such progressive constructions (2001, pp.31–2).

---

14 *Prosecutor v Krstić* (Case No. IT–98–33), Judgment, Trial Chamber I, 2 August 2001, para. 580.

15 *Ibid.*

16 Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para.(III) (4) (a) (aa). Emphasis added. Cited in *Prosecutor* v. *Krstić* (Case No. IT–98–33), Judgment, Trial Chamber I, 2 August 2001, para. 579.

As a concluding remark on this issue, it is here submitted that the interpretation of the Genocide Convention suggested by Schabas should be followed as it brings the conventional definition into harmony with the reality of the facts. Still, to paraphrase Schabas, if judges are not bold enough to adopt such progressive constructions, cultural genocide will fail to be recognized and, as the previous paragraphs have emphasized and as History has already shown, this non-recognition will hold the risks of not recognizing the physical genocide when it is committed, and of not being able to prevent it. By excluding cultural genocide from its list of genocidal acts and by ignoring this evidentiary tool, the Genocide Convention has here again created a serious impediment to adequate prosecution and effective punishment of the crime of genocide.

The problem of the exhaustive enumeration of acts of genocide in the Genocide Convention is far from being a new consideration and this issue was indeed addressed by the ILC which, in its 1954 Draft Code, incorporated Article II of the Genocide Convention but with a significant modification. Article 2(9) of the Draft Code thus reads as follows:

> Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, *including* ….[17]

By this provision, the definitional scope of genocide was widened in order for it to include not only the acts conventionally enumerated but also other acts which might destroy a protected group. This welcomed departure from the Convention failed to last, however, as the ILC reverted to the conventional text in Article 17 of its 1996 Draft Code of Crimes.[18] Moreover, because the Statutes of the Ad Hoc Tribunals[19] as well as the Statute of the ICC[20] also reproduced Article II of the Genocide Convention, acts of genocide remain subjected to a restrictive approach. Even further, in analyzing the elements of acts of genocide, the 'Elements of Crimes' adopted by the Preparatory Commission require that 'the conduct took place in the context of a manifest *pattern of similar conduct* against that group',[21] a requirement which appears to imply that the context of occurrence of the crime must consist of the same acts of genocide, i.e., killing, *or* causing serious bodily or mental harm, *or* deliberately inflicting conditions of life calculated to bring about the physical destruction of the group, *or* imposing measures intended to prevent births, *or* forcibly transferring children of the group to another group. If the Rome Statute is to be interpreted in this extremely restrictive way, the Court will only have jurisdiction over a genocidal conduct when the acts committed are the same. Needless to add that this will obviously be yet another serious impediment to the effective prosecution of the crime. Not only has the Rome Statute adopted the exact same definitional scope

17 [1954] II *ILC Yearbook*. Emphasis added.

18 [1996] II (2) *ILC* Yearbook 44.

19 Article 4 of the ICTY Statute, Article 2 of the ICTR Statute.

20 Article 6.

21 See Elements of Crimes, Article 6(a)(4). Emphasis added.

as the one embodied in the Genocide Convention, but the Preparatory Commission has further restricted this scope with completely new limitations which had never been legally contemplated – let alone adopted – before.

Ultimately, and as previously stressed, the major problem with this enumeration of genocidal acts is that it does not recognize and acknowledge the specificity of these genocidal acts. And indeed, the conventional definition of genocide totally omits the concept of dehumanization which, as analyzed in the first part of this book, is at the heart of this particular crime. To perpetrate the crime, genociders rely precisely on an enterprise of dehumanization, targeting the group they intend to destroy. By ignoring this crucial feature of the crime, the Genocide Convention ultimately fails adequately to define the crime of genocide. In other words, the list of genocidal acts, as provided in the conventional text, is not only counter-productive and incomplete; it is also incorrect: if there is no dehumanization – or rather no dehumanizing intent – there is no genocide. By unduly restricting the array of potential genocidal acts while omitting the very act that is omnipresent in the perpetration of genocide, the Genocide Convention, far from enhancing the uniqueness of the crime it prohibits, ultimately deprives it of one of its fundamental aspects, of what distinguishes it from any other crime, of what, in reality, qualifies a crime as genocide.

Chapter 4

The Conventional Selective Protection of Groups: The Omission of 'Racialization'

The question of the reasons for the commission of the crime or, in other words, of whether the perpetrator acted because of some special characteristics of the victim(s) is a crucial issue with respect to the crime of genocide. It is therefore unsurprising that the requirement of grounds for commission is omnipresent in the definition of the crime of genocide, this crime being perpetrated to destroy 'groups as such'.[1] However, the Genocide Convention only restrictively defines these grounds for commission as it is selective among the groups it would protect in whole or in part. Far from being a purely theoretical issue, this exhaustive enumeration of protected groups in the Convention has had disastrous consequences in practice as it does nothing but impede effective prosecution and punishment of the crime of genocide, while failing yet again to recognize the specificity of the crime of genocide itself.

The Conventional Definitional Uncertainty

Article II of the Genocide Convention only affords protection to '*national*, *ethnical*, *racial* [and] *religious*' groups.[2] This conventional selective protection of vulnerable groups has given rise to an enormous amount of comment and criticism, both on the part of legal scholars and of social theorists. Much has been written, and, it is here argued, rightly so, on the inconsistencies of such a restrictive approach to potentially vulnerable groups, inconsistencies which in practice might lead to the non-recognition of the crime of genocide even when genocide has actually been committed.

Such loopholes have also been acknowledged by the International Criminal Tribunals and it is striking that, in the *Akayesu* case, the ICTR had to resort to a most improbable interpretation of the Convention to qualify the events in Rwanda as genocide: had it not, they would not have qualified as genocide! And indeed, as Tutsis did not fit in any of the conventionally listed groups and were more probably a social group thus unprotected by the Convention,[3] the ICTR extensively interpreted

1 Article II of the Genocide Convention.

2 *Ibid.* Emphasis added.

3 Indeed, Tutsis did not fit in any of the groups described as they were not really a different ethnic group compared to the Hutus: they shared the same language, and probably the same culture. See Destexhe: 'The Hutu and the Tutsi cannot even correctly be described

the conventional scope of protection as being meant to apply to 'permanent and stable' groups.[4]

The case of Cambodia has also generated great debates among scholars as to the qualification of the crimes perpetrated by the Khmer Rouge between 1975 and 1978. And indeed, although widely viewed as genocide,[5] most of these crimes would actually fall outside the definition of genocide and, as Van Schaack pointed out, 'a close reading of the Genocide Convention leads to a surprising and worrisome conclusion' (1997, p.2261). Thus, while some of the crimes committed by the Khmer Rouge would fall within the conventional scope,[6] others would not, because the victims did not constitute a national, ethnic, racial, or religious group (see Van Schaack, 1997, pp.2269–72). Some authors have justified this discrepancy based on the argument that 'confusing mass killing of the members of the perpetrator's own group with genocide is inconsistent with the purpose of the Convention, which was to protect national minorities from crimes based on ethnic hatred' (Schabas, 2000, p.120). Here, what some refer to as 'autogenocide'[7] would fall outside the scope of the Convention and the atrocities committed by the Khmer Rouge in Cambodia against members of their own group would not amount to genocide. In its 1999 Report, the Group of Experts for Cambodia had acknowledged the problem and had accordingly stated that

> whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims.[8]

---

as ethnic groups for they both speak the same language and respect the same traditions and taboos. It would be extremely difficult to find any kind of cultural or folkloric custom that was specifically Hutu or Tutsi …., [There] were certainly distinguishable *social categories* in existence before the arrival of the colonisers, but the differences between them were not based on ethnic or racial divisions. …[the colonisers reinforced the antagonism between Hutus and Tutsis which] has since become absorbed by the people themselves' (1995, p.6). Emphasis added.

4 *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, 2 September 1998, para. 515.

5 See for example the opinion of Beres, who sees, among the instances of genocide committed since the Second World War, the Cambodian case as 'being, perhaps, the most far-reaching and abhorrent' (1988, p.133).

6 The Khmer Rouge did indeed commit genocide against a religious group – the Buddhists – and against ethnic groups: the Vietnamese community was entirely eradicated, while members of the Chinese and of the Muslim Cham communities were massacred.

7 See UN Doc. E/CN.4/SR.1510: A report to the UN Human Rights Commission noted that the mass murder which had occurred in Cambodia was comparable to the depradations of the Nazis and that it represented 'nothing less than autogenocide'. The term 'autogenocide' has also been used by some scholars. However, it might be confusing as it could imply a suicidal attitude.

8 UN Doc. E/CN.4/SR.1510.

Unfortunately, the Group of Experts here missed an opportunity to qualify such crimes as it failed to take a position on the issue, considering that the matter should be dealt with by the courts if Khmer Rouge officials were charged with genocide against the Khmer national group.[9]

Nevertheless, and notwithstanding the silence of the Group of Experts, it is arguable that the exclusion of 'autogenocide' from the definitional ambit of the crime of genocide is legally incorrect. And indeed, the Convention itself, by expressly conferring protection to 'national' groups, does include cases of 'autogenocide'.[10] Furthermore, such a reading of the text omits the fact that the majority of a population might also be a victim of genocide. In his report, Whitaker observed that a victim group can constitute either a minority or a majority,[11] and thus concluded that 'the definition does not exclude cases where the victims are part of the violator's own group' and that, accordingly, the Cambodian massacres were a clear case of genocide 'even under the most restrictive definition'.[12] According to Schabas, 'the label "group" is flexible, enabling the Convention to apply without question to the destruction of entities that may not qualify as "minorities"' (2000, p.108).

Ultimately, as the Convention does not provide for detailed definitions in its provisions, it leaves its states parties with significant discretion as to the groups which are to be protected. As a matter of fact, 'defining the groups more precisely was presumably left to the implementing legislation which parties to the Convention are to adopt in accordance with Article V' and, as a result, 'different states have varying definitions of protected groups and problems could arise in interpreting and applying the Convention' (Leblanc, 1988, pp.271–2). It is here suggested that the lack of clear definition has done nothing but create confusion as to which groups are effectively protected by the Convention. Consequently, the Genocide Convention has more often than not been interpreted in a restrictive manner and, due to the conventional limitative list of protected groups, groups other than those expressly enumerated have generally been considered as unworthy of protection under this instrument.

The Conventional Exhaustive Enumeration of Vulnerable Groups

During the drafting of the Convention, delegates suggested that, where acts fell outside the scope of the definition because the victims did not belong to one of the

9 Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850, UN Doc. S/1999/231, annex, para. 65. In this respect, it remains to be seen whether the internationalized domestic tribunal in Cambodia which was set up to prosecute the crimes committed by the Khmer Rouge will qualify such offences as genocide. See generally Linton (2002).

10 See also Hannum (1989, p.107): 'nothing in the *travaux préparatoires* is contrary to or incompatible with the proposition that the Khmer people of Kampuchea constitute a national group within the meaning of Article II.'

11 Whitaker Report, p.16, para. 29.

12 *Ibid.*, p.10, n.17.

groups enumerated, the offence 'could also constitute crimes against humanity when committed against members of other groups, including social and political groups'.[13] In other words, the delegates did acknowledge the fact that genocide was indeed possible against other groups than those expressly cited, but estimated that these groups did not deserve the protection of the Genocide Convention, which was then more efficient than the one offered by the concept of crimes against humanity. One has to remember that, at the time, it was not clear whether crimes against humanity could be qualified as such if they were committed in time of peace, the IMT having ruled that crimes against humanity had to be connected with war (see Bassiouni, 1992, p.31). As a result, the numerous groups excluded from the conventional scope of application were left without any protection, and the drafters of the Convention proved very hypocritical in suggesting that they could be protected through the apparently broader concept of crimes against humanity.

One could argue that this problem is now completely solved due to the fact that it has been recognized that crimes against humanity could also occur in time of peace. It is nonetheless submitted here that the distinction among groups remains highly questionable as there is no reason why genocide against some groups should be considered as a crime against humanity, and not as genocide. In this respect, it is rather striking that definitions by scholars encompass 'a wider array of targeted groups, destructive actions and actual cases' (Markusen, 1991, p.232).[14] Furthermore, it might be noted that the ICTR Statute itself indirectly acknowledged the reality of genocide committed on political grounds, as such grounds were actually added in its definition of crimes against humanity, to allow for the prosecution of acts perpetrated against Hutu opponents with the intent to destroy them as a group as such, acts which are not covered by the Convention.[15] Again, this is hardly a satisfying solution, either legally or morally: if genocide is happening, then the adequate term must be used to describe the criminal acts, if only to ensure adequate prosecution. As has already been stressed at the very beginning of the first part of the present book, the point here is not to argue that 'genocide' is a more serious legal qualification than 'crime against humanity'. Rather, it is simply to emphasize that, just as crimes against humanity should be qualified as such precisely when they are crimes against humanity, genocide ought to be recognized as such when the crime is a genocide. Crimes against humanity and genocide, although they are both international crimes which might share rather striking similarities, are still different crimes: they are two distinct legal qualifications and, as such, are not interchangeable. If genocide is committed against other groups than those conventionally protected, to qualify the crime as one against humanity is simply an aberration and an absurdity.

13 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 12–13, para. 61.

14 For scholarly definitions, see for example Huttenbach (1988, pp.289–303).

15 See Article 3 of the ICTR Statute.

The Exclusion of Political and Social Groups

The *travaux préparatoires* of the Convention show that the exclusion of political and social groups from Article II provoked more debate than any other aspect of the text. At the time of the drafting, it was indeed argued that the Convention should be ratified as promptly as possible to bring to an end the genocide which was being committed behind the Iron Curtain, notwithstanding the fact that the Genocide Convention would actually not be applicable to this particular instance! Indeed, the Soviet Union and its Communist satellites only had to invoke the fact that their victims were political enemies to avoid punishment. Thus the religious persecutions which took place in Czechoslovakia, Hungary and Bulgaria on the ground that the clergy were enemies of the state would be a clear example of the meaninglessness of the Convention in such cases. Van Schaack explained this contradiction by the 'imperative to avoid having the Convention inculpate Stalin's purges' of the Kulaks during the late 1920s and early 1930s (1997, p.2268).[16] Dramatically, such an imperative was respected as, under this exclusion, for many years Stalin's extensive mass murders of ethnic groups in the Soviet Union were not acknowledged as genocide.

It has been argued that the exclusion of 'political groups' from the scope of the Convention was due to the fact that such groups were neither stable nor permanent.[17] For instance, Leblanc accepted the exclusion of political groups because of the 'difficulty inherent in selecting criteria for determining what constitutes a political group' and because of 'their instability over time' (1988, p.292). Such an argument is however far from being convincing. And indeed, apart from the so-called racial groups which do not exist in reality, the other groups enumerated in the Convention do appear to be neither stable nor permanent.[18] In fact, only one day after the adoption of the Genocide Convention, the General Assembly adopted the UDHR whose Articles 15(2) and 18 expressly recognize the rights to change nationality as well as religion respectively.[19] Furthermore, History showed that political opinion or belonging to a social group could be seen as a permanent feature of a given individual. Thus, if we take the example of Cambodia, the Khmer Rouge believed that some social groups were globally criminal, that they were criminal by nature,

16 For a description of these purges, see Kuper (1981, pp.140–50).

17 During the Ad Hoc Committee's debates, Lebanon's representative argued that political groups were far less stable in character than the other groups mentioned (UN Doc. E/AC.25/SR.4, 10), while China's representative questioned the assertion that political groups 'had neither the stability nor the homogeneity of an ethnical group'. He further stated that 'there was a risk of bringing about a confusion between the idea of political crime and that of genocide' (UN Doc. E/AC.25/SR.3, 5−6).

18 This is certainly why the ICTR has been seen as giving a wrong interpretation of the Convention in the *Akayesu* case by resorting to the 'stable and permanent group' concept. *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, 2 September 1998, para. 515.

19 Article 15(2) provides that 'No one shall be … denied the right to change his nationality' and Article 18 that 'Everyone has the right to … freedom to change his religion'.

per se, and that this 'crime' was transmitted to spouses as well as to descendants,[20] through a 'hereditarization' of the acquired social features. Kuper also noted that 'past political affiliation can be as ineradicable a stigma, and as irrevocable a warrant for murder as racial or ethnic origin' (1985, p.127). As explained in the first part of this book, it is precisely this 'racialization' of the specific features of individuals – no matter how these features are qualified – operated by the genociders which gives the crime of genocide its unique dimension. The group as such might be a pure invention on the part of the *genociders who will thus proceed to the* 'racialization' *and* 'hereditarization' *of the individual characteristics of who they think should be part of a group targeted for destruction*.

Another reason given to justify the exclusion of political groups from the Convention's scope of application was the 'right of the State to protect itself' to respond to disturbing elements in its own country (Leblanc, 1988, p.292). Such an argument is obviously highly immoral as it expressly recognizes the possibility for the state to commit genocide to repress political opposition and to take action against subversive elements. Should it be recalled that genocide is never justifiable or admissible? What the Convention indirectly does is to legitimate violence against political groups. Its Article II is nothing less than an open door enabling states to commit genocide, with no legal possibility of seeing the crime qualified assuch and with consequently no risk of triggering the application of the Convention to prevent the crime, protect the victims and prosecute the perpetrators. As Lane rightly pointed out, the elimination of political groups from the Convention

> creates a serious loophole in the Convention's scheme, for not only does it leave unprotected political groups *per se*, but also suggests that the mass killing of protected groups may be justifiable for political reasons. This is of particular concern in the Cambodian setting, where the alleged mass killing had been directed to a large extent at the regime's middle-class constituency (1979, pp.261–2).

Other authors went even further and have asserted that 'through the dropping of political groups from the victim list, the most severe form of discrimination currently practiced is, in effect, tolerated and, in a sense, "legalized" by omission' (Glaser 1979, pp.8–9). Similarly, Donnedieu de Vabres has stated that

> genocide is an odious crime, regardless of the group which falls victim to it… , the exclusion of political groups might be regarded as justifying genocide in the case of such groups.[21]

Such assertions are nonetheless to be handled with care and cautiously read. As a matter of fact, the omission from the Convention of particular acts does not necessarily make them legal: such crimes would most probably still be qualified as 'crimes against humanity' and would thus still be considered as international crimes. The problem with the conventional loopholes is not that they legalize a

20 Children were deemed to be 'dangerous' until the third generation.

21 UN Doc. E/447, 22.

series of crimes by simply omitting them as, thankfully, they do not generate such an absurdity; rather the problem is that these lacunae unjustifiably exclude some acts from the conventional scope of application and, consequently, some victims from the conventional sphere of protection. And indeed, none of the reasons aimed at justifying the exclusion of political and social groups from the Convention are valid. For instance, political groups are being excluded therein on the grounds that they are neither stable nor permanent, and that they may represent a threat to a government's authority. If this were so, why would entire families be completely eradicated?[22] Why would children be murdered? How can someone honestly and sincerely believe that a child can have so strong a political opinion that he should be killed for it?[23]

From the *travaux préparatoires* of the Convention, it is obvious that such a shortfall is due to political reasons, and notably to the desire to insulate political leaders from scrutiny and liability. As Kuper rightly noted, 'the real issue was the freedom of governments to dispose of political opposition without interference from the outside world' (1985, p.16). Van Schaack further pointed out that the exclusion of political groups in the Convention results 'in a legal regime that insulates political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups' (1997, p.2268).

Once again, the argument of state sovereignty had the lead over that of Justice. As a matter of fact, it is very likely that most states would never have ratified the Convention had it extended protection to political groups. And indeed, during the drafting, some representatives feared that the inclusion of political groups in Article II might jeopardize support for the Convention in many states.[24] In other words, states wanted to keep a possibility to commit genocide against their own citizens by simply asserting that they were not members of groups conventionally protected. This is all the most unacceptable when one recalls that, before the adoption of the Genocide Convention, the General Assembly of the United Nations had adopted Resolution 96 (I), which illustratively lists protected groups while expressly citing political groups.[25]

Dramatically, the opinion of the French representative during the drafting of the Convention proved to be prophetic. He had indeed warned that 'whereas in the past crimes of genocide had been committed on racial or religious grounds, it was clear that in the future they would be committed mainly on political grounds'.[26] Events since the adoption of the Genocide Convention did show that political groups are

22 For instance, whole families were executed in Cambodia under Pol Pot's regime.

23 De Fontette (1993, p.111) reported that there was a Jewish child imprisoned in Drancy in May 1944 under this description: 'Boy, 18 months, terrorist'.

24 It can nonetheless still be pointed out that some national laws do recognize genocide committed on political grounds. See *infra*.

25 GA Resolution 96 (I), UN Doc. A/231 (11 December 1946).

26 UN ECOSOC Session 7, 26 August 1948, p.23. On the contrary, the Swedish representative curiously stated that 'it seemed that all States could guarantee that limited measure of protection [against physical destruction] to political groups'. See UN Doc. A/C.6/75, 114.

targeted for genocide. As a matter of fact, the Whitaker Report acknowledged the importance of such events and proposed to include these crimes in an additional optional protocol. Although this could be seen as a first step towards the recognition of the vulnerability of other groups than those expressly cited in Article II of the Convention, it still obviously does not solve the question as to why these groups would only be worth the protection of an optional protocol and not that of a Convention.[27]

In any event, one can really wonder why the Convention does not include political groups while other major instruments include the category of political groups among the protected ones. For instance, the prohibition of crimes against humanity as defined by Article 6(c) of the IMT Charter prohibits persecutions on '*political*, racial or religious grounds'.[28] Another example is Article I of the Convention relating to the Status of Refugees, which provides for protection of individuals from persecution on account of 'race, religion, nationality, membership in a particular *social* group, or *political* opinion'.[29] In other words, the Genocide Convention here creates 'an internally inconsistent human rights regime' (Van Schaack, 1997, p.2283). The prohibition of genocide against political groups is also expressed in various national legislations, which thus allow for prosecutions for genocide committed against these groups. This is expressly the case in Ethiopia[30] and in Costa Rica.[31] In Peru, the prohibition includes 'social groups', and, by extension, political ones,[32] while in both France and Romania, the protection is broader and the definition provides a 'catch-all' category: the French Penal Code indeed refers to 'un groupe déterminé à partir de tout autre critère arbitraire',[33] and the Romanian Code prohibits the destruction of a 'collectivity'.[34] As this brief overview of both domestic and international instruments highlights, it seems that the unduly restrictive approach to protected groups adopted in the Genocide Convention has no legal – let alone moral – justification.

Genocide against political and social groups should be included within the scope of the Convention, and some scholars tried to resolve this situation by introducing the notion of 'politicide', meaning genocide on a political basis and thus covering the killings of members of political groups.[35] The term 'sociocide' could also be used

27 See Whitaker Report, 19, para. 37.

28 Emphasis added.

29 Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees. Reprinted in *The Raoul Wallenberg Compilation*, pp.347–59. Emphasis added.

30 Article 281 of the Ethiopian Penal Code (1957).

31 Article 373 of the Costa Rican Penal Code. Also, Article 127 of the Costa Rican Penal Code Project (1998) offers an extremely wide protection as the definition of genocide covers gender, age, political, sexual, social, economic and civil groups.

32 Article 319 of the Peruvian Penal Code (1998).

33 'A group determined by any other arbitrary criterion'. Article 211−1 of the New Penal Code.

34 Article 356 of the Romanian Socialist Republic Penal Code. (1976).

35 Professor Paust even proposed a new draft convention on the crime of Politicide. See Fein (1990, p.11). See also Harff and Gurr (1990, pp.23–41) who distinguish between two

to designate genocide against social groups. This is however not a proper solution as it does not answer the question whether these killings are or are not genocide. If the affirmative, then the word 'genocide' should be employed. Furthermore, the introduction of new words would only complicate existing international law by creating numerous distinctions which would completely empty the notion of 'genocide' of its meaning. Ultimately, by not allowing for the recognition of a genocide just because the group targeted is not among those specifically listed, the Genocide Convention impedes adequate prosecution. Indeed, even if prosecution does take place, the offenders will not be tried for genocide while, as subsequent paragraphs will demonstrate, adequate terminology in criminal matters is essential for the victims as well as for society as a whole. If genocide has been committed, it seems obvious that its perpetrators should be tried under this charge and this is precisely what the Convention fails to provide for.

Other Groups Excluded from the Conventional Scope of Application

Political and social groups are not the only groups 'omitted' from the Genocide Convention. Indeed, while the atrocities of the Second World War provided the stimulus for the Convention, nothing is said about the mentally ill who were exterminated by the Nazis, or about the homosexuals who were also victims of persecutions and murders. The purpose of this section is not to engage in a debate about whether these persecutions amounted to genocide or not. Rather, it is simply to assert that, in the face of the horrors committed against members of these groups, the least the Genocide Convention should have done was to recognize the vulnerability of such groups. Thus, even without going so far as adopting an illustrative list of protected groups, it would have seemed pure common sense for the Convention to acknowledge the occurrence of the past events by including other groups persecuted by the Nazis within its scope of application. Maybe at the time of the drafting these subject matters were taboo – but in the twenty-first century, it is about time to recognize the need for protection of these groups.

The Convention also fails to consider gender-based genocide. Indeed, in some instances men or women are targeted for physical destruction, and even those who still contend that such cases do not amount to genocide will have to admit that, for obvious biological reasons, a group can only live and survive if both genders exist. Consequently, the systematic mass killing of men or women, when perpetrated with the intent to bring about, even in the long term, the destruction of the group, should most certainly qualify as genocide. As a matter of fact, gender-based genocide is probably the only instance in which objectivity prevails rather than subjectivity. And indeed, while other genocides will more often than not rely on the subjective definition of groups by the genociders themselves who will arbitrarily create a 'race' through the concepts of racialization and hereditarization, gender-based genocide will not be based on such artificial delirium. In other words, if genociders unequivocally

---

categories of genocides and four types of politicides.

target a gender to destroy the group as such, this should be considered a clear case of genocide. Here again, the uncertainty generated by the silence of the Convention is all the most problematic and it is now left to the courts and tribunals to settle the law on the issue.[36]

The Subjective Definition of Groups Conventionally Protected: The Protection of Groups 'As Such'

The Convention only protects the above-mentioned enumerated groups 'as such'[37] and this also gives rise to serious problems in terms of effective prosecution and punishment of the crime. Indeed, from a practical perspective, this means that genocidal actions can be taken against members of any national, ethnical, racial, or religious group, but that the application of the Convention to them can easily be impeded by the claim that they are not being proceeded against as members of one of these groups 'as such', but as members of other groups which are not protected by the Convention. In other words, perpetrators are here provided with a defence to a charge of genocide, as they could use the pretext of oppressing other groups to persecute groups conventionally protected. In this respect, Robinson rightly wrote that 'the destruction of ethnic, racial, or religious groups under the guise of "political groups" would be an obvious violation of the Convention' (1960, pp.61–2). Such an assertion is perfectly valid but remains completely theoretical. Indeed, such a manipulation of truth will be impossible to prove. Furthermore, it is arguable that the international community of states will find this very convenient as it will give them a perfect excuse not to condemn the mass killings, let alone to intervene.

In the words of Drost,

> a convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups … it serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups (1959, pp.122–3).

Kuper has also noted this interweaving of the political with the racial, ethnic, or religious, notably due to the fact that

> in situations of group conflict, the internal divisions become politicized, and political division tends more and more to coincide with ethnic (or racial and religious) origin. Thus political mass murders and the ethnic factor become interwoven, raising difficult problems of classification (1985, p.127).

The problem here is not that the conventional definition of the crime of genocide recognizes the subjective element in the qualification of the group targeted

36 See *infra* 5.2.2. on the case-law of the ICTY regarding the massacres of military-aged men.

37 Article II of the Genocide Convention. Emphasis added.

for destruction. On the contrary, groups victims of genocide will always be subjectively defined by the genociders who will artificially create a group in order to better destroy it. Rather, the problems here are that the conventional text erred in its acknowledgement of such subjectivity and that the words 'as such', far from enhancing the specificity of the crime of genocide and of the genocidal process, actually constitute a defence mechanism for genociders and thus a serious obstacle in terms of prosecuting the crime.

And indeed, with the Genocide Convention, 'determining the meaning of the groups protected by the Convention seems to dictate a degree of subjectivity. It is the offender who defines the individual victim's status as a member of a group protected by the Convention' (Schabas, 2000, p.109). In other words, the identification of the group as such is left to the genociders themselves who are therefore empowered to decide to grant the group they aim at annihilating the protection of the Convention, and to therefore decide whether the possibility for them to be prosecuted should remain open! Needless to say, in such circumstances, the perpetrator will do everything to avoid punishment, simply by arguing that the targeted group is not among those enumerated in the Convention. In other words, by exhaustively listing the protected groups, the Genocide Convention has directly provided genocide perpetrators with a defence to a charge of genocide. Fortunately, the case-law of the International Criminal Tribunals, by acknowledging the importance of subjective elements in determining the perpetration of genocide, seems to have remedy to the conventional shortcomings on the issue. And indeed, in the *Bagilishema* case, the Trial Chamber of the ICTR acknowledged that 'the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society.'[38] In the *Rutaganda* case, although expressing the view that 'a subjective definition alone is not enough to determine victim groups',[39] the Chamber noted that 'for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction.'[40] In the *Semanza* judgment, the Trial Chamber also found that:

> The determination of whether a group comes within the sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.[41]

---

38 *Prosecutor v Bagilishema* (Case No. ICTR–95–1A–T), Judgment, Trial Chamber I, 7 June 2001, para. 65.

39 *Prosecutor v Rutaganda* (Case No. ICTR–96–3), Judgment, Trial Chamber I, 6 December 1999, para. 57.

40 *Prosecutor v Rutaganda* (Case No. ICTR–96–3), Judgment, Trial Chamber I, 6 December 1999, para. 56.

41 *Prosecutor v Semanza* (Case No. ICTR–97–20), Judgment, Trial Chamber III, 15 May 2003, para. 317.

Adopting a similar view, Trial Chamber I of the ICTY, in the *Krstić* case, found that the qualification of the group could be achieved 'by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.'[42] The same Trial Chamber reiterated this finding while holding that 'the correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.'[43]

These decisions have to be welcomed as a trend towards recognizing the importance of subjective elements in qualifying the group as one targeted for genocide, in spite of the conventional silence on the matter. Notwithstanding the progress achieved by both International Criminal Tribunals, it still remains that, in itself, the Genocide Convention is an inherently defective instrument in the sense that its own provisions are in themselves counter-productive and do not allow it to do what it is supposed to do, namely, to be a 'forward-looking guide for the application of the full international prohibition of genocide' (Van Schaack, 1997, p.2268), and an effective tool for the punishment of this most heinous crime.

The first problem with the conventional selective protection of groups is that such an approach is inherently paralyzing. Precisely because the existence of the group might in fact only exist in the minds of the perpetrators and might have no real factual basis, a restrictive list of vulnerable groups is not only useless but also self-defeating as, by definition, these groups cannot be defined before the particular crime is actually committed. There is no possible way for a legal instrument to predict the future fantasies of the evil minds. For Chaumont,

> It matters that – contrary to normal usage – one understands behind the word 'group' *any group, as arbitrary as it might be*; it may well only exist in the torturers' files; we can only keep the reference to the 'denial of the right to existence of entire human groups' [GA Res] in the case of genocide only in return for this considerable expansion – but, as we will see, without prejudice to the applicability of the concept – of the notion of group. Considering that the regroupings of potential victims of these serial murders can be totally artificial and that it is therefore impossible to *a priori* enumerate the types of groups which might be victimized – this depends on the torturers' arbitrariness – it is essential to eliminate all reference to particular groups (national, ethnic, racial or religious) in the definitions of genocide (2002, p.212).[44]

---

42 *Prosecutor v Krstić* (Case No. IT–98–33), Judgment, Trial Chamber I, 2 August 2001, para. 557.

43 *Prosecutor v Blagojević and Jokić* (Case No. IT–02–60–T), Judgment, Trial Chamber I, 17 January 2005, para. 667.

44 Translation by the author. The original version reads as follows: 'Il importe – à contre-courant de l'usage normal du vocable – d'entendre derrière le mot de "groupe" *tout groupement, aussi arbitraire soit-il*; il peut très bien n'exister que dans les fichiers des bourreaux; on ne peut conserver la référence au "refus du droit à l'existence de groupe entier" [GA Res] dans le cas du génocide, que moyennant cet élargissement considérable – mais, nous le verrons, non préjudiciable à l'applicabilité du concept – de la notion de groupe. Etant donné que les regroupements de victimes potentielles de ces meurtres sériels peuvent être totalement

And even if it were maintained that an exhaustive list of vulnerable groups had to be drawn, the other problem is that such listed groups would need to be defined. In this respect, it must be recalled that the Convention does not provide a definition of these groups and one can thus legitimately wonder what the differences are between a national, an ethnical and a racial group. During the drafting of the Convention, some representatives even argued that the terms 'racial' and 'ethnic' covered the same reality, as did the terms 'ethnic' and 'national'.[45] There was also a serious debate over the inclusion of religious groups, the Soviet representative arguing that these groups should be considered as subgroups of national groups.[46] Moreover, the use of the term 'racial' is ambiguous and problematic as it is obvious that the concept of 'race' is nothing less than a fantasy inherited from the previous centuries[47] and only exists from the point of view of those who intend to define it, as, in reality, there is no race. In other words, instead of acknowledging and incriminating the genociders' process of racializing the members of a group to target it for destruction, the conventional text wrongly affords protection to 'racial' groups, in spite of the fact that there are no such groups except in the minds of the perpetrators. Genociders do not target a group according to the 'race'. Rather, they operate a 'racialization' of the members of the group to artificially create a 'race' which they will then target for genocide. By relying on the mythical concept of 'race' rather than on the 'racialization process', the conventional definition of genocide is intrinsically and inherently flawed. It is based on an incorrect presupposition.

Ultimately, the conclusion that was previously reached with respect to the conventional restrictive approach to acts of genocide may also apply here. And indeed, by failing to incorporate the subjective element in the definition of targeted groups, by failing to recognize the racialization process operated by the genociders to qualify the group targeted for destruction, the Genocide Convention omits to acknowledge the second characteristic of the crime of genocide. As previously stressed, the first such element is that of dehumanization, which the conventional text falls short of recognizing with its limitative list of genocidal acts and the second

---

artificiels et qu'il est donc impossible d'énumérer *a priori* les types de groupes susceptibles d'être victimisés – cela dépend de l'arbitraire des bourreaux – il est impératif d'éliminer toute référence à des groupes particuliers (nationaux, ethniques, raciaux ou religieux) dans les définitions du génocide.' Emphasis in original.

45 See UN (1988), GAOR C.6 (75th meeting), 115–16, UN Doc. A/633 (1948), cited in Leblanc, p.271. In this respect, Trial Chamber II of the ICTR gave a rather wide definition of 'ethnic group', a definition which could actually apply to the other groups enumerated in the Convention: it was defined as a group 'whose members share a common language and culture; or, a group which distinguishes itself, a such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)'. *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR–95–1–T), Judgment, Trial Chamber II, 21 May 1999, para. 98.

46 See Report of the Ad Hoc Committee on Genocide, 3 UN ESCOR Supp. 6, UN Doc. E/794 (1948), 6.

47 See Part I of the present book.

such element is the racialization process which genociders will use to define the group they aim at destroying. By restricting the array of vulnerable and protected groups, the Genocide Convention totally ignores this second element, without which the crime will in fact not be genocide. Once again, the conventional text not only constitutes a serious obstacle to effective prevention and prosecution of the crime, it is also wrong in the definition it provides of the crime itself. The Genocide Convention is based on incomplete and incorrect assertions which ultimately empty the crime of all its specificity and uniqueness. Without dehumanization and without racialization, the crime is not genocide and, again, by unduly restricting the lists of potential acts and of victims of genocide while casting aside the very elements which are essential to the commission of genocide, the Genocide Convention, far from enhancing the uniqueness of the crime it prohibits, ultimately deprives it of its fundamental aspects, of what distinguishes it from any other crime, of what, in reality, qualifies a crime as genocide.

Chapter 5

The Conventional Approach to Genocidal Intent

The Conventional Recognition of the Specificity of Genocidal Intent

The definition of the crime of genocide requires an extremely high standard of proof regarding the mental element in the sense that a very specific intent to destroy the group as such must exist to qualify the crime as genocide. Indeed, the different acts covered by the Genocide Convention constitute only one element of the crime of genocide; the other element being a very specific criminal intent: those acts constitute genocide only if committed with 'the *intent* to destroy in whole or in part, a national, ethnical, racial, or religious groups, as such'.[1] The reference to 'intent' in the Convention indicates that not only must the offender have meant to engage in the conduct or to cause its consequences; he must also have had a 'specific intent' or *dolus specialis*. It indeed appears from the debates during the drafting of the text that the drafters chose the intent to destroy the group as the distinctive element in genocide[2] and wanted to clearly distinguish 'the international crime of genocide from the municipal crime of homicide'.[3] As a result, if such a specific intent is not established, the crime remains punishable but not as genocide and, in this respect, Schabas pointed out that it may be classified as a crime against humanity (2000, p.214). In fact, echoing the District Court of Jerusalem in the *Eichmann* case,[4] the ILC also noted that, where the specific intent cannot be established, the crime may still meet the conditions to qualify as a crime against humanity, namely, that of persecution.[5]

---

1 Article II of the Genocide Convention. Emphasis added.

2 3 UN GAOR, Sixth Committee (1948), pp.89–97. Cited in Bryant (1975, p.692).

3 *Ibid.* In this respect, Robinson also pointed out that 'from the viewpoint of the minority groups, which are or may be exposed to acts described in the Convention, it makes a great difference whether those who commit these acts against them are prosecuted on that basis or only on the basis of ordinary violations of the criminal code' (1960, pp.33–4).

4 *Attorney-General of the Government of Israel v Eichmann*, 36 ILR 18 (Israel District Court – Jerusalem, 1961), para. 25.

5 Report of the ILC on the Work of its Forty-Eighth Session, 6 May–26 July 1996, UN Doc. A/51/10, p.87.

Genocidal Intent or Genocidal Knowledge?

As mentioned above, the Genocide Convention requires a specific intent, a requirement which is all the more problematic because if such intent cannot be established, the genociders will have to be acquitted of the charge of genocide. Genociders may thus easily deny the commission of genocide by simply arguing that the required intent to destroy a group in whole or in part is lacking. It may be recalled here that, during the drafting of the Convention, France and the Soviet Union were both concerned about this issue and about the danger that the definition of the intentional element might be too narrow and might thus result in acquittals.[6] Some scholars also identified this risk of acquittals, holding that 'the requirement of intent adds a subjective factor to the definition and thus potentially provides an escape from responsibility for mass killing' (Lane, 1979, p.262).

Although, to maintain the uniqueness of the crime, the specificity of the genocidal intent is to be preserved and although it is obvious that 'measures resulting in the partial or total destruction of a group but taken without the intention of such purpose and result do not fall under the definition and therefore do not constitute acts of genocide under the Convention' (Drost, 1959, p.82), the issue of proving this special intent is all the more problematic. To rectify this inextricable situation, a recognition of a crime of 'negligent genocide' or 'genocide in the second degree' has been proposed (see Lippman, 1985, pp.1–62).[7] Nevertheless, this solution is hardly satisfying as it is based on the completely incoherent proposal that genocide could be committed by negligence, carelessness or imprudence, and as it thus totally erases the fact that genocide is intentional *per se*. Furthermore, one can legitimately wonder if there could be a genocide at the third or fourth degree! Instead of giving a solution to this problem, this suggestion would totally empty the notion of genocide of its meaning and purpose. There simply cannot be genocide without intention, and affirming the contrary would be a ridiculous assertion.[8] Thus the Convention should not be criticized for not including unintentional or negligent genocide, as it simply does not exist. However, genocide being intentional *per se*, there might be no need to legally require the proof of a specific intent, a requirement which might then impede effective punishment. In other words, the problematic issue here is not so much the specific genocidal intent but the proof of this intent.

One possible solution would be for the notion of 'genocide' to draw upon the concept of 'crime against humanity' and to adopt a similar knowledge requirement. If the intent requirement was to be replaced by a knowledge requirement, this might both ensure adequate prosecution of the genociders and avoid their acquittals for

6 UN Doc. A/C.6/SR.73 (Chaumont, France; Morozov, Soviet Union).

7 See also Clark (1981, p.328): 'the Genocide Convention should be expanded to include negligent as well as reckless everyday genocide within its ambit.'

8 See Chalk (1989, p.189): 'genocide is primarily a crime of state and empirically it has not been true that it appears without intent.'

the charge of genocide, while still acknowledging their criminal state of mind.[9] In fact, this proposal does have some basis in practice. Indeed, using the concept of 'knowledge', the ICTR stated that 'the offender is culpable because *he knew or should have known* that the act committed would destroy, in whole or in part, a group'.[10] Even if this finding has remained an isolated sentence so far, it is true that it could lead the way to the recognition of indirect, but effective, means to prove genocidal intent.

Genocidal Intent and Factual Evidence

Generally speaking, genocidal intent can be inferred mainly from concrete results together producing the genocide[11] and, as terrible as it may sound, it is true that genocidal intent is best revealed in initiatives that have genocidal results. As Bryant rightly pointed out,

> unless the intent were express, … the intent to destroy the group could be difficult or impossible to prove, except in those instances where the mere number of people of the group affected was significant. Practically speaking, then, the number of victims may be of evidentiary value with respect to proving the necessary intent (1975, p.692).

In other words, more often than not, the courts will have to rely on the facts of the case and infer from them the genocidal intent. This was notably recognized in the *Akayesu* case as Trial Chamber I of the ICTR noted that 'intent is a mental factor which is difficult, even impossible, to determine', adding that, without confession of the accused, intent can only be 'inferred from a certain number of presumptions of fact'.[12] Applying this to the particular instance, the Trial Chamber found that it was possible to qualify the intent of the accused as genocidal.

The position of the ICTY seems however to be different and it may be pointed out here that the difficulties in proving the genocidal intent as to the crimes committed in Kosovo led to the abandonment of the charge of genocide in the indictment of Milošević, although this same indictment still listed, among the victims, a huge number

---

9 As opposed to the recognition of 'reckless' genocides.

10 *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, 2 September 1998, para. 520. Emphasis added.

11 In this respect, it might be noted that Article III of the Genocide Convention incriminates 'conspiracy to commit genocide', thus making punishable the anticipation of the crime of genocide itself. However, neither Article 6 of the ICC Statute on the crime of genocide nor Artivcle 25 of this same Statue on individual criminal responsibility prohibits this crime and it thus seems that, under the Statute, the planning and organizing of genocide not followed by the commission of the crime is not a crime the ICC will be able to prosecute. It is to be hoped that the Court will nonetheless use the factual evidence emerging from such a planning and organizing in order to prove genocidal intent.

12 *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, para. 523. Already in his 1985 Report, Whitaker had suggested that 'a court should be able to infer the necessary intent from sufficient evidence'. See Whitaker Report, p.19, para. 39.

of children. It is here submitted that, when children and babies are systematically murdered, the genocidal intent should be automatically inferred from these killings, which clearly prove the intention of exterminating the group as such.[13]

Still, the *Jelisić* case is here of particular interest as it seems that a new criterion which could be used to infer genocidal intent from the facts has emerged. In the first stage of this case, Trial Chamber I of the ICTY considered that the Prosecution had failed to prove the genocidal intent beyond reasonable doubt and thus unanimously acquitted the accused of the charge of genocide. Because he allegedly helped some detainees while he was commanding the camp at Luka, the Chamber concluded that 'Jelisić's actions did not reveal a firm will to pursue the partial or total destruction of a group as such',[14] and that 'although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group'.[15] Such a ruling is of course unacceptable considering the fact that a commander of a camp such as that at Luka necessarily had the intention to murder the prisoners and destroy the targeted groups. The Chamber should have remembered that, in the Nazi camps, the S.S. also had power of life and death over the prisoners, and thus had the completely arbitrary power to choose who could live and who should die. This certainly does not mean that they were not criminals and active participants in the commission of genocide. Requiring an additional element of rationality in the commission of genocide, as the Trial Chamber here seems to do, is nothing but a nonsense, both from a factual and from a legal point of view.

Fortunately, the ICTY Appeals Chamber subsequently recognized that 'the Trial Chamber erred in law'[16] and unequivocally held that 'this evidence [on the record that was presented by the prosecution during the appeal] and much more of a similar genre in the record could have provided the basis for a *reasonable Chamber* to find beyond a *reasonable doubt* that the respondent had the intent to destroy the Muslim group'.[17] Even though the Appeals Chamber decided that there should not be a retrial in this case,[18] its express reference to the notion of *reasonableness* in the assessment of evidence in cases of alleged genocide is to be welcomed.[19] This reasonableness concept might indeed be used as an effective criterion which judges will be able to rely on to infer the genocidal intent and the perpetration of genocide from factual evidence.

---

13 22 May 1999. See *Prosecutor v Milošević et al.* (Case No. IT–99–37–I), Initial Indictment, First Amended Indictment, 29 June 2001 and (Case No. IT–99–37–PT), Second Amended Indictment, 16 October 2001.

14 *Prosecutor v Jelisić* (Case No. IT–95–10–T), Judgment, Trial Chamber I, 14 December 1999, para. 107. For a study of this case, see Verdirame (2000, pp.586–8).

15 *Prosecutor v Jelisić* (Case No. IT–95–10–T), Judgment, Trial Chamber I, 14 December 1999, para. 108.

16 *See Prosecutor v Jelisić* (Case No. IT–95–10–A), Appeal Judgment, Appeals Chamber, (5 July 2001), para. 75.

17 *Ibid.*, para. 68. Emphasis added.

18 *Ibid.*, para. 77.

19 *Ibid.*, para. 68.

Genocidal Intent and Admissible Defence

- *The defence of superior responsibility* Not only might the *Jelisić* case have brought about a clear evolution in the rules of evidence regarding genocidal intent; it also perfectly illustrated the difficulty of proving that a given commander specifically intended to destroy a particular group, although it may be submitted here that the principle of command responsibility might facilitate the prosecution of commanders when their subordinates have committed genocide. It is true that the Convention is silent on the subject but the ICC Statute clearly established the responsibility of commanders and other superiors in its Article 28.[20] Furthermore, and most importantly, in the *Krstić* case, Trial Chamber I of the ICTY specifically dealt with the crime of genocide and considered the high-ranking position of the accused as an aggravating factor:

  > Direct criminal participation under Article 7(1), if linked to a high-rank position of command, may be invoked as an *aggravating factor*. In determining a sentence, both Tribunals have mentioned the three most direct forms of participation, 'planning, ordering, instigating', as possible aggravating circumstances in the case of a highly placed accused.[21] *So it is in the case of genocide*. Because an accused can commit genocide without the aid and co-operation of others, provided he has the requisite intent, a one-man genocidal agent could be viewed differently from the commander of an army or the president of a State, who has enlisted the resources of an army or a nation to carry out his genocidal effort. The Trial Chamber finds that the direct participation of a high level superior in a crime is an aggravating circumstance, although to what degrees depends on the actual level of authority and the form of direct participation.[22]

- *The defence of obedience to superior orders* If command responsibility in the context of the prosecution of genocide seems to be a well-established principle, the notion of responsibility of the subordinate raises more questions. As Blakesley recalled, 'proving specific intent to kill is one thing; proving the specific invidious intent required for genocide is another' (1997, p.209). In fact, such a difficulty could be accentuated regarding the extermination of a group by obedience to superior orders as the murderers could claim that

---

20 Previously, Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute had also established the criminal responsibility of a superior.

21 *See Prosecutor v Kambanda* (Case No. ICTR–97–23–S), Judgment and Sentence, Trial Chamber I, 4 September 1998, para. 44; *Prosecutor v Rutaganda* (Case No. ICTR–96–3–T), Judgment, Trial Chamber I, 6 December 1999, para. 470; *Prosecutor v Akayesu* (Case No. ICTR–96–4–T), Judgment, Trial Chamber I, 2 September 1998, para. 36; *Prosecutor v Kupreskić et al.* (Case No. IT–95–16), Judgment, Trial Chamber II, 14 January 2000, para. 862. Footnote in original. .

22 *Prosecutor v Krstić* (Case no. IT–98–33), Judgment, Trial Chamber I, 2 August 2001, para. 708. Emphasis added. See also *Prosecutor v Sikirica et al.* (Case No. IT–95–8), Sentencing Judgment, Trial Chamber III, 13 November 2001, paras 140, 172, 210.

> no intention could be imputed to them. As the Convention is silent on this matter, it could be argued that such a defence is permissible with respect to genocide. A close look at different international instruments and case-law seems however to suggest that this is, fortunately, not the case.

Going back to Nuremberg, it is interesting to note that, although genocide was not expressly among the crimes listed in the Indictment, the IMT, while admitting that the true test for the admissibility of this defence was 'not the existence of the order, but whether a moral choice was in fact possible',[23] still unequivocally affirmed that:

> Superior orders, even to a soldier, cannot be considered in mitigation when *crimes as shocking and extensive* have been committed consciously, ruthlessly and without military excuse or justification.[24]

This finding clearly demonstrated the refusal of the Tribunal to admit the leadership principle for defence purposes. As Finch rightly stated, had the contention that the defendants had

> acted upon the orders of Hitler been accepted as a valid defense, the rule *respondeat superior* would have served merely as *reductio ad absurdum* for the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war (1947, p.1).

Applying Article II(4)(b) of the Allied Control Council Law No. 10, the Court in the *Einsatzgruppen* case famously stated that 'the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery',[25] and, in the case of Field Marshall Milch, the Court found that 'the defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside'.[26]

Several international instruments now address the issue of the 'obedience to superior orders' defence and, although they generally acknowledge that it may constitute a mitigating factor, they expressly exclude any discharge of criminal responsibility. For instance, both the ILC 1954 Draft Code of Offences[27] and its 1996 Draft Code of Crimes[28] prohibited this defence and so did Article 7(4) of the ICTY Statute and Article 6(4) of the ICTR Statute. It has nonetheless to be noted that Article 33 of the Rome Statute is more equivocal in its prohibition as it adopted the conditional liability approach. According to this Article,

---

23 *Nuremberg Judgment* 224.

24 *Ibid*., pp.223–4. Emphasis added.

25 *U.S.A. v Ohlendorf et al.*, Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings* 470.

26 *U.S.A. v Milch et al.*, Case No. 2, Military Tribunal II, 2 *Nuremberg Subsequent Proceedings* 42.

27 Article 4.

28 Article 5 [1996] II (2) *ILC Yearbook* 23.

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

   a) The person was under a legal obligation to obey orders of the Government or the superior in question;

   b) The person did not know that the order was unlawful; and

   c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The wording of this Article is all the most problematic as, although paragraph 2 unequivocally recognizes the illegality of orders to commit genocide, thus excluding any exception to criminal responsibility in such cases, it still seems that the two exceptions contained in sub-paragraphs (a) and (b) could still be admissible even in cases of genocide. If this is so, it would be a great step backwards compared to the trend started in Nuremberg and subsequently adhered to by all major instruments.

- *The defence of compulsion: duress and necessity* Another problematic issue connected with the defence of superior orders is that of the legal admissibility of compulsion, understood here as encompassing both the notions of duress and of necessity. As Schabas explained,

  > [t]he defence of necessity is closely related to duress, in that the accused argues that the material act was committed under circumstances where there was an absence of moral choice. In the case of duress, the exterior pressure comes from an individual; in the case of necessity, it results from natural causes (2000, p.337).

In any case, compulsion forces a person to act in a criminal way and to harm another to avoid a greater or equal personal harm. For moral and ethical reasons, positive international law recognizes these defences only in a limited way as compulsion cannot be an excuse for excessive harm done to many others. Furthermore, for international crimes, the defence of necessity is rejected as there can never be unforeseeable natural forces obliging an individual to commit such acts, at least until the Rome Statute.

The controversial matter here lies in the concept of 'moral choice', a concept which can be traced back to the Nuremberg Judgment. And indeed, as previously mentioned, according to the IMT, the 'true test' of criminal responsibility is 'whether moral choice was in fact possible'.[29] Although both the IMT Judgment and the trials held pursuant to the Allied Control Council Law No. 10 did include the admissibility of this test to

29 *Nuremberg Judgment* 224.

avoid any abuse,[30] it remains the case that they implicitly recognized the possibility that one might not have a choice when perpetrating genocide. For instance, in the *Einsatzgruppen* case, the Court questionably held that, in the context of mass killings of Jews by Nazi extermination squads, 'there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns'.[31] This whole legal thesis was sharply criticized, and rightly so, as clearly

> no degree of duress can justify murder, let alone genocide. It can scarcely be contested today that atrocities, and even plain murder, cannot be exonerated on the ground of duress under international criminal law (Dinstein, 1965, pp.9–11).

In this respect, it is all the most regrettable – to say the least – that the Rome Statute expressly recognizes duress – and, so it seems, necessity – as a valid ground for excluding criminal responsibility. As a matter of fact, the wording of its Article 31(1)(d) is extremely problematic:

> d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
> i) Made by other persons; or
> ii) Constituted by *other circumstances beyond that person's control*.[32]

What this provision implies is that not only may the genocider be forced into committing the crime but – even worse – there might have been some unpredictable conditions, some unforeseeable natural events, a form of *force majeure*, which obliged the genocider to perpetrate the genocide. If the Rome Statute is here starting a new trend, it will not be long before genociders are enabled to successfully invoke climate change, hurricanes or storms as a defence to a charge of genocide!

To conclude, it should really be stressed that, in matters of genocide, there is *always* a choice to commit the crime or not to commit it; coming to a contrary conclusion would turn genociders into victims and would thus not only deprive the crime of its uniqueness; it would also be the ultimate insult with respect to the real victims of this most heinous crime.

---

30 See for example *U.S.A. v Ohlendorf et al.*, Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings* 470–1 and 666; *U.S.A. v Flick et al.*, Case No. 5, Military Tribunal IV, 6 *Nuremberg Subsequent Proceedings* 1213; *USA v Krauch et al.*, Case No. 6, Military Tribunal VI, 7–8 *Nuremberg Subsequent Proceedings*.

31 *U.S.A. v Ohlendorf et al.*, Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings* 480.

32 Emphasis added. It may be pointed out here that Article 31 also problematically recognizes insanity (Article 31(1)(a)) and intoxication (Article 31(1)(b)) as grounds for excluding criminal responsibility.

The Unduly Restrictive Conventional Recognition of Genocidal Intent: the Artificial Distinction between Genocide in Whole and Genocide in Part

Not only does the Genocide Convention prohibit a limited number of acts; it also operates a distinction between genocide 'in whole' and genocide 'in part', thus raising the question of what is really meant by genocide 'in whole' and genocide 'in part'. At first glance, one could legitimately argue that this distinction was created in the Genocide Convention as a clarification that genocide could be recognized even in instances where all the members of the victim group were not targeted, obviously not out of empathy or compassion on the part of perpetrators but rather most probably for material and/or geographical reasons. If this were so, the conventional recognition of genocides 'in part' should definitely be welcomed as a realistic approach to the crime.

Nonetheless, the distinction created in the Genocide Convention between genocide 'in whole' and genocide 'in part' contributed highly in restricting the conventional scope of application as the debate moved from the legal determination of what is genocide to the approximate discussion regarding which criteria are to be used to qualify genocide 'in part'. In other words, this artificial distinction in the Genocide Convention – supposedly inserted to avoid relying only on the number of victims for qualification purposes – has generated the emergence of geographic, quantitative and qualitative requirements victims of a genocide must fulfilled in order for the genocide committed against them to be qualified as such.

The Geographical Criterion

The geographical criterion which has been used to assess the commission of genocide is arguably the least controversial. And indeed, by explicitly finding that genocide could be committed even on a restricted geographical scale, the ICTY has proved very realistic. In the *Krstić* case, Trial Chamber I of the ICTY indeed found that 'the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality' could be considered as genocidal.[33] The Appeals Chamber further confirmed this finding in the following terms:

> The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether

33 *Prosecutor v Krstić*, Case No. IT–98–33, Judgment, Trial Chamber I, 2 August 2001, para. 589.

> the targeted group is substantial, it can − in combination with other factors − inform the analysis.[34]

Furthermore, it may here be recalled that Trial Chamber III of the ICTY had also, in the *Sikirica* case, acknowledged the fact that the destruction of part of the group living in a precise and limited geographical zone could amount to genocide, when this part of the group had been perceived by the genociders as a distinct entity to be targeted and subsequently exterminated as such:

> the intent to destroy a multitude of persons belonging to a group may amount to genocide, even where these persons constitute only part of a group within a given geographical area: a country or a region or a single community.[35]

The Quantitative Criterion

In his commentary of the Genocide Convention, Robinson, referring to the *travaux préparatoires*, wrote that the number of victims had to be substantial, even if it were left to the courts to decide in each case whether 'the number was *sufficiently large*' (1960, p.58).[36] Similarly, Whitaker, in his report on the Convention, believed that the term 'in part' implied 'a *reasonably significant number*, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.[37] The case-law of the International Criminal Tribunals shows the same inability to define properly the terms of the Convention. Thus, according to the ICTR, there must be a 'considerable number' of victims for the crime to qualify as genocide,[38] while the ICTY, adding to the confusion, referred to a 'substantial' part, although not necessarily a 'very important part'.[39]

It is here submitted that there cannot be genocide 'in whole' or genocide 'in part': either there is a case of genocide, or there is not, but there is certainly no 'in-between category' – simply because *it is not the number of victims which qualifies a crime as a genocide or not*. Some authors, such as Melson, found an easy way out and termed 'genocidal massacre' the partial destruction of a group. Needless to say, the problem remains the same, 'genocidal massacres' being nothing else than genocides 'in part'.[40] The Convention here created confusion by not defining the

---

34 *Prosecutor v Krstić* (Case No. IT–98–33–A), Judgment, Appeals Chamber, 19 April 2004, para. 13.

35 *Prosecutor v Sikirica et al.* (Case No. IT–95–8), Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, para. 68.

36 Emphasis added.

37 Whitaker Report, p.16, para. 29. Emphasis added.

38 *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR–95–1–T), Judgment, Trial Chamber II, 21 May 1999, para. 97. Emphasis added.

39 *Prosecutor v Jelisić* (Case No. IT–95–10–T), Judgment, Trial Chamber I, 14 December 1999, para. 82. Emphasis added.

40 Furthermore, as Smith rightly pointed out, 'sooner or later the *genocidal* is transformed into *genocide*'. See Smith, Roger W., 'Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide', in Wallimann and Dobkowski (2000, p.23).

terms it employs. As a result, the question may arise as to whether these two types of genocide are subjected to the same legal regime or if they are to be considered differently. In fact, far from ensuring the recognition of the crime of genocide even in instances where all members of the victim group were not targeted for genocide, the conventional distinction has allowed for some to argue that unless the goal was to kill *all* of a given people, the event was not 'really' genocide, or at the least it was a 'lesser genocide'. This has served as the basis for flagrant denials, such as the Turkish deniers' arguments that since many of the Armenians living in Istanbul were not killed, this is proof that there was no intent to kill *all* Armenians and hence no genocide.

It is obvious that this purely artificial distinction between genocide 'in whole' and genocide 'in part' is also very immoral. Clearly, such a distinction is based on the number of victims needed to qualify the acts as genocide. How many victims will a court need to consider their number 'sufficiently large'? What is a 'reasonably significant number' which will constitute genocide? In the *Krstić* case, Trial Chamber I of the ICTY had to determine whether the genocidal intent existed while only men of military age were targeted and murdered and found that:

> The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group …. By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.[41]

Using the concept of 'the group as a distinct entity' to assess the commission of genocide, Trial Chamber I accordingly found that the killings of all military-aged men amounted to genocide and further explained that:

> The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a *distinct part of the group* as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a *distinct entity* which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate *the group as a distinct entity* in the geographic area

41 *Ibid.*, paras 595–7.

> at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.[42]

Trial Chamber I nonetheless failed definitively to settle the law on the issue. Only one month after the *Krstić* judgment, Trial Chamber III of the ICTY reached an opposite conclusion in the *Sikirica* case. Trial Chamber III indeed adopted a mathematical approach to the crimes committed and reached the conclusion that the genocidal intent to destroy Bosnian Muslims or Bosnian Croats could not be inferred from the number of victims.[43] Fortunately, the Appeals Chamber in *Krstić* confirmed the Trial Chamber's finding and held that the 'Trial Chamber's determination of the substantial part of the protected group [the Bosnian Muslims of Srebrenica] was correct'.[44]

The Qualitative Criterion

The last – and probably even more problematic – criterion used by the ICTY is the qualitative criterion. In other words, the judicial interpretation of the notion of 'substantial part' here lies on an elitist approach to victims of genocide. Whitaker, in his report on the Convention, believed that the term 'in part' implied 'a reasonably significant number, relative to the total of the group as a whole, or else a *significant section of a group such as its leadership*'.[45] And indeed, the case-law shows that, for qualification purposes, 'substantial' has been equated with 'emblematic'.[46] In practical terms, this means that the elite of a group would be considered as a substantial part of this group.[47] In the *Jelisić* case, Trial Chamber I thus explained that:

> A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community. The Commission of Experts specified that '[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others − the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported

42 *Ibid.*, para. 590. Emphasis added.

43 See *Sikirica* case, *Prosecutor v Sikirica* (Case No. IT–95–8–T), Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, paras 55–97.

44 *Prosecutor v Krstić* (Case No. IT–98–33–A), Judgment, Appeals Chamber, 19 April 2004, para. 23.

45 Whitaker Report, p. 16, para. 29. Emphasis added.

46 *Prosecutor v Sikirica* (Case No. IT–95−8–T), Judgment on Defence Motions to Acquit, Trial Chamber, 3 September 2001, para. 77.

47 *Prosecutor v Krstić* (Case No. IT–98–33), Judgment, Trial Chamber I, 2 August 2001, paras 585–7.

> on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose'. Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group 'selectively'. The Prosecutor did not actually choose between these two options.[48]

Similarly, in the *Sikirica* case, Trial Chamber III subsequently found that:

> If the quantitative criterion is not met, the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership.
>
> *The Chamber* finds persuasive the analysis in the *Jelisic* Trial judgment that the requisite intent may be inferred from the 'desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such'. The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization within the terms of Articles 4(2)(a), (b) and (c) would impact upon the survival of the group, as such.[49]

This approach to the crime of genocide is very disturbing, and counting victims or relying on their social status to qualify the crime is extremely inappropriate. An act does not qualify as genocide according to the number of victims or to their profession or wealth. Rather, it is the deliberate and planned feature of the act that designates it as such. In this respect, it may be recalled here that, during the drafting of the Convention, France suggested that the definition of genocide should be broad enough to include the murder of a single person.[50] Even if this proposal was dismissed, it is still interesting because it pointed out that the qualification of genocide does not rely on the number of deaths. Also, it has to be noted here that in the 'Elements of Crimes' adopted by the Preparatory Commission, it is specified that '*one or more* persons' may be the victim of the crime of genocide.[51] It is true that this hypothesis certainly widens the definition of genocide as envisaged in the Convention and it is most probable that the murder of an individual because of his or her belonging to

---

48 *Prosecutor v Jelisić* (Case No. IT–95–10–T), Trial Chamber I, 14 December 1999, para. 82. Emphasis in original.

49 *Prosecutor v Sikirica et al.* (Case No. IT–95–8), Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, paras 76−7.

50 UN Doc., p.3 UNGAOR, Sixth Committee (1948), pp. 91–2. See also Bryant (1975, pp.686–98). During the drafting, the Ad Hoc Committee also expressed the view that the murder of an individual could be considered an act of genocide if it was part of a series of similar acts aimed at the destruction of the group to which the victim belongs. See Robinson (1960, p.62).

51 See Elements of Crimes, Article 6(a)(1). Emphasis added.

a protected group would be qualified as a 'racist murder' rather than as genocide. However, all genocides start with a single victim, and the question remains as to the qualification of this first particular murder in the event that the genocidal plan actually fails. Interestingly the 2002 German Code of Crimes against International Law (hereafter referred to as CCAIL) explicitly provides, in its Section 6, that a single act could qualify as genocide if perpetrated with genocidal intent. As Wirth explained,

> Germany implemented the Genocide Convention in its criminal law in the 1950s. Therefore, it only had to transfer the respective provision from the German Criminal Code into Section 6 of CCAIL [Code of Crimes against International Law 2002; Völkerstrafgesetzbuch]. However, the wording of the provision was clarified and now explicitly states that a *single* genocidal act, such as a single killing or a single infliction of great bodily harm, may also constitute genocide if committed with genocidal intent (i.e. with the intent to destroy in whole or in part one of the groups referred to in the Convention). Thus, according to the German legislature, customary international law does not require that the genocidal act be committed as part of a systematic practice (2003, p.156).[52]

Again, because such an individual act would have to be perpetrated with the specific genocidal intent to qualify as an act of genocide, it appears that German law is more in phase with the concept of genocide than the Genocide Convention itself actually is.

Ultimately, according to Drost,

> both as a question of theory and as a matter of principle nothing in the present [Genocide] Convention prohibits its provisions to be interpreted and applied to *individual cases* of murder by reason of the national, racial, ethnical or religious qualities of the *single victim* if the murderous attack was done with the intent to commit similar acts in the future and in connection with the first crime (1959, p.85).

It is here submitted that this interpretation of the Genocide Convention is legally correct. If an individual has been murdered as part of a plan of extermination of the group to which he or she belongs, this act should be considered as genocide, whether this plan succeeds or not. In the words of Miller, '[w]e must remind ourselves that the Holocaust was not six million. It was one, plus one, plus one' (1990, p.287).

52 Emphasis in original. Footnotes omitted.

Chapter 6

The Genocidal State

The involvement of the state in the commission of the crime of genocide is a highly controversial issue, which is therefore often seen as very critical. As Bassiouni rightly pointed out, international crimes are either 'the product of "state-action" or the result of a "state-favoring policy" by commission, or as a result of a lack of state enforcement, that ranges from permissiveness to purposeful omission' (1999, p.27). However, he also stated, and rightly so, that:

> In all cases, individuals commit crimes. What is called 'state action' and 'state-favoring policy' does not alter the fact that one or more individual authors are involved. The characterizations of 'state action' and 'state-favoring policy' refer to collective decision-making and actions by individuals who develop a policy or who execute a policy or carry out acts which constitute international crimes under color of legal authority. Decision-makers are usually few in comparison to the entire apparatus of government, let alone to the entire population of a state …. The invocation of the concept of state responsibility is, however, a symbolic act by the international community to stigmatize regimes that engage in internationally proscribed policies and conduct, irrespective of the effective results of the stigmatization in altering the internationally proscribed behaviour (1999, pp.27–8).

The idea that only individuals can commit crimes can be found as early as 1923, when the Permanent Court of International Justice held that 'States can act only by and through their agents and representatives'.[1] In the same vein, Justice Jackson, in his opening statement at Nuremberg, stated:

> While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity (1972, pp.88–9).

At Nuremberg, the Tribunal also famously stated that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[2] The Tribunal neither denied nor admitted the criminal responsibility of states, but based itself on the principle of individual responsibility. Still, as Friedlander rightly observed, '[t]he victorious allies in both world wars treated the defeated states as criminal entities' (1987, p.15). He further explained that:

---

1 *German Settlers in Poland*, PCIJ No. 6, p.22 (1923). Cited in Bassiouni (1999, p.269).

2 Nuremberg Judgment 565–6.

> Despite the impossibility of placing the German state in the dock at Nuremberg, Germany was on trial with its major war criminals. There can be no doubt that the allies intended to punish the German nation as well as its captured leaders. The Yalta Conference meetings, declarations, and documents are replete with references to the 'dismemberment of Germany,' sizeable reparations, and enforced disarmament (*ibid.*).

It is true that state responsibility is a highly political issue eluded by the Nuremberg Tribunal which instead concentrated on individual criminal responsibility. In the words of Bassiouni,

> 'Nuremberg' focused on individual criminal responsibility for conduct that was the product of state policy and for which collective responsibility and state responsibility could have been assessed. Those who established the IMT were careful to avoid the notions of state and collective responsibility, except with respect to criminal organization, namely the SS, SD, and SA. The simple reason is that these governments did not want to establish a principle that could one day be applied to them (1999, p.210).

In the *Eichmann* case, the Court was less cautious and unequivocally stated that '[a] State that plans and implements a "final solution" cannot be treated as *par in parem*, but only as a gang of criminals'.[3]

As regards the crime of genocide, it seems clear that this crime is the product of state policy in the sense that it relies on the state apparatus, or on an organization which has the same features than the state apparatus, in order to be committed. In other words, state action – or policy – corresponds to an objective reality in the commission of genocide. History has indeed shown that genocide needed an organizational policy to be perpetrated. The purpose of the following paragraphs is not to put into question the existence of the concept of state action as an objective element in the perpetration of genocide. Rather, it is to analyze whether state action is – or should be – considered as a legal component of the crime or if it should merely be regarded as an evidentiary tool for qualification and prosecution purposes.

In the *Jelisić* case before the ICTY, the Appeals Chamber unequivocally held that

> *The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime* [of genocide]. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The

3 *Attorney-General of the Government of Israel v Eichmann*, 36 *ILR*, 46 (Israel District Court – Jerusalem, 1961). Cited in David, Eric, 'L'actualité juridique de Nuremberg', in Centre de Droit International de l'Institut de Sociologie de l'Université Libre de Bruxelles (Centre Henri Rolin) et Fondation Auschwitz – Stichting (Centre d'Etudes et de Documentation) (1988, p.144). The Israeli Court here rejected the acts of state doctrine which lie in the principle *par in parem non habet jurisdictionem*, according to which a sovereign state cannot prosecute another sovereign state.

> evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[4]

This position, as reflecting customary international law, is legally correct. Nevertheless, the fact that state action is not a legal element of the crime of genocide must not in any instance imply that states cannot be recognized as responsible for the commission of this crime as this would clearly be nothing but a legal and factual non-sense. Although it is theoretically correct that one single individual could commit genocide, through the use of a deadly virus aimed at contaminating a designated people, for example, this hypothesis has so far remained purely theoretical. Strictly all the genocides committed so far have been crimes organized by a state or by an organization with all the characteristics and features of a state.

Although state action or policy is not a definitional component of the crime of genocide, the issue of state responsibility in the commission of the crime should therefore cease to be put into question. If a genocide is committed and if a state – or any other organization – is involved in this commission, the responsibility of this state – or organization – should be recognized. In this respect, it must be deeply regretted that the Genocide Convention does not deal properly with the crime of genocide as one *potentially* committed by the state. Even though its Article IX expressly mentions 'the responsibility of a State for genocide', the whole approach of the Convention is that of genocide as a crime committed by individuals and not of genocide as a crime which *could be* instigated by governments.[5] This is all the more surprising as the involvement of the state in the commission of genocide was recognized in Resolution 180 (II), in which the General Assembly stated that genocide was an international crime with national and international responsibilities for individuals as well as for states.[6] Furthermore, during the drafting of the Convention itself and the debates in the Sixth Committee, the Belgian representative stated that genocide could not be committed without the collaboration or the connivance of the governments.[7] More recently, Trial Chamber II of the ICTR, in the *Kayishema and Ruzindana* case, concurred with the view expressed by Morris and Scharf, according to whom 'it is virtually impossible for the crime of genocide to be committed without some direct involvement on the part of the state given the magnitude of this crime' (1998, p.167).[8]

---

4 *Prosecutor v Jelisić* (Case No. IT–95−10–A), Appeal Judgment, Appeals Chamber, 5 July 2001, para. 48. Emphasis added.

5 See Finch (1949, p.733): the crime of genocide properly defined is 'inherently one committed at the instigation or with the complicity of the States'. See also Horowitz, who defined genocide as '*a structural and systematic destruction of innocent people by a state bureaucratic apparatus*' (1977, p.18). Emphasis in original.

6 Resolution 180 (II) 20 November 1947.

7 See Robinson (1960, pp.25–6).

8 *Prosecutor v Kayishema and Ruzindana* (Case No. ICTR–95–1–T), Judgment, Trial Chamber II, 21 May 1999, para. 94.

According to Ago, former Special Rapporteur on state responsibility, the Genocide Convention 'failed to do the very thing that needed to be done: namely, to make clear that genocide is a State crime and should result in sanctions against the State' (1989, p.215). He thus regarded

> as totally inadequate to have made a Convention on a matter such as genocide at the end of World War II, in which all that is required is for governments to punish those who actually carried out the acts of genocide. Can one really believe that, if a genocide has taken place on the territory of a given State, this has happened without the connivance of the higher authorities of that State? And can one expect that those authorities will be willing to punish the individuals or State agencies that carried out the genocide? (*Ibid.*).

For Horowitz, 'genocide is always and everywhere an essentially political decision' (1977, p.38)[9] which

> must be conducted with the approval of, if not direct intervention by, the *state apparatus*. Genocide is mass destruction of a special sort, one that reflects some sort of political support base within a given ruling class or national grouping (*Ibid.*, p.16).[10]

In the same vein, Fein has defined genocide as 'organised *state murder*'[11] and has stressed that it is a 'calculated crime' (1990, p.8), while Jonassohn and Chalk held that 'twentieth-century genocide was increasingly becoming a case of the *state* physically liquidating a group of its own citizens' (2000, p.8).[12]

In any event, the fact that the Genocide Convention gives jurisdiction to the ICJ necessarily implies state responsibility as this court only deals with states. Indeed, the International Court of Justice had to deal with the issue of genocide notably in the *Application of the Genocide Convention* case, where it 'observe[d] that the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", does not exclude any form of State responsibility'.[13] It thus did not rule out the possibility that a state could be held directly responsible for the crime of genocide.

At least until 1 July 2002, the date of entry into force of the ICC Statute, the conventional deletion of the principle of universal jurisdiction and the failure to establish an international criminal court meant that the Convention relied only on the states on the territories of which the crime of genocide has been committed to prosecute such a crime. According to Fein,

> The Genocide Convention has an intrinsic disabling provision. By making the signatories responsible for punishing genocide (and incitement to genocide), it relied on the State

9 Emphasis added.

10 Emphasis added. See also Horowitz (1997, p.12).

11 Emphasis added.

12 Emphasis added.

13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment [1996] ICJ Reports 616, para. 32 (11 July).

> – the organization which is most often the perpetrator of genocide – to sanction its own crime (1990, p.3).

Practice clearly showed that domestic enforcement was at best illusory: genocide, as a governmental policy, would not be subjected to the jurisdiction of any national court, at least while the offending government is in power.[14] In the words of Schwarzenberger,

> the whole Convention is based on the assumption of virtuous governments and criminal individuals, a reversal of the truth …. Thus, the Convention is unnecessary where it can be applied … and inapplicable where it may be necessary (1957, p.143).[15]

Ultimately, because genocide is committed, as a general rule, by the state or with its complicity, leaving genocide prosecution to the domestic courts may only ensure impunity.[16] Furthermore, because the Convention does not provide for any details or definitions in its provisions, states parties are left with great discretion as to the definition of the crime and as to the scope of application of the Convention. As a result, the Convention, instead of creating a universal system of prevention and punishment of the crime of genocide, generated a heterogeneous system which varies from one country to another. As a matter of fact, Article V provides that:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

With this article, the obligation of states to enact relevant legislation is quite weak. The use of the term 'necessary' leaves the states the power to decide whether they ought to enact legislation or not. Furthermore, it does not impose any time limit within which the legislation has to be put into effect, thus providing states with an excuse for endlessly postponing such an enactment. Many states, among them

---

14 As regards Germany, it is interesting to note that, due to the prohibition of retroactive laws, Nazi crimes were prosecuted not as crimes against humanity or as genocide but as murder. Consequently, the punishment was not as severe as it should have been. For example, on the twenty individuals tried during the Auschwitz trial which opened in Frankfurt on 20 December 1963, only six were condemned to life emprisonment, while three others were acquitted. See Pendas (in Brayard (ed.) 2000, pp.79–111). However, it must also be stressed here that in the case of Rwanda, more than 120,000 alleged participants in the genocide were jailed after the Rwandan Patriotic Front came into power. It is true that many of the leaders escaped, but most of those who were indicted by the International Criminal Tribunal were apprehended. As a matter of fact, they could not obtain protection, let alone immunity, in their own country as they were defeated mainly by Tutsis from Uganda, the children of Rwandan refugees from previous massacres.

15 He also referred to the Convention as being 'an insult to the intelligence' (1957, p.143).

16 See Schabas (2000, p.346).

Canada, Norway and Australia, thought that their existing legislation was sufficient. Other states justified their legislative apathy by arguing that genocide was unlikely to occur on their own territory. In other words, Article V of the Genocide Convention totally fails to establish uniform measures to be taken by all the states parties and, in the words of Sibert, 'opens an "abyss" which threatens to wreck the whole value of the Convention' (Robinson, 1960, p.76). Consequently, legislation on genocide varies, and so does the punishment of this crime. And if it is true that insufficient legislation or penalties could constitute violations of Article IX on state responsibility, it must be recalled that, as of today, this remedy has remained purely theoretical. As a result, the Convention has been almost totally ineffective in securing punishment of the crime.

As Kuper noted,

> the consequences are particularly absurd in the case of domestic [i.e. internal] genocide. The effect of the present procedures is that in most cases of domestic genocide, governments would be required to prosecute themselves (1985, p.102).

He further stated that 'the performance of national courts in the punishment of genocide is thus hardly impressive' (1985, p.174). In this respect, it is also incomprehensible that the Genocide Convention does not even mention the question of reparation or redress – and thus completely omits and forgets the victims of this most terrible crime. It was argued during the drafting that responsibility other than criminal would be out of place in such a document.[17] However, Article V could have expressly imposed on states an obligation to provide damages in the legislation. It must be noted that the Whitaker Report did recommend the inclusion of a provision for a state's responsibility for genocide together with reparations.[18] Ultimately,

> whether one applies the test of the number of genocides that have run their seemingly uninhibited course since the adoption of the Convention, or the test of the prosecutions for genocide during the same period, it is impossible to escape the conclusion that the Convention has been quite ineffective (Kuper, 1985, p.17).

As a concluding remark, it may be pointed out that all the above discussion overwhelmingly shows the importance of state action in the commission of genocide and, historically speaking, it is very true that genocide has primarily been a state crime. Nonetheless, as noted from the outset, it still is theoretically possible for one single individual to commit genocide and state action should thus be seen as a potential factor in the commission of the crime rather than as a necessary requirement for its qualification. In this respect, it is worth noting that Trial Chamber I of the ICTY has recognized the possibility that a genocide could be perpetrated on an individual basis and found that:

17 UN Doc. A/C.6/SR.95, pp.11 ff.

18 Whitaker Report, p.26, para. 54.

> The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated …. [T]he drafters of the [Genocide] Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.[19]

To consider state or organization action as a legal component of the crime of genocide would constitute a retrospective definition of the crime which would apply to the genocides already committed. It would indeed freeze the definition in time: if the state action requirement would undoubtedly be met as regards all previous genocides, this might not be the case in the future. The risk enshrined in the state action requirement is too great to be taken as this requirement could limit the definitional scope of the crime of genocide to the type of crimes committed in the past. The ambit of the definition of this crime should remain wide enough to embody new types of crimes. In this respect, the drafters of the Genocide Convention were correct in not considering the state or organization's action as a legal ingredient of the crime of genocide. The lacuna of the Convention is however that it fails to expressly acknowledge that the state or organization's action is a potential element in the perpetration of genocide and, as previously explained, this failure has directly maintained a culture of impunity.

19 *Prosecutor v Jelisić* (Case No. IT–95–10–T), Judgment, Trial Chamber I, 14 December 1999, para. 100.

This page intentionally left blank

Chapter 7

The Conventional Omission of Genocide Denial

> I refuse to call opinion a doctrine which expressly targets particular persons and which tends to suppress their rights or exterminate them.[1]
>
> Jean-Paul Sartre (1954, p.10)

As the title of this chapter unequivocally indicates, the Genocide Convention fails to consider genocide denial as part of the crime of genocide. And indeed, if other parts of the present book contemplate the issue of genocide denial from a more moral and philosophical standpoint, the following paragraphs aim at exploring the issue of genocide denial as an issue of law. The purpose of the subsequent analysis is to demonstrate that genocide denial is not merely the expression of an idea or of an opinion, but that it is nothing else than an act of genocide, even under the most restrictive understanding of the Genocide Convention.

In the words of Charny, 'mankind is deeply limited in its readiness to experience and take action in response to genocidal disasters. Most events of genocide are marked by massive indifference, silence, and inactivity' (1982, p.284). As previously stressed, the whole event of genocide evolves around the notion of denial, denial of the victims' humanity and dignity, denial of their right to live, denial of their right to exist and, consequently, denial of their right to die (see Perec, 1996, p.180). Genocide being based on the denial of the victims' very existence, it is therefore unsurprising that denial of a given genocide is nothing but the universal strategy of perpetrators who thus typically deny either that the events took place, or that they bear any responsibility for the destruction, or still that the term 'genocide' is applicable to what occurred. Thus 'denial, unchecked, turns politically imposed death into a "non-event": in place of words of recognition, indignation, and compassion, there is, with time, only silence' (Smith, 1991, p.63). Denial is therefore a defence mechanism for the perpetrator of the crime,[2] a defence which is used in virtually all cases of genocide. In other words, 'the denial of genocide is now routine' (*ibid.*).

---

1 Translation by the author. The original version reads as follows: 'Je me refuse à nommer opinion une doctrine qui vise expressément des personnes particulières et qui tend à supprimer leurs droits ou à les exterminer.'

2 In this respect, one of the main methods used by perpetrators is euphemism. For instance, the Nazis employed 'language rules' (Sprachregelung) as regard the 'Final Solution'. Thus, 'to kill' became 'final solution', 'evacuation' (Aussiedlung), or 'special treatment' (Sonderbehandlung), while 'deportation' was re-baptized 'resettlement' (Umsiedlung) or

One of the main dangers of genocide denial is that it may take very perverse forms. Thus, if fanatics, such as skinheads and other swastika-brandishing groups, are rather easy to dismiss as racists, some deniers pretend to be historians. Under this cover, the Revisionists deny the facts, notably by devictimizing the survivors and by turning them into conspirators and opportunists motivated only by greed, to confuse future generations and to better convert them while continuously promoting persecutions and xenophobia. For instance, with respect to the destruction of the European Jews by the Nazis, deniers usually claim that the Nuremberg trials were held because of the Allies' need for revenge and their desire to clear their names at the expense of the defeated Germans, that there are no witnesses who can prove the existence of the gas chambers and the mass murders perpetrated in them. Of course, they also often raise the outrageous question 'Did Six Million Really Die?'[3] and repeatedly call for proofs of the existence of homicidal gas chambers.

The purpose of this discussion is obviously not to debate these points of view and this for the simple reason that no discussion is possible; there can be no debate. As Lipstadt rightly stated, there is no 'other side' to this issue: denying the Shoah is not an opinion; it is a lie (1994, p.111). She further wrote that 'deniers misstate, misquote, falsify statistics, and falsely attribute conclusions to reliable sources' (*ibid.*). And by so doing, deniers allow for the perpetration of the crime of genocide to continue: by denying that the crime was ever committed, they paradoxically allow for its ongoing perpetration. In other words, genocide denial is nothing less than an act of genocide, an act which, if not expressly recognized by the Genocide Convention, would still perfectly fit the restrictive conventional definition of the crime of genocide itself.

Genocide Denial as Direct and Public Incitement to Commit Genocide

Although extensive proposals on the question were formulated during its drafting, the Genocide Convention does not mention hate propaganda or the disbanding of racist organizations (see Schabas, 2000, pp.479–87). Nonetheless, its Article III(c) does make punishable the 'direct and public incitement to commit genocide', and such a provision could indeed be interpreted as including cases of genocide denial.

The fact that genocide denial is a direct incitement to commit the crime is very well illustrated by the denial of the Shoah. Indeed, if the public can be convinced that the extermination of the Jewish people is a myth, then the revival of national-socialism could be a feasible option. Thus, some deniers clearly have a *direct* political

'labour in the East' (Arbeitseinsatz im Osten). Referring to such 'language rules', Arendt rightly pointed out that they 'meant what in ordinary language would be called a lie'. See Arendt (1963, p.85).

3 See Harwood, Richard (1974), *Did Six Million Really Die*? *The Truth at Last*, Richmond, Surrey, England: Historical Review Press.

objective, namely the rehabilitation of Nazism.[4] The denial of such occurrences is not simply to rewrite the past. It is a deliberate effort 'to control and shape the future', and ultimately 'the last victim of any genocide is truth' (Cohen, 1983, p.81).

Similarly, the *public* aspect of genocide denial is obvious, the purpose of the deniers being to convince the maximum of people that a given genocide did not take place. Thus, they give conferences, publish books, create political parties, and so forth. Such publicity can be very harmful and cause extremely serious damage, notably because genocide denial may take a very perverted form by aiming at being History. Thus, the danger also exists in what we could call 'relativism'. A perfect example of this was the 'historians' debate' which occurred in the middle of the 1980s in Germany.[5] Some, notably defending the thesis of Nolte, stated that Nazism was only one crime among others in the history of the twentieth century and that all the great powers have had 'their own Hitler periods'. Others, such as the sociologist Habermas, argued that the Nazi crimes had no equivalent. Thus, this debate opposed the upholders of the relativization of Nazism by Stalinism[6] on one hand and those of the uniqueness of the regime and of the crimes committed under Hitler on the other. The danger here is that people might be led to think that, although one side is questionable, there are two sides to this question, that such a controversy opposes 'revisionists' to 'established historians', and that both are to be heard.

As Charny stressed, to seek to impose denial on the world is an incitement of the masses. As a matter of fact, the Armenian case is highly illustrative of the fact that both indifference towards genocide and genocide denial may easily turn into incitement (1991, pp.22–3). During the Second World War, the lack of activity on the part of the Allies at the end of the First World War was interpreted by the Nazis as tacit agreement, and they therefore felt free to develop methods to increase their mass murders, and to ultimately commit one of the worst possible crimes in History. Thus, Law has a fundamental and universal mission. When there is no real sanction, the impunity of the perpetrators is nothing but an incitement to repeat the crimes, against the same victim- roup or against another one. And indeed, 'Hitler's infamous invocation of the impunity granted to the perpetrators of the Armenian genocide serves as a poignant reminder that the absence of international criminal justice encourages future injustices' (McAuliffe de Guzman, 2000, p.341).[7]

---

4 Another goal of the deniers is to deny the historical foundations of the State of Israel. The deniers want indeed to show that the Jews lied in order to make the West feel guilty and to allow the creation of their own State. Denial of the Shoah is thus the expression of radical anti-Semitism. See generally the very good study of Igounet (2000).

5 See generally Devant l'Histoire (1988).

6 It may be recalled here that the visit of President Reagan to the German military cemetery at Bitburg 'is also symptomatic of the extent to which the Second World War was being remembered as a "normal" war', See Hilberg (1986, pp.16–23).

7 Hitler allegedly said: 'Who after all is today speaking of the destruction of the Armenians?' in order to obtain support for his criminal intentions.

Ultimately, the term 'denial' is probably misleading due to the fact that, as Michel has rightly pointed out, denying the crime is paradoxically nothing else than affirming it by promoting it:

> Considered properly, denial is an affirmation. Not a pseudo-historical discourse but an apology: the apology for the crime. All the paradox, all the attempt to give some reality to deprived significations, to spirits with no repercussion of clarity, is that the affirmation of the validity of the crime is given through its negation. Negation is here understood neither as a fascist litotes nor as one of Le Pen's plays on words. It is the method of affirmation. The sentence: 'the gas chambers did not exist', praises the crime, it defends and situates it, as denying the existence of the crime is precisely, in this atrocious case, to approve and to recommend it. *Affirmationnism* is to make the apology of the crime by arguing of its inexistence because arguing of its inexistence is to make its apology (Michel, 1997, p.14).[8]

Genocide Denial as Mental Harm

> If the Party could thrust its hand into the past and say of this or that event, *it never happened* – that, surely, was more terrifying than mere torture and death?
>
> George Orwell (1949, reprint 1990, p.37)[9]

In its Article II(b), the Genocide Convention lists the act of 'causing serious bodily or mental harm to members of the group' among acts of genocide. Originally, the phrase 'serious mental harm' was adopted at the instigation of China, so the Convention could cover acts of genocide committed through the use of narcotics. Thus, according to Robinson, 'mental harm' within the meaning of the Convention can be caused only by the use of narcotics (1960, p.ix). However, such an interpretation seems today much too narrow and restrictive. As a matter of fact, the Preparatory Commission for the ICC specified that 'this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment'.[10]

Clearly, the denial of genocides, as well as the fact that testimonies of witnesses remain unheard, can be traumas as serious as the initial event. In fact, even if the

8 Translation by the author. Emphasis added. The original version reads as follows: 'A bien le regarder en face le négationnisme est un affirmationnisme. Non un discours pseudo historique, mais une apologie: celle du crime. Tout le paradoxe, toute la tentative d'intimer de la réalité aux significations frustres, aux esprits sans répercussion de clarté, est que l'affirmation du bien-fondé du crime se donne dans sa négation. La négation n'est pas ici litote fasciste ou jeu de mot lepéniste. Elle est le mode même de l'affirmation. La phrase: "les chambres à gaz n'ont pas existé", vante le crime, le défend et le pose, en ce que nier l'existence du crime est précisément, dans l'atroce cas précis, en faire la louange et la préconisation. L'affirmationnisme est tel de faire l'apologie du crime en arguant de son inexistence, parce que arguer de son inexistence est en faire l'apologie'.

9 Emphasis in original.

10 Elements of Crimes, Articles 6(b), n. 3.

definition of 'mental harm' were limited to the enumeration of acts listed by the Preparatory Commission, genocide denial could fit into the notions of torture and of inhuman and degrading treatment. Denial is indeed a denial of the people's right to remember; it is a mockery of their sensibilities. It is another victimization of the victim people. In the words of Charny, denial is nothing less than a 'celebration of the destruction and of the deaths', as well as a 'celebration of renewed destructiveness in the future' (1991, pp.22–3).

Affirming that physical genocide is always accompanied by mental harm would appear to be a ridiculous understatement. Still, it is worth pointing out that not only do such harm and suffering not end with physical destruction; they are also further aggravated in cases of denial of a given genocide and of victims as victims. The case of the Armenian Genocide is perfectly illustrative of the consequences of genocide denial. As the European powers failed in their *duty* to punish the perpetrators, the events, widely recognized when they took place,[11] sank into oblivion (see Hovannisian, 1987, pp.30–2); Kuper described them as the 'United Nations' memory lapse' (1981, p.219), while Housepian referred to them as the 'unremembered genocide', further explaining that 'it is common practice to refuse to recognize the meaning of the Armenian fate' (1966).

Furthermore, due to political considerations, Turkey's denial has been generally effective. Indeed, other governments have aided and abetted Turkey in rewriting History and in hiding any knowledge of the genocide, in pursuit of what they have taken to be their national interests (see Des Pres, 1987, p.14; Housepian Dobkin, 1987, pp.103–4). But the denial of the Armenian Genocide did not stop there; and also reached the international fora. For instance, Ruyashyankiko, the Special Rapporteur in 1971 of the Sub-Commission on the Protection and Promotion of Human Rights aimed at the preparation of a report on genocide, stated that if the Sub-Commission wanted to put the Armenian case in the final report, he 'would need to have the necessary evidence'.[12] It is true that only one member of the Sub-Commission supported him, as well as the Turkish Government's observer, but the fact is that a UN Special Rapporteur went so far as to deny the Armenian Genocide.

Regarding domestic legislation, the case of France is here worthy of interest. If the French famous loi Gayssot prohibits the denial of crimes committed during the Second World War, the French legislation has also been enriched on 29 January 2001 with the adoption of a law recognizing the Armenian Genocide of 1915. This law, which initially contained only one single article, was straightforwardly phrased in the following terms: 'la France reconnaît publiquement le génocide arménien de 1915' ['France publicly recognizes the 1915 Armenian genocide'].[13] No matter

11 Hovannisian gave different examples of expressions of sympathy and outrage in many countries as to the deportations and massacres (1987, pp.30–2).

12 UN Doc. E/CN.4/Sub.2/SR.822, para. 47. Cited in Schabas (2000, pp.464–5).

13 Translation by the author. See Loi n° 2001/70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 (relating to Recogition of the Armenian Genocide of 1915).

how express this recognition was, the law nonetheless raised the question as to the practical and legal consequences of this recognition. In other words, did this legal recognition of the genocide concretely imply the prohibition of its denial? This matter has now been solved with the recent adoption of an amendment to the 2001 law and the addition of a new paragraph expressly prohibiting and criminalizing the denial of the Armenian Genocide:

> Will be punished according to Article 24 *bis* of the law of 29 July 1881 on freedom of the press, those who will have contested, by one of the means listed in Article 23 of the above-mentioned law, the existence of the 1915 Armenian genocide.[14]

This amendment triggered animated and heated debates, and most notably strong opposition on the part of eminent historians,[15] their main arguments being that History should not fall under the legal rule and that historical truth should not be the exclusive territory of law and judges. It seems nonetheless clear that these historians and intellectuals erred in their appreciation of the legal and of judicial powers. And indeed, a close and rigorous look at the cases regarding genocide denial in France shows that, far from considering themselves as the ultimate guardians of the historical truth, judges exercise a minimal control of appreciation when dealing with such cases.[16] And in any event, and as will be further demonstrated, genocide denial being an act committed with the intent to allow the genocide to continue, it is a genocidal act and, hence, a criminal act. As any other criminal acts, genocide denial should therefore automatically fall under the jurisdiction of the courts.

In any event, prior to the adoption of the amendment, a court decision had interpreted the initial 2001 law on the Armenian Genocide as a prohibition of its denial. On 27 May 2003, diverse associations[17] filed a complaint against the *Quid*, which in its 2002, 2003 and 2004 editions denied the events the qualification of genocide, minimized the number of victims, and equated victims and perpetrators. In its decision of 6 July 2005, the Tribunal de Grande Instance of Paris condemned the presentation of the Armenian Genocide made in the *Quid*,[18] while basing its ruling on the 2001 law and, in fact, while expressly mentioning this law. It accordingly found that the *Quid* had caused moral suffering at a time when memory and

14 Translation by the author. The original version reads as follows: 'Sont punis des peines prévues par l'article 24 *bis* de la loi du 29 juillet 1881 sur la liberté de la presse ceux qui auront contesté, par un des moyens énoncés à l'article 23 de ladite loi, l'existence du génocide arménien de 1915 .' Texte adopté n° 610 – Proposition de loi tendant à réprimer la contestation de l'existence du génocide arménien, adoptée par l'Assemblée Nationale en première lecture le 12 octobre 2006.

15 See notably Azéma (10 mai 2006).

16 See *infra*.

17 Comité de Défense de la Cause Arménienne, CCAF, Mémoire 2000 et J'Accuse.

18 See *Cdca et autres v Editions Robert Laffont, Encyclopédies Quid*, Tribunal de Grande Instance de Paris, 17e chambre civile, judgment, 6 juillet 2005.

historical attention had just triumphed over decades of silence and held that the false presentation of the Armenian Genocide in the *Quid* had caused

> close ones and heirs of this community, as well as groups which object is to maintain the memory of these events, agitation and moral harm enhanced by the fact that the memory and the historical interest had just triumphed over decades of silence.[19]

Not only is genocide denial collectively dangerous as an incitement to perpetrate the crime again and to continue the victimization of the group; it is also individually harmful, to say the very least. Writing on the pain felt by survivors who have to hear and listen to the atrocious comments and assertions of those who deny the crimes is an impossible task. Not only do victims have to live in a society which once aimed at destroying them, in a society which let their loved ones be so brutally murdered, but they also have to live in a society which tolerates these crimes to be denied, a society which, in respecting and protecting human rights, chooses to protect the freedom of expression of those who do nothing but continue the commission of the genocide through its denial rather than the freedom and rights of the victims!

Genocide denial is not an expression, it is not an opinion, and deniers do not believe for one second the truth of their assertions. Genocide denial is a manipulation of truth, it is a lie aimed at destroying more thoroughly the targeted group and at allowing for one particular instance of genocide to continue while opening the door for other genocides, against the same group or against other groups, to be committed. Human rights activists might be in complete disagreement with the idea that genocide denial should be expressly prohibited and that it should not be covered by freedom of expression and by freedom of opinion. It is nonetheless maintained here that genocide denial is an act of genocide; it allows the crime to continue and the least we can do is to ensure the protection of the victims' dignity, to put an end to the active commission of the crime and certainly not to grant protection to the rights of genociders. Society should not let human rights be invoked precisely by those who aim at destroying them.

In the words of Smith, 'genocide does not end with the last atrocity: aside from its physical consequences, its psychological, political, and moral effects may continue for generations …. [D]enial is a continued assault on life' (1991, p.74). And assaulting life clearly is a crime; in this particular case, it is also nothing less than the continuing of genocide itself.

---

19 Translation by the author. The original version reads as follows: 'aux proches et aux héritiers de cette communauté, ainsi qu'aux groupements qui ont pour objet de maintenir la mémoire de ces événements, un trouble et une douleur morale d'autant que le souvenir et l'attention historique venaient à peine de triompher de décennies de silence.'

Prosecuting Genocide Denial: Preventing Genocide

Even if the provisions of the Genocide Convention previously studied could, and indeed should, apply to cases of genocide denial, it nevetheless remains necessary to expressly incriminate such criminal behaviour. Furthermore, the international prohibition of genocide denial would represent a good and powerful incitement for states to follow the trend and adopt adequate domestic legislation. As a matter of fact, domestic legislation regarding genocide denial is rather scarce although it is noteworthy that Austria,[20] Belgium,[21] France,[22] Germany,[23] Israel,[24] Luxembourg, Spain and Switzerland[25] have all adopted specific legislation punishing genocide denial. It is indeed noticeable that among these states not only is the state considered as the 'victim state' – Israel – but also those states which were directly responsible for the commission of the genocide – Austria and Germany. Remarks may also be made regarding the other states as their decision to adopt legislation is most certainly symptomatic of their position during the Second World War: either these states were occupied territories with a more or less active collaboration policy – Belgium, France, Luxembourg – or were themselves a dictatorship allied to Nazi Germany – Spain – or a more or less collaborationist state – Switzerland. In all these different states, the legislation on genocide denial entered into force between 1990 and 1997, with France as the pioneer. And indeed, on 13 July 1990, France unanimously adopted the loi Gayssot,[26] which specifically created a new incrimination aimed at punishing certain intolerable forms of falsification of contemporaneous history.[27]

---

20 Austrian Law *N° 148:* Federal Law – Amendment of the Prohibition Law, 1992.

21 Law of 23 March 1995 for the Repression of the Denial of the Genocide Committed by the German National-Socialist Regime during the Second World War.

22 French Law n° 90/615 of 13 July 1990 Concerning the Suppression of all Racist, Anti-Semitic or Xenophobic Acts.

23 Article 130 (incitement to hatred), 131 (instigation of race hatred) and 185 (insult) of the West German Criminal Code.

24 Denial of Holocaust (Prohibition) Law 5746-1986.

25 Article 261b of the Penal Code.

26 'Il est ainsi inséré, après l'article 24 de la *Loi du 29 juillet 1881 sur la liberté de la presse*, un article 24bis ainsi rédigé: Art. 24bis. – Seront punis des peines prévues par le sixième alinéa de l'article 24 ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou plusieurs crimes contre l'humanité tels qu'ils sont définis par l'article 6 du Statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale.' Loi n° 90/615 of 13 July 1990 Concerning the Suppression of all Racist, Anti-Semitic or Xenophobic Acts.

27 The official bulletin of the Justice Ministry specifies that only those crimes against humanity perpetrated during the Second World War are the subject of the loi Gayssot. *Bulletin Officiel du Ministère de la Justice*, N° 39 du 30 septembre 1990, Circulaire CRIM 90−09 F1 du 27 août 1990, Application of *Loi n° 90/615*.

As previously mentioned, many arguments have been raised against the adoption of such legislation, the main one being that the judge is not a historian and that a court of law simply cannot be given the power to impose a particular vision of History. Nonetheless, a close reading of the rulings rendered by French courts regarding genocide denial shows that, far from being willing to impose a particular historical truth, French courts sanction the confusion between historical knowledge and a messianic, propagandist discourse (Salas, 2003, p.41). In other words, French courts do not impose a particular truth or a particular vision of the truth but they do impose on historians 'obligations of prudence, objective caution and intellectual neutrality'.[28] In fact, it is noteworthy that French judges have not waited for the loi Gayssot to be adopted to punish denial. For instance, already in 1981, in the *Faurisson* case, the Tribunal de Grande Instance of Paris had condemned

> The historian who concludes that the genocide of the Jews, as well as the existence of the gas chambers, constitutes one whole lie which has allowed for a gigantic political and financial swindle [has breached] the obligations of prudence, objective caution and intellectual neutrality which must be respected by the academic researcher.[29]

If such obligations are not respected, the role of the court will be to demonstrate the bad faith, the lies and the perversity of the intentions, by means of a contradictory debate. As Salas rightly noted, the judge has not been turned into the guardian of historical truth and the judge's control in cases of denial is in fact minimal:

> We are therefore far from a historical truth for which the judge would be the standard-bearer. We seem closer to a control of the manifest errors of appreciation. What matters is to unveil, behind the masks of historians, a manifestation of anti-Semitic propaganda (2003, pp.41–2).[30]

A fairly recent case in France showed that universities and research institutes might be a cover for deniers. In April 1999, Jean Plantin was tried because of his anti-Semitic works. This trial which occurred in Lyon showed that the University of Lyon–III, which ironically is named after Jean Moulin, hero of the *Résistance*,

---

28 See Affaire *Faurisson, Ligue internationale contre le racisme et l' Antisémitisme et Autres c. R. Faurisson*, Tribunal de Grande Instance de Paris, 8 July 1981.

29 Translated by the author. The original version reads as follows: 'L'historien qui conclut que le génocide des juifs, tout comme l'existence affirmée des chambres à gaz, ne formant qu'un seul et même mensonge historique ayant permis une gigantesque escroquerie politico-financière [manque] aux obligations de prudence, de circonspection objective et de neutralité intellectuelle qui s'imposent au chercheur.' Affaire *Faurisson, Ligue internationale contre le racisme et l'antisémitisme et autres* c. *R. Faurisson*, Tribunal de Grande Instance de Paris, 8 July 1981.

30 Translation by the author. The original version reads as follows: 'On est donc loin d'une vérité historique dont le juge serait le porte-drapeau. On semble plus proche d'un contrôle des erreurs manifestes d'appréciation. Ce qui compte est de dévoiler, derrière les masques de l'historien, une manifestation de propagande antisémite.'

allowed this person to be a historian by awarding him his diplomas while he wrote in his degree thesis that 'the number of Jews dead during the war is, at the most, between one million and one million and a half' (see Terras, 1999). Other French cases are related to Le Pen, leader of the Front National, who was condemned several times on the basis that freedom of speech does have its limits, namely, some essential values and the respect of the rights of others.[31] Even in countries where freedom of speech is nearly unlimited, courts did condemn the denial of the Shoah. Thus, in the USA, in the case opposing the Institute for Historical Review to Mr Mel Mermelstein, Judge Thomas T. Johnson made the following official statement: 'This Court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland' and that this 'is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy. It is simply a fact.'[32]

In the United Kingdom, in the case opposing Deborah Lipstadt to David Irving, Justice Gray ruled that Irving was 'an active Holocaust denier; that he is anti-Semitic and racist and that he associates with rightwing extremists who promote neo-Nazism'.[33] He also ruled that 'no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews'.[34] More recently, in February 2006, Irving was condemned to three years' imprisonment for having denied the existence of gas chambers while holding several lectures in Austria in 1989. By virtue of the 'Prohibition Statute', the Austrian Federal Law on the prohibition of National Socialist activities, a Vienna court found him guilty of denying the Shoah.

For the purposes of this discussion, the *Töben* cases in both Germany and Australia are worthy of interest for their implications as to the application of domestic laws to the Internet content, regardless of the place where this content was created. In 2000, Töben was tried and imprisoned in Germany for publishing material denying the genocide perpetrated by the Nazis on his website, which, according to the German Supreme Court, breached German law.[35] This ruling of the German Supreme Court quashed the decision of the Mannheim court which, had found that German law had no jurisdiction over writings or publications which Töben had not mailed or otherwise physically distributed in Germany, thus excluding all material published on the Internet. In 2002, Töben was tried again for similar material published on his website in Australia, and the judgment of the Federal Court in *Jones v Töben*[36] has to be welcomed as the first Australian court decision on race hate on the Internet.

---

31 For instance, Le Pen was condemned after having referred to the Shoah as 'a point of detail' in History. See Tribunal de Grande Instance de Nanterres, 23 May 1990.

32 Superior Court of the State of California for the County of Los Angeles, Pre-Trial Hearings, 9 October 1981. See Lipstadt (1994, p.141).

33 *The Guardian* (12 April 2000).

34 *Ibid.*

35 See Taylor (2001, p.262).

36 Federal Court of Australia, [2002], *FCA*, 1150.

The Federal Court found that since the Adelaide Institute website – run by Fredrick Töben – denied the Holocaust and vilified the Jewish people, it was unlawful under Australia's Racial Discrimination Act (1975). Accordingly, on 17 September 2002, the Australian Federal Court ruled against Töben and ordered that:

> a) within 7 days of the date of this order do all acts and things necessary to remove from the website http://www.adelaideinstitute.org and from all other World Wide Web websites the content of which is controlled by him or by the Adelaide Institute:
>
> i) the document headed 'About the Adelaide Institute';
>
> ii) any other material with substantially similar content to the document 'About the Adelaide Institute'; and
>
> iii) any other material which conveys the following imputations or any of them–
>
> A there is serious doubt that the Holocaust occurred;
>
> B it is unlikely that there were homicidal gas chambers at Auschwitz;
>
> C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;
>
> D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.
>
> 3 The respondent be restrained, and is hereby restrained, from publishing or republishing to the public, by himself or by any agent or employee, on the World Wide Web or otherwise:
>
> i) the document headed 'About the Adelaide Institute';
>
> ii) any other material with substantially similar content to the document 'About the Adelaide Institute'; and
>
> iii) any other material which conveys the following imputations or any of them–
>
> A there is serious doubt that the Holocaust occurred;
>
> B it is unlikely that there were homicidal gas chambers at Auschwitz;
>
> C Jewish people who are offended by and challenge Holocaust denial are of limited intelligence;
>
> D some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.[37]

It is perfectly true that not all cases dealing with genocide denial end up with a condemnation of the denier and the case of Ernst Zündel is very symptomatic of the reluctance of some courts to restrict what they believe is an exercise of freedom of opinion and of freedom of speech. In this particular instance, the Canadian judge took judicial act of the Shoah[38] and condemned the defendant to nine months of imprisonment. Judge Thomas indeed found that:

---

37 Federal Court of Australia, [2002], *FCA*, 1150. Emphasis in original.

38 *Regina v Zündel* [1987] 56 C.R. 3d 1, Ontario Court of Appeal, Judgment of 23 January 1987; *Regina v Zündel* [1988] District Court, p. 506; *Regina v Zündel* [1990] 37 Ontario Court of Appeal 37 OAC 354, 53 C.C.C. (3d) 161.

> The mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War is so generally known and accepted that it could not reasonably be questioned by reasonable persons. I directed you then and I direct you now that you will accept that as a fact. The Crown was not required to prove it. It was in the light of that direction that you should examine the evidence in this case and the issues before you.[39]

Nonetheless, in 1992, the Canadian Supreme Court declared unconstitutional the provision of the Criminal Code on the basis of which Zündel was condemned, finding that 'the limitation of freedom of expression [was] disproportionate to the objective envisaged'.[40] This Supreme Court decision is problematic, to say the very least, as in balancing the different interests, the Court expressly favoured the protection of Zündel's freedom of opinion and freedom of speech over the victims' rights not to be insulted and not to be, yet again, victimized. This decision trampled on the right to human dignity and, ultimately, made a mockery of those who were so brutally murdered. As a result, Zündel persisted in his criminal denial, although he is now facing trial in Germany where he has been charged, on 19 July 2005, with inciting racial hatred.

Furthermore, if genocide denial is clearly prohibited in the domestic laws of some countries, it remains incriminated nowhere in international legal instruments, and its prohibition is never explicit.[41] However, it can be inferred notably from the UDHR itself which provides, in its Article 29(3), that 'these rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations'. In its Article 30, it further states that 'nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein'. Thus, it may be argued that it prohibits genocide denial, even if only implicitly. Furthermore, denying a genocide clearly stands against the rights to equality and to dignity,[42] as well as against the protection from cruel, inhuman and degrading treatment.[43]

---

39 *Regina v Zündel* [1990] 37 Ontario Court of Appeal 37 OAC 354, 53 C.C.C. (3d) 161.

40 *Regina v Zündel* [1992] 2 Supreme Court Reports [Sc.R.] 731 at 734–5.

41 It must be noted, however, that the European Parliament adopted a Resolution on European and International Protection for Nazi Concentration Camps and Historical Monuments which declares that 'it is the duty of the Commission, the Council and the European Parliament … to combat … any denial of the fact that extermination took place in the camps' (Resolution No. B3–208, 0218, 0219, 0228 and 0283/93, European Parliament, Minutes of the Proceedings of the Sitting of 11 February 1993, Item 3). It also adopted a Resolution on racism which demanded 'the adoption by the Member States of appropriate legislation condemning any denial of the genocide perpetrated during the Second World War' (Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, No. A3–0127/93, European Parliament, Minutes of the Proceedings of the Sitting of 21 April 1993, Item 19).

42 Article 1 of the UDHR.

43 Article 5 of the UDHR.

Fortunately, international case-law shows a condemnation of genocide denial. Indeed, the rulings of both the UN Human Rights Committee and the European Commission of Human Rights seem to be in favour of such restrictions to freedom of speech (Massias, 1993). Most notably, the latter ruled that the families of survivors of the Holocaust continue to be entitled to a protection of their parents' memory.[44] Still, an international prohibition of genocide denial remains very much needed, not only because some states do not have proper legislation on the matter, but also because it has to be acknowledged that denial concerns all cases of genocides, and not only the Shoah.

It is here argued that genocide denial should not be protected by freedom of expression[45] precisely because it is in itself an act of genocide. Genocide denial is not simply the denial of a crime; it is a particular conduct which fits into the broader genocidal pattern of occurrence. As Wachsmann rightly stressed in reference to the denial of Nazi crimes, 'the denial of the genocide perpetrated by the Nazis and their accomplices against the Jews is part of the genocidal project itself' (2001, p.585).[46] And indeed, genocide denial precisely aims at killing the victims a second time by 'destroying the world's memory of them' (Lemkin, 1944, p.xvii). In the words of Vidal-Naquet, it is 'an attempt of extermination on paper which takes over from the real extermination' (1987, p.40).[47]

It is true that Law does have its shortcomings, that trying deniers might turn them into victims who are denied freedom of speech, that a trial might be a great way to advertise their ideas[48] and that a courtroom is not a historical forum …. But it is also true that measures such as adequate legislation against hate and discrimination, trials against deniers, the barring of entry rights[49] are all measures which can, if not stop the propagation of their ideas, then at least cast opprobrium on them and show an international and general respect for the victims. Deniers should not be

---

44 *Request 9777/82 v Belgium*, Decision of 14 July 1983. Nevertheless, the position of the European Court of Human Rights in *Lehideux et Isorni v France* (No. 55/1997/839/1045, 23 September 1998) is very questionable. The Court stated that the actions of Maréchal Pétain during the Second World War were still subject to debate among historians. It also went so far as to rule that, forty years after the facts, the same severity should not apply, thus implying that the passing of time may diminish crimes of collaboration with Nazi Germany.

45 For an opposite view, see Neier (1998, p.206): 'the best chance of preventing the message of the Nazis from being translated into reality was in making certain that freedom prevailed, even when that meant extending the benefits of freedom to the enemies of freedom.'

46 Translation by the author. The original version reads as follows: 'La négation du génocide perpétré par les nazis et leurs complices à l'encontre des Juifs fait partie du projet génocidaire lui-même.'

47 Translation by the author. The original version reads as follows: 'une tentative d'extermination sur le papier qui relaie l'extermination réelle.'

48 Ernst Zündel, referring to his own trials in Toronto, said that they were an advertisement worth a million dollars.

49 David Irving has been barred from Germany, Italy and Canada.

enabled to invoke human rights in order to destroy them more thoroughly. As Roth rightly wrote, this 'obscene historical deceit [should not] be practiced with impunity' (1993, p.216). It is also perfectly true that incriminating genocide denial depends on the previous legal recognition of the genocide being denied and that legislating against genocide denial therefore implies that a particular genocide has been legislatively recognized. The point here is certainly not to create a sordid hierarchy of genocides, some of which, as being legally acknowledged, would be protected against denial and some others which would not due to their non-legal express recognition. Nonetheless, far from constituting an obstacle, the legal recognition of past genocides should be encouraged precisely to impede their future denials. For instance, France has recognized both the destruction of the European Jews as well as the Armenian Genocide and, thanks to the case-law of the ICTR, it would not seem very disturbing or legally problematic for it to formally recognize the genocide perpetrated in Rwanda.[50] Rather than being criticized as an impediment regarding the 'equal treatment' of genocides, the incrimination of genocide denial should be the standard and, if genocide denial had expressly been recognized as an act of genocide by the Genocide Convention, the problem would not even have arisen. If prosecuting genocide denial implies for states, at both the domestic and international levels, to expressly qualify genocides as genocides, such an implication should be unconditionnally supported. The only pre-condition for genocide denial to be incriminated and prosecuted is the recognition of the potentially deniable genocide – which is to say all genocides, denial being an integral part of the genocidal plan – and such recognition does not appear to be too high an expectation.

Asserting the legal unfeasibility of incriminating and prosecuting genocide denial on the basis that its prerequisite is the legal qualification of genocide as such is not convincing – or amounts at admitting that genocide can never be adequately qualified, that its definition encounters too many obstacles – whether political, social, economic and so forth – to be truly universal. But if the international community, under the auspices of the United Nations, had at its disposal a workable and comprehensive definition of the crime,then surely recognizing the crime when it is committed should not be too difficult a task. On the contrary, if it is recognized that genocide denial fails to be incriminated for the sole reason that the international community of states is unable to qualify genocide itself in the first place, it is to be simultaneously acknowledged that the universality of the concepts of genocide and of its prohibition are purely illusory. It is true that the qualification of genocide as a crime is not a purely legal issue and that politics and other sadistic considerations

50 See Loi n° 96/432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins. Law n° 96/432 of 22 May 1996, *Journal Officiel*, 23 May 1996, p.7695, which adapted French legislation to Security Council Resolution 955 creating the ICTR and which provides for universal jurisdiction in France over the genocide perpetrated in Rwanda.

will necessarily come into play, thus impeding such qualification. But refusing to incriminate genocide denial on this basis would amount to giving a preponderant role to these political and other factors in the legal determination of the crime and would ultimately lower the seriousness of the crime of genocide itself. The law of genocide can certainly not settle for 'second best', for minimum standards on which the international community of states was able to agree. The universal prohibition and condemnation of the crime as well as its total eradication should be the aim, and nothing less. Again, incriminating and prosecuting genocide denial should be an international standard and its prohibition should not be cast aside as an unreachable fantasy; it should be as universal as the prohibition of genocide. As previously stressed, genocide denial is part of the broader genocidal pattern of occurrence and not prosecuting it is as serious as not prosecuting the crime of genocide itself.

This page intentionally left blank

Chapter 8

The Conventional Restrictive Approach and the *Jus Cogens* Prohibition of Genocide

The dramatic consequences of the inadequacies of the Genocide Convention and the impunity of genociders directly caused by such shortcomings ultimately prompt the questioning of such an instrument. And indeed, how can such a defective text, unable to achieve the universality of the prohibition of one of the most heinous crimes, be considered as the law on genocide? More specifically, is this Convention in conformity with the *jus cogens* prohibition of genocide? Or is it so restrictive that it in fact unduly contradicts the higher norm and should therefore be considered null and void?[1]

The outlawing of genocide has frequently been qualified as a universal and peremptory norm of international law (see for example Van Schaack, 1997).[2] In the words of Judge Elihu Lauterpacht,

> the prohibition of genocide … has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.[3]

Clearly, the prohibition of genocide as embodied in the Genocide Convention is widely accepted, and it has been indeed reproduced in several authoritative instruments.[4] Nonetheless, although it might seem that the conventional outlawing

---

1 See Article 53 of the 1969 Vienna Convention on the Law of Treaties which reads as follows: 'Treaties conflicting with a peremptory norm of general international law (jus cogens): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

2 See also the Case concerning armed activities on the territory of the Congo (New application: 2002) (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility [2006] ICJ Reports 27, para. 64 (3 February).

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Further Requests for the Indication of Provisional Measures, Separate opinion of Judge Lauterpacht [1993] ICJ Reports 440, para. 100 (13 September).

4 See Article 4 of the ICTY Statute, Article 2 of the ICTR Statute, Article 6 of the ICC Statute.

of genocide which is a *jus cogens* norm, it might also be argued that a broader *jus cogens* prohibition of genocide existed before the adoption of the Genocide Convention. In this context, it might therefore be asserted that the conventional outlawing of genocide being more restrictive than the pre-existing *jus cogens* norm, it is inconsistent with it. As Van Schaack rightly argued,

> [the] Genocide Convention is not the sole authority on the crime of genocide. Rather, a higher law exists. The prohibition of genocide represents the paradigmatic *jus cogens* norm, a customary and peremptory norm of international law from which no derogation is permitted (1997, p.2261).

Far from being a creation of the post-World War II era, the fact is that genocide has *always* been illegal, that it is illegal *per se* and that it therefore did not become illegal thanks to the ratification of a Convention, it is illegal in itself.[5] This idea is even expressed in Article I of the Genocide Convention itself which states that '[t]he Contracting Parties *confirm* that genocide … is a crime under international law,'[6] and which therefore implies the existence of a prior rule. As Beres rightly noted, '[g]enocide is a modern word for an old crime' (1988, pp.123−4). So much so that, as early as 1947, Lemkin had observed that 'no great difficulties are involved in this field [legislation on genocide] since genocide is a composite crime and consist of acts which are themselves punishable by most existing legislation' (1947, p.150). And in fact, as early as October 1933, at the Fifth International Conference for the Unification of Penal Law held in Madrid, Lemkin had identified the crime of barbarity which would amount to the actual notion of genocide which he defined as 'oppressive and destructive actions directed against individuals as members of a national, religious, or racial group' (1944, p.91). It is also arguable that, with the Nuremberg precedent which dealt with genocide as a crime against humanity, 'the prohibition of genocide was already an established principle of international law' (Ragazzi, 1997, p.94).

But if the prohibition of genocide is a peremptory norm of international law, this does not automatically mean that it is the prohibition of genocide as embodied in the Genocide Convention which is of a peremptory character. If there were a pre-conventional prohibition, it might well be that it is this broader, pre-existing norm which is the *jus cogens* norm on the matter. Different arguments may indeed be

---

5 In this respect, see the *Eichmann* case in which the Israeli Supreme Court emphasized the existence of the crime of genocide in International Law prior to the Genocide Convention, *Attorney-General of the Government of Israel v Eichmann*, 36 ILR 277 (Israel Supreme Court, 1962). The Court also dismissed an objection raised by the defendant that he could not be tried for genocide since the Genocide Convention was not in effect at the time of his acts. The Court maintained that anyone would know that such acts were legally and morally wrong. *Ibid.*, p. 282. The UN Secretariat also acknowledged that this was not 'the first time that a convention has been concluded on a matter on which rules of common law already exist'. See UN Doc. E/AC.25/3 (1948).

6 Emphasis added.

invoked in support of the idea that the conventional prohibition is not of a *jus cogens* character.

Firstly, the rather small number of states parties to the Convention casts doubt on the *jus cogens* characater of this instrument. And indeed, as of today, the Genocide Convention has 138 states parties, 'a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world' (Schabas, 2000, p.4).[7] In this respect, Sir Hartley Shawcross, the representative of the United Kingdom, was completely correct when he expressed the fear that a convention would defeat the purpose it sought to achieve, because the failure to ratify by some states would undermine the claim that it stood for universally accepted principles.[8] Even further, Lane pointed out that to consider the Genocide Convention as international common law is a position which 'must be regarded skeptically in light of the reaction of many States which, despite the Convention's compelling motivation and unassuming legal nature, have refused to ratify it. This refusal is inconsistent with the international common law characterization' (1979, pp.263−4).

Secondly, it must be recalled here that the Convention is not a permanent one and it is thus arguable that the drafters of the Convention never intended to create and generate a *jus cogens* norm. Indeed, the Convention was concluded for a period of ten years with the provision that 'it shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it'.[9] The Convention also contains a highly unusual provision for a multilateral convention in its Article XV, which states that '[I]f, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective'. In other words, far from being the permanent and authoritative instrument it really should have been, the Convention's existence could in fact be very easily challenged and, in the words of Drost,

> It shocks the juristic conscience to realize that under the positive law of the Convention genocide is conceived as an international crime for an indefinite and uncertain period yet delimited in definite and certain terms of time. The legislators established genocide as a crime under the law of nations on a temporary basis. Under the Convention genocide is considered a crime for the time being. Admittedly, this notion does not refer to the moral nature of the act but, legally speaking, this 'old crime under a new name' may possibly disappear from the international statute book (1959, p.134).

---

7 Schabas indeed compared the state of ratification of the Genocide Convention with that of the 1989 Convention on the Rights of the Child (191 states parties), of the 1965 International Convention for the Elimination of all Forms of Racial Discrimination (153 states parties), of the 1979 Convention for the Elimination of Discrimination against Women (163 states parties), and of the 1949 Geneva Convention relative to the Protection of Civilians (187 states parties).

8 UN Doc. A/C.6/SR.39 (Shawcross, United Kingdom).

9 Article XIV of the Genocide Convention. See Schwelb (1967, p.955).

Thirdly, the Genocide Convention raises the question of reservations and understandings which undermine the scope of the ratifying states' obligations under this convention,[10] and this problem is further aggravated by both the complete silence of the Convention on that matter and the lack of explicit guidance in the *travaux préparatoires* on this particular subject. When the question of the permissibility of reservations was submitted to the ICJ for an Advisory Opinion, the Court, in its opinion of 21 May 1951, laid down a new principle, that of the compatibility of the reservation with the object and purpose of the treaty.[11] Subsequently, the General Assembly adopted Resolution 598 (VI), which recommended that states parties be guided by the Court's Advisory Opinion.[12] As Robinson rightly pointed out, the difficulty with the Advisory Opinion is that 'it leaves the "decision" concerning the compatibility to the various parties' (1960, pp.38–9). Furthermore, the Advisory Opinion does not provide for any means of reconciliation in case a reservation generates different views as to its compatibility with the Convention (see *ibid.*). It merely states that

> If a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention.[13]

Such a statement can have very dangerous consequences as many states may consider that one or more states are in fact not parties to the Convention, which, in the crucial matter of genocide, could be catastrophic. It seems that some states have therefore chosen to react by not officially objecting to a reservation, which is probably the only solution, even if it is certainly not satisfying (Robinson, 1960, pp.38–9).[14] In any event, it is here submitted that, as regards the Genocide Convention, reservations should have never been allowed. In the words of Judge

---

10 On the 132 states parties to the Convention, 29 have formulated reservations, but ten of these have since been withdrawn. Still, it might be noted here that the USA attached an understanding to their instrument of ratification which provides that 'the term "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" appearing in Article II means the specific intent to destroy, in whole or *in substantial part*, a national, ethnic, racial or religious group as such by the acts specified in article II'. Emphasis added. See the reservations to the Genocide Convention: <www.unhchr.ch/html/menu3/b/treaty1gen.htm>. According to Leblanc, because the understanding contradicts the ordinary meaning of the phrase, it 'thus takes on the character of a reservation, which could lead to justifiable objections by other States parties' (1984, p.382).

11 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 15–30 (28 May).

12 Resolution of 12 January 1952.

13 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 29 (28 May).

14 Robinson illustrated this point by reference to the Canadian position concerning the reservations of the Communist states. Being aware of the fact that, even if Canada objected to these reservations, some states will still maintain that they were compatible with the

Alvarez, in a dissenting opinion urging that the Genocide Convention cannot admit any reservations, such conventions as that on genocide

> by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.[15]

The only justification behind the Court's Advisory Opinion, behind its authorization of reservations to the Genocide Convention, might simply be that the Court itself did not recognize the provisions of the Convention as customary law and as peremptory norms, that it implicitly acknowledged the fact that the prohibition encapsulated in the Convention was not a *jus cogens* norm. As a matter of fact, in the *North Sea Continental Shelf* cases, the ICJ noted that

> speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by anyone of them in its own favour.[16]

Thus the Court concluded that where customary law figures in a convention, it will generally be among the provisions where the right of unilateral reservation is not conferred or is excluded.[17] Clearly, this is not the case of the Genocide Convention as, even if the Convention is silent on the matter, the ICJ itself found that reservations were permissible.[18]

Ultimately, as the ICJ ruled in the *Military and Paramilitary activities in and against Nicaragua* case, the fact that principles 'have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions'.[19] As a matter of fact, already during the drafting of the Convention, the UN Secretariat addressed the issue of the interplay between the customary law,

---

Convention, Canada ratified the Convention without reference to the reservations, which legally means that it accepted them.

15 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, Dissenting opinion of M. Alvarez [1951] ICJ Reports 53 (28 May).

16 *North Sea Continental Shelf*, Judgment [1969] ICJ Reports 38–39, para. 63 (20 February).

17 *Ibid.*, p.39, para. 63.

18 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 15−30 (28 May).

19 *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility, Judgment [1984] ICJ Reports 424, para. 73 (26 November).

and thus the *jus cogens*, prohibition of genocide and the Convention and stated that 'common law retains its full force for the States which have not signed the convention'.[20] Considering the fact that the *jus cogens* prohibition of genocide is broader than the conventional one, this might lead to the absurd situation where a non-ratifying state has in fact more obligations and duties than the states parties to the Convention.

Before the adoption of the Genocide Convention, the General Assembly had adopted Resolution 96 (I), which reads as follows:

> Genocide is a denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of *cultural* and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, *political and other groups* have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of *international concern*.[21]

Because the definition of genocide is here broader than the one embodied in the Convention, the question arises as to the value of the Resolution and of the prohibition it contains. As it is a resolution of the General Assembly, Resolution 96 (I) is not a source of binding law. It nonetheless seems that Resolution 96 (I) did nothing less than codify an existing peremptory norm of international law. As the ICJ held in 1996:

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the condition of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[22]

The way states vote in the General Assembly is widely seen as evidence of state practice and of state understanding of the law and General Assembly Resolution 96 (I) can therefore be acknoweldged as reflecting the *opinio juris* of states. Considering the fact that this resolution was adopted unanimously and without debate, 'no question arises as to the legal validity and obligatory nature of General Assembly resolutions, for each State casting a vote could be regarded as bound by that expression of opinion' (Green, 1981, pp.19–20). Moreover, the resolution has been cited frequently in subsequent instruments and judicial decisions and this might reinforce the claim that it codifies a customary principle. For example, the United

---

20 UN Doc. E/AC.25/3 (1948).

21 GA Resolution 96 (I), UN Doc. A/231, 11 December 1946. Emphasis added.

22 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Reports 254–5, para. 70 (8 July).

States Military Tribunal cited General Assembly Resolution 96 (I) on four occasions and stated that: 'The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion.'[23] The significance of Resolution 96 (I) was further enhanced by the statement of the ICJ in its Advisory Opinion in the *Reservations to the Genocide Convention* case:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the *principles underlying the Convention* are principles which are recognized by civilized nations as *binding on States, even without any conventional obligation*.[24]

This statement illustrates the fact that the Convention is not necessarily the decisive element in the outlawing of genocide, as it seems clear that the 'principles underlying the Convention … which are binding on States' are these very principles found in Resolution 96 (I). In other words, by referring directly to Resolution 96 (I), the Court's statement supports the idea that it is the crime of genocide *as defined in Resolution 96 (I)* which is outlawed as a matter of custom. This does not imply that General Assembly resolutions are a source of international law or that Resolution 96 (I) is an exception to this principle; it is simply to assert that this Resolution merely put in a written form the pre-existing peremptory norm. Thus, while for many writers, treaties constitute the most important sources of international law as they require the express consent of the contracting parties, it seems that the Court, in its reasoning on the legal prohibition of genocide, not only relied on the positive element of recognition by states, but also on the underlying moral considerations of the prohibition. The fact is that states unanimously gave their consent to Resolution 96 (I), and, as the representative of Czechoslovakia, Mr Zourek, stated during the drafting of the Convention,

> although the General Assembly could not by a resolution adopt new rules of law, its resolutions could nevertheless reaffirm already existing laws; as such they would be binding upon the Members, particularly if they were unanimously adopted (cited in Robinson, 1960, pp.55–6).[25]

Some would argue that the resolution was adopted hastily and that there is little recorded debate on some important questions, such as the inclusion of political groups

---

23 *U.S.A. v Alstoetter et al.*, Case No. 3, Military Tribunal III, 3 *Nuremberg Subsequent Proceedings* 983.

24 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 23 (28 May). Emphasis added.

25 Schwarzenberger believed that the Resolution can be interpreted as creating *estoppel*, thus a rule of evidence which prevents future denials of the previous statement (1965, p.474).

within the definition. It is also true that some important issues were reconsidered and revised during the debates on the Convention in 1947 and 1948. Thus, a part of the doctrine believes that 'much caution is advised with respect to claims that Resolution 96 (I) constitutes a codification of customary law' (Schabas, 2000, pp.45–6). Nonetheless, it might equally be argued that the fact that there is little recorded debate on the inclusion of political groups constitutes an acknowledgement of the fact that no debate was actually needed, that the necessity to protect political groups raised no objection and that their subsequent deletion from the conventional scope of application was the result of political considerations which were clearly out of place considering such a crucial issue. Furthermore, an overview of domestic legislation shows that a considerable number of states took the approach of Resolution 96 (I) with repect to the protection of political groups.[26] It therefore seems that, on this particular point, domestic provisions resemble Resolution 96 (I) more than the Convention itself, and this further enhances the argument that the Resolution provides clear evidence of state opinion and practice.

Another crucial difference between the Genocide Convention and Resolution 96 (I) is the recognition in the latter of the principle of universal jurisdiction through its acknowledgement that the 'punishment of the crime of genocide is a matter of international concern'. And in fact the ILC, more in phase with the Resolution than with the Convention, has recognized, in its 1996 Report on the Draft Code of Crimes, 'the character of the crime of genocide as a crime under international law for which *universal jurisdiction existed as a matter of customary law*'.[27] As its work is evidence of state practice and as its drafts may constitute evidence of custom, this clearly indicates the importance and relevance of Resolution 96 (I) as well as the fact that, here also, the Convention has failed to encapsulate customary law.

It might also be argued that the modifications in the Convention were made due to political considerations and arrangements. Such modifications would then be contrary to the concept of *jus cogens* as identified by the ICJ in the *Reservations to the Genocide Convention* case. The ICJ indeed defined one of the accepted meanings of *jus cogens* as a 'public order of the international community' made up of principles and rules of 'such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force' (Mosler, 1974, p.34):

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. *In such a convention the contracting States do not have any interests of their*

26 See *supra*.

27 1996 Draft Code of Crimes, [1996] II (2) *ILC Yearbook* 29. Emphasis added. Thus, Article 8 of the Draft Code 'extends national court jurisdiction over the crime of genocide set out in Article 17 to every State party to the Code' (Gomez Robledo 1981, pp.176–9). See also Van Schaack (1997, pp.2277–80).

> *own*; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[28]

Verdross also wrote that the criterion for rules having the character of *jus cogens* 'consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community' (1966, p.55). Regarding the Genocide Convention, it seems very doubtful that states had 'the higher interest of the whole international community' at heart – unless they have interpreted 'international community' as 'international community of states' rather than as 'mankind'. As Bull rightly pointed out, 'agreements reached among States are notoriously the product of bargaining and compromise rather than of any consideration of the interests of mankind as a whole' (Christenson, 1988, pp.589–90). The Genocide Convention is no exception; it was a political compromise which considered the interests of states and the protection of state sovereignty rather than the overriding interests of humanity as a whole. The perfect and obvious illustration of this assertion is the difference between General Assembly Resolution 96 (I) and the Convention itself.

With the Convention, there is a risk of a 'weakened international law' or of an international law 'enfeebled by its own norms' (Carrillo Salcedo, 1997, p.587) and it is most probable that the prohibition of genocide as stemming from customary law and from natural law was reproduced in Resolution 96 (I) of the General Assembly.[29] But if the Convention did not originate from natural law, if the Convention did not encapsulate the broader *jus cogens* prohibition of genocide, if it unduly restricted the scope of the peremptory norm of international law as embodied in Resolution 96 (I) and if it is therefore inconsistent with this norm, the question arises as to the legal validity of the Convention. By virtue of Article 53 of the 1969 Vienna Convention on the Law of Treaties which unequivocally provides that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law', the Genocide Convention, as a treaty contrary to an existing rule of *jus cogens*, is void *ab initio*.

It is not the Convention-based prohibition but the one embodied in Resolution 96 (I) which should apply. Then, and only then, will the peremptory norm be respected and the definition of the crime of genocide be satisfying. Indeed, as a result of the application of the broader *jus cogens* norm, political and other groups would be recognized as possible targets of genocide and the principle of universal jurisdiction,

---

28 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports 23 (28 May). Emphasis added.

29 On the General Assembly resolutions as a new source of international law, see Gomez Robledo (1981, pp.176–9).

which also seemed to have been the intention of Resolution 96 (I), would cease to raise any doubts.

Ultimately, it has to be recalled here that the first Special Rapporteur on genocide believed that 'the 1948 Convention can only be considered a point of departure in the adoption of effective international measures to prevent and punish genocide;' he thus proposed 'to examine the possibility of fresh international measures for effective prevention and punishment of genocide'.[30] Similarly, in his report on genocide, Whitaker acknowledged the fact that 'certainly in its present form, the Convention must be judged to be not enough. Further evolution of international measures against genocide are necessary and indeed overdue.[31] Sibert went even further when he wrote that if effectiveness is preferred to spectacular text, it will be necessary 'to start again right from the beginning a work which is no more than the first step on an arduous road leading to absolute respect for the most sacred rights of mankind' (1951, pp.445–6). And indeed, the work regarding the law of genocide should be 'start [ed] again right from the beginning,' simply because, as it has been demonstrated, the Genocide Convention is contrary to *jus cogens*, contrary to international law and therefore void *ab initio*.

As has also been emphasized, the Genocide Convention, by failing to grasp the specificity and uniqueness of the crime of genocide itself, is in any event inherently defective and, as the following discussions will now stress, has had dramatic consequences in practice. Indeed, due to its intrinsic shortcomings, not only has the Genocide Convention failed to be used as a universal instrument for the prevention and punishment of this most atrocious crime; it has also impeded the use of the word 'genocide' even in clear cases of genocide. In other words, the Genocide Convention has done nothing but contribute to the general impunity granted to genociders and to their crimes. It has also participated heavily in the collective indifference, amnesia, and even forgiveness, expressed by society as a whole towards the crimes and their perpetrators. In this context, asserting that the Genocide Convention is an instrument contrary to international law and that it is therefore null and void should not be considered as a major legal revolution. Rather, it should be seen as the only possible conclusion to decades of massive failures in preventing the crime and punishing its perpetrators.

30 Ruhashyankiko Report, p.120, para. 440.

31 Whitaker Report, p.37, para. 71.

Part III

Consequences of the Conventional Restrictive Approach to the Crime of Genocide: The Inapplicability of the Genocide Convention and its Impact on Collective Memory of the Crime

As emphasized in the previous part of this book, the Genocide Convention is so restrictive in its definition of genocide that it omits its most crucial definitional elements, precisely those elements which are the essence of the crime and which give it all its specificity and unique dimension. This inapplicability of the legal norms has had dramatic consequences in practice as the inapplicability of the Convention logically caused its non-application. As the Genocide Convention is the exclusive instrument dealing with genocide, its non-application means that the qualification of genocide has been set aside and acts have failed to be qualified as such in courts of law. This failure to adequately qualify the crime has in turn degenerated into chaotic collective memories of the crime: the lack of legal memory has indeed shaped the lack of collective memory and has caused social amnesia, amnesia which ultimately culminated in the minimization of the crime, notably through undue comparisons and amalgams, or in its blatant denial. Furthermore, failure to prosecute at all directly led to *de facto* amnesty and to general forgiveness, precisely for what is unforgivable.

This page intentionally left blank

Chapter 9

The Symptoms of the Inapplicability of the Genocide Convention: The Lack of State Practice

To illustrate the assertion that the Genocide Convention is an inapplicable instrument, this chapter focuses on the law and practice of two particular states: Israel and France. The choice of these two states is far from random as both states indeed experienced highly media-covered trials with respect to the destruction of the European Jews. In spite of the widely recognized qualification of this destruction as genocide, this particular legal qualification was set aside in the context of these trials and the Genocide Convention remained unused, precisely because, it is argued, it was – and still is – unusable. In this respect, and before contemplating the Israeli and French trials, yet another domestic instance is here worthy of interest as it perfectly illustrates the inability of the Genocide Convention to be an effective instrument. As a matter of fact, in the *Niyonteze* case, regarding acts perpetrated in the course of the Rwandan Genocide, the tribunal noted that Switzerland was not, at the time of the trial, a state party to the 1948 Genocide Convention.[1] According to Schabas,

> even if Switzerland was bound by a customary legal obligation to punish the crime of genocide, this did not mean that Swiss courts had jurisdiction in the absence of any applicable provision of national law. It considered that the applicable international norms were not sufficiently specific for them to be directly enforceable by national courts without running afoul of the principle *nulla poena sine lege*; specifically, the international norms did not establish a penalty (2003, p.48).[2]

Ultimately, the Military Tribunal of Cassation did not rectify such a finding and thus maintained that the Genocide Convention was not specific enough in its drafting to be directly enforceable.[3] Although, as it will be demonstrated in the following paragraphs, this position appears to be wrong as the Genocide Convention is a directly applicable instrument, at least in countries of monist tradition, it remains the case that the unclear wording of the Convention led a court of law to conclude to the inapplicability of the notion of genocide itself in a however clear case of genocide.

---

1 Switzerland acceded to the Convention on 7 September 2000.

2 Emphasis in original.

3 Miltary Tribunal of Cassation, 27 April 2001, para. 9 (e). See Schabas (2003, p.48).

Regarding the destruction of the European Jews on which the following discussion will focus most particularly, it is true that the trend of dealing with the genocide orchestrated by the Nazis under other qualifications than genocide could be seen as dating back to Nuremberg itself, due to the absence of the charge of genocide from both the Charter of the International Military Tribunal and the text of the judgment. Although it has to be acknowledged that the indictment presented by the Prosecution did mention the term 'genocide'[4] and that the Prosecutors did refer to it (Mettraux, 2005, pp.194–95), it is nonetheless submitted here that Nuremberg was a very particular instance which occurred in the direct aftermath of the war and which voluntarily relegated the genocide to the second level. And indeed, at Nuremberg, only the 'major war criminals' were tried, and the qualification of 'major' here did not refer to the nature of the crimes themselves but to whether those who stood accused had accomplished their criminal acts in several countries and had thus perpetrated 'international crimes'. This explained that those in command of concentration and extermination camps, such as Rudolf Höss at Auschwitz, for instance, were not tried at Nuremberg by the IMT. This definition of the term 'major' perfectly fitted the general position of the prosecution at Nuremberg and the overwhelming concept that crimes against peace were 'the supreme international crime … in that it contains within itself the accumulated evil of the whole: war crimes and crimes against humanity'.[5] In other words, the focus at Nuremberg was not on the genocide but, rather, on the waging of an aggressive war which had directly produced this genocide (see Wieviorka, 2003). Further, the concept of 'genocide' found itself unduly included within the notions of 'war crimes' and 'crimes against humanity', over which the IMT had, from the text of its Charter, explicit jurisdiction. Consequently, and as Douglas rightly pointed out, the Nuremberg trial failed to acknowledge the specificity of the genocide, notably by failing to establish a distinction between political detainees and 'racial' detainees in concentration and extermination camps:

> It is rather symptomatic that the film showed at Nuremberg, *Nazi Concentration Camps*, was presented as evidencing horrific war crimes rather than the final solution … insofar as the film offers images of crimes against humanity, these were also war crimes – a telling example of how the ostensibly novel legal category was essentially reabsorbed into existing international law (2001, p.60).

Further, if a few witnesses were called to testify before the International Military Tribunal, only a very small number of them were Jews: Abram Suzkever, a Jewish writer from Vilna, Severina Shmaglevskaya, a Polish survivor of Auschwitz and Samuel Rajzman, a survivor of Treblinka (Douglas, 2001, p.78). Even more

4 See *Indictment Presented to the International Military Tribunal, the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Göring et al*., 18 October 1945, p.43.

5 *Nuremberg Judgment* 186.

problematic in this respect was the description of the Nazi extermination process made by French Prosecutor Faure, who presented it in the following terms:

> I shall not speak in detail of the great sufferings endured by persons qualified as Jews in France and in the other countries of Western Europe. I should like simply to indicate here that it also caused great suffering to all the other inhabitants of these countries to witness the abominable treatment inflicted upon Jews. Every Frenchman felt a deep affliction at seeing the persecution of other Frenchmen.[6]

The least that one can find is that this comparison – if not equalization – of the sufferings of Jews and non-Jews is heavily disturbing and highly questionable. It nonetheless gives an accurate picture of the fact that the extermination of Jews, as well as of Romas, was a far cry from being considered as 'the supreme international crime'.

Following the path drawn at Nuremberg, the extermination of the Jews of Europe failed to be qualified as genocide by domestic courts, even when those who stood accused were genociders, directly responsible for the deportation and subsequent murders of thousands of Jews.

Israel

The case of Israel is highly symptomatic of the incapacity of the Genocide Convention to be used as the core instrument in trials dealing with the destruction of the European Jews during the Second World War, due to its total failure to recognize the specificity and the uniqueness of the crime of genocide. And indeed, although it drew upon the Genocide Convention, the Israeli Nazis and Nazi Collaborators (Punishment) Law also departed from it to ensure that the specificity of the crime was legally acknowledged. As Douglas explained,

> While borrowing from both the Nuremberg conception of crimes against humanity and the definition of genocide used in the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Israeli statute differed from these authorities in significant respects. One the one hand, the Israeli statute importantly eliminated the restrictions placed on crimes against humanity by the Nuremberg charter, making crimes committed between the years 1933−39 justiciable. On the other hand, the Israeli law created a more restrictive category of offense, crimes against the Jewish people.[7] Such a restriction was meant to offer legal cognisance of the fact that Nazi

6 *Nuremberg Judgment*, vol. 7, p.25 in Douglas (2001, p.82).

7 The 1950 law defined 'crimes against the Jewish people' as 'any of the following acts, committed with intent to destroy the Jewish people in whole or in part: 1. killing Jews; 2. causing serious bodily or mental harm to Jews; 3. placing Jews in living conditions calculated to bring about their physical destruction; 4. imposing measures intended to prevent births among Jews; 5. forcibly transferring Jewish children to another national or religious group; 6. destroying or desecrating Jewish religious or cultural assets or values; 7. inciting to hatred of Jews.' The offense of 'crimes against the Jewish people' thus essentially tracks the statutory

> crimes had been directed not against humanity in general, but against the Jewish people in particular (2001, p.118).

And indeed, it can be recalled here that

> At the time the Nazis and Nazi Collaborators bill was submitted to the Knesset in 1950, Minister of Justice Rosen specifically distinguished it from another bill before the Knesset, one that dealt with genocide, by appealing to the concept of temporal efficacy: 'That law [that is, for the prevention and punishment of genocide] applies to the future …. On the other hand, the law which is now being proposed applies to the past, to a certain period in history, which began with the rise to power of Hitler and ended with his destruction' (*ibid.*).

In other words, Minister Rosen here expressly acknowledged the inability of the Genocide Convention – which would enter Israeli domestic law through the adoption of a more general law dealing with genocide[8] – to cover the specificity of the crimes perpetrated by the Nazis. It is argued here that the Genocide Convention, as previously demonstrated, is not only unable to cover the specificity of the Shoah; it is also unable to recognize the specificity of any genocide due to the fact that its definition omits to encompass the crucial unique elements which qualify a crime as genocide and which distinguish it from other crimes, and notably from crimes against humanity.

As a result, the Genocide Convention was cast aside from the Israeli trials for crimes perpetrated during the Second World War to the benefit of the Nazis and Nazi Collaborators (Punishment) Law[9] which exclusively concerned those crimes perpetrated 'during the period of the Nazi regime',[10] and which was thus considered as the adequate legal instrument to deal with the genocide committed by the Nazis. As a matter of fact, the aim of this law was expressly specified by the courts in *Honigman v Attorney General*, when Justice Cheshin of Israel's Supreme Court explained that '[t]he law in question is designed to make it possible to try, in Israel, Nazis, their associates and their collaborators for the murder of the Jewish people … and for crimes against humanity as a whole.'[11] Subsequently, in the *Eichmann* case, the court unequivocally declared that:

---

language for genocide (which also was adopted into Israeli law), applying it specifically to acts committed against the Jewish people. Footnote in original.

8 The Crime of Genocide (Prevention and Punishment) Law 1950, 42 Sefer Hachukim 137, 7 April 1950. It has not yet given rise to any prosecution.

9 Nazis and Nazi Collaborators (Punishment) Law 1950, 57 Sefer Hachukim, 9 August 1950, at p.281.

10 Id, Article 1(a).

11 *Honigman v Attorney-General of the State of Israel*, 7 Piskei Din (Law Reports) 296, at 303 [1951] ILR 542 (District Court – Tel Aviv, 1953).

> The State of Israel, the sovereign State of the Jewish People, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people.[12]

The purpose of the Israeli law to specifically cover the Shoah is easily understandable, considering the fact that Israel is a state which was created precisely as a state for the Jewish people or, in other words, as a state for the victims, and their descendants, of the Shoah. Wenig has expressed this particularity of the State of Israel in the following terms:

> Israel's approach to war crimes – though couched in the internationally accepted terms of the Genocide Convention, and though applied under universally recognized principles of jurisdiction – is deeply personal and has been coloured by the State's history and pre-history. Israel has 'war crimes' laws which are prospective and universal, but in relation to war crimes, Israel's primary concern is with the crimes of the Nazis, and with the aims of a Nazi regime which struck at the heart of the State's vital interests.
>
> Israel's approach must also be measured against the unique nature of the State's existence. Israel has chosen to go beyond the widely recognized universal jurisdiction to try war crimes and crimes against humanity in founding jurisdiction on its own unique personal experience. Though the State achieved sovereignty only in 1948 – after the conclusion of the Second World War – it is a Jewish State, and a State for the Jewish people, the very people against whom the Nazi genocide was directed. Israeli courts have asserted that this provides an additional 'linking point' between the crimes and the State of Israel, in the absence of a territorial connection, and not withstanding the more compelling universal basis (1997, pp.103–4).[13]

Consequently, and notwithstanding the fact that, as the District Court of Jerusalem in the *Eichmann* case pointed out, 'the crimes in question are not a free creation of the legislator who enacted the Nazis and Nazi Collaborators (Punishment) Law, but were stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations',[14] it is the concept of 'Crimes against the Jewish people'[15] – and not expressly of genocide – which was used in the course of the legal proceedings instigated against Adolf Eichmann. And indeed, although the definition of 'Crimes against the Jewish people' highly resembles the conventional definition of genocide, it also departs from the Genocide Convention in one important aspect. In the Israeli law, the victim group is identified and specified and the crimes covered are thus those crimes perpetrated 'with intent to destroy the Jewish people, in whole or in part'. In other words, the conventional definition of the crime of genocide had to be amended in the Israeli

12 *Attorney-General of the Government of Israel v Eichmann*, 36 ILR (Israel District Court – Jerusalem, 1961), at para. 38.

13 Ibid. At paras. 32–5.

14 Ibid. At para. 16.

15 Nazis and Nazi Collaborators (Punishment) Law 1950, 57 Sefer Hachukim, 9 August 1950, at 281, article 1(b).

Statute precisely because it failed to recognize the specificity of the crime and of its victims, as analyzed in the first part of the present book. Had the conventional definition been worded differently, had it acknowledged the specificity of the crime – even without mentioning expressly the Shoah and its victims – it is probable that the Israeli courts would have relied on the international definition and on the concept of 'genocide'. Ultimately, the Israeli experience demonstrated the failure of the Genocide Convention to be a universal instrument and to serve as a global condemnation of the crime of genocide. If the international definition of genocide cannot serve as the legal basis for the prosecution of Nazi genociders, what does it stand for?

France

France signed the Genocide Convention on 11 December 1948 – only two days after its adoption by the General Assembly of the United Nations – and subsequently ratified the text on 14 October 1950, thus showing its attachment to the prevention and punishment of the crime of genocide rather earlier on in the legislative process.[16] Nonetheless, the crime of genocide only made its entrance in the French Penal Code on 1 March 1994 with the adoption of the New Penal Code which defines genocide in its Article 211–1:

> Genocide occurs where, in the enforcement of a *concerted plan* aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of *a group determined by any other arbitrary criterion*, one of the following actions are committed or caused to be committed against members of that group:
>
> - wilful attack on life;
> - serious attack on psychic or physical integrity;
> - subjection to living conditions likely to entail the partial or total destruction of that group;
> - measures aimed at preventing births;
> - enforced child transfers.[17]

16 It can be noted here that, upon ratification, France made no declaration, no reservation and no objection. The Convention entered into force on 12 January 1951.

17 Emphasis added. The original version reads as follows: 'Constitue un génocide le fait, en exécution d'un *plan concerté* tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou d'un *groupe déterminé à partir de tout autre critère arbitraire*, de commettre ou de faire commettre, à l'encontre de membres de ce groupe, l'un des actes suivants:

- atteinte volontaire à la vie;
- atteinte grave à l'intégrité physique ou psychique;
- soumission à des conditions d'existence de nature à entraîner la destruction totale ou partielle du groupe;
- mesures visant à entraver les naissances;
- transfert forcé d'enfants'.

Although this definition was clearly influenced by the Genocide Convention, two different remarks may be made. First of all, while the conventional definition defines the crime of genocide by the *intent* to destroy a group, the French definition puts the emphasis on the planned and systematic feature of the crime and, to this end, adopts a more objective criterion, that of the existence of *a concerted plan*.[18] Second, under French law, the scope of application of the definition of genocide has been significantly enlarged. And indeed, although the Genocide Convention only affords protection to 'national, ethnic, racial or religious' groups as such, the French disposition grants protection to all of these conventionally protected groups as well as to 'group[s] established by reference to any other arbitrary criterion'.[19] The Genocide Convention has been criticized by several authors regarding its narrow sphere of application and its selective protection of groups and it thus seems that France has adopted a more progressive approach, recognizing that genocide could be committed against other groups than those expressly listed in the Convention. Nonetheless, no matter how progressive the French legislation actually is in theory, practice has proven more problematic and, far from following the legislator, French judges have been extremely reluctant in applying the definition of genocide – whether international or domestic – even in instances where genocide had clearly been perpetrated. Due to the fact that, as it will now be demonstrated, there was no legal justification not to apply the Genocide Convention, even before the entry into force of the New Penal Code, it is here argued that, similar to the Israeli experience, the French example is also highly symbolic of the failures of the Genocide Convention to serve as an adequate instrument for the prosecution of genocide.

French Legislation and the Crime of Genocide

As previously stated, although the crime of genocide 'entered' the French Penal Code only on 1 March 1994, France has been a Ssate party to the Genocide Convention since 14 October 1950. France being a country of monist tradition, the Convention should have been of immediate application as soon as it entered into force in January 1951. And indeed, at the time of the French ratification of the Convention, Article 26 of the 1946 French Constitution unequivocally granted international treaties, once ratified, an authority superior to that of domestic laws.[20]

18 'plan concerté'.

19 'groupe déterminé à partir de tout autre critère arbitraire'.

20 'Les traités diplomatiques régulièrement ratifiés et publiés ont force de loi dans le cas même où ils seraient contraires à des lois françaises, sans qu'il soit besoin pour en assurer l'application d'autres dispositions législatives que celles qui auraient été nécessaires pour assurer leur ratification.' Constitution du 27 octobre 1946 (Texte repris de *Document d'études*, n° 1.10, 'Les institutions de la Quatrième République', Paris: La Documentation française). This principle was reiterated in the 1958 French Constitution which is still in force today and which explicitly provides in Article 55: 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.'

The Genocide Convention should thus have been applicable in France even in the absence of any domestic legislation. In other words, the direct applicability of the Genocide Convention in France is without doubt and, in fact, in his *Commentary of the Genocide Convention*, Robinson expressly cited France as one of the states where 'an international agreement becomes domestic law by ratification' (1960, pp.34–5).

A second obstacle impeding the application of the Genocide Convention by French courts could have related to statutes of limitations, but recognizing this obstacle would mean ignoring the fact that, under French law, the non-applicability of statutory limitations to crimes against humanity is clear and unequivocal. As a matter of fact, in 1964, faced with the urgency emanating from the fact that crimes committed during the Second World War would soon be subjected to statutory limitations,[21] the French legislator unanimously adopted a law unequivocally recognizing the non-applicability of statutory limitations to crimes against humanity.[22] It is true that, in the silence of the law, the question may arise as to whether crimes against humanity were here understood as also encompassing also the crime of genocide and it is submitted here that, in light of the debates surrounding the 1964 law as well as of the subsequent legislative developments, the non-applicability of statutory limitations also concerned genocide. It is thus now unsurprising that Article 213–5 of the New Penal Code unequivocally states that '[t]he public action relating to the crimes envisaged by this title [genocide and crimes against humanity], as well as the sentences passed, are imprescriptible',[23] thus confirming the assertion that, for that matter, crimes against humanity did also cover the crime of genocide.

A third potential impediment to the application of the Genocide Convention could have been constituted by the prohibition of retroactive laws and thus by the prohibition of the application of the Convention to acts committed before its entry into force. Nonetheless, if, under international law, the principle is that treaties have no retroactive force, this rule nonetheless fails to be absolute and some limitations do apply, notably in the case of genocide and even if the Genocide Convention remains silent on the matter. For instance, Article 15 of the International Covenant on Civil and Political Rights which deals with the Prohibition of Retroactive Criminal Laws expressly makes an exception to the general principle in the following terms:

1. No one shall be held guilty of any criminal offence on account of any act or omission

21 Under French law, murders were prescribed 20 years after their commission. In other words, after 20 years, no trial for any of the crimes perpetrated during the Second World War could take place.

22 See loi n° 64/1326 du 26 décembre 1964 dispose en effet: '*Les crimes contre l'humanité, tels qu'ils sont définis par la résolution des Nations Unies du 13 février 1946, prenant acte de la définition des crimes contre l'humanité, telle qu'elle figure dans la charte du tribunal international du 8 août 1945, sont imprescriptibles par leur nature.*' See Article 213–5 of the Nouveau Code Pénal.

23 Article 213–5. 'L'action publique relative aux crimes prévus par le présent titre, ainsi que les peines prononcées, sont imprescriptibles.'

which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, following the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It seems clear that the 'general principles of law recognized by the community of nations' do encompass the prohibition of genocide (see Nowak, 1993, p.276), although it could also be argued that this prohibition stems from international rules of international customary law and is therefore covered by the reference to 'international law' in Article 15(1) rather than by Article 15(2) (see Cassese, 2006, pp.414–15). And, in fact, this reference to 'international law' in Article 15(1) is attributable to proposals by Uruguay *and France*, who argued that it would prevent persons responsible for the commission of international crimes to evade punishment by simply pleading that their offences were not punishable under the domestic law of their state(s).[24] In other words, France expressly showed its attachment to the punishment of international crimes and, in this respect, adopted a proactive approach, in phase with its obligations under international law. In such circumstances, it would be doubtful that France would see any legal obstacle in the application of Article 15 with respect to the Genocide Convention. As a matter of fact, this would be even more doubtful considering the fact that Article 7 of the European Convention on Human Rights – to which France is a party[25] − reiterates the content of Article 15 of the ICCPR in nearly the exact same terms:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Far from bring a purely theoretical hypothesis, it can be recalled here that the French Cour de Cassation itself expressly recognized the applicability of both Article 15(2) of the ICCPR and Article 7(2) of the ECHR to crimes perpetrated during the Second World War.[26]

---

24 See E/CN.4/SR.112, 5 ff.; A/2929, 45 (§94). Footnote in original.

25 France signed the ECHR on 4 November 1950 and subsequently ratified it on 3 May 1974.

26 *Barbie* case, cass. crim., 6 October 1983, Reproduced in Lyon-Caen (1988, pp. 52–3).

Genocide Qualified as a Crime against Humanity

The memory of the genocide perpetrated during the Second World War was very long to emerge in France, and the first ever trial which dealt effectively with this genocide was that of Klaus Barbie.[27] For the first time, the Shoah was at the heart of the legal debates. The trial of Barbie was subsequently followed by those of Paul Touvier, active member of the French Milice, Maurice Papon, former high civil servant responsible for the deportation of French Jews, and Aloïs Brunner.[28]

Most surprisingly, all those who stood accused for their participation in the Shoah were not charged with genocide – even though, as we have seen, it could have legally been the case – but with crimes against humanity. If, in theory, one could argue that crimes against humanity and genocide do cover the same reality, genocide being an aggravated form of crimes against humanity, the consequences of this amalgam in practice were far more important, not only regarding the law but also regarding the collective memory of the Shoah. The following discussion will thus analyze the practice of French courts regarding genocide and their reluctance to apply the Genocide Convention in spite of the fact that, as previously demonstrated, the Convention was applicable in France by French courts as soon as it had entered into force.

The trial of Klaus Barbie, as being the first trial in France dealing directly with the genocide perpetrated in France during the Second World War, is extremely interesting as it is very symptomatic of the reluctance of French courts to apply the Genocide Convention. If Klaus Barbie, chief of the Gestapo in Lyon, also known as 'the butcher of Lyon', owed this sinister reputation to his fierce and relentless struggle against *Résistance* fighters, he was also responsible for the deportation of Jews and an active participant in the Shoah.[29] He was nonetheless charged with crimes against humanity and not with genocide.

---

27 If numerous trials were held in the aftermath of the Second World War, they were based on Article 75 of the French Penal Code, which dealt with the crimes of treason and of intelligence with the enemy.

28 Aloïs Brunner was tried *in absentia* by the cour d'assises of Paris on 2 March 2001. He was charged with, and found guilty of, crimes against humanity for the following acts committed between 21 July 1944 and 4 August 1944: illegal arrests and confinements of 352 children, 345 of whom were deported; complicity of murders and/or attempted murders against 284 children, all of whom were murdered in Auschwitz-Birkenau and Bergen-Belsen. The youngest, Alain Blumberg, was 15 days old; the oldest was 18 years old. Brunner was sentenced to life imprisonment, although nobody knows whether he is still alive.

29 Klaus Barbie had already been tried by French courts *in absentia*. He was tried in 1952 and again in 1954 and sentenced to death for his participation in more than 4,000 killings and in the deportation of more than 7,000 Jews to concentration camps. Barbie managed to evade justice for nearly 40 years, and was supposedly supported by American intelligence officers who sought his assistance in anti-Soviet intelligence. In 1951, he emigrated to Bolivia and, under the name Klaus Altmann, he acquired Bolivian citizenship in 1957. After being discovered by Serge and Beate Klarsfeld in 1971, Barbie was extradited to France. His trial

As the court of appeals of Lyon acknowledged – and rightly so – the clear differences between crimes committed against *Résistance* fighters and crimes committed against Jews, it logically established two distinct qualifications for these two distinct types of crimes. Nonetheless, it is precisely in its legal qualifications of the crimes that the court erred and that the case started on the wrong basis. And indeed, as the court of appeals qualified crimes against *Résistance* fighters as war crimes and crimes against Jews as crimes against humanity, the debate incorrectly focused on the distinction between these two sets of crimes. As the qualification of war crimes entailed in practice the impossibility of trying Barbie for his crimes against *Résistance* fighters due to the application of statutory limitations to such crimes. Such illegitimate and unacceptable impunity did not go unnoticed and the court of appeals subsequently struggled to apply the distinction it had itself created. The limits of this distinction rapidly emerged when the court had to qualify the crimes perpetrated by Barbie against a Jewish *Résistance* fighter, Professor Gompel. In this particular case, the court explained that:

> Barbie could have thought that he was a Resistance fighter and, therefore, the presumption of innocence must apply here. We must consider, by presumption, that he was a non-innocent Jew and that the tortures Gompel had to endure fell within the statutory limitations applicable to war crimes.[30]

In other words, pushing its distinction to the extremes, the court, to exclude all *Résistance* fighters from the scope of application of crimes against humanity, defined Jews who were also members of the *Résistance* as 'non-innocent' Jews. If it does appear, from a close reading of the case, that the court equated 'innocent' with 'inoffensive' and 'non-innocent' with 'offensive', the least that can be said is that the choice of terminology is most unfortunate. Faced with such an unsustainable distinction between Barbie's victims, the Cour de Cassation famously quashed the decision of the lower court and, by a ruling of 20 December 1985, put an end to the debate by extending the notion of crimes against humanity in order for it to encompass crimes committed against fighters of the *Résistance*:

> Constitute imprescriptible crimes against humanity, according to Article 6(c) of the Charter of the International Military Tribunal at Nuremberg, appended to the London Charter of 8 August 1945, and even if they also qualify as war crimes, according to Article 6(b) of this same text, inhumane acts and persecutions which have been systematically committed, in the name of state practising a policy of ideological supremacy, against individuals by reason of their belonging to a racial or religious community as well as

---

lasted from 11 May 1987 to 4 July 1987. He was sentenced to life imprisonment and died in prison on 25 September 1991.

30 The original version reads as follows: 'Barbie a pu penser qu'il était résistant, par conséquent la présomption d'innocence qui joue en sa faveur doit jouer là, et l'on doit considérer, par présomption, que c' était un juif non-innocent et que les tortures qu'on a fait subir à ce malheureux Gompel étaient couvertes par la prescription des crimes de guerre.' Lyon-Caen (1988, p.55).

against the adversaries of this policy, whatever the form of their opposition – whether armed or not.[31]

Legally speaking, this meant that, under French law, crimes against humanity were no longer defined by the nature and the quality of the victim but by the nature of the acts and the ideological identity of their author. If this decision has to be welcomed as it rightly recognized and qualified crimes against *Résistance* fighters as crimes against humanity and as, in so doing, it correctly applied the concept of crimes against humanity as defined in the Nuremberg Charter, this finding is nonetheless highly questionable. And indeed, by applying the same legal qualification to both crimes against Jews and crimes against fighters of the *Résistance*, this decision blurred the distinction between these two crimes. If crimes against *Résistance* fighters were unquestionably crimes against humanity, crimes against Jews were – equally unquestionably – genocide and, by failing to establish the right distinction between the crimes, the Cour de Cassation here reached an incorrect decision and subsequently repeated its mistake in both the *Touvier* case and the *Papon* case, thus yet again failing to adequately qualify the destruction of the European Jews as genocide. As will now be demonstrated, this incorrect finding, both in law and in fact, in turn triggered an inadequate and chaotic collective memory of the crime. The legal misunderstandings ultimately shaped the collective uncertainties in the social memory of the Nazi crimes.

The Consequence of the Legal Amalgam between Crimes against Humanity and Genocide: The Equalization of the Crimes and of the Victims

As previously stressed, the problem in the *Barbie* case was that the different decisions were based on the incorrect presupposition that crimes against *Résistance* fighters were to be qualified as war crimes. And indeed, by subsequently qualifying such crimes as crimes against humanity, the Cour de Cassation, far from rendering a revolutionary decision, merely applied Article 6(c) of the Charter of the Nuremberg Tribunal[32] on which the French notion of crimes against humanity was based. Article 6(c) gave a definition of 'crimes against humanity' as being:

---

31 Translation by the author. The original version reads as follows: 'Attendu que constituent des crimes imprescriptibles contre l'humanité, au sens de l'article 6 (c) du Statut du Tribunal militaire international de Nuremberg annexé à l'accord de Londres du 8 août 1945, alors même qu'ils seraient également qualifiables de crimes de guerre, selon l'article 6 (b) de ce texte, les actes inhumains et persécutions qui, au nom d'un Etat pratiquant une politique d'hégémonie idéologique, ont été commis de façon systématique, non seulement contre des personnes en raison de leur appartenance à une collectivité raciale ou religieuse, mais aussi contre les adversaires de cette politique quelle que soit la forme de leur opposition – autrement dit forme armée ou forme non-armée.' See Lyon-Caen (1988, p.56).

32 The Charter was appended to the London Agreement of 8 August 1945; the Nuremberg Tribunal was thus established by a treaty, originally signed by the four major Allies and subsequently acceded to by nineteen states. These were Australia, Belgium, Czechoslovakia,

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on *political*, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[33]

In other words, right from the beginning, crimes against *Résistance* fighters should have been qualified as crimes against humanity, by direct application of Article 6(c) of the Nuremberg Charter. The crimes committed against them were nothing else as they went far beyond the concept of war crimes – so far that they ended in concentration and extermination camps, where the process of annihilation and destruction of the human being was the same for every detainee, whether racial or political. The crucial difference was, however, that *Résistance* fighters and political opponents actually chose to resist and fight an oppressive system while Jews were exterminated with their whole family; not only were they never given a choice, but they also had to suffer the horror of witnessing the genocide of their loved ones. This is the difference that the French courts should have established and acknowledged by qualifying crimes against Jews as genocide. As Frossard so poignantly wrote,

> The arrested opponent went alone to Dachau. Alone with his greatness, with his nobility.
>
> The little boy marked with the yellow star went to Auschwitz with his family ….
>
> No, it is not the same violence to track down the Résistance fighter and the child from Izieu, who is still hope and promise of life.
>
> The clandestine fighter knew the risks he was taking.
>
> The child from Izieu did not know he was unwelcome on the Earth where he had, for a while, the authorization to play ….
>
> The opponent could cease his opposition.
>
> The Jew could not cease to be Jewish (1997, pp.68–9).[34]

Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

33 Bassiouni (1992, p.1). Emphasis added.

34 Translation by the author. The original version reads as follows: 'L'opposant arrêté allait seul à Dachau. Seul avec sa grandeur, avec sa noblesse. Le petit garçon marqué de l'étoile jaune allait à Auschwitz avec sa famille …. Non, ce n'est pas la même violence de traquer le résistant et l'enfant d'Izieu, qui n'est encore qu'espérance et promesse de vie. Le combattant clandestin savait à quoi il s'exposait. L'enfant d'Izieu ne savait pas qu'il était de trop sur la terre où il avait eu, quelque temps, la permission de jouer …. L'opposant pouvait cesser de s'opposer. Le Juif ne pouvait cesser d'être juif.'

The purpose here is certainly not to establish a hierarchy between different crimes and different victims, but merely to establish a distinction: no crime is more serious than another; it is simply different. The Nazis had established a system which hierarchized and prioritized degrees of 'exterminability', notably between 'racial' and political prisoners and it is these different degrees that the French Cour de Cassation should have acknowledged by simply applying the law and, therefore, by qualifying the destruction of European Jews as genocide.[35] By failing to adequately qualify the facts, the Cour de Cassation proceeded to a merging of all the different victims of Nazism and ignored the specificity of each crime and of each victim. The *Barbie* case, which received intense media coverage, could have been a major opportunity for the court to ascertain the specificity of the crime of genocide, and most particularly of the genocide perpetrated by the Nazis against the Jews of Europe. Far from it, the confusion created by the court itself between all victims of Nazism has heavily contributed to shape the collective memory of the crimes, a collective memory which is thus uncertain and which fails to remember the specificity of each crime and the uniqueness of each victim.

Furthermore, by confirming this position in both the *Touvier* case and the *Papon* case, thus maintaining the qualification of crimes against humanity for crimes perpetrated against Jews, the Cour de Cassation failed to remedy to the confusing legacy of the *Barbie* case. It is true that, in these two particular cases, as the individuals accused were French nationals, the exclusion of the qualification of genocide could be seen as very symptomatic of the will of French judges not to link in any way crimes perpetrated by Vichy France with genocide.[36] And indeed, had the Cour de Cassation applied the qualification of genocide to crimes perpetrated in the context of the Second World War, both Touvier and Papon – and through them Vichy France – would have been found guilty of at least complicity of genocide. If the mere recognition of complicity would still be far beneath the historical truth, the policy of Vichy France had still been legally linked with a genocidal policy and not only would this have been closer to the historical truth, it would also have been essential in terms of collective memory and of remembrance of the victims.

35 See Coquio (1999, p.47).

36 In this respect, see *Touvier* case, chambre d'accusation de Paris, 13 April 1992. This judgment indeed reached the paroxysm of bad faith when it described Vichy France in the following terms: '[A] Vichy ne régnait pas une idéologie précise' [No precise ideology reigned in Vichy], and by finding that Vichy was 'une constellation de "bonnes intentions" et d'animosités politiques' [Vichy was a constellation of 'good intentions' and political anmosities]. Translation by author.

Chapter 10

Legal Memory: Its Impact on the Social and Collective Memory of the Crime

> It is for the dead, but also for the survivors, and even more for their children – and yours – that this trial is important: it will weigh on the future. In the name of justice? In the name of memory. Justice without memory is an incomplete justice, false and unjust.
>
> Élie Wiesel, Testimony at the Barbie Trial (1990, p.187).

Reflection on the Importance of Trials and of Testimonies

This chapter explores the question of the importance of trials of genociders, trials in which witnesses and victims, it is argued, should play a primary and decisive role. This does not in any way presuppose that trials do not have some major flaws and that relying on witnesses might not be problematic, but, as will be highlighted, trials for genocide remain essential tools to build up the social collective memory of the crimes perpetrated, to acknowledge the crimes and their victims, and ultimately to prevent them from being denied and perpetrated yet again.

The trials which have been held with respect to the crime of genocide and which received intense media coverage due to their importance were the trials dealing with the crimes perpetrated during the Second World War. As the purpose of this analysis is to highlight the impact of trials – the impact of the legal memory of the crime – on collective memory, the focus will be on these trials. This is not to say that other trials for genocide did not occur regarding other instances of genocide, but it is precisely to argue that had such other trials put the emphasis on victims as both victims and witnesses and on their testimonies, they might have attracted collective attention and, in turn, triggered a memory effort on the part of society as a whole. Does the general public know of Jean-Paul Akayesy? Does it know of Radislav Krstić? Precisely because there were no trials, or because these trials relegated victims and witnesses to the second level, these genocides failed to enter collective memory as much as the destruction of the European Jews did, even if – as we have seen – sporadically and chaotically. In other words, it is argued here that the very foundation of the memory of the Shoah was the trials themselves.

This assertion does not however mean that law and judicial processes have no shortcomings, the first one being that, even if they can serve as vectors of memory – as for the Shoah – they do not constitute a warranty for infallibility of this memory. Nonetheless, their absence is, infallibly, an obstacle to the construction of memory,

if not to say a warranty for amnesia. In any event, trials raise some serious questions as to the role of the judges and of the courts as well as to the role of witnesses and victims. And indeed, are the courts entitled to dictate History? Is it legitimate for judges to act as historians? As a matter of fact, there can be conflicts between what is being said in the course of a trial and the historical truth, if only because trials deal with the individual criminal responsibility of one perpetrator and thus focus on some clearly restricted elements rather than on the whole event. In this respect, a sharp criticism was expressed by Arendt who, in *Eichmann in Jerusalem*, had argued that 'the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – "the making of a record of the Hitler regime which would withstand the test of history" … − can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment' (1963, p.253). If this criticism has to be taken into account, it must nonetheless be expressly moderated by the fact that, as the subsequent analysis will highlight, most of the trials and their judicial documents actually constituted priceless and unprecedented historical archives.

Other doubts and criticisms were raised with respect to victims and witnesses and it must indeed be acknowledged that the recording of History cannot solely rely on individual, and not always reliable, testimonies. Nonetheless, it is submitted here that witnesses are an essential part of these trials if such trials are to bring about collective interest for, and memory of, the crime of genocide. And indeed, the fact that, within the contexts of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda respectively, victims are not strictly speaking parties to the trials but merely potential witnesses probably explains why the trials held in these arenas fail to attract general interest worldwide. For instance, the perpetrators of the Rwandan genocide remain unknown to the general public. The importance of witnesses and of testimonies of victims as victims in such trials does not mean that the courtroom will turn into a legal farce in which 'witnesses have the right to be irrelevant',[1] for the simple reason that there cannot be an 'irrelevant testimony' from victims of genocide. So the victims, or their descendants, may deviate slightly while answering the question, notably by making reference to the loved ones they lost or by asking their pictures to be publicly shown on the screen – this does not appear too great an expectation and, if the court does tolerate this 'irrelevance', what is so wrong with it? If showing a picture or reading out a few names may somehow help the victims in healing their wounds, then the trial will have been useful. And ultimately, the 'irrelevance' argument should be handled with care and should not be overestimated. As Frossard rightly stressed regarding the trial of Barbie, in such cases, time does not alter the memories of the victims at all. In some instances, time clearly has no healing power:

> This trial was necessary so that all the youth, remarkably disposed to welcome the truth, finally heard it and left definitely without response the miserable revisionist discourse throwing its shovelful of sarcasms on the peat of so many dead.

1 This quote refers to *Yad Vashem Bulletin*, as quoted in Arendt (1963, p.225).

> And with the youth, history and morality needed to hear once more, before they are also taken away, the last witnesses of the greatest dehumanization enterprise of all times. Do not believe that these ageing witnesses might not have a clear perception of what they have been through. Do not believe this. Time can do nothing on some memories (1997, p.42).[2]

The importance of trials does not mean that memory must be based solely on judicial episodes because this would imply that memory would be impossible without trials and that, in any event, memory would vanish with the death of the perpetrators. Trials cannot be the only vector for memory but they are an essential part in the construction of this memory. If one considers the case of the Armenian Genocide for which the perpetrators went free and evaded trial, it is true that the memory of the crime is now celebrated in several countries but this celebration is extremely recent considering the fact that the genocide occurred in 1915. This memory took such a long time to emerge precisely because of the lack of trials – and ultimately this memory probably surfaced much too late for the survivors to see the crimes perpetrated against them and their loved ones recognized and acknowledged.

Ultimately, it is submitted here that the criticisms expressed as to the importance and reliability of trials as effective tools for generating collective social memory of the crime are not very convincing. The only real limit to the trials for genocide has been expressed by Arendt, in a letter she wrote to Jaspers on 17 August 1946:

> The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug. They know that, of course. And just as inhuman as their guilt is the innocence of the victims. Human beings simply can't be as innocent as they all were in the face of the gas chambers …. We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime and an innocence that is beyond goodness and virtue.[3]

---

2 Translation by the author. The original version reads as follows: 'Ce procès était nécessaire pour que toute une jeunesse, remarquablement disposée à accueillir la vérité, l'entendît enfin, et laissât définitivement sans écho le misérable discours du révisionnisme jetant sa pelletée de sarcasmes sur la tourbe de tant de morts. Et avec la jeunesse, l'histoire et la morale avaient besoin d'écouter encore une fois, avant qu'ils ne fussent emportés à leur tour, les derniers témoins de la plus grande entreprise de déshumanisation de tous les temps. Que l'on ne croie pas que ces témoins vieillis n'ont peut-être plus une vue très nette de ce qu'ils ont vécu. Que l'on ne croie pas cela. Le temps ne peut rien sur certains souvenirs.'

3 Köhler, Lotte and Saner, Hans (eds), *Hannah Arendt / Karl Jaspers: Correspondence 1926-1969*; translated by Robert Kimber and Rita Kimber (1992), (New York: Harcourt Brace Jovanovich). Reproduced in Friedländer, (2001, p.275).

The ultimate and unavoidable limit to all trials for genocide is thus neither the pseudo-problematic role of judges nor the lack of accuracy of victims and witnesses; it is simply the fact that, in the words of Arendt, 'no punishment is severe enough'.

Trials as the Cornerstones of Social and Collective Memory of the Crime of Genocide

> By its dramaturgy, justice has the power, in the course of the debates, to arouse intensely consciousness of what has happened, of the horror of the crime itself. Because it directly questions consciences, because it obliges them to interrogate on the crime in order to determine its sanction, justice allows for the measurement of a criminal past and inscribes it in collective memory.[4]
>
> Robert Badinter (in Chalandon and Nivelle, 1998, p.VII)

As previously analyzed in the present book, in the direct aftermath of the war, victims of the Shoah were silenced and unheard. Such a lack of interest in the victims stands in sharp contrast with the current social situation in which testimonies and survivors' stories seem to generate great interest, and in which memory of the crimes perpetrated by the Nazis against the Jews of Europe appears to be omnipresent in the press, on television (through the airing of numerous documentaries), in Hollywood movies, in fiction as well as in commemoration events reuniting the political elite of different countries, and in the erection of monuments celebrating the memory of the victims. This shift in social attitude, this building-up of collective memory and interest, did not happen unexpectedly and it is argued here that this general recognition of the crimes and of the victims was accelerated by, if not in fact completely due to, the trials of the perpetrators which, despite their flaws and their weaknesses, proved essential landmarks in the construction of collective memory. In other words, the legal memory triggered and generated the collective memory generated, and this argument in itself suffices to justify unconditional support for such trials.

The starting point in the emergence of the collective memory with respect to the destruction of the European Jews was undoubtedly the trial of Adolf Eichmann. Wieviorka has analyzed the phenomenon and has expressly linked the evolution of the memory of the Shoah with the occurrence of the different trials. According to her,

> The Eichmann trial, this 'Nuremberg of the Jewish people', according to the expression employed by Ben-Gurion, Prime Minister of the Hebrew State, was one of the key

4 Translation by the author. The original version reads as follows: 'Par sa dramaturgie même, la justice a le pouvoir, au cours des débats, de faire prendre intensément conscience de ce qui est advenu, de l'horreur même du crime. Parce qu'elle interpelle directement les consciences, qu'elle les force à interroger sur le crime pour en déterminer la sanction, la justice fait prendre la mesure d'un passé criminel et l'inscrit dans la mémoire collective.'

> moments, one of the founding elements in the emergence of a real memory of the genocide, in Israel and in the rest of the world (14 April 2003).[5]

She further explained that

> The Eichmann trial marks a pivotal moment in the history of the memory of the genocide, in France and the United States as well as in Israel. It opens a new era, in which the memory of the genocide becomes central to the way many define Jewish identity, even as the Holocaust demands to be admitted to the public sphere. Scholars from various countries who have studied the evolution of the construction of memory have all noticed this shift (2006, p.56).[6]

Adopting a similar view, Douglas also stressed that the *Eichmann* trial was understood, notably by Segev,

> 'principally as "national group therapy", a ritual of national catharsis in which a collective public space was made available in which to grieve for traumatic private memory.'[7] Until the trial, Segev observes, the survivor experience was very much a suppressed fact of Israeli social and cultural life, one that conjured the despised history of the Jew as hapless victim and thus conflicted with the emerging national identity of the Israeli as a self-sufficient warrior. Survivors' memories, often enveloped in pain and shame, were secreted away, denied public or even private expression (2001, p.109).

This first landmark in the building up of the memory of the Shoah was not only due to the crimes perpetrated by the accused; it was also due to the whole organization of the trial whose first acknowledged aim was to serve as an educational tool for generations to come. As a matter of fact, this willingness to give an educational dimension to the trial could also be found at Nuremberg and, as Douglas recalled,

> Robert M.W. Kempner, a junior prosecutor at Nuremberg, called the Nuremberg trials the 'greatest history seminar ever held in the history of the world',[8] [while] Sir Hartley Shawcross, the British chief prosecutor, echoed this idea, declaring that the Nuremberg tribunal would 'provide … an authoritative and impartial record to which future historians may turn for the truth'.[9] Many important histories of the Holocaust, such as Raoul Hilberg's

---

5 Translation by the author. The original reads as follows: 'Quant au procès Eichmann, ce "Nuremberg du peuple juif", selon l'expression du premier ministre de l'Etat hébreu, Ben Gourion, il fut un des moments-clés, un des événements fondateurs de l'émergence d'une véritable mémoire du génocide, en Israël et dans les autres pays du monde.'

6 To cite only a few examples: Tom Seguev for Israel in *The Seventh Million*; Rochelle G. Saidel for the United States in *Never Too Late To Remember*; Annette Wieviorka for France, 'Autour d'Auschwitz', in *Allemagne France, Lieux de mémoire d'une histoire commune*, eds Moritz, J. and Müller, H., Paris: Albin Michel, pp.187–205. Footnote in original.

7 Segev *The Seventh Million*, p.351 in Douglas (2001, p.09).

8 Quoted in Buruma, *The Wages of Guilt*, pp.144–5. Kempner was referring to both the trial of the major war criminals and the subsequent trials of Nazi criminals before American courts. Footnote in original.

9 *Nuremberg Judgment*, vol. 3, p.92. Footnote in original.

> *The Destruction of the European Jews*, could not have been written without the massive archive of documentary material assembled through Nuremberg's act of legal discovery (2001, p.2).

Nonetheless, unlike Nuremberg, the *Eichmann* trial did not heavily rely on documents but rather put the emphasis on victims and witnesses, giving them a predominant role to play. The purposes of this trial were to generate interest among the Israeli population as a whole, and among the Israeli youth in particular, for the crimes perpetrated during the Second World War and, to this end, to trigger a process of identification with the victims (Wieviorka, 2003). In this context, it may be noted here that the *Eichmann* trial was the first ever trial to be broadcast live on the radio in Israel and on television in other countries.[10] Nonetheless, and notwithstanding the admitted educational vocation of the trial, the criticisms it generated in this respect were, it is here argued, exaggerated and ill founded. And indeed, the District Court of Jerusalem itself was unequivocal in expressly stating that the primary purpose of this trial was to try a man and that its educational impact was to be considered only as a 'by-product':

> the path of the court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law and these do not change, whatever the subject of the trial may be …. These … remarks do not mean that we are unaware of the great educational value implicit in the very holding of this trial … to the extent that this result has been achieved in the course of proceedings it is to be welcomed … but as far as this court is concerned, they are to be regarded as by-products of the trial.[11]

Even if it was therefore only a 'by-product' of the trial, a great educational value was achieved – without however departing from the traditional aims of the judicial process – notably through the hearing of numerous victims' testimonies and of witnesses' stories. While Nuremberg had focused on written documents and while only very few witnesses were called to testify (Wieviorka, 2006, p.67), the *Eichmann* trial was the first ever instance in which the indictment was based on factual evidentiary tools and on testimonies. Ultimately, in the words of Haïm Gouri, the witnesses *were* the facts:

> Nor did the numerous witnesses come to add to the accumulation of suffering and rage. They testified in order to illuminate the destruction in all its detail …. They were the very center of the trial, because they served as faithful proxies of the Holocaust. They were the facts (in Wieviorka, 2006, p.85).

---

10 The trial was not broadcast live on Israeli television due to a lack of infrastructure. Later on, the *Demjanjuk trial* was broadcast live on Israeli television.

11 *Attorney-General of the Government of Israel v Eichmann*, 36 ILR 5 (Israel District Court – Jerusalem, 1961), at para. 2.

Following the *Eichmann* case and the emergence of tremendous collective interest in the crimes perpetrated by the Nazis, the memory of such crimes had to overcome a rather major obstacle which, it has to be recognized, took the form of a failed trial. And indeed, the judicial mistake in the trial of John Demjanjuk for the crimes he committed as Ivan the Terrible proved to be a serious setback in the construction of the collective memory of the crime and in the faith public opinion had in trials. As in the *Eichmann* case, the court had intended to turn this case into a 'Monument' in memory of the victims. As Douglas recalled, the court had indeed entitled a whole section of its judgment 'A Monument':

> 'We shall erect in our judgment, according to the totality of the evidence before us, a *monument* to their [the victims'] souls, to the holy congregations that were lost and are no more, to those who were annihilated and did not receive the privilege of a Jewish burial because hardly a trace remained of them, to those who were burned on the pyre and whose skeletons became ashes and dust, used to fertilize the fields of Poland, which they made fertile when alive, and on which they found their horrible death.'[12] The aims of commemoration could not have been made more explicit, as the court's secular judgment assumed the tones of a religiously inspired eulogy (2001, p.187).[13]

The *Demjanjuk* trial also greatly evolved around testimonies, so much so that it was precisely the reliance on testimonies that led to the conviction of Demjanjuk who was sentenced to death (Douglas, 2001, pp.96–7). Nonetheless, in the course of the appeals procedure, it appeared that there had been two camp guards known as Ivan, one in Sobibór and one in Treblinka, and that John Demjanjuk was not Ivan the Terrible from Treblinka, but 'merely' Ivan from Sobibór. As Douglas explained,

> The process of appeal concomittent with the collapse of the Soviet Union and the new emerging information suggested that there had been two Ukrainian Ivans, one at Sobibór and one at Treblinka. Ivan the Terrible had been one Ivan Marchenko. This new information did not exculpate Demjanjuk as it strengthened the conviction that he had served at Sobibór, it still casted doubt on whether Israeli justice was about to execute the right man as Ivan the Terrible. Consequently, in July 1993, the Israeli Supreme Court overturned Demjanjuk's conviction (2001, pp.96–7).

The problem here is that, far from remembering that Demjanjuk was still a blood-thirsty criminal known as Ivan in Sobibór, collective memory selectively chose to recall the unreliability of victims, witnesses and judges. The fact that the trial documents constituted great historical archives on Treblinka which could serve an educational purpose was completely omitted and cast aside by collective memory. And although, in the words of the Supreme Court, 'the district court's verdict is not only a legal document, but also an historical and educational document of great

12 Criminal case (Jerusalem) 373/86, *The State of Israel v Ivan* (John) *Demjanjuk* (Tel Aviv, Israel Bar Association, 1991), p. 39 in Douglas (2001, p.187).

13 Emphasis added.

significance',[14] what remains in the collective mind is the unreliability of victims and of witnesses. According to Douglas,

> The Demjanjuk trial … volatilised memory. It meant, of course, to do just the opposite: to demonstrate that the living memory of survivors continues to constitute the ultimate bulwark against the spread of negationist lies …. Unfortunately, the strategy backfired terribly. By revealing the foibles of such memory – its vulnerability to suggestion and misidentification – the trial unintentionally invited negationists to attack the larger truths contained in survivor narratives. Such was the fatal logic of the trial court, which insisted on linking the accuracy of the identifications with the veracity of memories of the camp …. A cautionary tale, the opinion of the lower court stands as a reminder of the perils of relying on the legal process as a means of safeguarding and memorialising traumatic history (2001, 209–11).

It is very true that the strategy aimed at 'constitut[ing] the ultimate bulwark against the spread of negationist lies … backfired terribly' (*ibid.*), but this was one particular instance and it is still maintained here that trials are one of the key elements in fighting against denial as well as in preventing dangerous amalgams minimizing the horrors of the crime of genocide. This is the reason why the legal qualification of genocide as genocide is so crucial and why the French case-law which equated genocide with crimes against humanity is highly problematic because, in collective memory, the crime will stay as one against humanity and will not bear the stigma of the word 'genocide'. In other words, even when trials actually occur, the negationist risk is still very real, encouraged either by mistakes – as in the *Demjanjuk* case – or by the failure to adequately qualify the crime – as in the French cases. Needless to say, that when trials do not take place at all, the impunity granted to the perpetrators is much more likely to be perceived in public opinion as an acknowledgement of the fact that the crime was not committed in the first place and deniers will thus see their legitimacy among society in general dramatically increased. It must indeed be borne in mind that, in most democratic states, the concept of justice is based on the ancestral principle *res judicata pro veritate habetur* – what is tried must be considered as the truth – and the authority of judicial rulings thus has a normative value and an important symbolic power. Conversely, the absence of judicial rulings bears exactly the same symbolic force.

The impact of the legal recognition, and thus of the legal memory, of the crime of genocide on shaping collective memory and remembrance of the crime lies precisely in the recognition of the victims. And indeed, by legally qualifying the crime of genocide as genocide, trials would simultaneously acknowledge the status of victims as victims. Far from being a purely theoretical issue, this direct consequence of trials of genociders is crucial for victims and for their descendants. Because genocide is precisely nothing but the denial of the victims' identity, dignity and humanity, victims of genocide want justice not only to see the perpetrators punished but also to

14 Criminal Appeal 377/88. *The State of Israel v Ivan (John) Demjanjuk*: Judgment of the Supreme Court of Israel (Jerusalem: Supreme Court, 1993) p.7 in Douglas (2001, p.210).

be recognized as victims through the official public recognition of the perpetration of the crime.[15] In the course of such trials, and therefore of the recognition of victims as victims, it is also argued here that it is essential for those victims who wish to do so to be able to testify; whether for individual purposes – testifying might somehow help them to exorcize their pain and to heal their wounds – or for collective reasons – they might feel that their testimonies will ultimately reinforce, if not ensure, the collective memory of the crime.

The importance of trials in the recognition of the crime and of its victims is further enhanced by the highly symbolic places in which they take place and in which testimonies are told and – probably for the first time – actually listened to. In the words of Wieviorka,

> The witnesses told their own stories and that is what gave weight to their words. The extraordinary force their words acquired can also be attributed to the place where they were pronounced, which gave them a political and social significance no book could confer. Their political dimension lay in the fact that the state, represented by the prosecutor, underwrote their testimony and thus lent it all the weight of the state's legitimacy and institutional and symbolic power. The witnesses' words attained a social dimension because they were uttered before judges whose responsibility it was to acknowledge the truth they contained and because they were relayed to the world media as a whole. For the first time since the end of the war, the witnesses had the feeling that they were being heard (2006, p.84).

The importance of being able to testify in the course of a trial most certainly explains the huge number of voluntary witnesses who wished to testify at the *Eichmann* trial, in the course of which 111 witnesses had been called to testify (Wieviorka, 2006, pp.73–86). As Wieviorka further explained, with the *Eichmann* trial, witnessing victims, survivors, were enabled to acquire their social identity as survivors and to be recognized as such by society as a whole:

> In contrast, with the Eichmann trial the survivors acquired the social identity of survivors because society now recognized them as such. Before the Eichmann trial, the survivors, at least those who so desired, maintained this identity in and for the organizations they themselves had formed. These organizations created a communal life closed in on itself, serving both to honor the memory of the dead and to maintain social ties among people who had lived through the same experiences … (2006, p.88).

And, even further, not only does testimony re-establishe the identity of the survivors; it also re-establishes 'the identities of the descendants of those who died without graves, by allowing them to imagine the circumstances of their relatives' deaths and thus to begin the work of mourning' (Wieviorka, 2006, p.128). It is submitted here that only trials, and testimonies given in the course of such trials, can actually reintegrate the victims – survivors or not – into society and collective memory. Without trials, without a condemnation from a judicial – and somehow moral –

15 See Garapon (2002, p.205).

instance representing society as a political entity, the social recognition of victims as victims will be, if not impossible, at least greatly impeded (Garapon, 1999, p.120). Herein lies the importance of adequately defining the crime: it is not enough to hold trials and to call victims to testify, the crime needs to be appropriately determined. Without such determination, trials leave a door open for denial.

In other words, even in instances where genociders are tried, if their crimes are not legally qualified as genocide but as crimes against humanity, they will fail to stay in collective memory as genocide. One could argue here that the importance of this distinction fails to convince and that, as long as genociders are actually tried and as long as society as a whole remembers the crime perpetrated, their legal qualification bears little importance. Such an assertion, however, raises a series of problems.

The first problem is a purely legal concern as the concept of qualifying a genocide as a crime against humanity, in spite of the fact that 'genocide' exists as a legal qualification, is a legal non-sense, if not to say a legal heresy. There are perfectly good and valid reasons justifying the fact that there are different international crimes recognized under international criminal law and to indiscriminately 'pick and choose' among them amounts purely and simply to ignoring international criminal law as a whole. Crimes against humanity and genocide, although they do share some similarities, are intrinsically different, notably due to the fact that, as previously demonstrated, genocide relies on a very specific intent to destroy the group as such and on a dehumanization and racialization process orchestrated by the criminals. To qualify genocides as crimes against humanity denies the specific features of both crimes and it is precisely this specificity which will be lost if genocide and crimes against humanity are used interchangeably.

The second problem relates to the impact of this loss of specificity on collective memory. If genocides are qualified as crimes against humanity, they will be remembered by society as a whole as crimes against humanity and not as genocides. As previously analyzed, the French case-law is extremely symptomatic of this amalgam between these two distinct legal qualifications and, as a result, all Nazi crimes are remembered in the same way, regardless of the identity of the victims. This equalization of the crimes and of the victims generated by the confusion between crimes against humanity and genocide means that both crimes have been totally deprived of their specific and unique traits and the memory of these crimes is thus based on a two-fold mistake, a mistake of fact and a mistake of law. As a result and as previously mentioned, the French trials could be seen as counter-productive in that they failed unequivocally to establish the specificity of the crime of genocide. Of course, this is not to say that such trials were completely useless in terms of memory. For instance, the trial of Klaus Barbie ultimately served the most noble of purposes: it gave back their identities to Barbie's victims. Thanks to this trial, the victims entered the courtroom and, simultaneously, entered collective memory. If anything, French society now knows and remembers the 44 children of Izieu who, on 6 April 1944, were arrested by Barbie and his henchmen and sent to their death. In this respect, it seems here both opportune and crucial to acknowledge the work of one of the lawyers of the *parties civiles* in the *Barbie* case, Me Serge

Klarsfeld, whose dedication has allowed France to remember its children so brutally murdered:

> Me Serge Klarsfeld does not plead. He does not throw his sleeves towards the ceiling's mouldings, he does not use any vocal effect, he talks with sadness, he does not even seem to be a lawyer. No, Me Klarsfeld reads. And this reading, certainly more than everything that is to be said during eight days by the thirty-nine lawyers of the *partie civile*, distresses. Klarsfeld, who escaped from the raid, hidden by the thin rampart of a partitioned wardrobe. Klarsfeld the historian, the militant, the Nazi hunter, the auxiliary of justice haunted since 1971 by the memory of the forty-four Jewish children of Izieu. Klarsfeld, who only pronounces the name of these children, as if he were on the verge of beginning a teaching class. Forty-four names, one after the other, recited in a deathly silence (Chalandon in Chalandon and Nivelle, 1998, pp.111–12).[16]

Trials as the Recognition of the Crime and as a Tool against Denial

By entering collective memory through trials, the crime is legally qualified and this official recognition is most probably the most effective tool against denial, whether such denial takes the form of dangerous amalgams and undue comparisons, of minimization of the number of victims, or of flagrant and blatant denial. In the words of Garapon,

> The judgment does not evacuate facts which belong to the past but it fixes them into collective memory by giving an official and definitive version of these facts. It limits the story, it symbolically puts an end to the course of evil (1999, p.118).[17]

By 'symbolically putting an end to the course of evil', trials not only bring a sense of closure to victims but they also constitute the ultimate rampart against denial claims and therefore against the revival of the victims' pain and suffering. And indeed, such claims will be facilitated by the lack of justice and the absence of trials which would have impeded the crimes and the victims from penetrating into collective memory. The impunity granted to perpetrators will not only give deniers a perfect justification

16 Translation by the author. The original version reads as follows: 'Me Serge Klarsfeld ne plaide pas. Il ne jette pas ses manches vers les moulures du plafond, n'use d'aucun effet de voix, parle avec tristesse, ne semble pas même être avocat. Non. Me Klarsfeld lit. Et cette lecture, plus que, certainement, tout ce qui doit être dit durant huit jours par les trente-neuf avocats de la partie civile, bouleverse. Klarsfeld, qui a échappé à la rafle, masqué par le mince rempart d'une armoire à double fond. Klarsfeld l'historien, le militant, le chasseur de nazis, l'auxiliaire de justice hanté depuis 1971 par le souvenir des quarante-quatre enfants juifs d'Izieu. Klarsfeld, qui se contente de prononcer le nom de ces enfants, à la manière d'un appel de début de classe. Quarante-quatre noms, l'un après l'autre, récités dans un silence de mort.'

17 Translation by the author. The original version reads as follows: 'Le jugement n'évacue pas des faits passés mais il les fixe dans la mémoire collective en en donnant une version officielle et définitive. Il borne le récit, stoppe symboliquement le cours du mal.'

for their hideous arguments but it will also affect the collective perception of the crimes. And even if complete denials of the crimes are not necessarily adhered to by a given society, the non-recognition of the crimes by a court of law will nonetheless directly open the door to linguistic 'mistakes' and semantic 'drifts'. This obviously does not presuppose that legal decisions will always succeed over denial claims and that they will impede deniers from making such claims, but it is argued here that trials and judicial recognition of the crime will participate in fighting against such claims.

In this respect, it must of course be acknowledged that, although some perpetrators of the destruction of the European Jews have been tried and condemned, deniers of Nazi crimes are still very much in existence. Nonetheless, it is argued here that had such trials been held for genocide and had such perpetrators been accused and found guilty of genocide – which, as we have previously seen, was not the case notably due to the inapplicability of the Genocide Convention – these trials would have contributed to assessingthe specificity of genocide and would have participated in reducing the risks, if not of blatant denials, at least of semantic deviations and intolerable comparisons. And indeed, genocide remaining very much an 'unused' qualification, the term has gradually lost its legal and fundamental meaning, and has been employed to describe all massive human rights violations, whether these were actually genocide or not. This globalization of the term is obviously deeply problematic as it does nothing but deprive the crime of its meaning and uniqueness. As Finkielkraut explained,

> [A]lthough it is possible to rescue a given material reality from the obliterative work of the negation, we no longer have any way of fighting against the deviation or the *falsification of words*. It is relatively easy to respond to one discourse with another, but how does one respond to what has ceased to be a personal choice and has become a commonplace – that is, collective way of speaking? One cannot have a sword fight with vocabulary. That negation is an anonymous one that is confused with what is tending increasingly to be the correct use of words: *without intending any harm* but merely under the effect of a lexical perversion, the monstrous events of the last war 'are resituated within the banal course of bygone horrors' (Marthe Robert), since in 'Newspeak', as we have seen, genocide is a guarantee of marginality, a certificate of oppression that minority groups award to themselves. Because legitimacy is so closely tied up with genocide, to refuse these groups their claim to genocide is to expose oneself to the ideological infamy of not recognizing their difference. Thanks to this overpowering blackmail, the mythical meaning of the term gradually prevails over its literal meaning. Once this victory is definitive, the past will be lost and the truth will no longer stand a chance (1998, pp.114–15).[18]

Paradoxically, if the globalization of the term 'genocide' actually emanated from the indirect recognition of the utmost seriousness of this crime through the desire of all oppressed groups to see their victimization considered as the gravest, this globalization would in turn have generated a loss of gravity and of seriousness previously attached to the qualification of genocide. And indeed, if everything is genocide, then what is

18 Emphasis in original. Footnotes omitted.

so specific and so serious about genocide? To quote Finkielkraut again, '[n]o longer is genocide a concept but a title, a mark of respectability and excellence' (1998, p.114). The globalization of the term has thus not only generated linguistic abuses and deviations; it has also degenerated into collective amnesia.

The case of *Anne Frank's Diary* is particularly interesting here as it is highly symptomatic of the willingness of society to minimize the crime and to view it as a commonplace. As a matter of fact, following the publication of the *Diary*, a play and a movie were created and enjoyed tremendous success. According to Bettelheim, it is neither the importance of the *Diary* nor the tragic fate of Anne Frank which caused such a success but rather

> the fictitious ending … of this play and movie. At the conclusion we hear Anne's voice from the beyond, saying, 'In spite of everything, I still believe that people are really good at heart.' This improbable sentiment is supposedly from a girl who has been starved to death, had watched her sister meet the same fate before she did, knew that her mother had been murdered, and had watched untold thousands of adults and children being killed. This statement is not justified by anything Anne actually told her diary. … And if all men are good, then indeed we can all go on with living our lives as we have been accustomed to in times of undisturbed safety and can afford to forget about Auschwitz (1979, p.250).

Adopting a similar view, Alexander explained that, in the play,

> Anne's assertion that 'in spite of everything I still believe that people are really good at heart' [was lifted] from its relative obscurity in the book to make it the keynote of the play, a climactic benediction allowing the audience to leave the theater with a warm inner glow of happiness (1994, p.53).[19]

Bettelheim further stressed that society was in fact all too willing to minimize the importance of Anne Frank's fate and of the genocide in general. He indeed believed that

> the world-wide acclaim given her story cannot be explained unless we recognize in it our wish to forget the gas chambers, and our effort to do so by glorifying the ability to retreat into an extremely private, gentle, sensitive world, and there to cling as much as possible to what have been one's usual daily attitudes and activities, although surrounded by a maelstrom apt to engulf one at any moment (1979, p.247).

And that

19 See also Rosenfeld, Alvin, 'Popularization and Memory: The Case of Anne Frank', in Hayes, Peter (ed.) (1991), *Lessons and Legacies: The Memory of the Holocaust in a Changing World* (Evanston, Illinois: Northwestern University Press) pp.234–78. Cited in Alexander (1994, p.52): Rosenfeld indeed demonstrated that 'American literary culture overlooked any such sombre suggestions arising from the text of the diary, and then obliterated them in the stage and movie versions'.

> [T]he fictitious declaration of faith in the goodness of all men which concludes the play falsely reassures us since it impresses on us that in the combat between Nazi terror and continuance of intimate family living the latter wins out, since Anne has the last word. This is simply contrary to fact, because it was she who got killed. Her seeming survival through her moving statement about the goodness of men releases us effectively of the need to cope with the problems Auschwitz presents. That is why we are so relieved by her statement. It explains why millions loved play and movie, because while it confronts us with the fact that Auschwitz existed, it encourages us at the same time to ignore any of its implications. If all men are good at heart, there never really was an Auschwitz; nor is there any possibility that it may recur (1979, p.251).

Astonishingly, to say the least, when Walter Kerr reviewed the play for the *Herald Tribune*, he wrote about Anne's impressive 'careless gaiety', proof that 'Anne is not going to her death'.[20] (Alexander, 1994, p.53). The happy endings of both the play and the movie and their huge success are extremely representative of the willingness of society to forget, or at least to minimize, the crimes: the truth being too difficult and painful to live with, it is indeed easier to pretend that the crimes did not happen or that the victims did not suffer as much as they did in reality.

Élie Wiesel has also analyzed this Hollywood impact on memory in the following terms:

> The Holocaust has become a fashionable subject, so film and theatre producers and television networks have set out to exploit it, often in the most vulgar sense of the word … people fall over themselves for cheap and simplistic melodramas. They get a little history, a heavy dose of sentimentality and suspense, a little eroticism, a few daring sex scenes, a dash of theological rumination about the silence of God, and there it is: let kitsch rule in the land of kitsch, where, at the expense of truth, what counts is the ratings (1990, pp.166–7).

But if trials are held, if victims are called to testify, the courtroom will be filled with their pain and suffering and, in this context, trials will represent a barrier against happy endings made in Hollywood or Broadway as society will be impeded from avoiding the reality of the facts and from pretending that anything positive can emerge from the perpetration of such crimes. As a matter of fact, arranging and modifying the facts to please public opinion, to ease the life of the non-victims, to preserve their pleasant lifestyle, will rapidly push the crimes into oblivion: it is indeed easier and more comfortable to forget than to remember. And forgetfulness is nothing but the first step towards forgiveness, and amnesia will indeed quickly degenerate into *de facto* amnesty.[21] Although forgetting is a passive attitude as opposed to forgiving, which is an active reaction, both of them will have the exact

---

20 *Herald Tribune*, 23 October 1955.

21 It may be noted here that the term 'amnesty' derives from the Greek word *amnêstia*, which means pardon. It comes from the privative *a* and from *memnêsthai*, which means 'to remember'. The absence of remembrance is thus a pardon.

same result: indifference for the crimes and for the victims and clemency for their perpetrators. In the words of Jankélévitch,

> Today when the sophists recommend forgetfulness, we will forcefully mark our mute and impotent horror before the dogs of hate; we will think hard about the agony of the deportees without sepulchers and of the little children who did not come back. Because this agony will last until the end of the world (1996, p.572).

This page intentionally left blank

Conclusion: Forgiving the Unforgivable?

> Forgive them not, Father, for they knew what they did.
>
> Abe Rosenthal (cited in Wiesel, 1990, p.174).

For the purposes of the following discussion, forgiveness is understood as a moral concept rather than as a legal one, which is why the issue of legal amnesty is not contemplated therein. Nevertheless, it may be stated from the outset that forgiving such crimes will ultimately necessarily bring about *de facto* amnesty and that there is thus no need to officially grant amnesty for it to occur in reality. With respect to genocide, and notably in the context of the destruction of the European Jews, the issue of forgiveness, if it has failed to be legally explored, has nonetheless generated a great number of scholarly works and philosophical doctrines. Some authors have indeed expressed the unequivocal statement that such crimes are unforgivable and that forgiveness can therefore not be granted to genociders. For instance, such ideas can be found in the writings of Eluard, who poignantly wrote that, '[i]l n'y a pas de salut sur la terre / Tant que l'on peut pardonner aux bourreaux' [There is no salvation on Earth / As long as torturers can be forgiven] (1945,p.47).[1] Élie Wiesel has also adopted a similar view:

> The fundamental singularity was the plan, the enemy's project to annihilate all a people, until the last one. Unborn children were already condemned …. And to kill a child is absolute Evil. To kill a million and a half children is absolute Evil. No forgiveness should be granted to those responsible for these crimes (Semprun and Wiesel, 1995, p.31).[2]

Other authors have taken a more philosophical perspective and have actually explained why forgiving genociders is purely and simply an impossible task. For instance, Kalfa has listed the preconditions for forgiveness, preconditions which precisely impede any forgiveness in matters of genocide (2004, pp.252–3). The first prerequisite as identified by Kalfa is that only what is reparable can be forgiven, the second is that the act of forgiveness is nothing less than an act of love, and the

---

1 Translation by the author.

2 Translation by the author. The original version reads as follows: 'La singularité fondamentale et foncière, c'était le plan, le projet de l'ennemi d'anéantir tout un peuple jusqu'au dernier. Les enfants qui n'étaient pas nés étaient déjà condamnés …. Or, tuer un enfant, c'est le Mal absolu. Tuer un million et demi d'enfants, c'est le Mal absolu. Aucun pardon ne devrait être accordé à ceux qui sont responsables de ces crimes-là.'

third is that forgiveness can only occur if the perpetrator actually asks his victims for forgiveness:

> … firstly, is forgivable what is reparable: is there a possible reparation to the industrial murder of six millions Jews? Any reparation would be derisory as the logic of death lies in that it has the last word …. Secondly, to forgive is to love. And what is human in man cannot love barbarity against 'the essence of a human being as a human being'.[3] Man cannot love the 'vampire-metaphysician'.[4] Man can neither love nor forgive the irreparable. This is a question which involves and challenges morality because to love or to forgive the irreparable is to remove from morality its possibility of existing, for the reason that morality is rigorous. It is based on values which acquire their meaning only in the preservation of humanity from wickedness. According to morality, to forgive would amount to make morality disappear, to destroy what it is based on, what stubbornly persists in gradually building the humanity of man. It is in that sense that to forgive would be another crime …. Finally, for forgiveness to be possible, he who has been injured, he who has endured the offence should be asked for forgiveness. And, besides the fact that it is not a simple offence, no one can today forgive in place of those who no longer exist (*ibid.*).[5]

Notwithstanding these more recent studies, an analysis of the concept of forgiveness would be incomplete without reference to the work of Vladimir Jankélévitch. The following paragraphs concentrate exclusively on his essay entitled 'Should We Pardon Them?' rather than on his philosophical study *Forgiveness*. While in the latter, Jankélévitch 'explicitly writes that there is no such thing as that which is unforgivable', he takes a seemingly opposite approach in the former in which he 'argues vehemently against a pardon' with respect to Nazi crimes (Kelley, 2005, p.xxiv). But, as it had been analyzed, the 'contradiction' that exists between Jankélévitch's position in 'Should We Pardon Them?' and the one he takes in *Forgiveness* is not really one at all. In 'Should We Pardon Them?' Jankélévitch looks

---

3 Jankélévitch (1996, p.555).

4 *Ibid.*, p.558.

5 Translation by the author. The original version reads as follows: ' … est pardonnable en premier lieu ce qui est réparable: y a-t-il une réparation possible au meurtre industriel de six millions de Juifs? Toute réparation serait dérisoire, car la logique de la mort réside en cela qu'elle a le dernier mot …. En second lieu, pardonner c'est aimer. Et ce qu'il y a d'humain en l'homme ne peut aimer la barbarie "contre l'essence humaine, ou, si l'on préfère, contre "l' hominité" de l'homme en général". L'homme ne peut pas aimer le "vampire métaphysicien". L' homme ne doit pas aimer ou pardonner l'irréparable. C'est ici une question qui met en cause la morale, car aimer ou pardonner l'irréparable, c'est ôter à la morale sa possibilité d'existence puisque la morale est rigoureuse. Elle est fondée sur des valeurs qui n'ont de sens que dans le fait de préserver l'humanité de la méchanceté. Pardonner, ici, au nom de la morale, ce serait faire disparaître la morale, détruire ce qui la fonde, ce qui s'obstine à bâtir peu à peu l'humanité de l'homme. C'est en ce sens que pardonner serait un nouveau crime …. Enfin, pour qu'il y ait pardon, il faudrait que la demande de pardon ait lieu envers celui qui a été lésé, celui qui a subi l'offense. Or, outre le fait qu'il ne s'agit pas d'une simple offense, nul ne peut aujourd'hui pardonner à la place de ceux qui n'existent plus.'

at the issue of forgiving from within a system of ethics and laws' (Kelley, 2005, p.xxiv), which is precisely why it is this essay that is the focus of the following discussion.

In 'Should We Pardon Them?', Jankélévitch identified different preconditions to forgiveness, the first being the act of asking for forgiveness, an act that was never performed by the Nazi criminals. Consequently, according to Jankélévitch, 'pardoning died in the death camps':

> To pardon! But who ever asked us for a pardon? It is only the distress and the dereliction of the guilty that would make a pardon sensible and right. When the guilty are fat, well nourished, prosperous, enriched by the 'economic miracle', a pardon is a sinister joke. No, a pardon is not suitable for the swine and their sows. Pardoning died in the Death Camps (1996, p.567).

He further argued that to deserve forgiveness, genociders would first have to recognize and admit their criminal deeds:

> Our horror over that which properly speaking reason cannot conceive would smother pity at its birth. If only the accused could have shown us pity. The accused cannot have it all ways – cannot reproach the victims for their resentment, vindicate their own patriotism and good intentions, and presume to be pardoned. One must choose! To presume to be pardoned one must admit to being guilty, without conditions or alleging extenuating circumstances …. Why would we pardon those who regret their errors so little and so rarely? (1996, pp.567–8.)

Taking a different stand, 'Derrida argues that true forgiveness consists in forgiving the unforgivable …. If forgiveness forgave only the forgivable, then, Derrida claims, the very idea of forgiveness would disappear. It has to consist in the attempt to forgive the unforgivable' (Critchley and Kearney, 2001, pp.vii–viii). And indeed, according to Derrida:

> In order to approach now the very concept of forgiveness, logic and common sense agree for once with the paradox: it is necessary, it seems to me, to begin from the fact that, yes, there is the unforgivable. Is this not, in truth, the only thing to forgive? The only thing that *calls* for forgiveness? If one is only prepared to forgive what appears forgivable, what the church calls 'venial sin', then the very idea of forgiveness would disappear. If there is something to forgive, it would be what in religious language is called mortal sin, the worst, the unforgivable crime or harm. From which comes the aporia, which can be described in its dry and implacable formality, without mercy: forgiveness forgives only the unforgivable. One cannot, or should not, forgive; there is only forgiveness, if there is any, where there is the unforgivable. That is to say that forgiveness must announce itself as impossibility itself. It can only be possible in doing the impossible. For, in this century, monstrous crimes ('unforgivable' then) have not only been committed – which is perhaps itself not so new – but have become visible, known, recounted, named, archived by a 'universal conscience' better informed than ever; because these crimes, at once cruel and massive, seem to escape, or because one has sought to make them escape, in their very

> excess, from the measure of any human justice, then well, the call to forgiveness finds itself (by the unforgivable itself!) reactivated, remotivated, accelerated (2005, pp.32−3).[6]

Referring to other philosophers' position, Derrida also explained that

> Jankélévitch declares that there would be no question of forgiving crimes against humanity, against the humanity of man: not against 'enemies' (political, religious, ideological), but against that which makes of man a man – that is to say, against the power of forgiveness itself. In an analogous fashion, Hegel, the great thinker of 'forgiveness' and 'reconciliation', said that all is forgivable except the crime against spirit, that is, against the reconciling power of forgiveness (2005, p.34).

Where Derrida's position departs from Jankélévitch's is regarding the reciprocity element within the concept of forgiveness. And indeed, as mentioned above, Jankélévitch argued and maintained that the necessary precondition for forgiveness is that forgiveness must be asked for. On the other hand, Derrida argued that he:

> would be tempted to contest this *conditional* logic of the *exchange*, this presupposition, so widespread, according to which forgiveness can only be considered *on the condition* that it be asked, in the course of a scene of repentance attesting at once to the consciousness of the fault, the transformation of the guilty, and the at least implicit obligation to do everything to avoid the return of evil. There is here an *economic* transaction which, at the same time, confirms and contradicts the Abrahamic tradition of which we are speaking. It is important to analyse at its base the tension at the heart of the heritage between, *on the one side*, the idea which is also a demand for the *unconditional*, gracious, infinite, an economic forgiveness granted *to the guilty as guilty*, without counterpart, even to those who do not repent or ask forgiveness, and *on the other side*, as a great number of texts testify through many semantic refinements and difficulties, a conditional forgiveness proportionate to the recognition of the fault, to repentance, to the transformation of the sinner who then explicitly asks forgiveness. And who from that point is no longer guilty through and through, but already another, and better than the guilty one. To this extent, and on this condition, it is no longer the *guilty as such* who is forgiven (2005, pp.4−5).[7]

Further reflecting on the 'exchange' required by Jankélévitch, Derrida added that:

> Imagine, then, that I forgive on the condition that the guilty one repents, mends is ways, asks forgiveness, and thus would be changed by a new obligation, and that from then on he would no longer be exactly the same as the one who was found to be culpable. In this case, can one still speak of forgiveness? This would be too simple on both sides: one forgives someone other than the guilty one. In order for there to be forgiveness, must one not on the contrary forgive both the fault and the guilty *as such*, where the one and the other remain as irreversible as the evil, as evil itself, and being capable of repeating itself, unforgivably, without transformation, without amelioration, without repentance or

6 Emphasis in original.
7 Emphasis in original.

> promise? Must one not maintain that an act of forgiveness worthy of its name, if there ever is such thing, must forgive the unforgivable, and without condition? (2005, pp.38–9.)[8]

In other words, the divergence between Jankélévitch and Derrida is not so much on the concept of the 'unforgivable' as on the preconditions which have to be met for forgiveness to become possible. And indeed, while Jankélévitch argued that a prerequisite to the granting of forgiveness is for the perpetrator of the unforgivable to ask for forgiveness, Derrida maintained that, if this were so, forgiveness would then be granted to the 'guilty' who asked for forgiveness and not to 'the guilty as such'. Although both opinions are convincing, it is submitted here that Derrida's analysis, by emphasizing the distinction between the 'guilty' who asked for forgiveness and the 'guilty as such', is oblivious to the fact that the 'guilty' remains 'guilty' whether he asks for forgiveness or not and thus seems to equate the act of asking for forgiveness with the concept of innocence. It is true that, according to most religions and ancestral beliefs, a repented sinner is 'purer' than those who have never sinned ,but such reasoning fails to satisfy in the case of the unforgivable. So a genocider, guilty of the most horrendous crimes, would become a better and purer human being than any other person by the simple fact of asking for forgiveness? In the context of the unforgivable, asking for forgiveness does not pave the way for innocence: the guilt of the perpetrator of the unforgivable remains unaltered by the fact that he seeks repentance. In other words, the 'exchange' required by Jankélévitch does not presuppose that forgiveness would not be granted to 'the guilty as such', it merely emphasizes the idea that, because of their guilt, perpetrators of the unforgivable need at least to ask for forgiveness for the victims to contemplate the idea of granting such forgiveness. Ultimately, not requiring such exchange would again make a mockery of the victims as victims and would most probably contribute to what has been termed earlier 'the transfer of guilt'. And indeed, the least that can be said is that it is absolutely unfair to empower the victims with such an active initiative role in the possibility of granting forgiveness and to thus make them responsible for the moral rehabilitation of their tormentors.[9]

In any event, whether the perpetrator asks for forgiveness or not, the crime itself remains unforgivable. In this respect, it may be noted that another difference of opinion between Derrida and Jankélévitch relates to the idea expressed by the latter that forgiveness is impossible when the unforgivable, the inexpiable, has been committed. And indeed, Derrida analyzed the position of Jankélévitch in 'Should We Pardon Them?', in which the

> core of the argument … is that the singularity of the Shoah attains the dimension of the *inexpiable*. However, for the inexpiable there is no possible forgiveness according to Jankélévitch, not any forgiveness that would have a meaning [sens], that would make sense [sens]. For the common or dominant axiom of the tradition, finally, and to my eyes the most problematic, is that *forgiveness must have a meaning*. And this meaning must

8 Emphasis in original.

9 In this respesct, see Wiesenthal (1999).

> determine itself on the ground of salvation, of reconciliation, redemption, atonement, I would say even sacrifice. For Jankélévitch, as soon as one can no longer punish the criminal with a 'punishment proportionate to his crime' and 'the punishment becomes almost indifferent' it is a matter of the 'inexpiable' – he says, also, the 'irreparable' (a word that Chirac used in his famous declaration on the crime against the Jews under Vichy: 'France that day performed the irreparable'). From the inexpiable or the irreparable, Jankélévitch concludes the unforgivable. And one does not forgive, according to him, the unforgivable. This connection does not seem to me to follow. For the reason I gave (what would be a forgiveness that forgave only the forgivable?) and because this logic continues to imply that forgiveness remains the correlate to a judgement and the counterpart to a *possible* punishment, to a possible expiation, to the 'expiable' …. In 'L'Imprescriptible', therefore, and not in *Le Pardon*, Jankélévitch places himself in that exchange, in that symmetry between punishing and forgiving: forgiveness will no longer have meaning where the crime has become, like the Shoah, 'inexpiable', 'irreparable', out of proportion to all human measure. 'Forgiveness died in the death camps', he says. Yes. Unless it only becomes possible from the moment that it appears impossible. Its history would begin, on the contrary, with the unforgivable (2005, pp.36–7).[10]

On this point also, the divergence is neither on the notion of the 'inexpiable' nor on the notion of the 'unforgivable' but rather on the linkage operated by Jankélévitch between the concepts of forgiveness and of appropriate punishment. According to Jankélévitch, it is because there can be no adequate punishment for the perpetration of disproportionate crimes that these are unforgivable. In this respect, it is noteworthy that Ricoeur seemed to agree with Jankélévitch:

> There is no appropriate punishment to a disproportionate crime. In this sense, such crimes constitute a *de facto* unforgivable (2000, p.613).[11]

Nonetheless, Jankélévitch's position here seems to be more problematic. And indeed, by linking forgiveness with punishment, his analysis holds the risk of equating the two notions. As Arendt recalls in the context of the *Eichmann* trial,

> The most common argument was that Eichmann's deeds defied the possibility of human punishment, that it was pointless to impose the death sentence for crimes of such magnitude – which, of course, was true, in a sense, except that it could not conceivably mean that he who had murdered millions should for this very reason escape punishment (1963, p.250).

Although it seems obvious that, in the context of the most heinous crimes, no punishment could ever be deemed appropriate, that it would necessarily be derisory, it still remains that punishment is possible. Consequently, if prosecution and punishment actually occur, they could be interpreted – at least in the eyes of the general public – as paving the way for forgiveness.

---

10 Emphasis in original.

11 Translation by the author. The original version reads as follows: 'Il n'y a pas de châtiment approprié à un crime disproportionné. En ce sens, de tels crimes constituent un impardonnable de fait.'

This link between punishment and forgiveness is at the heart of the analysis of the present book, which argues that the lack of punishment generates forgetfulness, which is nothing but a form of passive forgiveness. Morin has argued against this assertion in the following terms:

> The question is: does non-punishment mean oblivion, as those who argue that punishment would serve memory think? These two notions are in fact separate. It is not because Papon may be imprisoned for ten years that the memory of Auschwitz will be reinforced. Mandela said 'let's forgive but not forget'. The Polish opponent Adam Michnik echoed him with his formula 'amnesty not amnesia'. Besides, both have reached out to those who had imprisoned them. American Indians did not forget the spoliations and massacres they have endured, in spite of the fact that their torturers have never been punished. Black people victims of slavery have never seen their tormentors punished and yet they have not forgotten (2000).[12]

Although, as previously mentioned, it has to be acknowledged that punishment and memory are indeed different notions which should be distinguished, it remains the case that punishment can serve as a tool for memory and that the lack of punishment will in any event be detrimental to collective memory. In other words, if punishment does not always succeed in enhancing memory, the lack of punishment will always be an obstacle to the building-up of collective memory. And in fact, the examples given by Morin perfectly illustrate this statement. When he writes that '[i]t is not because Papon may be imprisoned for ten years that the memory of Auschwitz will be reinforced', he is absolutely correct: the fact that Papon has been sentenced to ten years of imprisonment – and that, as we now know, he subsequently did not serve his sentence – minimizes, in the eyes of the general public, the seriousness of the crimes he has perpetrated and is clearly detrimental to memory. When Morin further writes that 'American Indians did not forget the spoliations and massacres they have endured, in spite of the fact that their torturers have never been punished. Black people victims of slavery have never seen their tormentors punished and yet they have not forgotten', we of course agree with him. The victim groups will always remember the crimes perpetrated against them and will never forget them, regardless of whether punishment has been inflicted upon the tormentors or not. The heart of the problem here is the impact of the lack of punishment on collective memory and on society as a whole. Sad but true, it has to be recognized that the crimes perpetrated against the American Indians, the crimes perpetrated against the

12 Translation by the author. The original version reads as follows: 'La question est: le non-châtiment signifie-t-il l'oubli, comme le pensent ceux pour qui punir servirait la mémoire? Les deux notions sont en fait disjointes. Ce n'est pas parce que Papon va passer éventuellement dix ans en prison que la mémoire d'Auschwitz sera renforcée. Mandela a dit "pardonnons, n'oublions pas". L' opposant polonais Adam Michnik lui fait écho avec sa formule "amnistie, non amnésie". Tous deux ont d'ailleurs tendu la main à ceux qui les avaient emprisonnés. Les Indiens d'Amérique n'ont pas oublié les spoliations et les massacres qu'ils ont subis, bien que ceux qui les ont martyrisés n'aient jamais été châtiés. Les Noirs victimes de l'esclavage n'ont jamais vu leurs bourreaux punis, et pourtant ils n'ont pas oublié.'

Black people, and all the other crimes perpetrated against other victims and which have gone unpunished, have failed to generate a great interest on the part of society and it is extremely doubtful that collective memory has integrated these events. But if law had intervened, if such events had been put on trial, if the tormentors had been punished, if legal memory existed, collective memory might have incorporated them. Again, legal memory might not automatically generate social and collective memory, but the lack of legal memory will necessarily constitute an obstacle to the creation of this social and collective memory. This sad fact has indeed been indirectly acknowledged in France where, in some instances where Law had failed to intervene after the facts through the punishment of the crimes and of their perpetrators, laws have been passed to incite collective memory to integrate such crimes. In these instances, the lack of legal memory had indeed degenerated into a lack of collective memory and this is the reason why such laws as the law recognizing the Armenian Genocide[13] or the law qualifying slavery as a crime against humanity[14] have been adopted. The French example is here very symptomatic of the role of Law in the building-up of collective memory: where trials did not take place, the events will fail to integrate collective memory and it is for Law to then intervene in the form of 'memorial laws' which will encourage collective memory to remember crimes which had sunk into oblivion, simply because it did not intervene in the first place. Collective memory without legal memory is probably an impossibility.

The purpose here is certainly not to promote revenge. On the contrary, it is precisely in instances where Law intervenes and where trials take place that the desire for revenge disappears. Conversely, when the criminals have never been punished, when legal memory remains absent, when the crimes have failed to penetrate collective memory, vengeance can remain an option. Justice, precisely because it impedes the unforgivable to be forgotten and forgiven, is not revenge.

In this respect, Derrida interestingly argued that it is precisely in the context of the unforgivable that forgiveness becomes possible. According to him, forgiveness can only be granted to the unforgivable and is therefore 'a madness of the impossible':

> pure and unconditional forgiveness, in order to have its own meaning, must have no 'meaning', no finality, even no intelligibility. It is a madness of the impossible (2005, p.45).

And indeed, it has to be admitted that, to be meaningful, forgiveness must relate to what cannot be forgiven. Forgiving the forgivable is nothing but forgiving the 'unserious', the 'futile', the 'benign', the 'without major consequences' and is thus an easy and natural psychological process. But the real forgiveness, forgiveness seen as an act of disinterested love for another human being, can only be granted to what is unforgivable and this is precisely why it is impossible. Ultimately, this 'madness

13 See Loi n° 2001–70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915.

14 See Loi Taubira du 21 mai 2001. Loi n° 2001–434 du 31 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité.

of the impossible' remains the victims' prerogative and theirs only. In the words of Derrida,

> In the radical evil of which we are speaking, and consequently in the enigma of the forgiveness of the unforgivable, there is a sort of 'madness' which the juridico-political cannot approach, much less appropriate. Imagine a victim of terrorism, a person whose children have been deported or had their throats cut, or another whose family was killed in a death oven. Whether she says 'I forgive' or 'I do not forgive', in either case I am not sure of understanding, I am even sure of not understanding, and in any case I have nothing to say. This zone of experience remains inaccessible, and I must respect its secret (2005, p.55).

Adopting a more radical view, Jankélévitch stressed that forgiveness is an individual act and one can only forgive the harm done to oneself and certainly not the harm done to others:

> Everyone is free to pardon the offenses that he has personally suffered if he chooses to, but those of others, what right does he have to pardon them? … I do not see why it should be up to us, the survivors, to pardon. Let us rather beware that complacency about our beautiful soul and our noble conscience, that the opportunity to assume a pathetic attitude and the temptation of playing a role do not one day make us forget the martyrs. It is not a question of being sublime; it is enough to be loyal and serious. In fact, why should we retain for ourselves this magnanimous role of pardoner? As Olivier Clément, an Eastern Orthodox Christian, wrote me in admirable terms, it is for the victims to pardon. What qualifies the survivors to pardon in the place of the victims or in the name of their relatives, their families? No, it is not our place to pardon on behalf of the little children whom the brutes tortured to amuse themselves. The little children must pardon them themselves. While we turn to the brutes, and to the friends of the brutes, and tell them, Ask the little children to pardon you yourselves (1996, p.569).

And indeed, how can someone forgive the crimes perpetrated against others? How can one have the legitimate right and power to do so? The right of granting or not granting forgiveness is that of the victims, and of the victims *only*. And, although they do rely on different arguments and their respective positions diverge, both Derrida and Jankélévitch reach the same conclusion: *the unforgivable cannot be forgiven, forgiving the unforgivable is impossible*. As demonstrated, for Derrida this impossibility is inherent to the concept of forgiveness itself: forgiveness can only apply to the unforgivable and is thus impossible. On the other hand, Jankélévitch's main idea is that the concept of forgiveness is linked to that of punishment and there can thus be no forgiveness for the 'inexpiable'.

And if forgiving genocides is impossible, where does the impunity awarded to perpetrators of genocide stand? Is legal impunity a form of forgiveness? From a philosophical standpoint, forgiveness being impossible in such cases, impunity cannot amount to forgiveness; it cannot achieve the impossible. From a legal perspective, impunity does not equate with forgiveness simply because, in theory, legal forgiveness is a non-sense: neither Law itself nor the courts are empowered to

forgive; it is neither their role nor their aim. Nonetheless, from a more sociological point of view, impunity does resemble forgiveness. If genociders are not tried and condemned, it will as if society as a whole is forgiving them. And in any event, impunity will not only give the impression – although legally incorrect – that the crimes and their perpetrators are forgiven; it will also ensure that they are forgotten, erased from collective memory. It will promote forgetfulness in the place of memory. Even if it does not directly forgive the crimes and their perpetrators, the lack of trials with respect to genocide – linked to the shortcomings of the Genocide Convention – or the too lmited role granted to victims as victims and as witnesses in the course of such trials, have constituted serious obstacles in the building-up of the memory of the crimes. Instead of contributing to shape the collective memory of the crimes, the legal memory of such crimes has so far been based on unsatisfactory trials which, in turn, have generated social amnesia rather than social memory.

Furthermore, as mentioned earlier in the present book, society as a whole is generally all too willing to forget its shameful past and the lack or shortcomings of trials of genociders have greatly incited and encouraged its comfortable amnesia. As Todorov rightly observed:

> Yet if we were willing to admit that totalitarianism is a possibility for any of us, that Kolyma and Auschwitz 'happened' to people like us and that one day we could find ourselves in the same situation, we would find it hard to continue leading the untroubled lives we know. We would have to change how we see not only the world but ourselves as well. The fact is, however, that the task is too onerous. Truth, it seems, is incompatible with inner comfort, and most of us prefer comfort. The manuscripts buried in the ground at Auschwitz and in Warsaw escaped the notice of the guards, withstood the damp, and with great effort were finally deciphered; but there is still no telling if they will succeed in breaking through the new wall of indifference that we have erected around them (1996, p.257).

Ultimately, forgetting past genocides is precisely making the terrible mistake of believing that such crimes belong to the past. As a matter of fact, Lanzmann expressed this idea in the following terms:

> When it comes to creating a work about the Holocaust, the worst crime – both morally and artistically – is to consider it *past*. Either the Holocaust is a legend, or it is current; in any case, it is not in the realm of memory. A film about the Holocaust can only be a counter-myth, that is to say an inquiry into the Holocaust in the present day; or at the very least in relation to a past whose scars are so recently and so vividly inscribed in certain places and in our minds that it appears in its hallucinating atemporality (1990, p.316).[15]

And indeed, past genocides necessarily imply that our whole society is post-genocidal, that it bears the stigma of such crimes and will do so for the rest of time. As Anders maintained, 'we are all also sons of Eichmann' or, at least, 'all sons of Eichmann's

15 Translated by Nelly Furman (1995, p.311). Emphasis in original.

world' (1988, p.89).[16] All past genocides did not represent an end but rather the beginning of a new era of destruction of humanity and asserting the contrary is simply a complete misinterpretation of the facts. According to Kertész, Auschwitz was only a beginning: 'Auschwitz n'était donc pas une fin, mais un commencement, dont on ne peut prévoir le developpement ultérieur' [Auschwitz was thus not an end but a beginning, of which we cannot predict the ulterior development] (in Coquio (ed.) 1999, p.87).[17] In the same vein, Bensoussan explained that

> Auschwitz announces, without enclosing it, the age of the war waged not against a given people or a given state but against humanity as a whole …. The seeds of this desolation are not dead in 1945, they are only dormant in our anomic societies (in Coquio (ed.) 1999, p.141).[18]

The idea that past genocides are precisely anything but past and that their uniqueness must not be equated with the impossibility for them to happen again was also emphasized by Charny:

> Obviously, it is the simple nature of humans that we care more about ourselves first of all. Each of us cares selfishly about our own survival first, next for our loved ones, and then for our people, but we also should not be indifferent to the plight of others and the tragedies of their losses of life. In any case, it is also a matter of self-interest to care about the genocide of others. In cases of genocide of peoples other than our own, it should also be obvious to us that any and every event of mass murder, to any and every people, also opens the door to greater possibilities of further genocidal massacres of additional peoples, perhaps again including our own people (in Totten, Parsons, Charny (eds). 2004, pp.xii−xiii).

Similarly, although in a more alarming formula, Ozick has asserted that '[t]he only thing that the Holocaust can give birth to is further images of itself. "Never Again" is not the message we get from the Holocaust. The message we get is that the Holocaust will replicate itself. *What was acceptable once will be acceptable again*.'[19]

In other words, even if for no other reasons than pure selfishness and basic survival instinct, society as a whole should remember all genocides. Genocide is a universal crime precisely because its impact is universal; it affects all human beings in their humanity as well as in their life. Past occurrences of genocide represent a

---

16 Translation by the author.

17 Translation by the author.

18 Translation by the author. The original version reads as follows: 'Auschwitz annonce, sans le clôturer, l'âge de la guerre menée non contre tel peuple ou tel Etat, mais contre le genre humain tout entier …. Les germes de cette désolation ne sont pas morts en 1945, ils sommeillent seulement dans nos societés anomiées.'

19 Ozick, C., Roundtable Discussion, in *Writing and the Holocaust*, ed. Lang, B., New York: Holmes & Meier, pp.277–84 at 280–81. Cited in Fowler, Jerry, 'Out of that Darkness: Responding to Genocide in the 21st Century', in Totten, Parsons, Charny (eds) (2004, p.457). Emphasis added.

constant reminder that the crime has indeed already happened – and that it will thus happen again – unless we remember. In the words of Élie Wiesel,

> We remember Auschwitz and all that it symbolizes because we believe that, in spite of the past and its horrors, the world is worthy of salvation; and salvation, like redemption, can be found only in memory (1990, pp.200–1).

Bibliography

Académie Universelle des Cultures (1999), Pourquoi se souvenir? *Forum International Mémoire et Histoire, UNESCO,* 25 *mars 1998, La Sorbonne, 26 mars 1998* (Paris: Editions Grasset & Fasquelle).

Ackerman, J.E. and O'Sullivan, E. (2001), *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia – with Selected Materials from the International Criminal Tribunal for Rwanda*, The Hague: Kluwer Law International.

Ago, R. (1989), Remarks on Some Classes of Crimes by States, in *International Crimes of State – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* eds Weiler, J.H.H., Cassese, A. and Spinedi, M., Berlin: Walter de Gruyter, pp. 215–16.

Akhavan, P. (1991), Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice, *Human Rights Law Journal*, **12**, 285–99.

Alexander, E. (1994), *The Holocaust and the War of Ideas*, New Brunswick: Transaction Publishing.

Alexidze, L. (1981), Legal Nature of *Jus Cogens* in Contemporary International Law, *Recueil des Cours de l'Académie de Droit International*, **III**, 219–70.

Alland, D. and Ferrand, F. (1998), Jurisprudence Française en Matière de Droit International Public, Cour de Cassation, Chambre Criminelle, 6 janvier 1998, *RGDIP*, **102**, 825–32.

Alvarez, J.E. (1999), Crimes of State/Crimes of Hate: Lessons from Rwanda, *The Yale Journal of International Law*, **24**, 365–483.

Aly, G. (1999), *'Final Solution': Nazi Population Policy and the Murder of the European Jews.* Translated from the German by Belinda Cooper and Allison Brown, London: Edward Arnold.

Amann, D.M. (1999), *Prosecutor v Akayesu*, *American Journal of International Law*, **93**, 195–9. [DOI: 10.2307/2997961]

Amann, D.M. (2002), *Prosecutor v Kupreskic*, No. IT–95–16–A, *American Journal of International Law* , **96**, 439–45. [DOI: 10.2307/2693938]

Anders, G. (1999, original version 1988), *Nous, Fils d'Eichmann Traduction de l'Allemand et Présentation par Sabine Cornille et Philippe Ivernel*, Paris: Editions Payot & Rivages.

Andreopoulos, G.J., ed. (1997), *Genocide – Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press.

Antelme, R. (1957), *L'espèce humaine*, Paris: Editions Gallimard.

Antelme, R. (1992, original version 1957), *The Human Race*, preceded by an Homage to Robert Antelme by Edgar Morin, translated by Jeffrey Haight and Annie Mahler, Evanston, Illinois: The Marlboro Press / Northwestern.

Antelme, R. (1996), *Textes Inédits Sur l'Espèce Humaine – Essais et Témoignages*, Paris: Editions Gallimard.

Apollodorus (1997), *The Library of Greek Mythology*, translated with an Introduction and Notes by Robin Hard, Oxford; Oxford University Press.

Aptel, C. (2002), The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda, *Criminal Law Forum*, **13**: 273–91.

Arendt, H. (1963, reprint 1994), *Eichmann in Jerusalem – A Report on the Banality of Evil*, revised and enlarged edition, New York: Penguin Books.

Arendt, H. (1966, reprint 1994), *The Origins of Totalitarianism*, New York: A Harvest Book, Harcourt Inc.

Arendt, H. (2003), *Responsibility and Judgment*, edited and with an introduction by Jerome Kohn, New York: Schocken Books.

Arnold, R. (2003), The *Mens Rea* of Genocide under the Statute of the International Criminal Court, *Criminal Law Forum*, **14**: 127–51.

Ascensio, H., Decaux, E. and Pellet, A., eds (2000), *Droit International Pénal Centre de Droit International de l'Université Paris X − Nanterre*, Paris: Editions A. Pedone.

Association française pour l'histoire de la Justice, Commission nationale consultative des droits de l'homme, Ecole nationale de la magistrature (2003), *La lutte contre le négationnisme, Bilan et perspectives de la loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe – Actes du Colloque du 5 juillet 2002 à la cour d'appel de Paris*, Paris: La Documentation Française.

Attarian, V. (1997), *Le Génocide des Arméniens devant l'ONU*, Brussels: Editions Complexe.

Azéma, J.-P. (2006), 'Cessez de Jouer avec les Mémoires,' *Libération* (10 mai 2006).

Bacou, P. (1998), *Devoir de Mémoire* (Fraïsse-sur-Agout). Manuscript with the author.

Ball, H. (1999), *Prosecuting War Crimes and Genocide – The Twentieth-Century Experience*, Lawrence, Kansas: University Press of Kansas.

Barbedo de Magalhães, A. (1992), *East Timor, Indonesian Occupation and Genocide*, President's Office, Oporto: Oporto University.

Barnett, M. (2002), *Eyewitness to a Genocide – The United Nations and Rwanda*, Ithaca: Cornell University Press.

Bassiouni, M.C. (1992), *Crimes Against Humanity in International Criminal Law*, Dordrecht: Martinus-Nijhoff.

Bassiouni, M.C. (1996), International Crimes, *Jus Cogens* and *Obligatio Erga Omnes*, *Law and Contemporary Problems*, **59**: 63–74. [DOI: 10.2307/1192190]

Bassiouni, M.C. (1996), Searching for Peace and Achieving Justice: The Need for Accountability, *Law and Contemporary Problems*, **59**: 9–28. [DOI: 10.2307/1192187]

Bassiouni, M.C. (1999c), *Crimes Against Humanity in International Criminal Law*, 2nd revised edn, The Hague: Kluwer Law International.

Bassiouni, M.C., ed. (1986), *International Criminal Law*, Vol. I *Crimes*, New York: Transnational Publishers, Inc.

Bassiouni, M.C., ed. (1987), *International Criminal Law*, Vol. III *Enforcement*, New York: Transnational Publishers, Inc.

Bassiouni, M.C., ed. (1998), *The Statute of the International Criminal Court: A Documentary History*, New York: Transnational Publishers, Inc.

Bassiouni, M.C., ed. (1999a), *International Criminal Law*, Vol. I *Crimes*, 2nd edn, New York: Transnational Publishers, Inc.

Bassiouni, M.C., ed. (1999b), *International Criminal Law*, Vol. III *Enforcement*, 2nd edn, New York: Transnational Publishers, Inc.

Bassiouni, M.C. and Manikas, P. (1996), *The Law of the International Criminal Tribunal for the Former Yugoslavia*, New York: Transnational Publishers, Inc.

Bassiouni, M.C. and Nanda, V.P., eds (1973), *A Treatise on International Criminal Law*, Vol. I *Crimes and Punishment*, Springfield, Illinois: Charles C. Thomas Publisher.

Bassiouni, M.C. and Wise, E.M. (1995), *Aut Dedere Aut Judicare – The Duty to Extradite or Prosecute in International Law*, Dordrecht: Martinus-Nijhoff.

Baxter, R.R. (1965–66), Multilateral Treaties as Evidence of Customary International Law, *British Yearbook of International Law*, **XLI**: 275–300.

Beres, L.R. (1988), Justice and Realpolitik: International Law and the Prevention of Genocide, *American Journal of Jurisprudence*, **33**: 123–59.

Bernadac, C. (1996), *L'Ordre S.S.*, Paris: Editions France-Empire.

Bettelheim, B. (1979), *Surviving and Other Essays*, New York: Alfred A. Knopf.

Bevans, C.F. (1970), *Treaties and Other International Agreements of the United States of America, 1776–1949*, Washington, DC: US Department of State.

Binder, G. (1989), Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie, *Yale Law Journal*, **98**: 1324–83.

Bishop, W.W., Jr (1951), Reservations to the Convention on Genocide, *American Journal of International Law*, **45**: 579–90. [DOI: 10.2307/2194560]

Blakesley, C.L., Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda, in McCormack, Timothy L.M. and Simpson, Gerry J. (eds) (1997), pp. 189–228.

Blanchot, M. (1980), *L'Ecriture du désastre*, Paris: Gallimard.

Blanchot, M. (1986, original version 1980), *The Writing of the Disaster*, translated by Smock, A., Lincoln: University of Nebraska Press.

Bloxham, D. (2001, reprint 2005), *Genocide on Trial – War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press.

Bochurberg, C. (1997), *Entretiens avec Serge Klarsfeld*, Paris: Editions Stock.

Borwicz, M. (1973, reprint 1996), *Ecrits des condamnés à mort sous l'occupation nazie (1939–1945)*, Paris: Editions Gallimard, Collection Folio Histoire.

Bourdon, W. and Duverger, E. (2000), *La Cour Pénale Internationale − Le Statut de Rome*, Paris: Editions du Seuil, Collection Points Essais.

Braham, R.L., ed. (1988), *The Psychological Perspectives of the Holocaust and of Its Aftermath, Holocaust Studies Series*, New York: Columbia University Press.

Brayard, F. (2004), *La 'solution finale de la question Juive' − La Technique, le Temps et les Catégories de la Décision*, Paris: Librairie Arthème Fayard.

Brayard, F., ed. (2000), *Le Génocide des Juifs Entre Procès et Histoire 1943−2000*, Brussels: Editions Complexe, Collection 'Histoire du Temps Présent'.

Browning, C.R. (1994, original version 1992), *Des hommes ordinaires – Le 101e bataillon de réserve de la police allemande et la Solution finale en Pologne*, translated from the English by Elie Barnavi (Les Belles Lettres, Bibliothèques 10/18).

Bryant, B. (1975), 'Substantive Scope of the Convention,' in 'Comment: The United States and the 1948 Genocide Convention, Part I', *Harvard International Law Journal*, **16**: 686–98.

Buber-Neumann, M. (1988, original version 1985), *Prisonnière de Staline et de Hitler 2 – Déportée à Ravensbrück*, translated from the German by Alain Brossat, Paris: Editions du Seuil, Collection Points.

Buber-Neumann, M. (2004, original version 1985), *Prisonnière de Staline et de Hitler 1 – Déportée en Sibérie*, translated from the German by Anise Postel-Vinay, Paris: Editions du Seuil, Collection Points.

Burgorgue-Larsen, L., ed. (2003), *La Répression Internationale du Génocide rwandais*, Brussels: Editions Bruylant, Collection du CREDHO.

Burrin, P. (1989), *Hitler et les Juifs – Genèse d'un Génocide*, Paris: Editions du Seuil, Collection Points Histoire.

Buxton, R. (2004), *The Complete World of Greek Mythology*, London: Thames and Hudson.

Cammilleri-Subrenat, A. (2002), L'incitation à la Haine et la Constitution, *Revue Internationale de Droit Comparé*, 513–48.

Carillo Salcedo, J.A. and Antonio, J. (1997), Reflections on the Existence of a Hierarchy of Norms in International Law, *European Journal of International Law*, **8**: 583–95.

Cassese, A. (2003), *International Criminal Law*, Oxford: Oxford University Press.

Cassese, A. (2006), Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: *The Kolk and Kislyiy v Estonia* before the ECHR, *Journal of International Criminal Justice*, **4:** (2), 410–18.

Cassou, J. (2001), *La Mémoire Courte*, Paris: Editions Mille et une nuits.

Cayrol, J. (1946, reprint 1995), *Poèmes de la Nuit et du Brouillard*, Paris: Editions Pierre Seghers, Editions du Seuil.

Centre de Droit International de l'Institut de Sociologie de l'Université, Libre de Bruxelles (Centre Henri Rolin), et Fondation Auschwitz-Stichting (Centre d'Etudes et de Documentation) (1988), in *Le Procès de Nuremberg – Conséquences et Actualisation, Actes Du Colloque International, Université Libre de Bruxelles, Le 27 Mars 1987*, Brussels: Editions Bruylant, Editions de l'Université de Bruxelles.

Chalandon, S. and Nivelle, P. (1998), *Crimes Contre L'Humanité – Barbie, Touvier,*

Bousquet, Papon, Paris: Plon/Libération.
Chalk, F. (1989), Definitions of Genocide and Their Implications for Prediction and Prevention, *Holocaust and Genocide Studies*, **4**: 149–60.
Chalk, F. and Jonassohn, K. (1990), *The History and Sociology of Genocide – Analyses and Case Studies*, New Haven: Yale University Press.
Charny, I.W. (1982), *How Can We Commit the Unthinkable? Genocide: The Human Cancer*, Boulder, CO: Westview Press.
Charny, I.W., ed. (1991), *Genocide, A Critical Bibliographic Review, Volume Two*, London: Mansell.
Charny, I.W., ed. (1994), *The Widening Circle of Genocide – Genocide: A Critical Bibliographic Review, Volume Three*, New Brunswick: Transaction Publishing.
Chaumont, J.-M. (2002), *La Concurrence des Victimes – Génocide, Identité, Reconnaissance*, Paris: La Découverte & Syros.
Chirac, J. (1998), *Discours et Messages de Jacques Chirac, Maire de Paris, Premier Ministre, Président de la République, En Hommage aux Juifs de France Victimes de la Collaboration de l'Etat français de Vichy avec l'Occupant Allemand*, Paris: Fédération des Fils et Filles des Déportés Juifs de France.
Chirac, J. (2005), Discours Prononcé lors de l'Inauguration de la Nouvelle Exposition du Pavillon d'Auschwitz le 27 janvier 2005, *Libération*, 27 janvier 2005.
Chrétien, J.-P. (1993), *Burundi, L'Histoire Retrouvée*, Paris: Editions Karthala.
Christenson, G.A. (1988), Jus Cogens Guarding Interests Fundamental to International Society, *Virginia Journal of International Law*, **28**: 585–648.
Clark, R.S. (1981), Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor, *Ohio Northern University Law Review*, **8**: 321–28.
Clark, R.S. and Sann, M., eds (1996), *The Prosecution of International Crimes – A Critical Study of the International Tribunal for the Former Yugoslavia*, New Brunswick: Transaction Publishing.
Cohen, R. (1983), Killing Truth, *Washington Post*, 81 (31 May 1983).
Cohen-Jonathan, G. (1997), Négationnisme et Droits de l'Homme, RTDH, pp.291–97.
Collectif (1988), *Politiques de l'Oubli*, Paris: Le genre humain, Seuil.
Collectif (1990), *Au Sujet de Shoah – Le Film de Claude Lanzmann*, Paris: Editions Belin.
Collectif (1996), *Le Droit Antisémite de Vichy*, Paris: Le genre humain, Seuil.
Collectif (2001), *Écrire, Résister*, La Versanne: Encre Marine.
Collovald, A. (2004), *Le 'Populisme du FN' un Dangereux Contresens*, Bellecombe-en-Bauges: Editions du Croquant, Collection Savoir/Agir de l'Association Raisons d'agir.
Conan, E. (1998), *Le Procès Papon – Un Journal D'Audience*, Paris: Gallimard.
Conan, E. and Rousso, H. (1996), *Vichy, un Passé Qui ne Passe pas*, Paris: Librairie Arthème Fayard, Collection Folio Histoire.
Cooper, B., ed. (1999), *War Crimes – The Legacy of Nuremberg*, New York: TV Books.

Coquio, C., ed. (1999), *Parler des Camps, Penser les Génocides*, Paris: Editions Albin Michel, Bibliothèque Albin Michel Idées.

Cotler, I. (1996), *Regina v Finta*, *American Journal of International Law*, **90**: 460–76. [DOI: 10.2307/2204072]

Courtois, S. *et al.* (1997), *Le Livre Noir du Communisme – Crimes, Terreur, Répression*, Paris: Robert Laffont, Collection Pocket.

Cowles, W.B. (1948), Trials of War Criminals (Non-Nuremberg), *American Journal of International Law*, **42**:, 299. [DOI: 10.2307/2193675]

Critchley, S. and Kearney, R. (2001), Preface, in Derrida (2001).

Dadrian, V.N. (1975), The Common Features of the Armenian and Jewish Cases of Genocide: A Comparative Victimological Perspective, in *Victimology*, Volume IV, Lexington, MA: D.C. Heath, pp. 99–120.

Dadrian, V.N. (1988), The Convergent Aspects of the Armenian and Jewish Cases of Genocide A Reinterpretation of the Concept of Holocaust, *Holocaust and Genocide Studies*, **3**: 151–69.

Dadrian, V.N. (1990), Towards a Theory of Genocide Incorporating the Instance of Holocaust: Comments, Criticisms and Suggestions, *Holocaust and Genocide Studies*, **5**: 129–43.

Dadrian, V.N. (1991), A Textual Analysis of the Key Indictment of the Turkish Military Tribunal Investigating the Armenian Genocide, *Armenian Review*, **44**: 1–36.

Dadrian, V.N. (1993), The Secret Young-Turk Ittihadist Conference and the Decision for the World War I Genocide of the Armenians, *Holocaust and Genocide Studies*, **7**: 173–201.

Dadrian V.N. (1994), Essay: Comments on Robert Melson's *Revolution and Genocide*, *Holocaust and Genocide Studies*, **8**: 410–17.

Dadrian, V.N. (1995), *Autopsie du Génocide Arménien Traduit de l'anglais par Marc et Mikaël Nichanian*, Brussels: Editions Complexe.

Dadrian, V.N. (1997), The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series, *Holocaust and Genocide Studies*, **11**: 28–59. [DOI: 10.1093/hgs%2F11.1.28]

Dadrian, V.N. (1999), *Histoire du Génocide Arménien – Conflits Nationaux des Balkans au Caucase Traduit de l'anglais par Marc Nichanian*, Paris: Editions Stock.

De Fontette, F. (1993), *Histoire de l'Antisémitisme*, Paris: Presses Universitaires de France, Collection Que Sais-Je?.

De Gaulle Anthonioz, G. (1998), *La Traversée de la Nuit*, Paris: Editions du Seuil.

De Hoogh, A.J.J. (1991), The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective, *Austrian Journal of Public and International Law*, **42**: 183–214.

De Saint Cheron, M. (2000), *De la Mémoire à la Responsabilité – Dialogue avec Geneviève de Gaulle Anthonioz, Edgar Morin, Emmanuel Levinas*, Paris: Editions Dervy.

De Saint-Exupéry, P. (2004), *L'inavouable – La France au Rwanda*, Paris: Editions des Arènes.

Delbo, C. (1965), *Le Convoi du 24 janvier*, Paris: Les Editions de Minuit.
Delbo, C. (1970a), *Auschwitz et Après − Aucun de Nous ne Reviendra*, Paris: Les Editions de Minuit.
Delbo, C. (1970b), *Auschwitz et Après – Une Connaissance Inutile*, Paris: Les Editions de Minuit.
Delbo, C. (1971), *Auschwitz et Après – Mesure de nos Jours*, Paris: Les Editions de Minuit.
Delbo, C. (1995, original version 1970–71), *Auschwitz and After*, translated by Rosette C. Lamont, with an introduction by Lawrence L. Langer, New Haven and London: Yale University Press.
Delmas Saint-Hilaire, Jean-Pierre (1997), 'La définition juridique de la complicité de crime contre l'humanité au lendemain de l'arrêt de la Chambre Criminelle du 23 Janvier 1997 (Affaire Papon),' *Recueil Dalloz* 30ème Cahier: 249–54.
Derrida, J. (2000), *Foi et Savoir* Suivi De *Le Siècle et le Pardon*, Paris: Editions du Seuil.
Derrida, J. (2001), *On Cosmopolitanism and Forgiveness*, translated by M. Dooley and M. Hughes, London: Routledge.
Des Forges, A., ed. (1999), *Aucun Témoin ne Doit Survivre – Le Génocide au Rwanda, Human Rights Watch, Fédération Internationale des Ligues des Droits de L'Homme*, Paris: Editions Karthala.
Des Pres, T. (1987), Introduction: Remembering Armenia, in Hovannisian, Richard G. ed., (1987), pp. 10–20.
Destexhe, A. (1995), *Rwanda and Genocide in the Twentieth Century*, translated by A. Marschner, London: Pluto Press.
Devant l'Histoire (1988), *Les documents de la controverse sur la singularité de l'extermination des Juifs par le régime Nazi*, Paris: Les Editions du Cerf, 'Passages'.
DeWeese, G.S. (1998), The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention, *Denver Journal of International Law and Policy*, **26**: 625–54.
Dinstein, Y. (1965), The Defence of 'Obedience to Superior Orders' in *International Law*, Leyden: A.W. Sijthoff.
Dinstein, Y. and Tabory, M. (1996), *War Crimes in International Law*, Dordrecht: Martinus-Nijhoff.
Dobkine, M. (1992), *Crimes et Humanité – Extraits des Actes du Procès de Nuremberg, 18 Octobre 1945-1er Octobre 1946*, Paris: Editions Romillat.
Dobry, M., ed. (2003), *Le Mythe de L'Allergie française au Fascisme*, Paris: Editions Albin Michel, Bibliothèque Albin Michel Idées.
Donnedieu de Vabres, H. (1947), Le Procès de Nuremberg Devant les Principes Modernes du Droit Pénal International, *Recueil des Cours de l'Académie de Droit International*, **I**: 477–582.
Donnet, P.-A. (1992), *Tibet, Mort ou Vif*, Paris: Gallimard, Collection Folio Actuel.
Douglas, L. (2001), *The Memory of Judgment – Making Law and History in the Trials of the Holocaust*, New Haven: Yale University Press.

Drost, P.N. (1959), *The Crime of State – Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II:* Genocide – United Nations Legislation on International Criminal Law (Leyden: A.W. Sythoff).

Dupaquier, J.-F., ed. (1996), *La Justice Internationale Face au Drame rwandais*, Paris: Editions Karthala.

Edwards, R.W., Jr (1981), Contributions of the Genocide Convention to the Development of International Law, *Ohio Northern University Law Review*, **8**: 300–314.

El Kenz, D., ed. (2005), *Le Massacre, Objet d'Histoire*, Paris: Editions Gallimard, (Collection Folio Histoire Inédit).

Eltringham, N. (2004), *Accounting for Horror, Post-Genocide Debates in Rwanda*, London: Pluto Press.

Eluard, P. (1945, reprint 1999), *Au Rendez-Vous Allemand Suivi de Poésie et Vérité 1942*, Paris: Les Editions de Minuit.

Eluard, P. (1947, reprint 2000), *Le Livre Ouvert 1938–1944*, Paris: Editions Gallimard.

Ergec, R. (1993), La Liberté d'expression, L'Autorité et L'Impartialité du Pouvoir Judiciaire, RTDH, pp.171–81.

Ertel, R. (1993), *Dans la Langue de Personne. Poésie Yiddish de l'Anéantissement*, Paris: Seuil.

Etzioni, A. (2005), Genocide Prevention in the New Global Architecture, *British Journal of Politics and International Relations*, **7**: 469–84. [DOI: 10.1111/j.1467-856X.2005.00201.x]

Falk, R.A. (1974), Ecocide, Genocide, and the Nuremberg Tradition of Individual Responsibility, in *Philosophy, Morality and International Affairs*, eds Held, V., Morgenbesser, S. and Nagel, T., New York: Oxford University Press, pp. 123–37.

Fein, H. (1979), *Accounting for Genocide – National Responses and Jewish Victimization during the Holocaust*, London: Collier-Macmillan.

Fein, H. (1990), Genocide: A Sociological Perspective, *Current Sociology*, **28**: whole issue.

Finch, G.A. (1947), The Nuremberg Trial and International Law, *American Journal of International Law*, **XLI**: 20–37. [DOI: 10.2307/2193852]

Finch, G.A. (1949), The Genocide Convention, *American Journal of International Law*, **43**: 732–38. [DOI: 10.2307/2193261]

Finkelstein, N.G. and Birn, R.B. (1999, original version 1998), *L'Allemagne en Procès – La Thèse de Goldhagen et la vérité historique*, translated from the English by Denis Berger, Paris: Albin Michel.

Finkielkraut, A. (1989), *La Mémoire Vaine – Du Crime contre l'Humanité*, Paris: Editions Gallimard, Collection Folio Essais.

Finkielkraut, A. (1982), *L'Avenir d'une Négation – Réflexion sur la Question du Génocide*, Paris: Editions du Seuil.

Finkielkraut, A. (1992, original version 1989), *Remembering in Vain – The Klaus Barbie Trial and Crimes Against Humanity*, translated by Roxanne Lapidus with

Sima Godfrey with an introduction by Alice Y. Kaplan, New York: Columbia University Press.

Finkielkraut, A. (1998, original version 1982), *The Future of a Negation – Reflections on the Question of Genocide*, translated by Mary Byrd Kelly with an ntroduction by Richard J. Golsan, Lincoln: University of Nebraska Press.

Fottorino, E. (2005), Survivre à sa Mémoire, *Le Monde* (29 janvier 2005).

Frank, A. (1989, original version 1947), *Le Journal d'Anne Frank Texte Établi par Otto H. Frank et Mirjam Pressler, Nouvelle Édition Courante Adaptée du Néerlandais par Nicolette Oomes et Philippe Noble à partir de la Traduction de l'Édition Critique par Philippe Noble et Isabelle Rosselin-Bobulesco*, Paris: Calmann-Levy.

Frankowska, M. (1990), The United States Should Withdraw Its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal, *Michigan Journal of International Law*, **12**: 141–49.

Friedlander, A. (Rabbi) (2001); Is Forgiveness Possible?A Jewish Perspective, BBC History [website], (updated 15 June 2006) <http://www.bbc.co.uk/history/war/genocide/forgive_01.shtml>.

Friedlander, R.A., Problems of Enforcing International Criminal Law, in Bassiouni, M. Cherif (ed.) (1987), pp. 13–22.

Friedländer, S. (1979, original version 1978), *When Memory Comes*, translated from the French by Helen R. Lane, Madison: The University of Wisconsin Press.

Friedländer, S. (1993), *Memory, History and the Extermination of the Jews of Europe*, Bloomington: Indiana University Press.

Frossard, A. (1987, reprint 1997), *Le Crime Contre Humanité*, Paris: Editions Robert Laffont.

Furman, N. (1995), The Languages of Pain in *Shoah*, in Kritzman, L.D. ed., pp. 306–16.

Fussell, J.T., (2006) A Crime without a Name, Prevent Genocide International [Website], (updated 15 June 2006) http://www.preventgenocide.org/genocide/crimewithoutaname.htm.

Gaeta, P. (1999), *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, *European Journal of International Law*, **10**: 172–91.

Gaillard, P. (2004), Rwanda 1994: Un Témoignage: 'On peut tuer autant de gens qu'on veut, on ne peut pas tuer leur mémoire', *Revue Internationale de la Croix-Rouge*, **86**: 611–27.

Garapon, A. (1999), La justice et l'inversion morale du temps, in Académie Universelle des Cultures (1999), pp. 113–24.

Garapon, A. (2002), *Des Crimes qu'on ne Peut ni Punir ni Pardonner – pour une Justice Internationale*, Paris: Editions Odile Jacob.

Gellately, R. (2001), *Backing Hitler – Consent and Coercion in Nazi Germany*, Oxford: Oxford University Press.

Gellately, R. and Kiernan, B., eds (2003), *The Specter of Genocide – Mass Murder*

in Historical Perspective, Cambridge: Cambridge University Press.
Ginsburgs, G. and Kudriavtsev, V.N., eds. (1990), *The Nuremberg Trial and International Law*, Dordrecht: Martinus Nijhoff.
Glaser, K. (1979), *Victims of Politics: The State of Human Rights*, New York: Columbia University Press.
Glaser, S. (1970), *Droit International Pénal Conventionnel*, Brussels: Editions Bruylant.
Godin, C. (2000), *Négationnisme et Totalitarisme*, Nantes: Editions Pleins Feux.
Goldhagen, D.J. (1997, original version 1996), *Les Bourreaux Volontaires de Hitler – Les Allemands Ordinaires et l'Holocauste*, Paris: Editions du Seuil, Collection Points.
Gomez Robledo, A. (1981), Le *Jus Cogens* International: Sa Genèse, Sa Nature, Ses Fonctions, *Recueil des Cours de l'Académie de Droit International*, **III**: 9–217.
Gordon, W.C. (1950), International Law – Self-Executing Treaties – The Genocide Convention, *Michigan Law Review*, **48**: 852–60.
Govciyan, A. (2003), *24 Avril, Témoignage sur la reconnaissance par la France du génocide arménien de 1915*, Paris: le cherche midi.
Gray, M. (1971), *Au Nom de Tous les Miens*, Paris: Editions Robert Laffont.
Green, L.C. (1981), New Trends in International Criminal Law, *Israel Yearbook on Human Rights*, **11**: 9–40.
Green, L.C. (1995), Command Responsibility in International Humanitarian Law *Transnational Law and Contemporary Problems*, **5**: 319–71.
Greenawalt, A.K.A. (1999), Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, *Columbia Law Review*, **99**: 2259–94.
Grinspan, I. and Poirot-Delpech, B. (2002), *J'ai pas Pleuré*, Paris: Editions Robert Laffont.
Grmek, M., Gjidara, M. and Simac, N. (1993), *Le Nettoyage Ethnique – Documents Historiques sur une Idéologie Serbe*, Paris: Librairie Arthème Fayard.
Guéno, J.-P., ed., (2002) *Paroles d'Étoiles, Mémoire d'Enfants Cachés (1939−45)*, Paris: Editions Librio.
Guroian, V. (1988), Post-Holocaust Political Morality: The Litmus of Bitburg and the Armenian Genocide Resolution, *Holocaust and Genocide Studies*, **3**: 305–22.
Haarscher, G. (1995), Le Blasphémateur et le Raciste, *Revue Trimestrielle des Droits de l'Homme*, 417–22.
Hannikainen, L. (1988), *Peremptory Norms (Jus Cogens) in International Law – Historical Development, Criteria, Present Status*, Helsinki: Lakimiesliiton Kustannus: Finnish Lawyers' Publishing Company.
Hannum, H. (1989), International Law and Cambodian Genocide: The Sounds of Silence, *Human Rights Quarterly*, **11**: 82–138. [DOI: 10.2307/761936]
Harff, B. and Gurr, T.R. (1988), Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945, *International Studies Quarterly*, **32**: 359–71. [DOI: 10.2307/2600447]
Harff, B. and Gurr, T.R. (1990), Victims of the State: Genocides, Politicides and

Group Repression Since 1945, *International Review of Victimology*, **1**: 23–41.
Hartman, G., ed. (1986), *Bitburg in Moral and Political Perspective*, Bloomington, IN: University Press.
Herdegen, M.J. (1995), Unjust Laws, Human Rights, and the German Constitution: Germany's Recent Confrontation with the Past, *Columbia Journal of Transnational Law*, **32**: 591–606.
Hier, M. (Rabbi), Auschwitz Fifty Years Later: What will we remember?, Simon Wiesenthal Center Multimedia Learning Center Online [Website], (Updated 15 June 2006) http://www.motlc.wiesenthal.com/resources/education/fiftyyears/index.html.
Hilberg, R. (1985), *The Destruction of the European Jews*, New York: Holmes & Meier Publishers.
Hilberg, R. (1996, original version 1994), *La Politique de la Mémoire*, translated from the English by Marie-France de Paloméra, Paris: Editions Gallimard, Collection Arcades.
Hirsh, D. (2003), *Law against Genocide: Cosmopolitan Trials*, London: The GlassHouse Press, Cavendish Publishing Limited.
Hitler, A. (Reprint 1971), *Mein Kampf*, translation by J. Gaudefroy-Demombynes and A. Calmettes, Paris: Nouvelles Editions Latines.
Horowitz, I.L. (1977), *Genocide, State Power and Mass Murder*, 2nd edn, New Brunswick, NJ: Transaction Books.
Horowitz, I.L. (1997), *Taking Lives – Genocide and State Power* 4th edn, New Brunswick: Transaction Publishing.
Höss, R. (1959, reprint 1995), *Le Commandant d'Auschwitz Parle*, Paris: Editions Julliard, Editions La Découverte.
Housepian, M. (1966), 'The Unremembered Genocide', *Commentary*, 55–61.
Housepian Dobkin, M. (1987), What Genocide? What Holocaust? News from Turkey, 1915–1923: A Case Study. in Richard G. Hovannisian, ed. (1987), pp. 97–109.
Hovannisian, R.G. (1968), The Allies and Armenia, 1915–18, *Journal of Contemporary History*, **3**: 145–68.
Hovannisian, R.G., ed. (1987), *The Armenian Genocide in Perspective*, New Brunswick, NJ: Transaction Books.
Hovannisian, R.G., ed. (1999), *Remembrance and Denial – The Case of the Armenian Genocide*, Detroit, MI: Wayne State University Press.
Human Rights Watch (1994), Génocide au Rwanda, Rapport avril–mai 1994, *Human Rights Watch Rapports.*
Huttenbach, H.R. (1988), Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization, *Holocaust and Genocide Studies*, **3**: 289–303.
Igounet, V.(2000), *Histoire du Négationnisme en France* (Paris: Editions du Seuil, Collection XXè Siècle).
Imbleau, M. (2003), *La Négation du Génocide Nazi – Liberté d'Expression ou Crime Raciste? Le négationnisme de la Shoah en droit international et comparé*, Paris:

L'Harmattan, Collection Allemagne d'hier et d'aujourd'hui.
International Commission of Jurists (1959), *The Question of Tibet and the Rule of Law*, Geneva: International Commission of Jurists.
International Commission of Jurists (1960), *Tibet and the Chinese People's Republic – A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet*, Geneva: International Commission of Jurists.
International Commission of Jurists (1997), *Tibet: Human Rights and the Rule of Law*, Geneva: International Commission of Jurists.
Jackson, R.H. (1972), *The Nürnberg Case*, Cooper: Square Press, Inc.
Jankélévitch, V. (1948, reprint 1994), Dans l'Honneur et la Dignité, in Jankélévitch, V (1994), *L'Imprescriptible*, Paris: Editions du Seuil, Collection Points Essais.
Jankélévitch, V. (1971, reprint 1994), Pardonner?, in Jankélévitch, Vladimir (1994), *L'Imprescriptible*, Paris: Editions du Seuil, Collection Points Essais.
Jankélévitch, V. (1980a), *Le Je-ne-sais-quoi et le Presque-Rien. 1 La Manière et L'Occasion*, Paris: Editions du Seuil, Collection Points Essais.
Jankélévitch, V. (1980b), *Le Je-ne-sais-quoi et le Presque-Rien. 2 La Méconnaissance – Le Malentendu*, Paris: Editions du Seuil, Collection Points Essais.
Jankélévitch, V. (1980c), *Le Je-ne-sais-quoi et le Presque-Rien. 3 La Volonté de Vouloir*, Paris: Editions du Seuil, Collection Points Essais.
Jankélévitch, V. (1996, original version 1971), Should We Pardon Them?, translated by Ann Hobart, *Critical Inquiry*, **22** (3): 552–72.
Jankélévitch, V. (2005, original version 1967), *Forgiveness*, translated by A. Kelley, Chicago: The University of Chicago Press.
Jones, J.R.W.D. (2000), *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd edn, New York: Transnational Publishers, Inc.
Jones, R.H. (1975), Jurisdiction and Extradition under the Convention, 'Comment: the United States and the 1948 Genocide Convention, Part II,', *HILJ*, **16**: 696–704.
Jørgensen, N.H.B. (2002), The Genocide Acquittal in the *Sikirica* Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea, *Leiden Journal of International Law*, **15**: 389–407. [DOI: 10.1017/S0922156502000195]
Joyner, C.C. and Bassiouni, M.C., eds (1998), Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17–21 September 1998, *Nouvelles Etudes Pénales*, Association Internationale de Droit Pénal (érès).
Kahn, R.A. (2004), *Holocaust Denial and the Law – A Comparative Study*, Basingstoke: Palgrave Macmillan.
Kalfa, A. (2004), *La Force du Refus – Philosopher Après Auschwitz*, Paris: L'Harmattan.
Kalfa, A. and De Saint Cheron, M., eds (1998), *Élie Wiesel en Hommage*, Paris: Les Editions du Cerf.

Kelley, A. (2005), Translator's Introduction, in Jankélévitch, V. (2005, original version 1967), pp.vii–xxvii.

Kelsen, H. (1947), Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, *International Law Quarterly*, **1**: 153–71.

Kershaw, I. (1987, reprint 2001), *The 'Hitler Myth' – Image and Reality in the Third Reich*, Oxford: Oxford University Press.

Kershaw, I. (2000), *The Nazi Dictatorship – Problems and Perspectives of Interpretation*, 4th edn, London: Arnold.

Kiernan, B., ed. (1993), *Genocide and Democracy in Cambodia – The Khmer Rouge, the United Nations and the International Community*, New Haven: Monograph Series 41 / Yale University Southeast Asia Studies.

Klarsfeld, A. (1994), *Touvier, Un Crime Français*, Paris: Librairie Arthème Fayard.

Klarsfeld, A. (1998), *Papon, Un Verdict Français*, Paris: Editions Ramsay.

Klarsfeld, S. (1978), *Le Mémorial de la déportation des juifs de France*, Paris: Beate et Serge Klarsfeld.

Klarsfeld, S. (1983), *Vichy-Auschwitz, Le Rôle de Vichy dans la Solution Finale de la Question Juive en France – 1942*, Paris: Librairie Arthème Fayard.

Klarsfeld, S. (1983−85, reprint 2001), *La Shoah en France – Vichy-Auschwitz, La 'solution finale' de la Question Juive en France*, Paris: Librairie Arthème Fayard.

Klarsfeld, S. (1985), *Vichy-Auschwitz, Le Rôle de Vichy dans la Solution Finale de la Question Juive en France – 1943–1944*, Paris: Librairie Arthème Fayard.

Klarsfled, S. (1993), *Le Calendrier de la persécution des Juifs de France, 1940–1944, éphéméride relatant les étapes de la Shoah en France*, Paris: L'Association 'Les Fils et Filles des déportés juifs de France' et la Fondation Beate Klarsfeld.

Klarsfeld, S. (2001a), *La Shoah en France – Le Calendrier de la Persécution des Juifs de France, juillet 1940 – août 1942*, Paris: Librairie Arthème Fayard.

Klarsfeld, S. (2001b), *La Shoah en France – Le Calendrier de la Persécution des Juifs de France, septembre 1942 – août 1944*, Paris: Librairie Arthème Fayard.

Klarsfeld, S. (2001c), *La Shoah en France – Le Mémorial des Enfants Juifs Déportés de France*, Paris: Librairie Arthème Fayard.

Klarsfeld, S. (1984), *Les enfants d'Izieu, une tragédie juive*, Documentation réunie et publiée par Serge Klarsfeld, Président de l'Association 'Les Fils et Filles des Déportés Juifs de France', Paris: AZ Repro.

Klarsfeld, S., ed. (1987), *Mémoire du Génocide – Recueil de 80 articles du – Monde Juif – Revue du Centre de Documentation Juive Contemporaine*, (Publié conjointement par Le Centre de Documentation Juive Contemporaine de Paris CDJC et L'Association 'Les Fils et Filles des Déportés Juifs de France' FFDJF).

Kofman, S. (1987), *Paroles suffoquées*, Paris: Editions Galilée, Collection Débats.

Kofman, S. (1998, original version 1987), *Smothered Words*, translated from the French by Madeleine Dobie, Evanston, Illinois: Northwestern University Press.

Kogon, E. (1947, original version 1946), *L'Etat SS – Le système des camps de concentration allemands*, Paris: Editions de la Jeune Parque, Collection Points Histoire.

Korczak, J. (1998, original version 1957), *Journal du Ghetto*, translated from Polish and prefaced by Zofia Bobowicz, Editions Robert Laffont, Bibliothèques 10/18.

Krell, R. and Sherman, M.I. (1997), *Medical and Psychological Effects of Concentration Camps on Holocaust Survivors*, New Brunswick, NJ: Transaction Publishing.

Kritzman, L.D., ed. (1995), *Auschwitz and After – Race, Culture, and 'the Jewish Question' in France*, London: Routledge.

Kuhn, A.K. (1949), The Genocide Convention and State Rights, *American Journal of International Law*, **43**: 498–501. [DOI: 10.2307/2193644]

Kunz, J.L. (1949), The United Nations Convention on Genocide, *American Journal of International Law*, **43**: 738–46. [DOI: 10.2307/2193262]

Kuper, L. (1981), *Genocide – Its Political Use in the Twentieth Century*, New Haven: Yale University Press.

Kuper, L. (1985), *The Prevention of Genocide*, New Haven: Yale University Press.

L'honneur des poètes (1944), *Europe* (Volume publié aux dépens de quelques lettrés patriotes achevé d'imprimer sous l'oppression à Paris le 1er mai 1944).

Lane, E. (1979), Mass Killing by Governments: Lawful in the World Legal Order?, *New York University International Law and Politics* **12**: 239–80.

Langbein, H. (1975), *Hommes et Femmes à Auschwitz*, translated from the German by Denis Meunier, Paris: Librairie Arthème Fayard.

Lanzmann, C. (1985), *Shoah*, Paris: Librairie Arthème Fayard.

Lanzmann, C. (1990), De l'Holocauste à *Holocauste* ou Comment s'en débarasser, in Collectif (1990), pp.306–16.

Leblanc, L.J. (1984), The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, *American Journal of International Law*, **78**: 369–85. [DOI: 10.2307/2202281]

Leblanc, L.J. (1988), The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?, *Yale Journal of International Law*, **13**: 268–95.

Lemkin, R. (1944), *Axis Rule in Occupied Europe – Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for International Peace, Division of International Law.

Lemkin, R. (1947), Genocide as a Crime under International Law, *American Journal of International Law*, **41**: 145–51.

Levi, P. (1987, original version 1958), *Si c'est un Homme*, translated from the Italian by Martine Schruoffeneger, Julliard.

Levi, P. (1988, original version 1986), *The Drowned and the Saved*, translated by Raymond Rosenthal, London: Abacus.

Levi, P. (1989, original version 1986), *Les Naufragés et les Rescapés – Quarante Ans Après Auschwitz*, translated from the Italian by André Maugé, Paris: Editions Gallimard, Collection Arcades.

Levi, P. (1995), *Le Devoir de Mémoire*, translated from Italian by Joël Gayraud, Paris: Editions Mille et une nuits.

Levi, P. (2005 for the French version), *Rapport sur Auschwitz*, Translated from

Italian by Catherine Petitjean, Paris: Editions Kimé.
Levinet, M. (2004), La Fermeté Bienvenue de la Cour Européenne des Droits de L'Homme Face au négationnisme Obs. S/La Décision du 24 juin 2003, *Garaudy* C France, *Revue Trimestrielle des Droits de l'Homme*, 653–62.
Lévi-Strauss, C. (1987, original version 1952), *Race et Histoire*, Paris: Editions Gallimard, Collections Folio Essais.
Lindwer, W., (1999, original version 1988), *The last seven months of Anne Frank*, translated from Dutch by Alison Meersschaert, London: Macmillan Children's Books.
Lippman, M. (1985), The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, *Boston University International Law Journal*, **3**: 1–62.
Lippman, M. (2000), The Evolution and Scope of Command Responsibility, *Leiden Journal of International Law*, **13**: 139–70. [DOI: 10.1017/S0922156500000108]
Lipstadt, D. (1994), *Denying the Holocaust – The Growing Assault on Truth and Memory*, London: Penguin Books.
Lord Russell of Liverpool (1955), *The Scourge of the Swastika – A Short Story of Nazi War Crimes*, London: Cassell and Company Ltd.
Lorin, M. (1989); Schönebeck, un kommando de Buchenwald – Du sabotage des avions Nazis à l'Épouvante d'une Marche de la Mort, (Amicale des anciens déportés de Schönebeck – Mülhausen – Buchenwald).
Lyon-Caen, A. (1988), De Nuremberg au Procès Barbie, in Centre de Droit International de L'Institut de Sociologie de l'Université Libre de Bruxelles, Centre Henri Rolin; Fondation Auschwitz-Stichting (Centre d'Etudes et de documentation), pp.47–59.
Lyotard, J.-F. (1983), *Le Différend*, Paris: Les Editions de Minuit, Collection 'Critique'.
Lyotard, J.-F. (1988, original version 1983), The Differed – Phrases in Dispute, in *Theory and History of Literature 46*, translated by G.V. Abbeele, Minneapolis: University of Minnesota Press.
Magnarella, P.J. (2000), *Justice in Africa – Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal*, Aldershot: Ashgate Publishing.
Maison, R. (1994), Les Ordonnances de la CIJ dans L'Affaire Relative à l'Application de la Convention sur la Prévention et la Répression du Crime de Génocide, *European Journal of International Law*, **5**: 381–400.
Maison, R. (1999), Le Crime de Génocide dans les Premiers Judgments du Tribunal Pénal International pour le Rwanda, *Revue Générale de Droit International Public*, **103**: 129–45.
Maljean-Dubois, S. (1996), L'affaire Relative à l'Application de la Convention pour la Prévention et la Répression du Crime de Génocide (Bosnie-Herzégovine c. Yougoslavie), Arrêt du 11 juillet 1996, Exceptions Préliminaires, *Annuaire Français de Droit International*, **XLII**: 357–86.
Mälksoo, L. (2001), Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law, *Leiden Journal of International Law*, **14**: 757–87.

[DOI: 10.1017/S0922156501000371]
Marcus, P. and Rosenberg, A., eds (1989), *Healing Their Wounds – Psychotherapy with Holocaust Survivors and Their Families*, New York: Praeger.
Marienstras, R. (1994), *Dans la langue de personne: sur quelques poèmes improbables – In Poésie 70, 69–80*, Paris: Editions Belin.
Markusen, E. (1991), Genocide, Total War, and Nuclear Omnicide, in Charny, I.W., ed. (1991), pp.229–47.
Massias, F. (1993), La Liberté d'Expression et le Discours Raciste ou Révisionniste, *Revue Trimestrielle des Droits de l'Homme*, 183–213.
Maurice, V. (2001), *n.n. – nacht und nebel*, La Versanne: Encre Marine.
McAuliffe deGuzman, M. (2000), The Road from Rome: The Developing Law of Crimes against Humanity, *Human Rights Quarterly*, **22**: 335–403.
McCormack, T.L.M. and Simpson, G.J., eds (1997), *The Law of War Crimes, National and International Approaches*, The Hague: Kluwer Law International.
Meier Wang, M. (1995), The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact, *Columbia Human Rights Law Review*, **27**: 177–226.
Melander, G. and Alfredsson, G., eds (1997), *The Raoul Wallenberg Compilation of Human Rights Instruments*, Dordrecht: Martinus-Nijhoff.
Melka, A. (2005), *Les Morts vivent à Auschwitz*, Marseille: Transbordeurs.
Melson, R. (1989), Revolutionary Genocide: on the Causes of the Armenian Genocide of 1915 and the Holocaust, *Holocaust and Genocide Studies*, **4**: 161–74.
Melson, R. (1992), *Revolution and Genocide – on the Origins of the Armenian Genocide and the Holocaust*, London: The University of Chicago Press.
Melvern, L. (2000), *A People Betrayed – The Role of the West in Rwanda's Genocide*, London: Zed Books.
Melvern, L. (2004), *Conspiracy to Murder – The Rwandan Genocide*, London: Verso.
Meštrović, S.G., ed. (1996), *Genocide After Emotion – The Postemotional Balkan War*, London: Routledge.
Mettraux, Guénaël (2005), *International Crimes and the* Ad Hoc *Tribunals*, Oxford: Oxford University Press.
Michel, N., ed. (1997), *Paroles à la Bouche du Présent – Le négationnisme: histoire ou politique?*, Marseille: Editions Al Dante, Collection Axolotl.
Miller, J. (1990), *One by One, by One: Facing the Holocaust*, New York: Simon & Schuster.
Miller, R.H. (1971), The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *American Journal of International Law*, **65:**, 476–501. [DOI: 10.2307/2198971]
Mission d'étude sur la spoliation des Juifs de France (2000a), *Guide des Recherches dans les Archives des Spoliations et des Restitutions*, Paris: La Documentation Française.
Mission d'étude sur la spoliation des Juifs de France (2000b), *La Persécution des*

Juifs de France 1940-1944 et le Rétablissement de la Légalité Républicaine – Recueil des Textes Officiels 1940-1999, Paris: La Documentation Française.

Mission d'étude sur la spoliation des Juifs de France (2000c), *Rapport Général*, Paris: La Documentation Française.

Moreau, P. (1994), *Les Héritiers du IIIe Reich. L'Extrême Droite Allemande de 1945 à nos Jours*, Paris: Editions du Seuil.

Morin, E. (2000), Pardonner, c'est Résister à la Cruauté du Monde, in *Le Monde des Débats* (Février 2000).

Morris, V. and Scharf, M.P. (1998), *The International Criminal Tribunal for Rwanda*, New York: Transnational Publishers, Inc.

Mosler, H. (1974), The International Society as a Legal Community, *Recueil des Cours de l'Académie de Droit International* , **IV**: 1–320.

Neier, A. (1998), *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, New York: Times Books.

Novick, P. (1999), *The Holocaust and Collective Memory – The American Experience*, London: Bloomsbury Publishing.

Nowak, M. (1993), *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, Kehl: N.P. Engel Publisher.

Orwell, G. (1949, reprint 1990), *Nineteen Eighty-Four*, London: Penguin Books.

Parrau, A. (1995), *Ecrire les Camps*, Paris: Editions Belin.

Paust, J.J. *et al.*, eds (2000), *International Criminal Law Documents Supplement*, Durham, NC: Carolina Academic Press.

Paust, J.J. *et al.*, eds (2000), *International Criminal Law, Cases and Materials*, 2nd edn, Durham, NC: Carolina Academic Press.

Paxton, R.O., (1997, original version 1972), *La France de Vichy, 1940–1944*, translated from the English by Claude Bertrand, Editions du Seuil, Collection Points Histoire.

Pearsall, J. (2001) *The Concise Oxford Dictionary*, Oxford: Oxford University Press.

Perec, G. (1996), Robert Antelme ou la Vérité de la Littérature, in Robert Antelme (1996), pp.173–90.

Philosophie (2000), La Philosophie Devant la Shoah, *Philosophie 67: Whole Issue*, Paris: Les Editions de Minuit.

Piralian, H. (1994), *Génocide et Transmission*, Paris: Editions L'Harmattan.

Poliakov, L. (1963), *Le Procès de Jérusalem – Juger Adolf Eichmann*, Paris: Calmann-Levy.

Price, S. and Kearns, E., eds (2003), *The Oxford Dictionary of Classical Myth and Religion*, Oxford: Oxford University Press.

Procida, N.M. (1995), Ethnic Cleansing in Bosnia Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide, *Suffolk Transnational Law Review*, **18**: 655–86.

Ragazzi, M. (1997), *The Concept of International Obligations Erga Omnes*, Oxford: Clarendon Press.

Ratner, S.R. (1999), The United Nations Group of Experts for Cambodia, *American Journal of International Law*, **93**: 948–53. [DOI: 10.2307/2555361]

Ratner, S.R. and Abrams, J.S. (2001), *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, 2nd edn., Oxford: Oxford University Press.

Reichel, P. (1997, original version 1991), *La Fascination du Nazisme Traduction de 'Allemand par Olivier Mannoni*, Paris: Editions Odile Jacob, Collection Opus.

Reid, J.J. (1989), The Concept of War and Genocidal Impulses in the Ottoman Empire, 1821–1918, *Holocaust and Genocide Studies*, **4**: 175–91.

Rérolle, R. and Weill, N. (1994), La Parole contre l'Extermination, *Le Monde* (25 février 1994).

Reydams, L. (2002), *Niyonteze v Public Prosecutor*, Tribunal Militaire de Cassation (Switzerland), 27 April, 2001, *American Journal of International Law*, **96**: 231–6. [DOI: 10.2307/2686140]

Ricoeur, P. (2000), *La Mémoire, l'Histoire, l'Oubli*, Paris: Editions du Seuil, Collection Points Essais.

Rigaux, F. (1995), La Liberté d'Expression et ses Limites, *Revue Trimestrielle des Droits de l'Homme*, 401–15.

Ringelheim, F. (1997), Observations – Le négationnisme contre la loi, *Revue Trimestrielle des Droits de l'Homme*, 120–33.

Rinn, M. (1998), *Les Récits du Génocide – Sémiotique de l'Indicible*, Paris: Delachaux et Niestlé SA.

Robinson, J. (1972), The International Military Tribunal and the Holocaust, Some Legal Reflections, *Israel Law Review*, **7**: 1–13.

Robinson, M. (1999), Genocide, War Crimes, Crimes Against Humanity, *Fordham International Law Journal*, **23**: 275–85.

Robinson, N. (1960), *The Genocide Convention – A Commentary*, New York: Institute of Jewish Affairs/World Jewish Congress.

Roht-Arriaza, N., ed. (1995), *Impunity and Human Rights in International Law and Practice*, Oxford: Oxford University Press.

Rosenbaum, A.S., ed. (2001), *Is the Holocaust Unique? Perspectives on Comparative Genocide*, 2nd edn, Oxford: Westview Press.

Roth, M.S. and Salas, C.G., eds (2001), *Disturbing Remains: Memory, History, and Crisis in the Twentieth Century The Getty Research Institute Publications Program – Issues and Debates*, Los Angeles: The Getty Research Institute.

Roth, S.J. (1993), Denial of the Holocaust as an Issue of Law, *Israel Yearbook of Human Rights*, **23**, 215–35.

Rousset, D. (1965), *L'Univers Concentrationnaire*, Paris: Les Editions de Minuit.

Rousset, D. (1993), *Les Jours de Notre Mort*, Paris: Editions Hachette, Collection Pluriel.

Rousso, H. (1990), *Le syndrome de Vichy de 1944 à nos jours*, 2nd edn, Editions du Seuil, Collection Points Histoire.

Rousso, H. (2004), *Le Dossier Lyon III – Le Rapport sur le Racisme et le négationnisme à l'Université Jean-Moulin*, Paris: Librairie Arthème Fayard.

Sadat Wexler, L. (1994), The Interpretation of the Nuremberg Principles by the French Court of Cassation: from Touvier to Barbie and Back Again, *Columbia Journal of Transnational Law*, **32**: 289–367.

Salas, D. (2003), *Le Droit Peut-Il Contribuer au Travail de Mémoire*?, in Association française pour l'histoire de la Justice, Commission nationale consultative des droits de l'homme, Ecole nationale de la magistrature, pp.36–45.

Sartre, J.-P. (1954), *Réflexions sur la Question Juive*, Paris: Gallimard, Collection Idées.

Schabas, W.A. (1996), Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, *Criminal Law Forum*, 7, 523–60.

Schabas, W.A. (2000), *Genocide in International Law – The Crimes of Crimes*, Cambridge: Cambridge University Press.

Schabas, W.A. (2001a), *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press.

Schabas, W.A. (2001b), The Jelisić Case and the *Mens Rea* of the Crime of Genocide, *Leiden Journal of International Law*, **14**: 125–39. [DOI: 10.1023/A%3A1017938324448]

Schabas, W.A. (2003), National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,', *Journal of International Criminal Justice*, **1**: 39–63.

Scharf, M. (1996), The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, *Law and Contemporary Problems*, **59**: 41–61. [DOI: 10.2307/1192189]

Schreuer, C. (2000), East Timor and the United Nations, *International Law Forum du Droit International*, **2**: 18–25. [DOI: 10.1163/15718040020962375]

Schwarzenberger, G. (1957), *International Criminal Law*, Vol. I *3rd edn.*, London: Stevens and Sons Limited.

Schwarzenberger, G. (1965), International *Jus Cogens*?, *Texas Law Review*, **43**: 455–78.

Schwelb, E. (1946), Crimes Against Humanity, *British Yearboook of International Law*, **23**: 178–226.

Sémelin, J. (2005), *Purifier et Détruire – Usages Politiques des Massacres et Génocides*, Paris: Editions du Seuil.

Semprun, J. (1963), *Le Grand Voyage*, Paris: Editions Gallimard.

Semprun, J. (1994), *L'Écriture ou la Vie*, Paris: Editions Gallimard.

Semprun, J. (1995), *Mal et Modernité: Le Travail de L'Histoire Suivi de '… Vous avez une tombe au creux des nuages ….'*, Castelnau Le Lez: Editions Climats.

Semprun, J. (1998), Une petite lampe s'est allumée dans la baraque des contagieux …., in Kalfa, A. and de Saint Cheron, M., eds, pp.53–61.

Semprun, J. (2001), *Le Mort qu'il faut*, Paris: Editions Gallimard.

Semprun, J. and Wiesel, E. (1995), *Se Taire est Impossible*, Paris: Editions Mille et une nuits/Arte Editions.

Shandley, R.R., ed. (1998), *Unwilling Germans? The Goldhagen Debate*, Minneapolis: University of Minnesota Press.

Shaw, M.N. (1989), Genocide and International Law, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, ed Y. Dinstein, Dordrecht: Martinus Nijhoff, pp.797–820.

Sibert, M. (1951), *Traité de Droit International Public: Le Droit de la Paix*, Paris: Dalloz.

Smith, R.W. (1991), Denial of the Armenian Genocide, in Charny, I.W. eds (1991), pp.63–75.

Souchard, M., Wahnich, S., Cuminal, I. and Wathier, V. (1997), *Le Pen, Les Mots – Analyse d'un Discours D'Extrême-Droite*, Paris: le Monde Editions.

Staub, E. (2003), Preventing Violence and Generating Humane Values: Healing and Reconciliation in Rwanda, *International Review of the Red Cross*, **85**: 791–806.

Stein, E. (1986), History Against Free Speech: the New German Law Against the 'Auschwitz' – and other – 'Lies' *Michigan Law Review*, **85**: 277–324.

Steiner, J.-F. (1966, reprint 1994), *Treblinka, la Révolte d'un Camp d'Extermination*, Paris: Librairie Arthème Fayard.

Stern, A.-L. (2004), *Le Savoir-Déporté – Camps, Histoire, Psychanalyse*, Paris: Editions du Seuil, La Librairie du XXIe Siècle.

Stern, B. (1999), Universal Jurisdiction over Crimes against Humanity under French Law, *American Journal of International Law*, **93**: 525–29. [DOI: 10.2307/2998008]

Swaak-Goldman, O. (2001), *Kambanda v Prosecutor*, *American Journal of International Law*, **95**: 656–61. [DOI: 10.2307/2668511]

Symposium (1999), The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression, *Cornell International Law Journal*, **32**: whole issue.

Taguieff, P.-A. (1981), L'héritage Nazi, *Les Nouveaux Cahiers*, **64**: 3–22.

Taylor, G. (2001), Casting the Net Too Widely: Racial Hatred on the Internet, *Criminal Law Journal*, 260–75.

Ternero, J. (1981), Adolf et les chics types, *Les Nouveaux Cahiers*, **64**: 23–30.

Ternon, Y. (1989), *Enquête sur la Négation d'un Génocide*, Marseille: Editions Parenthèses, Collection Arménies.

Ternon, Y. (1995), *L'Etat criminel – Les Génocides au XXe siècle*, Paris: Editions du Seuil.

Ternon, Y. (1999), *Du Négationnisme – Mémoire et tabou*, Paris: Desclée de Brouwer.

Ternon, Y. (1996), *Les Arméniens – Histoire d'un Génocide*, 2nd edn, Paris: Editions du Seuil, Collection Points Histoire.

Ternon, Y., Thalmann, R. and Bensoussan, G. (2005), Classer/Penser/Exclure – De l'Eugénisme à l'Hygiène Raciale, *Revue d'histoire de la Shoah*, **183**: whole issue.

Terras, C. (1999), *Les Faussaires de l'Histoire*, Villeurbanne: Editions Golias.

Tillion, G. (1997), *La Traversée du mal*, Paris: Arlea.

Tillion, G. (1973, reprint 1988); *Ravensbrück*, Paris: Editions du Seuil, Collection Points Histoire.

Todorov, T. (1996), *Facing the Extreme – Moral Life in the Concentration Camps*, translated by Arthur Denner and Abigail Pollack, London: Weidenfeld & Nicolson.

Tomuschat, C. (1994), International Criminal Prosecution: The Precedent of Nuremberg Confirmed, *Criminal Law Forum*, **5**: 237–47.

Totten, S., ed. (2005), *Genocide at the Millennium, Genocide: A Critical Bibliographic Review – Volume 5*, London: Transaction Publishing.

Totten, S., Parsons, W.S. and Charny, I.W., eds. (1995), *Genocide in the Twentieth Century – Critical Essays and Eyewitness Accounts*, New York: Garland Publishing, Inc.

Totten, S., Parsons, W.S. and Charny, I.W., eds (2004), *Century of Genocide – Critical Essays and Eyewitness Accounts*, 2nd edn., New York: Routledge.

Tournaye, C. (2003), Genocidal Intent before the ICTY, *International and Comparative Law Quarterly*, **52**: 447–62. [DOI: 10.1093/iclq%2F52.2.447]

Triffterer, O. (2001), Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such, *Leiden Journal of International Law*, **14**: 399–408. [DOI: 10.1023/A%3A1012795313139]

Van Schaack, B. (1997), The Crime of Political Genocide: Repairing the Genocide Convention's *Blind Spot*, *Yale Law Journal*, **106**: 2259–91.

Vegh, C. (1979), *Je ne lui ai pas dit au Revoir – Des Enfants de Déportés Parlent*, Paris: Editions Gallimard.

Verdirame, G. (2000), The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, *International and Comparative Law Quarterly*, **49**: 578–98.

Verdross, A. (1966), Jus Dispositivum and Jus Cogens in International Law, *American Journal of International Law*, **60**: 55–63. [DOI: 10.2307/2196718]

Verschave, F.-X. (1994), *Complicité de Génocide? La Politique de la France au Rwanda*, Paris: Editions La Découverte.

Vidal-Naquet, P. (1987), *Les Assassins de la Mémoire – Un Eichmann de Papier– et Autres Essais sur le Révisionnisme*, Paris: La Découverte).

Vidal-Naquet, P. (1991), *Les Juifs, la Mémoire et le Présent*, Paris: La Découverte, Collection Points Essais.

Wachsmann, P. (1997), La Jurisprudence Récente de la Commission Européenne des Droits de l'Homme en Matière de Négationnisme, in *La Convention européenne des Droits de l'Homme: Développements Récents et Nouveaux Défis*, eds Flauss, J.-F. and De Salvia, M., Brussels: Bruylant, Collection Droit et Justice 19, pp. 101–12.

Waintrater, R. (2003), *Sortir du Génocide – Témoigner pour Réapprendre à Vivre*, Paris: Editions Payot & Rivages.

Walleyn, L. (2002), Victimes et Témoins de Crimes Internationaux: du Droit à une Protection au Droit à la Parole, *International Review of the Red Cross*, **84**: 51–78.

Wallimann, I. and Dobkowski, M.N., eds (2000), *Genocide and the Modern Age – Etiology and Case Studies of Mass Death*, Syracuse: University Press.

Weiler, J.H.H., Cassese, A. and Spinedi, M., eds (1989), *International Crimes of*

State – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, Berlin: Walter de Gruyter.

Weine, S.M. (1999), *When History Is a Nightmare – Lives and Memories of Ethnic Cleansing in Bosnia Herzegovina*, New Brunswick, NJ: Rutgers University Press.

Werle, G. and Jessberger, F. (2002), International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law, *Criminal Law Forum*, **13**: 191–223.

Wiesel, É. (1958), *La Nuit*, Paris: Les Editions de Minuit.

Wiesel, É. (1987), *Discours d'Oslo*, Paris: Editions Grasset and Fasquelle.

Wiesel, É. (1990), *From the Kingdom of Memory − Reminiscences*, New York: Schocken Books.

Wiesenthal, S. (1999, original version 1969), *Les Fleurs de Soleil*, Paris: Editions Albin Michel.

Wieviorka, A. (1992), *Déportation et Génocide – Entre la Mémoire et l'Oubli*, Paris: Editions Plon, Collection Pluriel.

Wieviorka, A. (1998), *L'Ère du Témoin*, Paris: Editions Plon.

Wieviorka, A. (1999), *Auschwitz Expliqué à Ma Fille*, Paris: Editions du Seuil.

Wieviorka, A. (2003), La Mémoire du Génocide, *Le Monde* (14 avril 2003).

Wieviorka, A. (2005), *Auschwitz, 60 Ans Après*, Paris: Editions Robert Laffont.

Wieviorka, A. (2006, original version 1998), *The Era of the Witness*, translated from the French by Jared Stark, Ithaca: Cornell University Press.

Willame, J.-C. (1997), *Les Belges au Rwanda – Le Parcours de la Honte*, Brussels: GRIP, Editions Complexe.

Wirth, S. (2003), Germany's New International Crimes Code: Bringing a Case to Court, *Journal of International Criminal Justice*, **1**: 151–68.

Woetzel, R.K. (1962), *The Nuremberg Trials in International Law with a Postlude on the Eichmann Case*, London: Stevens and Sons Limited.

Wolfe, R. (1998), Flaws in the Nuremberg Legacy: an Impediment to International War Crimes Tribunals' Prosecution of Crimes Against Humanity, *Holocaust and Genocide Studies*, **12**: 434–53. [DOI: 10.1093/hgs%2F12.3.434]

Wright, Q. (1947), The Law of the Nuremberg Trial, *American Journal of International Law*, **XLI**: 38–72. [DOI: 10.2307/2193853]

Wyman, D.S. (1984, reprint 1998), *The Abandonment of the Jews – America and the Holocaust, 1941–1945*, New York: The New Press.

Zahar, A. (2001), Command Responsibility of Civilian Superiors for Genocide, *Leiden Journal of International Law*, **14**: 591–616. [DOI: 10.1017/S0922156501000292]

Index